Study J-1321 September 10, 2003

Memorandum 2003-20

Jurisdictional Limits for Small Claims and Limited Civil Cases (Comments on Tentative Recommendation)

Pursuant to Government Code Section 70219, the Commission and the Judicial Council are jointly reexamining civil procedure in light of trial court unification. In December 2002, the Commission issued a tentative recommendation proposing to increase the jurisdictional limit for a limited civil case from $25,000 to $50,000, and the jurisdictional limit for a small claims case from $5,000 to $10,000. The tentative recommendation also proposes a number of other changes relating to small claims procedures. Stakeholders and other interested persons submitted numerous and extensive comments on the tentative recommendation. For ease of reference, the comments are attached to the First Supplement to Memorandum 2003-20. This memorandum analyzes the comments and discusses how to proceed. The ultimate goal is a joint recommendation with the Judicial Council, to be introduced in the Legislature.

The memorandum is organized as follows:

PRELIMINARY REMARKS

The Commission was originally scheduled to consider the comments on the tentative recommendation in April. The goal was to achieve a legislative proposal approved by both the Commission and the Judicial Council in time to be introduced in the Legislature in 2004. The plan to consider the comments at the April meeting and share the comments with the Administrative Office of the Courts ("AOC") before that meeting seemed to afford adequate time for both entities to determine their tentative positions and attempt to resolve any differences in time to meet that goal.

Consideration of the comments was delayed from April until June, however, when the Commission canceled the April meeting. As the June meeting approached, consideration of the comments was delayed again at the request of

the AOC, due to ongoing state budget negotiations relating to filing fees and other matters that might have had an impact on the proposal. The Commission is thus behind schedule in considering the comments and developing a final recommendation.

From the tenor of the comments, it is also clear that achieving broad consensus on the issues will not be simple. The input on both of the proposed jurisdictional increases was decidedly mixed. There is considerable support for both proposals, but also significant opposition. Unless revisions are made to address the opposition, it seems unlikely that the Legislature would enact either of the proposals.

In addition, the comments were submitted before the full extent of the state budget crisis became clear. Filing fees were substantially increased to help resolve the budget crisis. Further increases in filing fees may be difficult to achieve. Similarly, it may be harder to obtain funding for possible improvements relating to small claims or limited civil cases than the Commission or the stakeholders originally anticipated. The Legislature may also be reluctant to make major structural changes in the court system at a time when the courts are struggling to maintain existing services at an adequate level. In all likelihood, a proposal to increase the jurisdictional limits for small claims and limited civil cases will succeed only if it has broad support and a positive fiscal effect, or at least not a substantial negative fiscal effect.

It is thus essential that before issuing a final recommendation and seeking an author to introduce legislation, the Commission try to achieve consensus among the stakeholders, adjust its proposal to meet the concerns raised and account for the new budgetary constraints, and make every effort to reach a joint recommendation with the Judicial Council. This will take time, particularly since the Commission is now operating with reduced staffing and a reduced meeting schedule. The staff is dubious that the process can be completed in time to introduce legislation in 2004. We have discussed this point with AOC staff, who agree that it is unrealistic to aim for 2004 legislation. It is far more important to achieve a well-balanced proposal that stands a reasonable chance of enactment than to act quickly enough to introduce the legislation by next year.

FILING FEE INCREASES

The newly adopted state budget includes an unallocated $85 million reduction in funding for the state trial courts. That reduction is offset to some extent by legislation increasing filing fees, which has already been put into effect. The fee legislation (AB 1759 (Budget Committee), 2003 Cal. Stat. ch. 159) includes various new and increased filing fees. For present purposes, the key fees are:

(1) Small claims case: regular fee. This fee was $20 under Code of Civil Procedure Section 116.230, plus a 10 percent surcharge under Government Code Section 68087, for a total of $22. AB 1759 did not change this fee. The surcharge is in effect only until July 1, 2007.

(2) Small claims case: frequent filer fee. This fee was $35 under Code of Civil Procedure Section 116.230, plus a 10 percent surcharge under Government Code Section 68087, for a total of $38.50. The surcharge is in effect only until July 1, 2007. AB 1759 increased the fee to $66 ($60 plus a $6 surcharge). This increase is operative until July 1, 2006.

(3) First paper in limited civil case: $10,000 or less demanded. This fee was $83 under Government Code Section 72055, plus a 10 percent surcharge under Government Code Section 68087 (effective until July 1, 2007), plus a surcharge of $18 under Government Code Section 70373.5 (scheduled to increase to $25 effective July 1, 2007), for a base fee of $109.30, which may be augmented by additional fees that vary from jurisdiction to jurisdiction (see, e.g., Gov't Code § 26863). AB 1759 added a $20 court security fee (Gov't Code § 69926.5), bringing the base fee to $129.30.

(4) First paper in limited civil case: More than $10,000 demanded. This fee was $90 under Government Code Section 72055, plus a 10 percent surcharge under Government Code Section 68087 (effective until July 1, 2007), plus a surcharge of $18 under Government Code Section 70373.5 (scheduled to increase to $25 effective July 1, 2007), for a base fee of $117, which could be augmented by additional fees that vary from jurisdiction to jurisdiction (see, e.g., Gov't Code § 26863). AB 1759 increased the fee under Government Code Section 72055 to $185 (until July 1, 2006), and also added a $20 court security fee (Gov't Code § 69926.5), bringing the base fee to $241.50. Each party also has to pay a $25 court reporter fee that was not previously required (Gov't Code § 68086).

(5) First paper in unlimited civil case. This fee was $185 under Government Code Section 26820.4, plus a 10 percent surcharge under Government Code Section 68087 (effective until July 1, 2007), plus a surcharge of $10 under Government Code Section

70373 (scheduled to increase to $15 on January 1, 2004, and sunset on December 31, 2007), for a base fee of $213.50, which could be augmented by additional fees that vary from jurisdiction to jurisdiction (see, e.g., Gov't Code § 26863). AB 1759 added a $20 court security fee (Gov't Code § 69926.5), bringing the base fee to $233.50. Each party also has to pay a $25 court reporter fee that was not previously required (Gov't Code § 68086).

Notably, the fee for filing the first paper in a limited civil case for over $10,000 now *exceeds* the fee for filing the first paper in an unlimited civil case. A similar situation exists with regard to the fee for filing the defendant's first paper in such cases. We understand that negotiations are now in progress to eliminate these anomalies, as well as other glitches in AB 1759.

The implications of the new filing fees are discussed below, in the analyses of the comments on each of the jurisdictional increases proposed by the Commission. Because most of the comments relate to the jurisdictional limit of a small claims case, we begin by analyzing the comments on whether to raise the jurisdictional limit of a limited civil case. By addressing that issue first, we hope to draw attention to its importance and help ensure that it is not neglected in the debate over the small claims issues.

JURISDICTIONAL LIMIT OF A LIMITED CIVIL CASE

The tentative recommendation proposes to increase the jurisdictional limit for a limited civil case from $25,000 to $50,000, to account for inflation and improve access to justice in cases that are too small to effectively litigate using standard court procedures, as opposed to the simplified procedures (economic litigation procedures) that apply to a limited civil case. The tentative recommendation does not propose any changes in economic litigation procedures.

Some of the parties who submitted comments expressed support for this approach, some voiced opposition, and some suggested revisions or took other positions. The parties' positions can be summarized as follows:

Support
Beverly Hills Bar Association Litigation Section
California Judges Association (unofficial position)
Culver Marina Bar Association
HALT
Marin County Superior Court
Nolo.com
Orange County Bar Association
State Bar Committee on Administration of Justice
A number of individuals (Darian Bojeaux, Richard Haeussler, Robert Kornswiet, Court Commissioner Barbara Kronlund, Barbara Holian Mejia, Michael Saliba, M. Dean Sutton, Hon. Rolf Treu, and J. Anthony Vittal)

Conditional support
Consumer Attorneys Association of Los Angeles (extra deposition)
Los Angeles County Law Library Board (no loss of law library revenue)

Opposition
Association of Defense Counsel of Northern California and Nevada
California Defense Counsel
Consumer Attorneys of California
A number of individuals (Art Acevado, Raymond Coates, James Curran, Wayne Maire, and Lou McMurray)

No position but negative comments
Association of California Insurance Companies
Calaveras County Law Library
Consumers Union
Fresno County Public Law Library
Personal Insurance Federation of California
Attorney Denise Fischer

The comments are discussed in greater detail below.

Support and Conditional Support

Marin County Superior Court supports the proposed increase in the jurisdictional limit of a limited civil case. The Marin judges believe that such an increase is necessary because it is uneconomical to litigate a case for $50,000 or less under standard court procedures. First Supplement to Memorandum 2003-20, Exhibit p. 99. The court says that "[w]ithout limits on discovery in hourly fee cases, it would be extremely difficult today to bring a matter to trial for under $50,000." *Id*. The court also states that in contingent fee cases, "the time spent by an attorney would likely exceed the fee." *Id*.

Similarly, HALT "approves of the proposed increase in limited civil case jurisdiction from $25,000 to $50,000, as this increase would … improve access to the legal system for the average person." *Id*. at Exhibit p. 39. HALT describes itself as the nation's oldest and largest legal reform organization, which "has been working for twenty-five years to improve accessibility and accountability in the civil justice system." *Id*.

Nolo.com, the well-known publisher of legal self-help materials, also supports the proposed increase in the jurisdictional limit to $50,000. Nolo.com regards this as "a decent step in the right direction," but would prefer that the limit be increased even more, to $100,000. *Id*. at Exhibit p. 100.

The State Bar Committee on Administration of Justice ("CAJ") "believes the jurisdictional limit should be increased to $50,000, without necessarily linking that increase to any modifications to the economic litigation procedures." *Id*. at Exhibit p. 112. CAJ is "a committee of attorneys from diverse practice areas, with expertise in civil procedure, court rules and administration, rules of evidence, and other matters having an impact on the administration of justice in civil cases." *Id*. at Exhibit p. 108 n.1.

Several local bar associations also support the proposed increase: the Culver Marina Bar Association, the Orange County Bar Association, and the Executive Committee of the Beverly Hills Bar Association Litigation Section. *Id*. at Exhibit pp. 36, 37, 101. The latter group states that it strongly endorses the proposal, because its members "all agreed that such a measure would improve access to justice by cutting the costs of litigating cases in the $25,000-$50,000 range." *Id*. at Exhibit p. 102.

The Consumer Attorneys Association of Los Angeles expresses conditional support. It "agrees with the increase in limits to $50,000, but … request[s] an additional deposition allowance." *Id*. at Exhibit p. 25. Similarly, the Board of Law Library Trustees of Los Angeles County supports the proposal "provided that no revenues currently received by the Los Angeles County Law Library are lost." *Id*. at Exhibit p. 116.

In January 2003, the Civil Law Committee of the California Judges Association ("CJA") favored the proposed jurisdictional increase. Email from R. Waring to D. Pone & B. Gaal (Jan. 21, 2003). CJA has not taken an official position on this matter as yet.

Individuals supporting the increase from $25,000 to $50,000 include attorneys Darian Bojeaux, Richard Haeussler, Robert Kornswiet, Barbara Holian Mejia,

Michael Saliba, and J. Anthony Vittal, and Judge Rolf Treu of the Los Angeles County Superior Court. *Id*. at Exhibit pp. 138, 145, 147, 154, 160, 182; Email from R. Treu to B. Gaal (Feb. 14, 2003). Barbara Kronlund, San Joaquin County Court Commissioner, writes:

> I … support increasing limited case jurisdiction from $25,000 to $50,000. In today's market, a $50,000 case is a "small" case. I think the courts that handle limited cases are fully capable of handling the additional cases that fall within the $50,000 cap. This might help to curb out of control discovery to some degree since attorneys won't be so afraid of possible run-away verdicts on their smaller cases. I think this can relieve the stress on some courts by taking the $25,001-$50,000 cases out of the unlimited jurisdiction courtrooms, thereby giving them more time to settle the bigger cases.

First Supplement to Memorandum 2003-20, Exhibit pp. 148. Similarly, attorney M. Dean Sutton says:

> I agree that the top limit for "limited civil cases" should be increased from $25,000 to $50,000. Inflation alone in the last decade justifies the increase. Also, the costs of private practice for a lawsuit increase, but never decrease. The ability to provide any justice for the plaintiff owed in the range between $25,000 and $50,000 now is virtually impossible. It costs too much to win, given the discovery and pretrial time-wasting available to any competent defendant's attorney.

Id. at Exhibit pp. 163.

Along the same lines, a recent editorial by a Los Angeles County Superior Court judge maintains that the jurisdictional limit should be increased to $45,000, a figure the author says is "the current value of $25,000 in 1985." J. Farrell, *Lawmakers Must Consider Raising $25,000 Maximum for Civil Limited Jurisdiction Cases*, San Francisco Daily Journal (May 8, 2003), p. 4. Judge Farrell explains that such a change "would make litigation simpler and less expensive for an increased number of smaller cases." *Id*. A secondary benefit, in his view, "would be to reduce the backlog of general jurisdiction courts by diverting more cases to limited jurisdiction courts, thus allowing expedited disposition of the remaining larger unlimited cases." *Id*.

Opposition and Other Negative Input

The defense bar strongly opposes the proposal to increase the jurisdictional limit for a limited civil case to $50,000. California Defense Counsel ("CDC"), an

organization with more than 3,500 members statewide, "very strongly disagree[s]" with the proposal. First Supplement to Memorandum 2003-20, Exhibit p. 18. The group expresses great concern about the limited discovery under economic litigation procedures. *Id*. at Exhibit p. 20. It cautions that the Commission's proposal "would apply economic litigation limitations to the overwhelming majority of all civil cases filed, and would dramatically restrict the ability of our members to provide effective representation to their clients." *Id*. at Exhibit p. 19. CDC is "simply not aware of any problem in the limited jurisdiction arena which compels a 100% increase in jurisdictional limits, other than changes in CPI." *Id*. at Exhibit p. 20. The vast majority of its members "believe the negative consequences far outweigh the need to make a CPI-based adjustment, and for this reason, the California Defense Counsel would strongly oppose the increase should it be proposed legislatively." *Id*.

The Association of Defense Counsel of Northern California and Nevada ("ADC"), with approximately 1,100 members, expresses similar views. Its Board of Directors unanimously concluded that the changes proposed in the tentative recommendation "will be detrimental to the interests of the citizens of the State of California and will deprive defendants of the ability to properly defend actions brought against them and will result in significant increases in the costs of insurance." *Id*. at Exhibit p. 3. The group explains:

> [A] significant concern is the potential consequences on defendants and on the insurance industry in California who will be adversely [a]ffected by increasing the limits from $25,000 to $50,000 in limited civil cases. Limiting the right of discovery to one deposition and 35 interrogatories deprives the defendant of an adequate defense and will lead to an increase in insurance costs. Our initial survey of members indicates that with regard to personal line carriers, upwards of 90% of their claims fall within this suggested jurisdictional limit. Limiting adjudication of the thousands of these types of claims may have dramatic effects upon the defendant's ability to properly defend and expose unwarranted or exaggerated claims. The ability of the defendant to ferret out fraudulent claims would be substantially diminished. The ADC believes the suggested changes will lead to higher insurance costs and a significant increase in the filing of these types of lawsuits.

Id. at Exhibit pp. 3-4.

Raymond Coates, president of CDC and a former president of ADC, voiced much the same concerns in a letter he submitted on his own behalf, as did

defendant's attorney Wayne Maire. *Id*. at Exhibit pp. 140, 152-53. Mr. Coates does "not know where the impetus comes from to limit the discovery available to defendants in such cases by increasing the jurisdictional amount of limited civil cases, but [he] think[s] if Californians were aware how their rights were being impaired by such a proposal, they would overwhelmingly oppose it." *Id*.

The plaintiffs' bar also has reservations about the proposed jurisdictional increase. The Consumer Attorneys of California ("CAOC"), an organization of more than 3,000 attorneys who represent consumer plaintiffs, submitted a letter stating that CAOC "oppose[s] increasing the jurisdictional limits of limited civil cases." *Id*. at Exhibit p. 27. Like the defense bar, CAOC is concerned about the limited discovery under economic litigation procedures. *Id*. In addition, CAOC says that "[m]any judges abuse the current $25,000 limited jurisdiction by designating personal injury cases as limited where special damages alone are in the $20,000 plus range. *Id*.

CAOC reportedly softened its position somewhat in discussions with a group known as the Blue Ribbon Panel of Experts on Fair and Efficient Administration of Civil Cases. As we understand it, CAOC expressed support for increasing the jurisdictional limit to $50,000, so long as the plaintiff has the option of treating a case for $25,001-$50,000 either as a limited civil case or as an unlimited civil case. It is also encouraging that CAOC's Los Angeles counterpart, the Consumer Attorneys Association of Los Angeles, would support the proposed jurisdictional increase if economic litigation procedures were modified to permit two depositions per adverse party, instead of only one (see "Support and Conditional Support" *supra*). It might therefore be possible to identify ways to revise the Commission's proposal such that CAOC would go along with a jurisdictional increase. It is clear, however, that CAOC would oppose the proposal in its present form.

Unlike CAOC, Consumers Union ("CU") refrained from taking a position on the proposed increase in the jurisdictional limit for a limited civil case. First Supplement to Memorandum 2003-20, Exhibit p. 35. CU is a national nonprofit consumer organization and the publisher of *Consumer Reports*, which has a paid circulation of approximately four million. *Id*. at Exhibit p. 28 n.1. Although CU did not take a position on the proposed increase, it warned that "such a change may reduce incentives to settle cases." *Id*. CU also commented that "[a]ny increase in the amount for limited civil case jurisdiction should provide a simple method for additional discovery for good cause." *Id.* It seems quite possible that

CU would oppose the proposed jurisdictional increase if the Commission were to go forward with it in its present form.

Likewise, the insurance industry did not take a position on the proposed increase, but appears inclined to oppose it unless the Commission makes revisions. Personal Insurance Federation of California ("PIFC") represents insurance companies writing approximately 30% of the personal lines insurance policies in California, including automobile, homeowners, and earthquake insurance." *Id*. at Exhibit p. 102. When PIFC submitted comments in February, it was "in the process of conducting research on the proposal to increase the jurisdictional limit in limited cases from $25,000 to $50,000, and the impacts such a change would have on insurers and their customers." *Id*. at Exhibit p. 104. Its preliminary assessment of the matter was negative:

> Initial feedback is that the change will curtail discovery in cases where policyholders, especially those with lower liability limits, may have personal exposure above policy limits or where potential insurance fraud exists. In such cases the defendant can be left with significant exposure that is not covered by the policy, leading to financial hardship.
>
> Defense costs may also increase if defense counsel needs to file more trial court motions to obtain permission to conduct additional discovery. The amount in controversy, $50,000, and the potential for financial harm to defendants is so significant, that it could be argued that limiting the allowed discovery to only one deposition and 35 interrogatories is a fundamental denial of due process. Raising the jurisdictional limit to $50,000 may also interfere with the insurer's ability to provide a vigorous defense, as required under the policy. The higher the jurisdictional limit, the more consumers will incur the risk that they may be required, where personal assets are exposed beyond the coverage limits, to pay a judgment out of pocket because the severely limited discovery rules hampered a zealous, effective defense. Future premiums could also be [a]ffected if the defendant losses their good driver status as a result of an at-fault determination by the court.

Id.

The Association of California Insurance Companies ("ACIC") also expressed concern about the proposal. ACIC "represents more than 200 property/casualty insurance companies who write more than a third of the total insurance market in California, including 55 percent of the personal auto insurance, 35 percent of the homeowners insurance and 20 percent of the business insurance written in the state." *Id*. at Exhibit p. 1. ACIC warns that if the jurisdictional limit for a

limited civil case was increased to $50,000, "[t]he limitation on discovery in such cases would compromise the ability of an insurer's counsel to thoroughly investigate claims and prepare cases for trial." *Id*. According to ACIC, the "limitation on discovery is particularly restrictive in claims involving personal injury and medical costs because far more than a single deposition is often necessary to fully investigate such claims." *Id*.

Several individuals (aside from Messrs. Coates and Maires) also wrote in opposition to the proposed increase in the jurisdictional limit of a limited civil case. Their comments are discussed below, in the sections on "Extra Discovery" and "Effect on Court Revenue and Workload," as appropriate.

Extra Discovery

A recurring theme in the comments was that the discovery limits under economic litigation procedures are inappropriate for cases in the $25,001-$50,000 range. For example, attorney James Curran objected to the proposal because only one deposition is permitted in a limited civil case:

> It would not be in the interest of justice to limit the parties to one deposition each when there is between $25,001 and $50,000 at stake. The change in the rules will make it very difficult to evaluate, and therefore settle, cases falling within that range because the parties' attorneys will not know how well key witnesses will hold up under cross-examination, and might not know anything at all about what these witnesses know or saw.

Id. at Exhibit p. 142.

Similarly, attorney Denise Fischer wrote:

> Currently, discovery rules for "limited civil actions" limit the defense to 1 deposition.
>
> A large portion of the cases are automobile liability cases. As you know, California Vehicle Code specifies minimum insurance limits for automobile liability. Those limits are $30,000 per any single occurrence. That means that there is a potential for a $20,000 uninsured, personal judgment against the defendant driver in a case within the limited civil action category. When someone is subjected to a potential uninsured loss which may well equal their income for an entire year, it is necessary to consider whether restricting discovery to one deposition under such circumstance constitutes substantial justice.

Id. at Exhibit p. 144.

CAOC also expressed concern regarding the impact of the one-deposition limit in cases for $25,001-$50,000. According to CAOC, "[o]ften defendants will designate multiple experts in a case." *Id*. at Exhibit p. 27. CAOC points out that "[w]ith the limits on discovery, a consumer will be unable to depose those experts," hindering the consumer's ability to prepare for trial. *Id*.

Concerns regarding the discovery limits were voiced by supporters of the jurisdictional increase, as well as by opponents. As previously mentioned, the Consumer Attorneys Association of Los Angeles supports the proposal conditionally, requesting an extra deposition for each. The State Bar CAJ supports the proposal unconditionally, but a majority of its members believe that discovery rights should be expanded, "given the increase in jurisdictional amounts, which will bring in different types of cases with higher stakes. *Id*. at Exhibit p. 112. Similarly, although the Litigation Section of the Beverly Hills Bar Association strongly supports the proposal, its Executive Committee "suggests that the appropriate authority study the possibility of allowing a total of two depositions per side to be taken in a limited civil case, especially one that seeks over $25,000 in damages." *Id*. at Exhibit p. 38. In making that suggestion, the Executive Committee points out that $50,000 "is a significant sum of money, and a party should be entitled to independent discovery from at least one third-party without leave of court, in proving her entitlement to, or in defendant against a claim for, that sum." *Id*.

Attorney Richard Haeussler also suggests an increase in the number of depositions, as does attorney Robert Kornswiet, both of whom support the proposed jurisdictional increase. Mr. Haeussler proposes that a deposition may be taken of each party, no more than two depositions by each side may be taken of non-parties, video recorded depositions of treating doctors and allied medical providers may be taken for use at trial, and expert depositions may be taken under Code of Civil Procedure Section 2034. First Supplement to Memorandum 2003-17, Exhibit pp. 1-2. Mr. Kornswiet suggests that the limit be raised from one deposition per adverse party to three depositions per adverse party. First Supplement to Memorandum 2003-20, Exhibit p. 147.

Mr. Kornswiet further suggests that the amount of written discovery in a limited civil case be increased. He would permit a total of 75 written discovery requests, instead of the current 35. *Id*. By phone, Mr. Haeussler also suggested that the number of written discovery requests be raised. Likewise, the State Bar CAJ urges reconsideration of the "Rule of 35." *Id*. at Exhibit p. 112.

CU proposes modification of the standard for obtaining permission to exceed the discovery limits for a limited civil case. Under Code of Civil Procedure Section 95, a court may permit additional discovery over objection "only upon a showing that the moving party will be unable to prosecute or defend the action effectively without the additional discovery." CU points out that a

> consumer dispute over a home equity loan, home improvement contract, or completed real estate transaction could easily involve damages between $25,000 and $50,000. These cases can be complex factually, and the amount at stake is very significant to the individual.

First Supplement to Memorandum 2003-20, Exhibit p. 35. CU therefore suggests that the standard for obtaining additional discovery be revised "to allow for more discovery for good cause shown." *Id*.

Similarly, CDC expresses concern regarding the standard for obtaining additional discovery:

> Because the $50,000 threshold would encompass such a large percentage of cases, the limits on depositions and interrogatories would apply to very factually complex matters. Counsel simply cannot ignore the malpractice risk of not requesting additional discovery where warranted, so motions for additional discovery will increase markedly. While judges have noted that these requests should typically be granted, the proposal includes no change to the current standard for additional discovery, that "the party will be unable to prosecute or defend the action effectively without the additional discovery."

Id. at Exhibit p. 20.

It thus appears that some tinkering with the discovery limits under economic litigation procedures might help to obtain a greater degree of consensus regarding the proposed increase in the jurisdictional limit. This needs to be done carefully, however, to avoid subverting the goal of promoting affordable access to justice. The concerns expressed by CDC and others regarding the need for sufficient discovery to adequately investigate a case, prepare for trial, and avoid a malpractice claim are valid. But discovery is costly, particularly depositions. The Commission should strive to balance these considerations, exploring factors such as:

- Whether to increase the number of depositions permitted under economic litigation procedures.

- Whether to revise the "Rule of 35" to permit a greater number of written discovery requests under economic litigation procedures.
- Whether to change the standard for exceeding the discovery limits under economic litigation procedures, or the process of determining whether that standard is satisfied.
- Whether any changes in the discovery limits or the rules regarding deviation from those limits should apply to all limited civil cases, only to cases for $25,001-$50,000, or to some other subgroup of limited civil cases.

Discussions with the interested parties, particularly the defense bar, CAOC and other consumer-oriented groups, and the insurance industry may help shed light on how to strike an acceptable balance.

Fiscal Effect and Impact on Workload

Another area of concern was how the proposed jurisdictional increase would affect the finances and workload of the courts, as well as related entities such as law libraries. The concerns relating to the courts are discussed first, then the concerns raised by law libraries.

Effect on Court Revenue and Workload

In its letter dated February 18, 2003, CDC commented that if the jurisdictional limit of a limited civil case is increased to $50,000, parties will bring more motions seeking discovery in excess of the discovery limits. CDC warned that "the large increase in the numbers of these discovery motions will amount to a financial 'double whammy' on the courts in these times of budget challenges." *Id*. at Exhibit p. 20. CDC explained that "[c]ourt time to hear and decide discovery motions will increase, while filing fee revenue will decrease, due to the reclassification of formerly unlimited cases to limited status." *Id*.

These comments are outdated, because the filing fee of a limited civil case now is comparable to (and in fact slightly exceeds) the filing fee of an unlimited civil case. See "Filing Fee Increases" *supra*. Thus an increase in the jurisdictional limit will *not* result in a loss of filing fee revenue, but there might still be an increase in the number of motions for additional discovery, which would affect the workload of the trial courts. Of course, there might also be a reduction in other types of judicial activity (e.g., there might be fewer motions to compel, because there is less discovery in a limited civil case than in an unlimited civil case).

Lou McMurray of the Los Angeles County Superior Court is convinced that increasing the jurisdictional limit to $50,000 "would be an incredible burden on the limited jurisdiction courts." *Id*. at Exhibit p. 86. Writing on his own behalf and not on behalf of the court, he explained:

> There would be at least a 25% increase in filings [if] not more. … With the shortage of employees and the increased workload, the backlog would increase two fold. The increased limits would put a strain on an already overworked courtroom and office staff. It would call for more bench officers and more staff, and with budget constraints as they are, it would not be a feasible situation at this time.

Id.

Mr. McMurray assumes that if the jurisdictional limit is increased, the court staff now handling limited civil cases will have to handle a larger number of such cases, because there is no funding available to hire additional people. Presumably, however, present court staff could be reallocated, such that persons previously assigned to handle unlimited civil cases would be reassigned to handle limited civil cases. In fact, a key impetus for trial court unification was the flexibility it affords to assign judges and other personnel to cases and departments as needed.

Art Acevado (Civil Operations, Los Angeles County Superior Court) also expressed concern regarding the potential impact on court workload and finances. As of March, his personal view was that the proposed increases in the jurisdictional limit of a limited civil case and the jurisdictional limit of a small claims case would result in "[s]ignificant additional workload and revenue losses." *Id*. at Exhibit p. 87. He provided a detailed analysis to support those conclusions. *Id*. at Exhibit pp. 88-94. Unlike Mr. McMurray, he projected a net *decrease* in the number of limited civil cases, due to the proposed increase in the jurisdictional limit of a small claims case. *Id*. at Exhibit pp. 89, 90. Unfortunately, however, the fiscal portion of his analysis is now outdated, because of the recent increases in filing fees. It would be very helpful to have an updated version of his analysis.

Similarly, the AOC prepared a fiscal analysis of the proposed jurisdictional increases in April. That analysis projected that increasing the jurisdictional limit of a limited civil case to $50,000 would result in a multi-million dollar cost savings for the courts.

The AOC is in the process of revising its analysis to account for the new filing fees and other recent developments. We will provide the updated version to the Commission when we obtain it. We do not know whether that will be before the September meeting or afterwards.

Although the updated version is not yet available, we suspect that it will project even bigger costs savings than the April analysis, because of the increase in the filing fees for a limited civil case. It is more difficult to anticipate what an updated version of Mr. Acevado's analysis would show. When updated versions of both analyses are available, the methodologies used should be carefully examined and compared, to determine which projections are most reasonable and make improvements in the analyses if possible.

Law Library Funding

Law libraries are funded through a portion of the filing fees for any civil case other than a small claims case, a petition for letters of adoption, or the filing of a disclaimer. Bus. & Prof. Code §§ 6321, 6322, 6322.1, 6323. The fees differ from county to county, depending on whether and to what extent the Board of Supervisors has exercised its authority to increase the law library fee beyond the statutory minimum. According to a website maintained by the Council of California County Law Libraries ("CCCLL"), the fees range from a low of $7 in Yolo County ($3 in a limited civil case) to a high of $38 in Sacramento County. See <www.cccll.org/2003fees.html>. Most fees are in the $20-$25 range. *Id*.

In most counties, increasing the jurisdictional limit of a limited civil case would not affect law library funding, because the law library fee for a limited civil case is the same as the law library fee for an unlimited civil case. Los Angeles is one of those counties, so increasing the jurisdictional limit would not decrease the funding for its law library, which was a condition of the law library's support for the proposed jurisdictional increase. *Id*. at Exhibit p. 116.

In a few counties, however, the law library fee for a limited civil case differs from the law library fee for an unlimited civil case. According to CCCLL's website, those counties are Calaveras, Colusa, Fresno, Monterey, Sutter, and Yolo. *Id*.

Both Calaveras County Law Library and Fresno County Public Law Library expressed concern that the proposed increase in the jurisdictional limit of a limited civil case would cause a decline in law library funding. First Supplement to Memorandum 2003-20, Exhibit pp. 118, 123. According to Fresno County

Public Law Library, the "[p]otential loss of revenue for unlimited cases becoming limited is unknown." *Id*. at Exhibit p. 123.

Those concerns could perhaps be addressed by amending the law library statute to require that the law library fee for a limited civil case be the same as the law library fee for an unlimited civil case. The fees for limited and unlimited civil cases could also be equalized through voluntary action of the Board of Supervisors in each of the affected counties.

In addition, a bill is pending before the Governor to establish a task force on county law libraries, which would be responsible for making recommendations regarding funding, facility improvements, and expansion of county law libraries, and reporting on these matters to the Judicial Council and the Legislature on or before January 1, 2005. See AB 1095 (Corbett). It is possible that this task force will propose fundamental changes in law library funding, such as funding the libraries through means other than civil filing fee revenues, which would eliminate the concerns expressed by Calaveras County Law Library and Fresno County Public Law Library.

In any event, increasing the jurisdictional limit of a limited civil case would entail a potential decline in law library funding only in a few counties. While it is important to spare those law libraries from a precipitous drop in revenue, that does not appear to be an insurmountable problem.

Other Ideas

A few other ideas were mentioned in the comments on increasing the jurisdictional limit of a limited civil case. Those ideas related to the procedure for reclassifying a limited civil case as an unlimited civil case, recovery of costs and attorney's fees, and the use of pilot projects.

Reclassification Procedure

Mr. Haeussler suggests revising the procedure for reclassifying a limited civil case as an unlimited civil case. He proposes that reclassification be permitted through an ex parte procedure (maybe on a showing of good cause), instead of a motion procedure. First Supplement to Memorandum 2003-20, Exhibit pp. 145-46.

Policy Studies, Inc. ("PSI") made a similar suggestion in its report for the Judicial Council on the results of its empirical work for this joint study. The report points out that in increasing the jurisdiction limit for a limited civil case, a

possible safety valve "might be to allow a party to move a case more easily to unlimited civil at any time during the period of ongoing discovery when it appears that the value of the case could exceed the limited civil limit." Weller, et al., *Report on the California Three Track Civil Litigation Study* (July 31, 2002) (hereafter "PSI Report"), at 47.

Those suggestions might be worth pursuing if other parties express interest in revising the reclassification procedure. The reclassification statute (Code Civ. Proc. §§ 403.010-403.090) was just amended in 2001 following a study by a Judicial Council working group. See 2001 Cal. Stat. ch. 824. It seems imprudent to revise the statute again so soon after the last reform, unless further changes are clearly needed.

Recovery of Costs and Attorney's Fees

Attorney Darian Bojeaux favors the proposed jurisdictional increase, but he acknowledges that "some attorneys are concerned about the limited discovery which is allowed in limited civil cases." First Supplement to Memorandum 2003-10, Exhibit p. 138. Mr. Bojeaux therefore suggests that those who have cases worth between $25,000-$50,000 should have the option of filing either as a limited civil case or as an unlimited civil case, "without any reprisals concerning the recovery of costs." *Id.* In other words, he is "suggesting that the plaintiff not be prevented from recovering all costs in any Superior Court case in which the verdict is $25K or more." *Id.*

Mr. Bojeaux's suggestion is similar to, but expands on, CAOC's reported proposal that plaintiffs be given the option of treating a case for $25,001-$50,000 either as a limited civil case or as an unlimited civil case. See "Opposition and Other Negative Input" *supra*. Presumably, the defense bar would oppose that concept, particularly if the implementation included Mr. Bojeaux's idea regarding plaintiffs' recovery of costs. We anticipate that the approach would be highly controversial, but encourage further input on the matter.

Pilot Project and Matters to Be Studied

The tentative recommendation discusses and rejects the possibility of conducting a pilot project to test the feasibility of increasing the jurisdictional limit of a limited civil case to $50,000. None of the comments express support for conducting a pilot project. The State Bar CAJ explicitly states that "the jurisdictional limit for limited civil cases should be increased without pilot

projects." First Supplement to Memorandum 2003-10, Exhibit p. 112. In light of the input received, it probably would not be productive to pursue the option of a pilot project at this time.

CAJ suggests, however, that the following issues be studied if the jurisdictional limit is increased to $50,000:

(1) Consideration of changes to economic litigation procedures, such as mandatory use of case questionnaires, mandatory disclosure of witnesses and evidence, and expanded use of affidavit testimony.
(2) Continued study of the possibility of developing improved forms for use in limited civil cases.
(3) Study of the number of motions made and granted for additional discovery beyond that prescribed by Code of Civil Procedure Section 95.
(4) Study of the disposition of limited civil cases before trial, through alternative dispute resolution, to determine what percentage of the courts' trial calendars are limited civil cases and what percentage are unlimited civil cases.
(5) Continued tracking of the quantity of limited jurisdiction cases that are filed, by type (collection, breach of contract, tort, etc.), to determine the extent of the impact of an increase in the jurisdictional limit on filings as limited jurisdiction cases.
(6) Provision of free or low cost mediation in limited civil cases.

Id. at Exhibit pp. 112-13. Implementing CAJ's ideas would require expenditure of resources, which might be difficult to obtain due to the state's precarious financial situation. Ideally, however, it would be helpful to gather information on these matters.

Progress of the Judicial Council

The Judicial Council has not yet taken a position on the proposal to increase the jurisdictional limit of a limited civil case to $50,000.

In 2002, AOC staff organized a working group to study the possibility of increasing this jurisdictional limit, as well as the small claims limit. The working group, known as the Three Track Study Working Group, consisted of trial judges, court administrators and other court personnel, a law professor, and a few attorneys. In April 2003, the Three Track Study Working Group made a recommendation that the jurisdictional limit of a limited civil case be increased to $50,000. The Civil and Small Claims Advisory Committee (a standing advisory committee of the Judicial Council, which makes recommendations to the

Council) was scheduled to consider that recommendation in mid-May, but the item was withdrawn from the agenda due to the state budget negotiations.

In addition to the Three Track Study Working Group, another special group has been created within the Judicial Council to facilitate development of a joint recommendation with the Commission on increasing the jurisdictional limits for small claims cases and limited civil cases. That special group is a three-person subcommittee of the Policy Coordination and Liaison Committee ("PCLC"). The PCLC is a committee consisting of some members of the Judicial Council, which makes recommendations to the Judicial Council and is authorized to act for the Judicial Council in certain situations. The three-person subcommittee of the PCLC (hereafter "PCLC Subcommittee") is chaired by Justice Norman Epstein, who was very involved in the initial development of economic litigation procedures and also influential in involving the Commission in trial court unification. The other members are Judge Brad Hill (a former member of the Commission) and Alan Slater (Chief Executive Office, Orange County Superior Court).

In early 2003, the PCLC Subcommittee expressed support for increasing the jurisdictional limit of a limited civil case to $50,000. The subcommittee did not favor the concept of a pilot project to explore this matter.

The proposal to increase the jurisdictional limit of a limited civil case has not yet been presented to the PCLC or to the Judicial Council itself. It is unclear whether recent developments, such as the recently adopted state budget and related legislation or the state's continuing fiscal problems, will prompt the Three Track Study Working Group or the PCLC subcommittee to reassess their positions.

Recommendation

Although there is considerable support for increasing the jurisdictional limit of a limited civil case from $25,000 to $50,000, there is also significant opposition, particularly from the defense bar, consumer-oriented groups, and probably also from the insurance industry. Both supporters and opponents of the proposed increase suggested the possibility of making modifications regarding the discovery limits under economic litigation procedures. The Commission should further explore this possibility, developing and seeking input on various approaches, in hopes of identifying ways to achieve greater consensus regarding the proposed jurisdictional increase. The Commission should also give further

attention to the fiscal and workload issues pertaining to the courts, and try to ensure that the concerns relating to law library funding are satisfactorily resolved. Based on our current information, these matters appear easier to address than the issues relating to the amount of discovery. We would not devote significant resources to other possibilities (e.g., modification of the reclassification procedure, new rules regarding recovery of costs, or the possibility of a pilot project), unless there are solid indications that doing so is likely to be fruitful.

JURISDICTIONAL LIMIT OF A SMALL CLAIMS CASE

The tentative recommendation proposes to increase the jurisdictional limit of a small claims case from $5,000 to $10,000. The tentative recommendation also proposes a number of other reforms relating to small claims procedures.

The Commission is fortunate to have received many comments on these proposals, which provide much useful information. The comments regarding the proposed increase in the small claims limit can be summarized as follows:

Support

Beverly Hills Bar Association Litigation Section
Culver Marina Bar Association
HALT
Marin County Superior Court
Nolo.com
Orange County Bar Association
State Bar Committee on Administration of Justice
A number of individuals (Darian Bojeaux, Herb Clough, Hon. Roderic Duncan, Richard Haeussler, Robert Kornswiet, Court Commissioner Barbara Kronlund, Ann Madden, Lou McMurray, Barbara Holian Mejia, Hon. Stephen Petersen, Michael Saliba, M. Dean Sutton, Hon. Rolf Treu, and J. Anthony Vittal)

Conditional support

California Small Claims Court Advisors' Association (plaintiff should have right of appeal; defendant should get more information about claim)
Consumer Attorneys Association of Los Angeles (jurisdictional limit should be increased only for use by general public, not by corporations and businesses)
Consumer Attorneys of California (numerous conditions)

Opposition

Association of Defense Counsel of Northern California and Nevada
Association of California Insurance Companies
California Defense Counsel
Consumers Union
Personal Insurance Federation of California (opposes $10,000; no position as to $7,500, but negative comments)
A number of individuals (Art Acevado, Raymond Coates, Paul Mahoney, Wayne Maire, and David Ricks)

Opposition to $10,000 but not to $7,500

California Commission on Access to Justice
California Judges Association (unofficial position)
Los Angeles County Superior Court, Small Claims Subcommittee
Public Law Center

Concerned about law library funding and related issues

Calaveras County Law Library
Council of California County Law Librarians
Fresno County Law Library Board of Trustees
Kern County Law Library
Los Angeles County Law Library Board (supports jurisdictional increase if no loss of law library revenue)
Orange County Public Law Library
Placer County Law Library
Sacramento County Public Law Library
Santa Cruz County Law Library (strongly opposes jurisdictional increase unless no loss of law library revenue)
Siskiyou County Public Law Library
Sonoma County Law Library Board of Trustees
Southern California Association of Law Libraries
Stanislaus County Law Library
Tulare County Public Law Library
Elena Simonian (concerned about funding for Self Help Centers)

These comments and the input on the other proposed reforms are described in greater detail below.

Support for Increasing the Small Claims Limit

Many of the groups that support the proposed increase in the jurisdictional limit of a limited civil case also support the proposed increase in the jurisdictional limit of a small claims case. For example, the Marin County Superior Court supports the proposed increase of the small claims limit. First

Supplement to Memorandum 2003-20, Exhibit p. 99. The court did not elaborate on this point.

Similarly, HALT "applauds" the proposed increase. *Id*. at Exhibit p. 40. HALT "has long supported any changes to small claims courts that make them more accessible to the people they are intended to help." *Id*. at Exhibit p. 39. HALT views small claims court as the true "people's court" and "the only court where people can resolve their disputes without the unaffordable and unnecessary intervention of an attorney." *Id* HALT says that it "has long publicized the problem of the 'legal no-man's land' where users of the legal system find themselves when their claims are too large for small claims court, but too small to make representation by a lawyer cost-effective. *Id*. at Exhibit p. 40. According to HALT, "[t]he proposed increase in the small claims jurisdictional limit, while not large enough to entirely eliminate the 'legal no-man's land,' is a large step in the right direction." *Id*. at 44.

HALT further comments that increasing the small claims limit to $20,000 would help consumers even more. *Id*. at 40. HALT points out that this is approximately the average price of a new car or minivan. *Id*. HALT then explains that

> While purchasing a new vehicle is an important financial decision for most people, it is not one for which they consult an attorney or other outside expert. Similarly, Californians who are seeking resolution of disputes worth an equal value should be able to do so without outside expertise.

Id.

HALT also submitted a report regarding the results of a recent empirical study that it conducted regarding small claims courts in California. *Id*. at Exhibit pp. 45-84. Among other things, the study found that most small claims cases are breach of contract claims, construction cases, and auto torts. The study further found that superior court cases for $5,000-$10,000 "involve essentially the same causes of action, indicating that an increase in the jurisdictional limit would not increase the complexity of cases entering small claims court." *Id*. at 48.

Interestingly, the researchers' suspicion that "many litigants waive excess damages was largely unsupported." *Id.* at 47-48. But a majority of litigants interviewed in the HALT study indicated that if a claim exceeds the current limit by $1,000-$2,000, they "are willing to waive the excess damages in order to file in

small claims court and avoid the expense and difficulty of filing in superior court." *Id*. at 53.

Nolo.com also supports the proposed increase in the small claims limit. Its Executive Publisher explains that "[h]ere at Nolo we are daily besieged by people who face the loss of important democratic rights, because their claims are too big to fit into small claims court (and often are also larger than $25,000), but too small to justify hiring a lawyer." *Id*. at Exhibit p. 100. As a result, "legitimate claims must either be scaled back, abandoned or prosecuted on a pro per basis in superior court (no fun there, especially if the other side is represented by a lawyer)." *Id*. Nolo would prefer that the small claims limit be raised to $20,000, but it views the proposed increase to $10,000 as a good step forward. *Id.*

Similarly, the vast majority of the State Bar CAJ "believes the jurisdictional limit for small claims cases should be increased from $5,000 to $10,000, primarily because it is no longer cost-effective to hire an attorney to pursue a claim for $5,000 to $10,000." *Id.* at Exhibit p. 108. The majority of CAJ "also believes that the increase to $10,000 will avoid the need to adjust that limit again in the near future." *Id*. A small minority "believes the jurisdictional limit should be increased to $7,500, simply to account for inflation." *Id*.

Other bar groups supporting the proposal include the Culver Marina Bar Association, the Orange County Bar Association, and the Executive Committee of the Beverly Hills Bar Association Litigation Section. *Id*. at Exhibit pp. 36, 37, 100. The Beverly Hills committee states that "such a measure would lead to increased access to our states' courts." *Id*. at Exhibit p. 100. All of its members who attended the meeting on this matter "agreed that they generally could not economically prosecute or defend a claim for $10,000 or less, even if 'economic litigation' procedures were utilized." *Id*.

Quite a number of individuals also wrote in favor of increasing the small claims limit to $10,000. Among them are Darian Bojeaux, Richard Haeussler, Robert Kornswiet, Lou McMurray, Ann Madden, Barbara Holian Mejia, Michael Saliba, Judge Rolf Treu (Los Angeles County Superior Court), and J. Anthony Vittal. *Id.* at Exhibit pp. 86, 145, 147, 98, 154, 160; Email from R. Treu to B. Gaal (Feb. 14, 2003). Several other individuals, including a number of persons who try small claims cases, commented in detail about why they support the proposed increase.

For example, Herb Clough describes himself as a citizen concerned with improving the public's ability to solve disputes without lengthy and costly court

procedures. He urges the Commission "to increase the limits of small claims to $10,000 and to provide the public with expanded advisory services so that the 'little fellow' won't be afraid to make use of small claims court." First Supplement to Memorandum 2003-20, Exhibit p. 139. He also suggests "providing for the increase in small claims from $10,000 to, say, $15,000 in X years." *Id.* He closes by requesting that the Commission "[p]lease do something to help the common person settle disputes without draining his pocket book." *Id.*

Court Commissioner Barbara Kronlund raises other points:

> I fully support increasing the small claims jurisdictional limits from $5,000 to $10,000. I believe inflation requires this, but I also think that it will increase access to justice since many lawyers simply cannot afford to handle such small cases. This will serve judicial economy as well by reserving juries' time for more serious cases and eliminating discovery expenses which will then allow for more money to go to the successful litigant instead of to their attorneys fees and costs. It just makes a lot of sense.

Id. at Exhibit p. 148.

Similarly, M. Dean Sutton, who has frequently served as a pro tem judge in small claims court for nearly 20 years, "strongly recommend[s] that jurisdiction in Small Claims Court should be increased to $10,000." *Id.* at Exhibit p. 162. He explains that "[m]ost 'fender-bender' auto accidents include damages in excess of $5,000, which can be handled quite well in small claims court." *Id*.

Judge Stephen Petersen of the Los Angeles County Superior Court gives four reasons why an immediate increased in small claims jurisdiction is warranted: (1) to provide a fair and economical forum for the resolution of small claims, and thus greater access to the courts and justice, (2) to alleviate the chronic and increasing problem of juror shortages, (3) to provide greater speed and efficiency in the handling of small civil cases, and (4) to save on the strained judicial budget. *Id*. at Exhibit pp. 156-57. He explains that raising the jurisdictional limit

> will help provide an economical forum for the resolution of smaller civil cases. At the present time, the resolution of $5,000-$10,000 civil cases is usually governed by financial pressures unrelated to the merits of the case. The increase in jurisdiction will alleviate this inappropriate pressure. It appears that a considerable number of plaintiffs' lawyers favor such an increase on the grounds that the client would receive more compensation, and the lawyer could collect a reasonable fee for filing and serving the case, negotiating for a settlement, and working up an evidence package for the client.

> Such lawyers have told me that it is not economically feasible to try an under $10,000 case to a jury with any hope of the plaintiff, plaintiff's attorney, and health care providers receiving anything close to full compensation. It is not by accident that juries in these cases are demanded mostly by insurers.

Id. at 156. Judge Petersen's other points are covered elsewhere in this memorandum, together with other comments relating to the same topics.

Another enthusiastic supporter of increasing the small claims limit to $10,000 is Roderic Duncan, a retired judge of the Alameda County Superior Court who is also a member of the AOC's Three-Track Study Working Group and the author of a Nolo Press self-help book on limited jurisdiction lawsuits. He writes that he recently handled the small claims appeals calendar in Alameda County for four days. This experience made it clear to Judge Duncan that "many Californians with claims in the area of $10,000 are denied full access to our courts," for the reasons expressed in the tentative recommendation. *Id*. at Exhibit p. 143.

Judge Duncan notes that some opponents of increasing the small claims limit to $10,000 are "concerned about the defendants who are sued for $10,000 in Small Claims Court and face having a large judgment entered against them without being able to obtain adequate legal advice." *Id*. But he thinks "we much ask what happens to these cases if they cannot be brought in Small Claims Court." *Id*. In his experience, "[i]f the plaintiff is a business, the claim will be brought in Limited Jurisdiction with a lawyer and the defendant will have a more difficult task than if the claim had remained in Small Claims Court." *Id*. For example, it "is not unusual for lawyers in such a position to file a motion for summary judgment in order to achieve a quick victory over a defendant who cannot master Code of Civil Procedure section 437c." *Id.*

Conditional Support for Increasing the Small Claims Limit

A number of organizations expressed conditional support for increasing the small claims limit to $10,000. One of these was the California Small Claims Court Advisors' Association ("CSCAA"), which is comprised of small claims advisors throughout the state and has a sustaining membership of approximately 25 to 30 members. CSCAA "supports raising the jurisdictional limit to $10,000 in order to better serve the interests of justice." *Id*. at Exhibit p. 22. "However, the CSCAA believes that if the jurisdictional limit is raised to $10,000 *it should be done … with the implementation of additional procedural safeguards*." *Id*. (emphasis added). In particular, CSCAA recommends that (1) a small claims plaintiff be allowed to

appeal and (2) a small claims defendant be given greater information about the plaintiffs' claim. *Id*. at Exhibit pp. 22-24. These points are discussed in greater detail later in this memorandum.

Another organization supporting the proposed increase with a caveat was the Consumer Attorneys Association of Los Angeles. That group "agrees with the increase of limits to $10,000 for use by the general public." *Id*. at Exhibit p. 25. But the group "disagree[s] that corporations and business should be allowed the increase, in that our members believe there is considerable abuse by many businesses against unknowing consumers." *Id*.

CAOC, the statewide organization of consumer attorneys, takes a different position in its comments. CAOC observes:

> As noted in the LRC study, it is increasingly difficult for an injured consumer to find an attorney who can handle a case valued under $10,000. Insurance companies fight claims of this size with the same intensity as one valued at $100,000. Costs associated with prosecuting these claims can exceed the value of the case. After deducting fair compensation for an attorney, a consumer is left with a fraction of the value of their claim. These injured consumers need a forum to resolve their disputes. We therefore support increasing the limits of the small claims jurisdiction, *provided* that safeguards are in place.

Id. at Exhibit p. 26 (emphasis in original). This conditional support represents a change from CAOC's historical position of opposing increases in the small claims limit "primarily out of fear that individuals would be disadvantaged in cases filed by a business or corporate plaintiff." *Id*. CAOC's members "continue to have these concerns but believe that we must strike a balance between providing access to justice for the consumer while providing safeguards to assure that individual defendants are not denied justice." *Id*.

To that end, CAOC offers the following principles "as necessary in considering an increase" in the small claims limit:

- We support strengthening the small claims advisory service and would support increasing the filing fees to support that goal.
- We believe that the existing restrictions on the number of claims greater than $2500 per year are important and should be retained.
- The jurisdictional amount for claims involving the collection of medical debt should not be expanded.
- Court provided translators should accompany any increase in jurisdictional limits.

- Protections must be in place to assure that small claims court professionals do not appear to represent institutional parties.
- Filing in small claims court must be at the plaintiff's option only.
- Courts of limited jurisdiction and superior courts must not be permitted to remand a case to small claims court based upon their own evaluation of a claim.
- We oppose any sanction against a plaintiff who files a claim in superior court believing that his or her claim is greater than $10,000 but is ultimately awarded a smaller amount.
- The Judicial Council and the Law Revision Commission should explore additional protections to individual plaintiffs and defendants in the small claims process. Institutional parties, whether plaintiff or defendant, should not be permitted to use the system to take advantage of a less sophisticated party.

Id. at Exhibit pp. 26-27.

Opposition to Increasing the Small Claims Limit

The defense bar opposes the proposed increase in the small claims limit, just as it opposes the proposed increase in the jurisdictional limit of a limited civil case. CDC writes that it "very strongly disagrees" with the proposal to raise the small claims limit to $7,500 or $10,000. *Id*. at Exhibit p. 18. "For a whole host of reasons, [CDC] believe[s] that increases to small claims jurisdictional limits are very unwise at this time." *Id*.

In particular, CDC says that "a claim for $10,000 is simply not a 'minor civil dispute' as envisioned by Code of Civil Procedure Section 116.120." *Id*. CDC explains that it "is the impact on litigants which should be considered, and we believe the people deserve lawyers, discovery, juries, and evidentiary standards when exposed to this level of detriment." *Id*. at Exhibit p. 19. CDC also states that "[u]ntil there can be substantial improvements in infrastructure, particularly as it relates to judging, we are opposed to exposing litigants to the vicissitudes of volunteer decision makers for increased jurisdictional amounts." *Id*. CDC further comments that "the increase in small claims jurisdiction is likely to have other deleterious effects, including increased risk of fraudulent claims by plaintiffs who understand that their adversaries will be unrepresented, increased temptation to utilize claims adjusters in a quasi-legal capacity, and increased costs to the court system from *de novo* appeals by defendants." *Id*.

Similarly, ADC maintains that "depriving the citizens of the State of California [of] the assistance of legal counsel in actions where there may be

personal responsibility up to $10,000 is unwarranted." *Id*. at Exhibit p. 3. Like CDC, ADC asserts that "$10,000 is not a 'small' amount of money." *Id*. ADC believes that the proposed increase in the small claims limit "will be bad for the citizens and consumers of this State." *Id*. at Exhibit p. 4.

Raymond Coates (president of CDC and former president of ADC) also expressed concerns about the proposal in his individual capacity. In his opinion, increasing the small claims limit will have a negative effect on defendants. "They will be required to defend themselves without counsel and have virtually no information prior to the hearing to prepare for rebuttal." *Id*. at Exhibit pp. 140-41. Mr. Coates says that "[t]his is simply unfair." *Id*. at Exhibit p. 141. He warns that it "will end up costing consumers more money through increased insurance premiums and similar costs." *Id*.

Another strong opponent of the proposal is Consumers Union, which is "deeply concerned about the potential unfairness of exposing individual consumers to an initial judgment of up to $7,500 or $10,000 without the ability to be represented by counsel in the proceeding." *Id*. at Exhibit pp. 28-29. CU's concern "is exacerbated by the absence in small claims court of court-provided translators, the unevenness of the quality of *pro tem* decision-makers, and the absence of effective, accessible small claims court advisor services in every county." *Id*. at Exhibit p. 29. CU "respectfully suggest[s] that the jurisdictional limit for small claims cases should not be increased *unless and until these quality of justice issues are fully and effectively remedied." Id*. (emphasis added).

CU provided a detailed analysis in support of its position. *Id*. at Exhibit pp. 28-35. Its comments are further discussed at appropriate points in the remainder of this memorandum.

The insurance industry also opposes the proposed increase in the small claims limit. According to PIFC, an increase to $10,000 "would include a clear majority of auto insurance third party liability claims." *Id*. at Exhibit p. 102. Even raising the limit to $7,500 would "result in a large increase in the number of low-impact auto insurance cases filed in small claims court." *Id*. PIFC warns that these "are the types of cases where fraud most frequently occurs, and often involve questions of liability and coverage not easily addressed in a small claims court setting. *Id*. PIFC provides the following explanation of the increased danger of fraud:

> Increasing the small claims jurisdiction will increase the number of fraudulent claims filed and diminish the ability of insurers to

> combat these claims. Fraudulent claims are frequently filed for amounts under $10,000 with the hopes that the insurer will simply settle the claim for nuisance value rather than investigating it. However, insurers have become much more aggressive, through Special Investigation Units, at ferreting out fraudulent claims, facilitated in part by the fact that discovery is allowed once a case is filed in Superior court. Since neither pretrial discovery nor legal representation is permitted in small claims court, the number of fraudulent and frivolous claims will increase.
>
> Compounding this problem is the fact that small claims courts often attempt to "split the baby" and reach a compromise, with some award going to the plaintiff even in cases of fraud, or where there are significant questions of liability or coverage. While compromise is certainly beneficial in many cases, "splitting the baby" is not appropriate in cases where fraud is present. The proposal will encourage fraudulent claims up to the jurisdictional limit and will limit the ability of defendants to defend themselves against such merit-less claims. The cumulative impact will be an increase in claims costs and auto insurance premiums.

Id. at Exhibit p. 103. PIFC also raises other concerns, which we cover below in the sections on the particular issues to which they relate.

Similarly, ACIC reports that insurers "do not support an increase in the jurisdictional limits of small claims cases." *Id*. Like PIFC, ACIC cautions that "the potential for fraudulent claims will be increased because the factual scrutiny that claims undergo in small claims court is not sufficiently rigorous to expose claims that are either outright fraudulent or fraudulent in their enhancement of the claim's value." *Id* at Exhibit p. 2. ACIC further says that an insurer "cannot provide adequate representation for its insureds in small claims cases, and those insureds are entitled to, and expect, representation by their insurers on third party claims." *Id*. at Exhibit p. 1. In addition, ACIC also predicts that small claims appeals "will become routine if insurers view the small claims process as resulting in large numbers of typically excessive judgments." *Id*. at Exhibit p. 2. ACIC warns that this will offset "any perceived judicial economy" of increasing the small claims limit. *Id.*

A few individuals (in addition to Mr. Coates) also wrote in opposition to the proposed jurisdictional increase. Art Acevado of the Los Angeles County Superior Court raised concerns regarding the potential impact on court revenue and workload. *Id*. at Exhibit pp. 87-94. We describe his concerns when covering those issues later in this memorandum.

Attorney David Ricks "strongly object[s] to the increased limits for the Small Claims court." *Id*. at Exhibit p. 158. In his civil practice, he has "had many clients come to [his] office with judgments rendered in Small Claims court that were completely unjustified and incorrect." *Id*.

Attorney Paul Mahoney reports similar experiences:

> I have been practicing law for 34 years and my experience has been that in small claims, you normally don't get a judge, might be lucky to get a commissioner, but most often get a lawyer volunteering his or her time. Often the number of cases on calendar is so large that not much time is given to each case with the result that small claims is not justice for the poor or the middle class, but rather a clearing house for judges who don't have to fool around with legal issues which sometimes are very complex, in small cases. That is not good.
>
> Also, I saw [i]n two cases this year involving well-educated, well to do clients that the legal system can be manipulated by public entities. [One of those clients] fought in the Battle of Okinawa and … felt he got better treatment in that battle th[a]n he did in front of the court.
>
> ….
>
> If this can happen to these people, the poor have no chance.

Id. at Exhibit pp. 149-50. He considers the proposed jurisdictional increase "a terrible idea." *Id*. at Exhibit p. 149.

Attorney Wayne Maire likewise expresses concern about use of the small claims process for cases as large as $10,000:

> The work of our law firm is exclusively devoted to handling civil litigation in the thirteen northernmost counties of the State of California. I along with many of the attorneys in our firm have had an opportunity to sit as a Pro Tem Judge in Small Claims Court. I would strongly oppose changing the jurisdictional limits from $5,000 to $10,000. While $10,000 may not be a significant sum of money in some portions of the State of California, I can assure you that it is a very significant sum in this portion of the State. To deprive people of their right to retain counsel and to be represented in claims of this type is in my opinion unwarranted and unjust.

Id. at Exhibit p. 152.

A recent law review article also maintains that an increase in the small claims limit would be inappropriate. Zucker & Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. Rev. 315 (2003). The authors conducted an empirical study of small claims cases in

Ventura County. Based on their results, they concluded that the small claims limit should remain at $5,000 for the following reasons:

> First, the average claim amount is only $1,616. The range is $63 to $5,000. However, less than thirty-nine cases exceed $3,500 (14.4%), and less than twenty-six cases exceeded $4,000 (10.48%). We found only twenty-four cases filed for $5,000 (9.68%). Even in those cases that reached the jurisdictional maximum, only five of those were in fact awarded $5,000 at trial.
>
> Second, the median small claims court jurisdictional limit in the United States is $4,500. The most common limit is $5,000. Given the abbreviated nature of a small claims court case in terms of procedural due process rights of the defendant (that is, lack of opportunity to conduct discovery, no right to counsel, extremely short duration to trial, extremely short trial hearing), it seems that cases that exceed the $5,000 limit should be directed to the regular civil track where defendants maintain their procedural due process rights. At some point, abbreviated claims and "afternoon justice" may simply fail to properly address the seriousness of concerns involving claims of a higher amount.
>
> Third, a review of the literature shows that there has been no empirical study conducted on a statewide or nationwide basis indicating any need for raising the jurisdictional maximum. Until such a study is completed, the commentators arguing for a jurisdictional increase have no hard evidence on which to base their conjecture.

Id. at 347 (footnotes omitted). Obviously, the last of these reasons (the lack of a statewide or nationwide empirical study) is no longer valid, in light of the empirical research that PSI conducted for the Judicial Council for purposes of this joint study.

Opposition to Increasing the Small Claims Limit to $10,000, But Not to Increasing the Limit to $7,500

Importantly, four organizations indicated that they would oppose an increase in the small claims limit to $10,000, but would not oppose an increase to $7,500. For example, although the California Judges Association has not yet taken an official position on this matter, its unofficial position in January was that it would support an increase in the small claims limit, but only to $7,500. Email from R. Waring to D. Pone & B. Gaal (Jan. 21, 2003).

Similarly, the Small Claims Subcommittee of the Los Angeles County Superior Court would oppose an increase to $10,000 for a number of reasons, which we discuss later in this memorandum. The subcommittee includes a

representative from each district in Los Angeles except one. Despite its concerns, the subcommittee states that a "lesser amount of $7,500.00 would be acceptable." First Supplement to Memorandum 2002-20, Exhibit pp. 96-97.

The California Commission on Access to Justice (hereafter "Access to Justice Commission") also "believes the jurisdictional limit for small claims cases should only be increased from $5,000 to $7,500." *Id.* at Exhibit p. 16. The Access to Justice Commission, established in 1996, "is pursuing long-term strategies designed to make significant progress toward the goal of improving access to justice for law and moderate-income Californians." *Id*. at Exhibit p. 15. The group includes appointments from the State Bar, the Governor, the Attorney General, the President Pro Tem of the State Senate, the Speaker of the Assembly, the Judicial Council, California Judges Association, CAOC, California Chamber of Commerce, California Labor Federation, the League of Women Voters, and the California Council of Churches. *Id*.

The Access to Justice Commission explains that increasing the small claims limit to $7,500

> would account for inflation and also make the system accessible for those with cases over the jurisdictional limit. However, the Commission is concerned about an increase to $10,000 until such time as the systemic problems in the Small Claims Court system are resolved, including the appropriate training of pro tem judges. The Commission is aware of the lack of time available for training and the rush of cases facing pro tems on the Small Claims Court calendar, and suggests that the distribution of model training materials to pro tem judges could help achieve the training goal in an effective and efficient manner.

Id. at Exhibit p. 16.

Public Law Center takes the same position. It is a pro bono public interest law firm, which provides free legal assistance on civil matters (including many small claims cases) to low income persons in Orange County. It urges the Commission to give "strong consideration" to the comments of the Access to Justice Commission, because that entity "is one of the most respected participants in the access to justice field in our state." *Id*. at Exhibit p. 106.

Public Law Center also points out that

> most small claims plaintiffs are not individuals seeking to access the "People's Court." Rather, most plaintiffs in small claims court are businesses seeking to collect money owed to them by individuals. Increasing the jurisdictional limit and modifying or

> eliminating the "frequent filer" limitation will, to be sure, give some individuals more access. But what it will do more than anything else is turn the Small Claims Court into even more of a debt collection court than it already is.

Id.

Law Library Funding

Numerous law libraries wrote to express concerns that the proposed increase in the small claims limit would lead to a decrease in law library funding. These included the law libraries for Calaveras County, Fresno County, Kern County, Los Angeles County, Orange County, Placer County, Sacramento County, Santa Cruz County, Siskiyou County, Sonoma County, Stanislaus County, and Tulare County. *Id*. at Exhibit pp. 116-18, 123-32, 135-37. The Commission also received comments on this point from the Council of California County Law Libraries ("CCCLL"), a statewide coordinating body comprised of representative librarians from the 58 county law libraries, as well from the Southern California Association of Law Libraries ("SCALL"), an association representing over 400 law librarians from law firms, law schools, county law libraries, and other institutions in southern California. *Id*. at Exhibit pp. 119-22, 133-34.

Most of these comments did not take a position on the jurisdictional increase, other than to request that the reform be accomplished in a manner that does not reduce law library funding. The Board of Law Library Trustees of Los Angeles County supports the proposed increase so long as there would be no loss of law library revenue. *Id*. at Exhibit p. 116. Santa Cruz County Law Library strongly opposes the proposed increase unless there would be no loss of law library revenue. *Id*. at Exhibit p. 130.

The funding issue arises because law libraries receive a portion of the filing fee for a limited civil case, but not for a small claims case. Increasing the small claims limit would mean that cases formerly categorized as limited civil cases and thus subject to the law library fee would instead be categorized as small claims cases and thus exempt from the law library fee. As Calaveras County Law Library explains:

> While Small Claims Court litigants use their county law libraries and are "labor intensive," the Small Claims Courts have never contributed any of their filing fees to their county law libraries, as do the other civil filings. Every time the jurisdictional limit for Small Claims courts [is] increased, the county law libraries lose

> revenue. And the county law libraries have been economically devastated over the last decade due to the sharp rising costs of law books and the complete failure of civil court filing fees to keep pace. At the very least, the Small Claims Courts may have to finally start "paying their fare."

Id. at Exhibit p. 118.

Similarly, CCCLL says:

> Since 1891, county law libraries have been primarily funded by a portion of the court's filing fee in civil actions only. No portion of a small claims filing fee goes to the county law libraries. Over the last ten years, law libraries have seen a dramatic decrease in revenue due to the increasing number of fee waivers and use of alternative dispute resolution. At the same time, inflation and the cost of legal publications and online subscriptions combined have escalated annually. With the county law libraries' revenue steadily decreasing and its buying power weakened, many libraries are in a precarious balancing act of limiting its resources and essential services.

Id. at Exhibit pp. 119-20. A recent bar publication highlights the difficult financial situation of the county law libraries, reporting that their income was the same in 1992 as it was in 2000, while consumer and law book prices rose, resulting in a 40 percent loss in purchasing power over the eight-year period." Cal. Lawyer (Sept. 2002), p. 11.

The extent of the potential revenue loss from the proposed increase in the small claims limit is not clear. CCCLL states that "[s]everal county law libraries have estimated that they would suffer revenue losses in the range from ten to twenty-five percent if the small claims limit were increased. First Supplement to Memorandum 2003-20, Exhibit p. 121. The director of Sacramento County Public Law Library estimates that the loss may be more than the entire budget of the branch library ($193,800), which "serves staff and constituents of the family law courthouse and the courthouse where small claims, traffic, and unlawful detainer cases are heard." *Id*. at Exhibit p. 129. Fresno County Public Law Library projects that "the potential loss of revenue to the law library could exceed $79,000 annually if all limited cases under $10,000 were filed in small claims." *Id*. at Exhibit p. 123. Tulare County predicts "a loss of filing fee revenue ranging between $13,000 to $26,000, a five to ten percent decrease in revenue." *Id*. at Exhibit p. 136.

The law libraries point out that such reductions in law library revenue would hurt small claims litigants. As Santa Cruz County Law Library comments, "[s]mall claims litigants are frequent (and grateful) library users — this is where citizens come for self-help resources." *Id*. at Exhibit p. 130. The small claims advisory service in that area "has extremely limited hours and actually operates out of Monterey County." *Id*. This is not a unique situation: CCCLL explains that "[s]ince the small claims advisor is a part-time position in many counties, the small claims user often relies on their county law library to provide them with the assistance and resources to prepare and to follow-up on their small claims actions." *id*. at Exhibit p. 119. Even where there is an excellent small claims advisory service, such as in Sacramento County, "library staff field small claims questions and provide pathfinders and resources for self represented litigants." *Id*. at Exhibit p. 129. For example, approximately 25% of the questions that the Sacramento County Public Law Library answers in its 24/7 reference service relate to small claims actions. *Id*.

Other libraries also report heavy usage by small claims litigants. *Id*. at Exhibit pp. 117, 123. For instance, Kern County Law Library observes:

> Over the past decade, the law library has experienced an increase in self-represented litigants using the law library. Recent statistics show that 51% of those that use the library are not attorneys and many of these are filing small claims actions. Besides providing guidance to small claims litigants through books the library also provides a typewriter and computers so that litigants may conveniently complete their forms. Many times small claims patrons become repeat users as they traverse through the appellate process or in conjunction with collecting their judgment.

Id. at Exhibit p. 125.

In light of their importance to small claims litigants and their desperate funding situation, the law libraries request that if the small claims limit is increased, the filing fee for small claims cases in each county be increased to include "that county's law library fee established for limited jurisdiction cases, and such increases to that county's law library fee as authorized by statute." *Id*. at Exhibit p. 121; see also *id*. at Exhibit pp. 116, 127.

According to CCCLL's website, the law library fee for a limited civil case ranges from a low of $3 in Yolo County to a high of $38 in Sacramento County. See <www.cccll.org/2003fees.org>. Most law library fees are $20 or more. *Id*. While adding $3 to the filing fee for a small claims case might not be too

burdensome, adding $20 or more would essentially double the current small claims fee of $22 for a person other than a frequent filer. See "Filing Fee Increases" *supra*. That would be a considerable jump, and would not incorporate any funding for other types of improvements to the small claims system, such as increased funding for the small claims advisory service.

Traditionally, there has been great resistance to increasing small claims fees, because the Legislature does not want to inhibit ordinary citizens' access to the courts for resolution of minor disputes. That remains an important consideration, but the concerns expressed by the law libraries are important as well. Fees should be low enough that potential small claims litigants can pay them without hardship, yet should be high enough that law libraries can adequately serve the needs of those litigants. That is a challenge.

As explained in the discussion of the jurisdictional limit of a limited civil case, however, a bill on the Governor's desk would establish a task force that would make recommendations regarding means of funding law libraries, among other matters. This is critical for the law libraries, because civil filing fees have proven to be an unstable source of funding. Perhaps the proposed task force will develop a solution to the funding problem that the law libraries raise.

Another possibility would be for the local Board of Supervisors to increase the law library fees for limited civil cases and unlimited civil cases in each county where the jurisdictional increase would result in a law library funding problem. See Bus. & Prof. Code § 6322.1. The Board of Supervisors also has authority to provide other funding for law libraries. Bus. & Prof. Code § 6324.

If these possibilities prove ineffectual, the Commission should take steps to address the law libraries' concerns in some manner. The potential loss of income from the proposed jurisdictional increase is too great to expect the county law libraries to absorb it while maintaining a satisfactory level of service, particularly after enduring previous budget cuts and other fiscal challenges. Maybe some modest law library fee (e.g., $5) could be charged for a small claims case of $5,000 or less, and a larger law library fee (e.g., $20) could be charged for a small claims case over $5,000. The Commission needs to explore such alternatives and develop a approach that appropriately balances the competing interests.

Small Claims Advisory Service

Another entity that assists small claims litigants is the small claims advisory service. As explained at page 16 of the tentative recommendation, "[s]mall claims

advisors are critical to the functioning of a small claims division." Because of the importance of the small claims advisory service, the tentative recommendation proposes to increase funding for the service. This would be achieved by (1) charging more for filing a small claims case in which the demand exceeds $5,000 than for filing a small claims case in which the demand is $5,000 or less, and (2) allocating the revenue from the fee differential to the small claims advisory service.

Specifically, the tentative recommendation proposes to charge an ordinary person $40 for filing a small claims case over $5,000 — i.e., double the fee under Code of Civil Procedure Section 116.230 for filing a small claims case seeking $5,000 or less. For a frequent filer (a person who files more than 12 small claims cases in a year), the tentative recommendation proposes to charge $70 for filing a small claims case over $5,000 — again, double the fee under Section 116.230 for filing a small claims case seeking $5,000 or less. Since the tentative recommendation was issued, however, the frequent filer fee under Section 116.230 was increased from $35 to $66, which would be $132 if doubled. See "Filing Fee Increases" *supra*.

Many of the comments on the tentative recommendation refer to the small claims advisory service and the proposed increase in funding for that service. Those comments are discussed below. The comments relate to the importance and adequacy of the small claims advisory service, funding for the service, the types of services provided, and funding for Self Help Centers.

Importance of the Small Claims Advisory Service

There seemed to be broad acceptance that the small claims advisory service is helpful to small claims litigants and to the effective functioning of the small claims system. For instance, Consumers Union wrote that "well-funded, in-person, courthouse-based small claims court advisors are essential." First Supplement to Memorandum 2003-20, Exhibit p. 29. Similarly, the State Bar CAJ "agrees with the CLRC that small claims advisors are critical to the functioning of a small claims division." *Id*. at Exhibit p. 109. None of the comments questioned this point.

Adequacy of the Small Claims Advisory Service

While it is clear that the small claims advisory service is important, it is less clear how well it is functioning. As Consumers Union comments:

> The [PSI] Study confirms that the quality, quantity and accessibility of small claims court advisor service vary widely across counties. The study reports that San Francisco small claims court litigants are served by a full-time, in-person attorney. Consumers can sign up for that service directly at the Clerk's office, or access another full-time attorney by phone. By contrast, consumers in Fresno are offered advice on small claims court procedure only, and the advice is provided by law students who are not even located in the courthouse.
>
> Weaknesses in the advice service are particularly serious when an individual consumer is litigating in small claims court with a business. While businesses cannot use lawyers in small claims court, they are more likely to be repeat litigants, and they may have a professional who regularly presents matters in the court, gaining knowledge about how to develop and present a case. Effective, available small claims court advisor services are essential to at least partially address this inherent imbalance.

Id. at Exhibit pp. 31-32 (citations omitted).

HALT's empirical study provides basic information about the small claims advisory service in each county. *Id*. at Exhibit pp. 72-78. The HALT researchers conclude that small claims advisors "currently meet the demand for services." *Id*. at Exhibit p. 49. The researchers also state that the current system "can likely support a larger caseload due to an increase in the monetary jurisdictional limit with few additional resources." *Id*.

But the study reveals that six counties have no small claims advisory service: Alpine, Amador, Del Norte, Glenn, Mariposa, and Siskiyou. Seventeen counties have a small claims advisory service, but did not respond to HALT's survey. The small claims advisory service in 12 or 13 of the remaining counties offers no walk-in hours (the data for Tulare County is unclear). In some of the other counties, walk-in hours and even phone assistance hours are quite limited. Few counties provide any services during evenings and weekends, making it hard for an individual who works normal business hours to use them. Many but not all counties offer services in Spanish as well as English, but very few offer services in any other language. It is unclear how many counties have more than one small claims advisor, which is necessary to avoid a conflict of interest situation if both sides seek assistance in a case. *Id*. at Exhibit pp. 72-78.

Further, small claims advisors are not required to be attorneys, or even law students. The Access to Justice Commission recommends, however, "that Small Claims Advisors be required to be attorneys, using supervised paralegals in

certain situations." *Id*. at Exhibit p. 17. Consumers Union likewise intimates that an advisory service is inadequate if "it is not staffed by lawyers." *Id*. at Exhibit p. 32. Similarly, attorney Richard Haeussler suggests that small claims litigants be given an opportunity to consult with an attorney or at least a certified second or third year law student on the day of trial. *Id*. at Exhibit p. 145. In the same vein, attorneys from the Department of Consumer Affairs (speaking on their own behalf and not on behalf of the Department) orally informed Commission and AOC staff that small claims advisors should not only be attorneys but preferably *paid* attorneys, because volunteers typically do not devote enough hours to small claims representation to acquire sufficient expertise.

From these comments and the data on small claims advisory services, it is clear that although small claims advisors may be doing their best to serve the public, there is significant room for improvement. The question is how to achieve improved service within current budget constraints.

Funding of the Small Claims Advisory Service

There was solid support for the Commission's proposal to charge a higher filing fee for a small claims case over $5,000 than for a small claims case seeking $5,000 or less, and to direct the fee differential to the small claims advisory service. The Access to Justice Commission, CAOC, HALT, the Small Claims Subcommittee of Los Angeles County Superior Court, Marin County Superior Court, Nolo.com, the State Bar CAJ, and Court Commissioner Barbara Kronlund all commented favorably on the proposal, as did the California Judges Association unofficially. *Id*. at Exhibit pp. 17, 26, 31-32, 42-43, 97, 99, 109, 148; email from R. Waring to D. Pone & B. Gaal (Jan. 21, 2003).

Consumers Union was also supportive. CU wrote that the jurisdictional limit for a small claims case should not be increased until quality of justice issues relating to small claims cases are "fully and effectively remedied." First Supplement to Memorandum 2003-20, Exhibit p. 29. "As one small part of these needed improvements, [CU] support[s] the proposals for a fee increment providing a dedicated funding stream for small claims court advisor services." *Id*. CU explains that "[a]n adequate, permanent, dedicated revenue stream is essential to increasing the availability of high quality small claims court advisor services." *Id*. Thus, CU recommends that the income from the proposed higher fees for small claims cases over $5,000 "be fully dedicated to funding small claims court advisor services." *Id*. at Exhibit p. 32. CU further comments that "[i]f

this dedicated stream would not be sufficient to pay for in-person, courthouse-based service by one or more licensed attorneys, at a level adequate to serve the probable increase in small claims court caseload and demand for advisor services, then other permanent funding sources should be arranged." *Id*

It is thus clear that the concepts of charging a two-tiered filing fee and using some or all of the fee differential for the small claims advisory service are worth pursuing. What remains to be resolved is:

- Whether to use some of the fee for improving the small claims process in other ways (e.g., ensuring that law libraries are adequately funded, or hiring court commissioners to try small claims cases instead of pro tems).
- How much to charge, especially given the recent substantial increase in the frequent filer fee.
- Whether the increased funding would be adequate to achieve a satisfactory level of service. Would further funding increases from other sources be needed, as CU indicates is possible?

The Commission should explore these points with the interested parties and further analyze this matter.

Types of Advice Provided by the Small Claims Advisory Service

The tentative recommendation proposes to add the following provision to the Code of Civil Procedure:

> 116.941. The small claims advisory service described in Section 116.940 shall provide advice to small claims litigants and other interested persons on all of the following matters:
>
> (a) How to complete the necessary forms for presenting or defending a small claims action.
>
> (b) How to determine the proper court in which a small claims action may be filed.
>
> (c) How to present and defend against a small claims action.
>
> (d) How to appeal from a judgment in a small claims action.
>
> (e) How to enforce a judgment in a small claims action.
>
> (f) How to protect property that is exempt from enforcement of a small claims judgment.
>
> (g) Any other aspect of a small claims action that the small claims advisory service deems necessary and appropriate.
>
> **Comment.** Section 116.941 is added to provide guidance on the types of advice to be provided by the small claims advisory service. It is drawn from Section 116.930(b) (content of small claims manual).

The main impetus for this provision was to make explicit that the duties of a small claims advisor include giving advice on how to enforce a judgment, an area in which California received an "F" in a nationwide study conducted by HALT.

This proposed new provision was well-received. The State Bar CAJ "supports the recommendation to specify the types of advice to be provided by small claims advisors, and believes advice on how to enforce a judgment obtained in a small claims action is particularly important." First Supplement to Memorandum 2003-20, Exhibit p. 109. Similarly, the Access to Justice Commission "agrees with the recommendation of the Law Revision Commission that Small Claims court advisors should be required to help litigants recover judgments, which is often the most difficult part of the process for litigants." *Id.* at Exhibit p. 17. CU also "support[s] proposals to clarify that small claims court advisors can and should provide a broad array of advice, including substantive legal advice and advice about how to enforce a judgment." *Id.* at Exhibit p. 32. Likewise, HALT "supports the proposal that providing advice on collection procedures be made an explicit part of the duties of a small claims advisor." *Id*. at 43. In fact, HALT writes:

> Except for raising the jurisdictional limit, this is the most important reform for small claims courts nationwide, and the area in which California's system is most in need of reform. In too many instances, a plaintiff finds that a verdict in her favor is not the end of her journey through the legal system, but the beginning. Any help that courts can provide with the collection process relieves consumers of a considerable burden.

Id.; see also *id*. at Exhibit p. 62.

Given this favorable input, the concept of the proposed new provision appears worth pursuing. The Three Track Study Working Group of the Judicial Council suggested some refinements of the language, which we will present at a later meeting. In addition, the PCLC Subcommittee requested further research and analysis relating to this provision. We will keep the Commission posted on any additional materials or information we receive.

Self Help Centers

Elena Simonian of San Francisco Superior Court requests that the Commission consider funding for Self Help Centers, as well as for the small claims advisory service:

> I would like to see the recommendation for expanding Small Claims Advisory Services and such fee allocations to also include

> any Self Help Centers that may be operating in a court. Some of these centers are operating under grant funding and if this recommendation is implemented I can see those centers also assisting any overflow from the [small claims advisory attorneys]. These centers will most likely also be impacted with the increase in jurisdiction of limited cases. Any increase [in] funding would most likely be used more efficiently in Self Help Centers since they serve a broader range of litigants and assist in a broader range of case types.

Id. at Exhibit p. 161. Similarly, the Small Claims Subcommittee of the Los Angeles County Superior Court expresses concern regarding the impact of the proposed jurisdictional increase on the workload of the Department of Consumer Affairs Self-Help Legal Maxis Center. *Id*. at Exhibit p. 96.

The staff is not familiar with how many Self Help Centers are currently operating, where they are located, what services they provide, and how much funding they receive. We will attempt to gather information on these points if the Commission is interested.

Access to an Interpreter and Related Issues

Under existing law, if a small claims litigant does not speak English well, the court may permit an interpreter to assist the party. The court does not supply the interpreter; the party must arrange for one. The court is, however, required to maintain a list of interpreters who will translate for small claims litigants at no cost or for a reasonable fee. Code Civ. Proc. § 116.550.

CU considers this situation unacceptable if the small claims limit is increased:

> Court-provided interpreter services should accompany any expansion of small claims jurisdiction.… The mere availability of a list of interpreters who will act *pro bono* or for a reasonable fee is not sufficient. There is no guarantee that any no-cost services will be available at the time that they are needed, and a reasonable fee may still be unaffordable to lower income small claims court litigants.
>
> The suggestion in the CLRC's Tentative Recommendation at pages 16-17 that small claims court advisors can advise limited English speaking litigants of their right to bring a friend to small claims court to translate reveals a startling lack of understanding of the importance of professional translation services in court. Nonprofessional translators may be unfamiliar with the legal terms or the kinds of questions the decision-maker will ask. Nonprofessional translators often are family members who are minors. Some adult volunteer nonprofessional translators may have

> limited English skills themselves and thus be unable to convey important nuances in testimony, or in questions from the bench.

First Supplement to Memorandum 2003-20, Exhibit pp. 32-33. Like CU, CAOC says that "[c]ourt provided translators should accompany any increase in jurisdictional limits." *Id*. at Exhibit p. 27.

Constitutional issues relating to availability of a court-provided interpreter are discussed in Memorandum 2003-22. Regardless of whether the lack of a court-provided interpreter would amount to a constitutional violation, however, it is less than ideal for a litigant to have difficulty understanding court proceedings because the litigant lacks an interpreter altogether or has an interpreter who cannot translate well in the court context. According to a legal newspaper, a recent report by the Access to Justice Commission ("The Path to Equal Justice") found that in some areas of California almost one-third of all litigants lack fluency in English. *The Poor Get Poorer and Lack Legal Aid*, S.F. Daily J. (Nov. 20, 2002), p. 7. That is too big a problem to brush aside.

Some steps are being taken to address the situation. For example, the Judicial Council's Self Help website, including the small claims material, is now available in Spanish as well as English. See <www.sucorte.ca.gov>. San Mateo County has also translated its small claims website into Spanish. Various other court materials have been, or are in the process of being, translated into other languages. San Francisco now has an Access Center stocked with multilingual materials to help pro per litigants. As previously discussed, some but not all small claims advisory services offer assistance in Spanish. Very few offer assistance in any other language, however, despite the wide variety of languages spoken in California. And Nolo.com does not publish any legal self-help books in languages other than English.

Further efforts to make small claims materials and assistance available in different languages are needed. As CU and CAOC suggest, it would be particularly helpful to be able to provide skilled interpreters at small claims hearings to assist litigants who do not speak English well. That would entail considerable expense, however, and we understand that there is a shortage of court-certified interpreters. It is probably unrealistic to expect the state at any time in the near future to be able to provide a court-certified interpreter for every small claims litigant who does not understand English well.

Perhaps, however, some funding could be secured to pay interpreters to attend at least some small claims hearings (e.g., a court in a major metropolitan

area could hire a court-certified Spanish-speaking interpreter to handle the small claims calendar on a specified day, and the court could schedule cases in which a party needs such assistance for that day). Maybe there are other ways in which the concerns raised by CU and CAOC could be at least partially addressed. The Commission should explore such alternatives, in the interests of achieving broader consensus regarding the proposed increase in the small claims limit and improving the functioning of the small claims courts.

Use of a Temporary Judge in a Small Claims Case

Another area of concern was the use of temporary judges in small claims cases. Numerous parties made negative comments about the quality of justice rendered by temporary judges, or urged consideration of changes in the use or training of temporary judges.

For example, CDC said:

> Small claims litigants … deserve a relatively uniform application of justice, regardless of the county hearing the claim. This means reasonably consistent small claims infrastructure, in terms of small claims assistance, interpreters, and especially, judges. Counties differ markedly on the degree to which small claims are assigned to volunteer temporary judges, and on the degree of training provided to these decision makers. Throughout the Discussion of Issues there is recognition that funding for small claims infrastructure must be increased to provide litigants with equal "access to justice", yet there is no meaningful chance given the state's budget situation to provide these increases, even if a two-tier filing fee is adopted. In fact, filing fees were increased last year, and may be increased this year, just to maintain current services. Until there can be substantial improvements in infrastructure, particularly as it relates to judging, we are opposed to exposing litigants to the vicissitudes of volunteer decision makers for increased jurisdictional amounts.

First Supplement to Memorandum 2003-20, Exhibit p. 19.

CU was even more emphatic, asserting that "[p]rofessional decision-makers … are essential." *Id*. at Exhibit p. 29. CU explained:

> The significant empirical record developed in the [PSI] Study about the varying quality of justice in small claims court should not be ignored. That study shows that an individual consumer may receive a significantly different quality of justice based on the accident of residence. Consumers in San Francisco County, for example, are guaranteed a decision-maker who is either a court

> commissioner or one of a small number of regular-serving, compensated *pro tems*. By contrast, a consumer in Fresno must accept a *pro tem* who may serve only irregularly, or return for a new trial date which would necessitate taking another day away from work, which is often an uncompensated day for a nonprofessional employee.
>
> The [PSI] Study reports a higher appeal rate from *pro tems* than from professional court commissioners. The attorneys surveyed by PSI also reported "some dissatisfaction with the quality of the judges *pro tem*," in both of the sample counties which used *pro tem* judges. If the jurisdictional limit is increased, the issues presented can be expected to be more complex, with more need for legal research before a decision. Larger cases also heighten the need for consistency and high quality justice.
>
> The [PSI] study also reports that infrequent service by volunteer *pro tems* makes it "difficult for them to develop familiarity with the legal problems that arise in small claims court." The study goes on to point out that "lack of familiarity with the law is exacerbated by the absence of attorneys to present or argue the relevant law."
>
> Use of paid court commissioners may be the most effective way to improve the quality of justice in the small claims court. The San Francisco model, combining court commissioners with a small number of regularly serving, compensated *pro tems* may provide a model for improvement.

Id. at Exhibit p. 31.

Other parties expressing concern about temporary judges were the Access to Justice Commission, the California Small Claims Court Advisors' Association, the Small Claims Subcommittee of Los Angeles County Superior Court, Public Law Center, and the State Bar CAJ. *Id*. at Exhibit pp. 16, 22, 97, 106-07, 111. In addition, the recent empirical study in Ventura County found that

> the judgment amounts differ substantially between commissioners and judges pro tem. From the data, it appears that commissioners tend to issue lower judgment amounts than judges pro tem. As such, it would behoove a small claims court defendant to refuse a judge pro tem and have his or her case heard by a commissioner.

Zucker & Her, *supra*, 37 U.S.F. L. Rev. at 348. The authors suggest changes such as providing additional training and oversight of temporary judges, and requiring temporary judges to prepare a written statement of reasons for each decision. *Id*.

Attorney M. Dean Sutton, who frequently serves as a small claims judge, has a more positive view of temporary judges:

> Small claims court pro tem judges are underrated and unappreciated. I am not unbiased, but I am constantly impressed by the time and skill given without pay or even notice by the Santa Clara County bar.
>
> Most cases are recurring, repetitive cases. The pro tem should be aware of current (read "this week's") law concerning: landlord-tenant law (especially security deposits and default in payment of rent); the licensing and deposit requirements of licensed contractors, especially "HIC" (home improvement contractors); auto repairs; auto repossession and deficiency judgments; damage limitations by treaty and the Warsaw Convention; as well as general contract and tort law.
>
> From my experience, most of the pro tems here try very hard to become informed on the relevant consumer and other laws, and the court clerks and bailiffs constantly provide information and guidance from their collective years of experience.
>
> If there is a concern that bigger disputes will be decided by pro tems and not "real judges," I can only say that most pro tems do a very good job most of the time.
>
> A litigant need not stipulate to a pro tem, but may insist on a commissioner or a "real judge" if desired.
>
> As long as the pro tems go through a periodic "cram course" session on new, often-used laws, or are encouraged to ask for advice and assistance from a "real judge" or experienced pro tem, the system should work well.

Id. at Exhibit pp. 168-69. Similarly, the HALT Study states that "[t]he data collected for this report indicates no major risks associated with pro tem adjudication." *Id*. at Exhibit p. 65. But these were minority views.

The AOC has established a working group on temporary judges, which is studying the use of temporary judges generally, not just in small claims cases. It is appropriate for the judicial branch to take the lead on this topic, because it is more familiar with current use of temporary judges than the Commission, and because administrative reforms and changes in the Rules of Court may be better ways of addressing at least some of the issues than legislation.

For instance, one step to improve the performance of temporary judges might be to provide better training for them. The education division of the AOC is already responsible for developing and maintaining a comprehensive and quality education program for the judicial branch. Judicial Admin. Standards § 25. Perhaps the AOC should put more emphasis in that program on the training of temporary judges. At present, each court that uses temporary judges to hear small claims cases is supposed to train those temporary judges. Cal. R. Ct. 1726;

Judicial Admin. Standards § 16.5. Maybe the AOC should assume responsibility for such training instead.

The working group should examine such possibilities in conducting its study. It is our understanding that the working group expects to complete its empirical study on the use of temporary judges and to begin to implement changes in 2004.

We will continue to track the progress of the working group and inform the Commission of significant developments. From the depth of concern regarding the use of temporary judges in small claims cases, it is clear that some reforms along these lines may be needed before we can achieve a greater degree of consensus on increasing the small claims limit. Unfortunately, however, many options would entail substantial expense (e.g., using court commissioners and a small number of regularly serving, compensated temporary judges to try small claims cases, as CU suggests). It will be hard to find ways to finance such changes in these tough budget times.

Effect on Court Workload and Revenue

Interested parties also raised concerns regarding the potential effect of the proposed jurisdictional increase on the workload and revenue of the courts.

With regard to workload, ACIC, CDC, and PIFC all warn that if the small claims limit is increased, there will be more appeals by small claims defendants, increasing demands on the judiciary. First Supplement to Memorandum 2003-20, Exhibit pp. 2, 19, 103. For example, PIFC states:

> Increasing the small claims jurisdiction will not relieve court congestion. Instead, insurers will be forced to appeal small claims judgments to the Superior Court. Court resources will be drained twice — at both the small claims court level and through an increased number of appeals. When the small claims court decides against a defendant who is represented by insurance, there will very often be a request for a trial de novo because the insurer responsible for indemnifying the claim has not had an opportunity to evaluate the merits or to present a defense.

Id. at Exhibit p. 103.

The Small Claims Subcommittee of Los Angeles County Superior Court also expresses concern regarding an anticipated increase in the small claims workload. The subcommittee states that the court does not have the staff to handle the anticipated increase in workload and is unlikely to be able to obtain additional staffing due to the budget situation. *Id*. at Exhibit p. 96. Also, the

subcommittee predicts that if the proposal was adopted, businesses "would be less likely to work with the consumers in reducing the balance owed." *Id*. Thus, "claims filed by businesses would inundate the court's calendar, which would make it difficult for the average citizen to get his/her claim in court." *Id.*

Along the same lines, attorney David Ricks writes:

> [A] further objection to the increased limits, is that the Small Claims courts are already extremely crowded and understaffed. Therefore the judges handling these matters are seldom giving the individual cases sufficient time and attention to make decisions that could ruin a family, small business or individual. Increasing the pressure on these courts while decreasing the time available to evaluate and judge these cases will only result in greater injustice to and frustration with an already skeptical public.

Id. at Exhibit p. 158.

In contrast, Judge Petersen of Los Angeles County Superior Court expects that increasing the small claims limit would decrease the overall workload of the courts, although some resources might need to be shifted from limited civil cases to small claims cases. He explains:

> There will obviously be savings of bench officer days from not trying these cases to juries. (I can try the typical case in an hour or two, when a jury trial would last 3-5 days, assuming there are no problems obtaining the necessary jurors.)
>
> No doubt some shifting of judicial resources from limited civil jurisdiction to small claims jurisdiction would be required. But the overall efficiency of the judicial system would benefit from shorter trials unhampered by the delays attendant to juror acquisition, selection, argument, evidence, and deliberation.
>
> It is an interesting question as to whether fewer cases would settle if they did not suffer from the financial pressure of a week-long jury trial. But then, that's the point, to help insure that cases settle on the merits rather than from economic pressures. Also, as we get into the $5-$10,000 range, we get more cases where the defense is funded by insurance and both sides have legal representation, two things that distinguish the current typical small case and promote more settlements and better presentation.

Id. at Exhibit p. 157.

HALT also states that concerns about an increased small claims workload are misplaced. According to HALT, "data from other increases in small claims jurisdictional limits show that such increases have a minimal effect on the caseload of the small claims court." *Id*. at Exhibit pp. 40-41, 81-84.

As mentioned in the discussion on "Jurisdictional Limited of a Limited Civil Case," Art Acevado of Los Angeles County Superior Court has provided a detailed analysis of how the proposed increases in the jurisdictional limits of small claims cases and limited civil cases would affect Los Angeles County Superior Court. *Id*. at Exhibit pp. 87-94. He disagrees with the Commission's proposal, because "[s]ignificant additional workload and revenue losses are projected if this proposal is implemented." *Id*. at Exhibit p. 87. With regard to judicial workload, he concludes that the overall impact "is difficult to determine but should result in a relatively small net reduction in judicial workload." *Id*. at Exhibit p. 91. With regard to staff workload, however, he states that the proposal "recognizes the increased need for small claims advisors, but does not address clerical staffing needs." *Id*. He points out that while much clerical work for limited and unlimited civil cases is done in the courtroom, "[s]mall claims clerical processes are handled in the Clerk's Office and the staffing impact of this proposal will be considerable." *Id*. The proposal would also affect security staffing, because small claims courts "have bailiffs that neither limited civil nor general civil courts have." *Id*.

Mr. Acevado also projects that in Los Angeles County the Commission's proposal would result in a loss of approximately $12 million dollars in filing fee revenue per year, of which approximately $4.5 million would be attributable to the increase in the small claims limit. *Id*. at Exhibit pp. 92-93. Funding for the court's ADR programs would be particularly affected, because "[n]o portion of the small claims filing fees goes towards ADR services." *Id*. at Exhibit p. 93. The Small Claims Subcommittee of Los Angeles County Superior Court also expresses concern regarding loss of filing fee revenue in Los Angeles County. *Id*. at Exhibit p. 97.

On a statewide basis, the AOC projected in April that the proposed increase in the small claims limit would result in a multi-million dollar net loss for the courts, taking into account both changes in filing fee revenue and the impact on judicial workload. The AOC is in the process of updating its projections, in light of the new budget realities and increased filing fees. We also hope to obtain an updated version of Mr. Acevado's projections at some point.

It is clear, however, that the situation is fiscally challenging at best. Increasing the small claims limit necessarily will result in a substantial reduction in filing fee revenue, because the filing fees for small claims cases are lower than for limited civil cases. Whether this reduction in filing fee revenue would be offset to any

substantial degree by cost savings due to changes in judicial workload is debatable.

The Commission and the Judicial Council need to examine the situation more carefully and take into account the recent developments relating to the state budget. In these difficult financial times, neither the courts nor the public can afford a serious mistake regarding financing of court operations.

Appeal by the Plaintiff in a Small Claims Case

Several comments urge the Commission to consider giving a small claims plaintiff a right of appeal, at least in cases over $5,000. Those taking that position include the California Small Claims Court Advisors' Association, the Small Claims Subcommittee of Los Angeles County Superior Court, Ann Madden, and David Ricks. First Supplement to Memorandum 2003-20, Exhibit pp. 22-23, 97, 98, 158. In its report for the Judicial Council, PSI also mentions the possibility of allowing plaintiffs to appeal. PSI Report at 56.

As PSI explains, "[a] wrong decision can go against a plaintiff as well as a defendant, and the notion that plaintiffs have exercised a choice in selecting to sue in small claims court is really a fiction, given the difficulty in finding a lawyer to take those cases in the regular civil docket." *Id*. Similarly, the Small Claims Subcommittee says:

> The committee felt the appeal process would need to be changed to allow the plaintiff an option to appeal the ruling. It was understood by the committee that if the plaintiff opts to file his/her claim in Small Claims court, he/she is giving up their right to appeal, but on the other hand, $10,000.00 is a lot of money to most and is a great amount to not allow for an appeal process. In addition, the time allowed on each case (roughly 10 minutes) is not a lot of time when considering the potential amount of the judgment.

Id. at Exhibit p. 97.

The California Small Claims Court Advisors' Association offered the most extensive comments on this point. Allowing plaintiffs to appeal was one of only two conditions that the small claims advisors considered necessary before raising the small claims limit to $10,000. They explain:

> Under present small claims statutes, plaintiffs are denied the right to appeal. The justification for this rule has been that since the plaintiff chose the forum, they forfeited their right to appeal. These rules were promulgated in a day when plaintiffs were litigating

> over hundreds, not thousands, of dollars. As to the logic underlying the purpose for denying the Plaintiff's right to appeal, it is unlikely in most cases that the small claims defendant would have opted to litigate in superior, rather than small claims court.
>
> With the high cost of legal services in today's world, plaintiffs have little choice as to where to litigate cases with relatively low dollar amounts in controversy.
>
> Another compelling reason to allow plaintiffs the right to appeal is that in many counties, especially the largest counties, small claims cases are heard and decided by pro tem judges. While no one disputes that judges pro tem provide a valuable public service, the fact remains that, by and large, their training to hear small claims cases is inadequate and frequently their areas of practice are wholly unrelated to the typical areas of litigation seen in small claims court. In addition, their knowledge of procedure is generally derived from practice in superior court and not small claims court, which has its own (very different) procedures.
>
> As a result [of] the unevenness in the abilities of judges pro tem, the small claims advisors see, first hand, a vast number of poorly reasoned or wholly unsupportable judgments. When these judgments go against a plaintiff, the plaintiff is left with no remedy. Couple this with the fact that small claims judges are not required to give, nor do they usually provide, a factual basis for their decisions and the result is that thousands of unsuccessful plaintiffs have no recourse and have no information as to why they have lost their case.
>
> This leads to a disaffection towards, and disrespect for, our legal system, which, over time, could have serious societal effects. This is especially so in light of the fact that small claims court is generally the only interface most litigants will ever have with the California court system. If they come away bitter and with the feeling there is no justice, society is at risk in the long term. It is untenable to contemplate such a widespread erosion of respect for the legal system.

Id. at Exhibit pp. 22-23.

The State Bar CAJ disagrees with the notion of allowing small claims plaintiffs to appeal. It states that when a plaintiff chooses to file a small claims case, the plaintiff receives a quick, easy, informal trial in exchange for foregoing a right of appeal. *Id*. at Exhibit p. 110. According to CAJ, the plaintiff "should not then be allowed to appeal from that award." *Id*. at Exhibit pp. 110-11. CAJ warns that "allowing plaintiffs to appeal would lead to potential gamesmanship with plaintiff's forum selection, and also anticipates that there would be an extremely high rate of appeals." *Id*. at Exhibit p. 111.

CSCAA writes, however, that "[i]f there is fear of opening a Pandora's Box of plaintiff's appeals, perhaps the right could be made conditional." *Id*. at Exhibit p. 23. For example, CSCAA suggests that a right of appeal be given "only in cases where the amount sought exceeds $2500, thereby limiting the cases in which an appeal could be filed by a plaintiff to two per year." *Id*. CSCAA also proposes the following measures to discourage frivolous appeals: "(1) charging a significant filing fee, perhaps the same fee charged for initiating an action in the court of limited jurisdiction; (2) increasing the amount under Code of Civil Procedure section 116.780 from $150 to $500; and (3) increasing the amount awarded under Code of Civil Procedure section 116.790 from $1,000 to $2,000." *Id*.

The concerns raised by CAJ about potential gamesmanship and increased judicial workload are weighty, and changes should not be made in the small claims process unless they are truly needed. But enough parties suggested the possibility of allowing plaintiffs to appeal that the idea deserves serious consideration, particularly if appropriate limits are also explored, as CSCAA suggests. The staff will pursue this point further if the Commission agrees.

Discovery in a Small Claims Case

The other condition that CSCAA considers necessary before increasing the small claims limit is to increase defendants' access to information about the cases being brought against them. Specifically, the small claims advisors suggest requiring a small claims plaintiff to complete a form detailing the plaintiff's damages and serve it on the defendant:

> Because demand letters are not required prior to asserting a party's rights in small claims court, in many cases defendants are not aware of the nature of the claim being asserted against them. If the jurisdictional limit is increased, this problem will become more severe. In order to promote settlement out of court and to provide the defendant with greater due process, the CSCAA suggests that the Judicial Council prepare a form to be filed and served by the plaintiff that fully calculates their damages. This form would be similar to a Bill of Particulars, but with broader application. This will prevent defendants from being unduly surprised and will cause the plaintiffs to more fully evaluate their damages prior to filing. For good cause (and where the defendant is not prejudiced) the plaintiff could amend the calculation at the hearing, if necessary, and if the interests of justice would be served.
>
> Several procedural safeguards could be built into the requirement. The filing of a completed "calculation of damages"

> could be a jurisdictional requirement. If the plaintiff wholly fails to serve the "calculation of damages" on the defendant, the judge would have several options, including postponing the hearing at the election of the defendant, requiring that the defendant be provided a copy at the hearing, or dismissing the case without prejudice.

Id. at Exhibit p. 24.

No one else suggested an approach quite like this. But Raymond Coates complained about a small claims defendant's lack of information before trial, *id*. at Exhibit pp. 140-41, and Robert Kornswiet suggested the possibility of "informal discovery so that both sides must exchange all documents together with a narrative of what their witnesses will say within 10 days prior to the hearing," *id*. at Exhibit p. 147.

The staff is inclined to look into CSCAA's suggestion further. We are struck by the fact that this reform was one of only two changes that the small claims advisors considered necessary before increasing the small claims limit to $10,000. Given the advisors' familiarity with the small claims process, their focus on this aspect of it warrants attention.

Attorney Representation and Use of a Paraprofessional in a Small Claims Case

A number of comments express concern about imbalance in the ability of small claims litigants to present their cases. For example, the Small Claims Subcommittee of Los Angeles County Superior Court states that "[b]usiness entities are usually more sophisticated than the consumers, so if the doors are opened for businesses to sue consumers up to $10,000.00, the consumers [i]n most cases are going to be at a disadvantage in terms of understanding the process." *Id*. at Exhibit p. 97. Similarly, attorney David Ricks says that if the jurisdictional limit was increased, many injury cases would be brought in small claims court and "would subject injured victims to the manipulation of information and facts by unscrupulous insurance adjusters without the protection of counsel." *Id*. at Exhibit p. 158. CDC predicts an increased risk of "fraudulent claims by plaintiffs who understand that their adversaries will be unrepresented" and "increased temptation to utilize claims adjusters in a quasi-legal capacity." *Id*. at Exhibit p. 19. CAOC warns that "[p]rotections must be in place to assure that small claims court professionals do not appear to represent institutional parties." *Id*. at Exhibit p. 27. CAOC further cautions that

"[i]nstitutional parties, whether plaintiff or defendant, should not be permitted to use the system to take advantage of a less sophisticated party." *Id*.

PIFC expresses concern about the fate of insureds who will not be permitted to have counsel in the initial small claims hearing. The group writes that increasing the jurisdiction of the small claims court

> will deny the vast majority of defendants in automobile insurance cases the right to a defense by their insurance company from legal claims, a right which they have contracted and paid for as part of their policy coverage. The insurer has a duty to defend their insured under the policy that cannot be met in small claims court since the parties are not allowed legal representation. Although it might be argued that insurers could train claims adjusters to assist defendants in small claims court actions, this would not only be extremely difficult to accomplish, but could be construed as the unauthorized practice of law.

Id. at Exhibit p. 103.

None of the comments propose that attorney representation be permitted at the initial hearing in a small claims case over $5,000, although that was a possibility suggested by PSI in its report for the Judicial Council. PSI Report at 56. The State Bar CAJ thinks that permitting attorney representation at the initial hearing is a bad idea:

> Allowing an attorney in a case in excess of $5,000 (or in any small claims case) would defeat the fundamental purpose of small claims. In small claims cases, the proceedings are informal, there are few formal rules of evidence, and hearsay is allowed. Cases are usually heard in less than an hour with limited witnesses and documents. CAJ believes that bringing an attorney into this process would bring the process to a virtual standstill. CAJ also believes that judges who preside over small claims cases are often actively involved, and are able to elicit the necessary information from litigants in a $10,000 case just as well as they can in a $5,000 case, without the presence of an attorney. Finally, at least from the plaintiff's perspective, a small claims case presents a choice of forum, with the option of filing as a limited case if plaintiff wishes to pursue the case with an attorney.

First Supplement to Memorandum 2003-20, Exhibit p. 110.

We are also dubious about attorney representation at the initial hearing in a small claims case, because there would be no way of ensuring that both sides are able to obtain representation, particularly given the financial disincentives for

attorneys to try such small cases. In addition, the use of attorneys would add cost and complexity to the small claims process, conflicting with the goal of keeping that process simple and informal.

But the concerns expressed regarding imbalance in the sophistication of small claims litigants are legitimate. Although the problem exists to some degree at present, increasing the small claims limit might exacerbate it. We welcome suggestions on how to deal with the problem, recognizing that it probably can never be entirely eliminated.

Constitutionality of Increasing the Small Claims Limit

Several of the comments questioned the constitutionality of increasing the small claims limit to $10,000. The constitutional issues are discussed in detail in Memorandum 2003-22. A basic premise of the small claims system is that the use of abbreviated, informal procedures, instead of the full panoply of procedural protections (e.g., attorney representation, jury trial, evidentiary requirements, discovery), is justified because the amounts at stake are small and the disputes cannot economically be litigated using traditional court procedures. The thrust of the comments raising constitutional concerns is that a dispute for $5,001-$10,000 is not small enough to justify the loss of procedural protections.

For example, Public Law Center writes that although $10,000 may be a small amount by many standards, it is not a small amount for the thousands of indigent individuals served by Public Law Center and other legal service providers. First Supplement to Memorandum 2003-20, Exhibit p. 106. Similarly, PIFC warns that "increasing the jurisdiction to $10,000 denies defendants due process protections whether the risk of financial loss is significant." *Id*. at Exhibit p. 103.

In the same vein, CDC comments:

> [A] claim for $10,000 is simply not a "minor civil dispute" as envisioned by Code of Civil Procedure Section 116.120. In fact, $10,000 represents a very substantial percentage of median California income, and would entirely eliminate the liquid savings of most retired Californians. Subjecting Californians to this level of personal liability without such basic due process protections as right to counsel, discovery, right to jury, evidentiary standards and others represents a very serious deprivation of Constitutional rights.
>
> Frankly, we believe that the materiality of $10,000 to the average California is the only proper measure of the appropriate

> jurisdictional limit. The CLRC's Discussion of Issues agrees that this amount is not "very small for most litigants, but notes that the amount is very small compared to the costs of litigating a limited or unlimited civil case. Respectfully, we do not agree that this is the appropriate standard: the cost of a Ford Taurus is very small when compared with a Ferrari, but this does not make a new Taurus affordable for most Californians.

Id. at Exhibit pp. 18-19. Likewise, ADC points out that in many counties "$10,000 is equivalent to 35% of the median family income." *Id*. at Exhibit p. 3. "It is the ADC's position that $10,000 is not a 'small' amount of money and there is a significant issue whether the deprivation of the right to a jury trial and counsel is constitutional with this proposed increase in the limit." *Id*.

Consumers Union also emphasizes the significance of the amounts involved:

> The amounts at stake in small claims court are significant to the individuals and families seeking to recover them or liable to pay them. … A recently published study of family finances underscores just how significant a claim or judgment for $7,500 or $10,000 can be. According to the triannual Federal Reserve Board Survey of Consumer Finances, the median reported net wealth for U.S. Hispanic families was $11,300. African American families nationwide had a median net wealth of $19,000. Net wealth for families in the bottom fifth of the economic strata was $9,300. A judgment of $7,500 or $10,000 could wipe out all or a very significant portion of these families' net wealth.
>
> Increased jurisdictional amounts are so significant for California families that the issues of the quality of justice in the small claims court system should be effectively and permanently addressed before such increases are made.

Id. at Exhibit p. 30.

In contrast, HALT maintains that increasing the jurisdictional limit would comply with constitutional constraints:

> [T]he idea that increasing the jurisdiction of small claims courts will result in a denial of due process is based on the false dichotomy that the alternative to small claims court is representation by a lawyer. This is simply not true. The decision the legislature must make for Californians with cases worth under $20,000 is not whether they will use courts with limited procedure or courts with full procedure. Rather, it is a choice between courts with limited procedure and no courts at all.
>
> Opponents of an increased dollar limit have raised the argument that for many people $10,000 is a substantial sum and

> deserves all the procedures of traditional superior court, or at least economic litigation procedures. These opponents miss the point. While $10,000 or $20,000 is certainly a substantial sum of money, litigants in cases worth such an amount are not well served by having to navigate a maze of procedures by themselves. Yet this is exactly what such litigants will have to do, since it is not cost-effective to hire an attorney for these cases. Perhaps in an ideal world, all litigants would have access to counsel. However, since there is no civil *Gideon* right in sight, we must deal with the facts that not everyone can afford to hire a lawyer, and for those who can afford to, it may not be cost-effective to do so. The court system is therefore obligated to meet the needs of pro se litigants. Expanding the availability of small claims court is a far better way of meeting those needs than allowing pro se litigants to become trapped in the labyrinth of higher court procedures.

Id. at Exhibit pp. 41-42.

Attorney Dean Sutton also addresses the constitutional issues in detail and concludes that the proposed jurisdictional increase would be constitutional. *Id*. at Exhibit pp. 165-70. He is confident that $10,000 is an appropriate amount for small claims procedures:

> Do you have any idea how much it costs to live today? With median house prices at approximately $500,000 in many California counties; with residential rents in many counties over $1,000/month and houses renting here for $2,500/month not uncommon; with common auto repair (body work and painting) bills easily $8,000; with the bottom-of-the-line, basic Chevrolet or Ford car selling for about $15,000 or more; and considering the cost of other, basic, day-to-day costs of living, the sum of $10,000 is clearly appropriate for small claims court. The car I bought in 1972 for about $1,800 now sells for about $18,000. If you want a quick "rule of thumb" for costs of living in the last thirty years, just move the decimal point over one place to the right. A residential security deposit, often equal to two months' rent, can easily exceed $4,000 alone.

Id. at Exhibit p. 169. Like HALT, Mr. Sutton stresses the financial dilemma of a party with $5,001-$10,000 at stake. He says bluntly that

> [o]nly the very wealthy can afford to sue and win, or to defend themselves from spurious actions, for sums up to $10,000. It just plain costs more to win than it is worth.

Id. at Exhibit p. 170.

As discussed in Memorandum 2003-22, it is not easy to predict how the courts would resolve the constitutional issues presented by the proposed increase in the small claims limit. In general, the loss of procedural protections is a more compelling concern with regard to a small claims defendant than with regard to a small claims plaintiff, because the defendant does not choose to forego those protections by filing in small claims court.

It is important to bear in mind, however, that a small claims appeal is a trial de novo. The parties are entitled to present their cases to a judicial officer (as opposed to a temporary judge), they can be represented by counsel, and they have the benefit of knowing the other side's position and evidence by virtue of the initial hearing, which may be more useful than traditional discovery.

Still, there is no jury or court-provided interpreter in a small claims appeal, and the rules of evidence (other than the rules of privilege) do not apply. A successful constitutional challenge is not inconceivable.

It is safe to say, however, that a smaller increase in the small claims limit (e.g., to $7,500) would be more likely to withstand constitutional attack than a larger one (e.g., to $10,000) and that an increase accompanied by procedural improvements (e.g., a stronger small claims advisory service and greater availability of interpreters) would be less vulnerable than one without such improvements. The staff will continue to look into the constitutional issues as this study progresses.

Frequent Filer Limit

The current jurisdictional limit for a small claims case is $5,000, but a party (other than a local entity) is allowed to file only two small claims cases per year for over $2,500. Code Civ. Proc. § 116.231. The tentative recommendation proposes to increase this frequent filer limit from $2,500 to $5,000 to account for inflation since 1991, when the $2,500 limit went into effect.

HALT and Marin County Superior Court support the proposed approach, as do Court Commissioner Barbara Kronlund and attorney M. Dean Sutton. *Id.* at Exhibit pp. 43, 99, 148, 163. The Small Claims Subcommittee of Los Angeles County Superior Court would permit unlimited small claims filings with a demand over $5,000. *Id*. at Exhibit p. 97.

But there is strong opposition to increasing the frequent filer limit, from a wide variety of influential groups, including the Access to Justice Commission, CAOC, Consumers Union, PIFC, Public Law Center, the State Bar CAJ, and

especially the California Association of Collectors. *Id*. at Exhibit pp. 5-14, 16-17, 26, 33, 103-04, 105-06, 109-10. For example, the State Bar CAJ made the following comments, which the Access to Justice Commission seconded:

> CAJ believes that the limit of two small claims cases per year in which the demand exceeds $2,500 should be retained. If the two-claim cap were to be eliminated entirely, "small claims court," is likely to turn into "collection court," deluged with claims by institutional creditors against individuals, impinging upon the ability of individuals to pursue small disputes. In addition, collection actions are often governed by specific remedies and subject to technical requirements that must be adhere to before relief can be granted to the creditor. Before a default or other judgment is entered, a high level of judicial scrutiny is necessary to ensure that all the requirements have been met and that the consumer/debtor receives the necessary protection. The required level of scrutiny exists in limited jurisdiction cases, but is often absent in small claims cases. This is particularly so when defaults are at issue, given the built-in protection provided by the prove up requirements in limited jurisdiction cases that are absent in small claims cases.
>
> For similar reasons, CAJ believes the two-claim cap should *not* be increased to $5,000. If the cap were to be increased, collection cases between $2,500 and $5,000 are likely to flood into small claims court, without the protections discussed above. CAJ does not believe that doubling the jurisdictional limit to $10,000 supports doubling the two-claim cap to $5,000, because different policy interests are implicated.

Id. at Exhibit pp. 16-17, 109-10.

Similarly, Consumers Union says:

> We recommend against *any* increase, even for inflation, because the existing cap has the beneficial effect of restricting the use of small claims court as a debt collection court to companies or persons collecting their own debts of under $2,500.
>
> We are even more concerned about the Judicial Council's working group's tentative recommendation to repeal the cap on more than two claims per year over $2,500. Eliminating the cap would vastly expand the availability of small claims court as a collection court for California's businesses. Debt collection actions can present issues that require more formality, legal representation, discovery, and/or counterclaims. For example, some debt collection cases involve disputes about the payment of medical bills, which can be very complex. Debt collection cases may involve counterclaims by the consumer for violations of California's

> Rosenthal Fair Debt Collection Practices Act, which governs the conduct of creditors collecting their own debts. Civil Code § 1788 *et seq*. Allegations about collection practices may require discovery. California's Fair Debt Collection Practices Act seems to recognize the need for individuals to be represented by an attorney in these types of cases, by permitting an award of attorneys fees in favor of a prevailing consumer. Civil Code § 1788.30(c). Eliminating or raising the cap would simply permit more use of the small claims court as a collection court, which is inconsistent with its purpose as a people's court.

Id. at Exhibit p. 33.

The most vociferous opponent of increasing the frequent filer limit is the California Association of Collectors ("CAC"), which consists of approximately 385 third party debt collectors. CAC submitted a lengthy analysis of the proposed increase in the frequent filer limit. *Id*. at Exhibit pp. 5-14. In that analysis, CAC concludes that increasing the frequent filer limit "is to make the small claims court into a dedicated debt collection court, and any rationale for excluding assignees no longer exists." *Id*. at Exhibit p. 14. CAC argues that either the frequent filer limit should be left as is, or the provision excluding collectors and other assignees from suing in small claims court should be repealed. *Id*.

It does not seem necessary to repeat any more of CAC's analysis here, because of the breadth and intensity of the opposition to the proposed increase in the frequent filer limit. In the staff's estimation, attempting to increase the frequent filer limit probably would be futile, and might well jeopardize any likelihood of increasing the $5,000 small claims limit as well. Rather than getting entangled in this side issue, the Commission should leave the frequent filer limit alone. If the frequent filer limit needs adjustment, another organization could always pursue that matter as a separate reform.

Special Limits for a Claim Against a Guarantor

The Small Claims Act includes special jurisdictional limits for claims against guarantors. Instead of the $5,000 limit, the limit is $2,500 if the guarantor provided the guaranty without charging a fee, and $4,000 if the guarantor charged a fee for its services. Code Civ. Proc. § 116.220(c). The tentative recommendation proposes to eliminate these special limits in the interest of simplicity, subjecting guarantors to the same jurisdictional limit as other small claims litigants.

HALT "agrees with the Commission's recommendation that these special limits be eliminated in the interest of simplicity." First Supplement to Memorandum 2003-20, Exhibit p. 43. Marin County Superior Court also agrees, as do the Executive Committee of the Beverly Hills Bar Association, Court Commissioner Barbara Kronlund, and attorney M. Dean Sutton. *Id*. at Exhibit pp. 37, 99, 148, 163. Mr. Sutton writes:

> I agree that guarantors can be sued in small claims court. If the plaintiff puts on the prima facie case, there is no reason why the guarantor should no[t] be included. There should [b]e no confusing rule concerning guarantors and the $4,000/$2,500 limit. *Small claims court procedure should be as simple as possible.*

Id. (emphasis in original).

But Consumers Union strongly opposes the proposal to eliminate the special limits for claims against guarantors. It explains:

> Consumers Union is strongly opposed to expanding access to small claims court as a debt collection device, including as a debt collection device against uncompensated guarantors. Uncompensated guarantors tend to be parents, friends or neighbors, who often will sign a loan agreement as a guarantor without realizing that this places them in the position of full responsibility for repayment of the debt. There may be highly technical defenses to the debt, such as inadequate notice of the sale of collateral in a personal property secured debt, which may bar the collection of the debt. *See* California Commercial Code § 9626.
>
> The goal of simplification, while valuable, does not outweigh the important protective effect of the existing cap. We respectfully suggest that the only appropriate simplification with respect to uncompensated guarantors would be to eliminate their exposure to suit in small claims court. If this cannot be done, then the current restriction of $2,500 should be retained for claims against uncompensated guarantors.

Id. at Exhibit p. 33.

Surety Company of the Pacific ("SCP") also views the proposal very negatively, focusing solely on this issue in its comments. *Id*. at Exhibit pp. 114-15. SCP points out that the special limits for guarantors were adjusted as recently as 1998, so they do not need to be changed again in the near future. *Id*. at Exhibit p. 114. SCP also says that "a Small Claims Court defendant who is required to respond based upon the default, actions or omissions of another is typically not familiar with the facts surrounding the underlying dispute." *Id*. Nonetheless, it

"is not uncommon for such a defendant to be served with a Small Claims Court action and given *as little as five days' notice* of a hearing." *Id.* (emphasis in original). Although the court has authority to postpone the hearing in such circumstances, "without the use of discovery, the ability to postpone the hearing for thirty days is of no benefit in many instances." *Id.* SCP maintains that a surety, "especially a surety issuing a license or permit bond, should not be forced to appear in Small Claims Court to argue the complex conditions for recovery from such a bond without any knowledge whatsoever of the underlying dispute between the plaintiff and the bond principal." *Id.* at Exhibit p. 115. SCP thus concludes that the current jurisdictional limits for guarantors should be retained. *Id.*

Due to the serious opposition from Consumers Union and SCP, the staff is not optimistic about enactment of the proposal to repeal the special jurisdictional limits for claims against guarantors. As with the frequent filer limit, we suggest dropping this portion of the tentative recommendation, to reduce opposition to the legislative package that the Commission is developing.

Costs and Attorney's Fees

Under Code of Civil Procedure Section 1033, a court has discretion to deny recovery of costs to a prevailing party in a limited civil case if the party could have brought the action in the small claims division but did not. The tentative recommendation proposes to amend Section 1033 to make clear that the court's authority to allow or deny costs encompasses authority to allow or deny attorney's fees otherwise authorized by contract, statute, or law. The proposed amendment would codify case law on this point. *Dorman v. DWLC Corp.*, 35 Cal. App. 4th 1808, 1815, 42 Cal. Rptr. 2d 459 (1995).

Input on the proposed amendment of Section 1033 was mixed and complicated. HALT, Marin County Superior Court, and the State Bar CAJ all support the amendment, with little discussion. First Supplement to Memorandum 2003-20, Exhibit pp. 43, 99, 110.

Court Commissioner Barbara Kronlund considers the amendment unnecessary, because it would merely codify case law. *Id.* at Exhibit p. 148. Attorney M. Dean Sutton disagrees with the amendment and with the existing case law:

> I do not agree that the statute should state that attorney fees could/should be denied to a successful plaintiff who gets a judgment which could have been obtained in Small Claims Court.
>
> Not all people are able to prosecute an action in Small Claims Court. Some people simply have lots of money to afford counsel, and they have no time to spend a half day standing around in small claims court. Some are too old, weak, shy, or confused to be a faux Perry Mason in court. Some people by culture, language, or immigration status fee that they are in no position to be aggressive and "loud" in court. For various reasons, people still should be able to sue for smaller amounts in civil court, and get reasonable attorney fees in appropriate cases (such as with an attorney fee clause per Civil Code § 1717). They should not be punished for retaining counsel for civil litigation.
>
> In short, those who want to use small claims court should be welcomed and encouraged to do so. Those who do not want to use Small Claims Court should not be punished for not doing so.

Id. at Exhibit pp. 163-64.

Similarly, CAOC "oppose[s] any sanction against a plaintiff who files a claim in superior court believing his or her claim is greater than $10,000 but is ultimately awarded a smaller amount." *Id*. at Exhibit p. 27. CAOC does not say that it is proposing to repeal Section 1033(b) (the portion of the statute relating to actions that could have been brought in small claims court). But that appears to be the thrust of CAOC's comments on this point.

Attorney Darian Bojeaux also mentions the difficulty of predicting the outcome of a case. He says that "the plaintiff should not be prevented from recovering all costs in any limited jurisdiction case in which the verdict is more than $5K." *Id*. at Exhibit p. 138. He explains that Section 1033 "should be revised so that cost recovery deterrents are based upon the old jurisdictional limits and not the new ones." *Id*.

Attorney William Pagnini opposes the proposed amendment of Section 1033, because the out-of-state clients he represents would have difficulty pursuing their claims in small claims court. He says that the prevailing party's right to recover attorney's fees "is a valuable right to out of state clients who need attorney assistance in filing collection claims in a court other than small claims court." *Id*. at Exhibit p. 155.

The Executive Committee of the Beverly Hills Bar Association Litigation Section also expressed concerns regarding the proposed amendment. The Executive Committee states that "while a court should be empowered to deny

attorney's fees in the proper circumstance, … it should do so only on a showing of good cause." *Id*. at Exhibit p. 37. In other words, "[w]ithout a showing of good cause by the aggrieved defendant, it would be unfair to deny costs to a plaintiff who had a good faith belief that he could recover more than $10,000.00, and chose not to forego procedural protections central to our adjudicatory processes such as the right to discovery and the right to a jury trial." *Id*. at Exhibit p. 38. The Executive Committee also regards the proposed amendment of Section 1033 as "somewhat unnecessary," and suggests that the provision "be expanded to deny recovery of attorney's fees in all limited civil cases, unless evidence is introduced to a court that the plaintiff informed the defendant that an action against the defendant could result in a judgment that included reimbursement for the plaintiff's attorneys' fees." *Id*. at Exhibit pp. 37-38.

Consumers Union suggests that the proposed amendment be revised to operate in a one-way fashion, protecting a consumer's right to recover attorney's fees pursuant to statute or contract:

> The CLRC's proposal on attorneys fees is intriguing, but would have to be implemented extremely carefully to avoid interfering with the statutory purposes of existing consumer statutes which permit recovery of attorneys fees. Consumers Union generally supports a restriction on collection of attorneys fees from a consumer when a business chooses to forgo the lower cost small claims court system and sue an individual in Superior Court. However, there are good policy reasons to apply such a rule in a one-way fashion. Individual consumers should continue to be able to win statutory and contractual attorneys fees … when they are unprepared to represent themselves in the small claims court and therefore choose Superior Court.
>
> We could support a clarification that attorneys fees may be denied if the case could have been brought in small claims court only if the clarification also states that a court may not exercise this discretion to deny an award of attorneys fees to a prevailing consumer under statute or contract providing for attorneys fees to a prevailing consumer. Where the Legislature has determined that consumer access to an attorney is so important that it has provided for statutory attorneys fees, access to those fees should not be rendered uncertain due to a possible future exercise of judicial discretion.

Id. at Exhibit p. 34.

CU also suggests "developing a stronger restriction on contractual and open book account attorneys fees awarded against consumers." *Id*. CU explains:

> There should be a prohibition against recovery of these fees against a consumer in a case which could have been brought in small claims court, but instead was brought in Superior Court, particularly if the case is decided by default. A default case is cheaper and simpler to bring. As a result, the standing court fee schedule for attorneys fee awards may overcompensate the plaintiff, unfairly inflating the amount of the judgment.

Id.

The staff is not sure quite what to make of all of these comments regarding the proposed amendment of Section 1033. It is clear that most of the input is negative, but there does not seem to be any consensus on what should be done regarding recovery of costs and attorney's fees. For now, we recommend that the Commission simply drop the proposed amendment of Section 1033 from its proposal. If at some point it appears possible to develop a consensus on recovery of costs and attorney's fees, the Commission should revisit the issue.

Pilot Project and Matters to Be Studied

The tentative recommendation rejects the option of conducting a pilot project on increasing the small claims limit. The tentative recommendation proposes, however, that the Legislature direct the Department of Consumer Affairs to study and report to the Legislature on the effects of increasing the small claims limit. The comments on these points are discussed below.

Pilot Project

There was not much input on the option of conducting a pilot project, but two organizations strongly recommended that approach: Consumers Union and Public Law Center.

Consumers Union objects to increasing the small claims limit statewide without first testing the effects of raising the limit. CU states that consumers "should not be treated as 'guinea pigs' in an untested, statewide expansion of small claims court jurisdiction." First Supplement to Memorandum 2003-20, Exhibit p. 30. CU urges that if the idea of increasing the jurisdictional limit is pursued, "any increase in the jurisdictional amount be implemented using an initial pilot in one or two counties, with rigorous study and evaluation of the impacts of the pilot on the demand for advisor services, the quality of justice, the ability of unrepresented individuals to effectively present and defend cases, and similar issues." *Id*. at Exhibit p. 29.

Similarly, Public Law Center advocates the use of a pilot project:

> An increase on a pilot basis to $7,500 would allow the courts to consider the impact of a jurisdictional increase and at the same time bear a relationship to the Consumer Price Index, which when compared to figures when the current jurisdictional limit was put in place, only supports an increase to approximately $6,600. An increase to $7,500 would allow for inflation to catch up with the limit for several years to come, during which time the impact of the increase could be considered. Given the current critical funding crisis faced by the courts, it seems particularly appropriate to proceed cautiously in this area since trial courts are unlikely to have sufficient resources to deal with the influx of small claims court cases and the concomitant increased usage of and training requirements for pro tem judges and increased need for small claims court advisor assistance that an across the board large jurisdictional increase would require.

Id. at Exhibit pp. 106-07. As the Commission may recall, PSI also recommends a pilot project approach in its report for the Judicial Council. PSI Report at 55-57, 61-62.

The State Bar CAJ opposes the use of a pilot project, for reasons similar to the ones given in the tentative recommendation:

> CAJ believes the jurisdictional limit should be increased without pilot projects. CAJ believes the matter has been studied adequately, and questions whether meaningful empirical data on the impact of an increase in the jurisdictional limit could be obtained from pilot projects. In addition, there is no unity in how small claims are handled across the State, an issue that should be addressed in any event. Pilot projects would become particularly problematic if they were established in certain designated counties only, given the significant variations among the counties.

Id. at Exhibit p. 108.

While there would be downsides to a pilot project approach, there would also be advantages, such as potentially alleviating fear that increasing the jurisdictional limit would have disastrous effects. The Commission should give the matter further thought, particularly if other means of reducing opposition to its proposal prove unsuccessful.

Matters to be Studied

In April, the Three Track Study Working Group recommended that if the small claims limit is increased as proposed, the effects of the reform should be

studied by the Judicial Council, rather than by the Department of Consumer Affairs as proposed in the tentative recommendation. We have not heard from the Department of Consumer Affairs on this matter. We will try to gather additional information on which entity should conduct the proposed study. The Commission need not resolve the point at this time.

The State Bar CAJ has suggested certain issues that should be examined if the proposed study or a pilot project is conducted. *Id*. at Exhibit pp. 112-13. We will analyze these suggestions for a later meeting, if that appears appropriate.

Other Suggestions Regarding Small Claims Procedures

The comments on the tentative recommendation also touched on a few other matters:

- **Collection of Medical Debt.** Consumers Union and CAOC both state that if the small claims limit is increased, the increase should not apply to claims involving collection of medical debt. *Id*. at Exhibit pp. 27, 34-35. CU explains that consumers "face special problems in connection with the collection of medical debt because bills arrive before it is clear whether and how much of the bill will be covered by private or government-sponsored insurance." *Id*. at Exhibit pp. 34-35. Although we are reluctant to complicate small claims procedure by creating another exception to the jurisdictional limit, the Commission should followup on the suggestions regarding medical debt and find out more about this area.
- **Fourth Track Concept.** In its report for the Judicial Council, PSI suggested the possibility of creating a fourth procedural track for cases seeking $5,000-$15,000. PSI Report at 59-60. The only positive input on this idea was given to staff orally by attorneys for the Department of Consumer Affairs (speaking on their own behalf and not on behalf of the Department). The State Bar CAJ opposed the concept. First Supplement to Memorandum 2003-20, Exhibit p. 110 n.4.
- **Small Claims Forms.** The attorneys from the Department of Consumer Affairs and others suggested that small claims forms be improved. *Id*. at Exhibit pp. 17 (Access to Justice Commission), 66-68 (HALT survey of small claims advisors). The Judicial Council is the appropriate entity to followup on this suggestion.
- **Mediation.** The State Bar CAJ supports broader use of mediation in small claims cases. *Id*. at Exhibit p. 111. While this may be a good idea, we are not inclined to try to address the matter in this study of jurisdictional limits.

- **Handbook for Small Claims Judges.** M. Dean Sutton suggests preparing and keeping updated annually "a handbook for Small Claims Judges, especially pro tems, as to current special consumer protection statutes (such as auto repair, dry cleaners, gym and dance contracts, etc.), and the effect of administrative systems (such as worker's compensation and disability payments), to help the judge properly apply the special public policies." *Id.* at Exhibit p. 164. We understand from Cara Vonk of the AOC that such a handbook already exists. The AOC should undertake to publicize and widely distribute the handbook.
- **Remand to Small Claims Court.** CAOC writes that "[f]iling in small claims court must be at the plaintiff's option only." *Id.* at Exhibit p. 27. CAOC also says that "[c]ourts of limited jurisdiction and superior courts must not be permitted to remand a case to small claims court based on their own evaluation of a claim." *Id.* To the best of our knowledge, the current small claims system is consistent with these principles. We are not aware of any proposal to change the system in these respects.
- **Consultation of Small Claims Advisors Regarding Needed Reforms.** Consumers Union suggests soliciting input from small claims advisors regarding needed reforms of the small claims system. *Id.* at Exhibit pp. 29, 35. HALT's empirical study already includes some such input. *Id.* at Exhibit pp. 63-65, 68. Through CSCAA, the small claims advisors have also provided comments on the tentative recommendation. *Id.* at Exhibit pp. 21-24. Further input from the small claims advisors would be appreciated.

Progress of the Judicial Council

The Judicial Council has not yet taken a position on the proposal to increase the jurisdictional limit of a small claims case to $10,000. The matter has not yet been presented to the Judicial Council, PCLC, or the Civil and Small Claims Advisory Committee.

In April, the Three Track Study Working Group was closely divided as to whether the small claims limit should be increased to $10,000 or only to $7,500. The working group decided not to take a position on that point, leaving the matter be resolved upon further review by the Civil and Small Claims Advisory Committee, the PCLC, and the Judicial Council. The working group also made the following recommendations:

- The filing fee for small claims cases over $5,000 should be higher than for cases under $5,000 and the additional amount should be allocated to small claims advisor services and county law libraries.

The working group did not attempt to develop a specific allocation formula.

- The Commission's proposed provision on the types of advice provided by small claims advisors should be revised to clarify certain points.
- The prohibition on filing more than two small claims cases over $2,500 per year should be repealed, rather than adjusted for inflation as proposed by the Commission.
- The special jurisdictional limits for guarantors should be repealed.
- Code of Civil Procedure Section 1033 should be amended as proposed by the Commission, to make explicit that the court has discretion to deny recovery of attorney's fees under the provision.
- The effects of increasing the small claims limit should be studied by the Judicial Council, not by the Department of Consumer Affairs as proposed in the tentative recommendation.

To date, the Three Track Study Working Group has not revisited its recommendations following the adoption of the state budget, nor have the recommendations been reviewed by the Civil and Small Claims Advisory Committee or submitted to the PCLC or the Judicial Council.

Recommendation

The proposed increase in the jurisdictional limit of a small claims case is controversial. There was much support for increasing the limit to $10,000, but also weighty opposition, which primarily focused on the quality of justice rendered in small claims cases and the impact of the proposed increase on the workload and finances of the courts. Proceeding with the proposal in its present form is likely to lead nowhere fast, and perhaps impede prospects of adjusting the small claims limit in any manner in the next few years.

The Commission should strive to attain a greater degree of consensus before issuing a final recommendation. A number of organizations would support a small claims limit of $7,500 but not $10,000. The Commission should consider proposing a $7,500 limit instead of the $10,000 limit that is in the tentative recommendation. This would not only help build consensus, but would also make the legislation easier to defend against constitutional challenges.

It is also essential that the Commission and the Judicial Council carefully reassess the proposal in light of the new state budget, the recent filing fee increases, and the state's ongoing budget crisis. Given the state's difficult

financial situation, the proposal does not stand a chance of enactment unless it is fiscally defensible.

The Commission should also work with the interested parties to resolve their concerns regarding the quality of justice in small claims cases. In particular, taking the following steps might improve the Commission's proposal and increase its prospects for enactment:

- Explore ways to ensure that the proposal does not adversely affect law libraries.
- Refine the proposed two-tier filing fee approach in light of new budget realities. If necessary, explore other ways of providing sufficient funding for an effective small claims advisory service.
- Continue refining the proposed new provision on the types of services to be provided by a small claims advisor.
- Explore ways of helping small claims litigants who do not speak English well.
- Incorporate legislative reforms relating to temporary judges, if this appears necessary after the Judicial Council completes its work on that topic.
- Explore the possibility of allowing a small claims plaintiff to appeal, with appropriate restrictions.
- Explore the possibility of requiring a small claims plaintiff to complete a form detailing the plaintiff's damages and serve it on the defendant.
- Leave the frequent filer limit as is.
- Leave the special jurisdictional limits for guarantors as is.
- Delete the proposed amendment of Code of Civil Procedure Section 1033.
- Revisit the possibility of a pilot project if attempts to eliminate opposition through other steps prove futile.

The overriding goal is not simply to increase the small claims limit, but rather to improve how well the courts serve the public, by providing accessible and affordable means of resolving disputes and achieving justice.

Respectfully submitted,

Barbara Gaal
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