

June 13, 2019

*Via electronic mail*

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Superior Court of the District of Columbia  
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Washington, D.C. 20001  
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**Re: Proposed Addition to the Superior Court Rules of Procedure for the Small Claims and Conciliation Branch**

Dear Ms. Wait,

The Legal Aid Society of the District of Columbia<sup>1</sup> (“Legal Aid”), joined by Tzedek DC,<sup>2</sup> submits these comments on the proposed addition of Rule 19 to the Superior Court Rules of Procedure for the Small Claims and Conciliation Branch (“Small Claims Rules”), which would apply only to debt collection and subrogation cases.

We support the addition of rule provisions tailored to the substantive and access-to-justice issues presented by small claims cases on the high-volume “collections calendar,” which accounted for more than 70% of all small claims filings in 2018.

In extensive comments on prior small claims rules amendments submitted on August 14, 2017, Legal Aid described some of the fundamental differences between collections calendar cases (in which all plaintiffs are commercial entities represented by counsel and almost all defendants are

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<sup>1</sup> Legal Aid is the District’s oldest and largest general civil legal services organization. Since 1932, Legal Aid lawyers have been making justice real in individual and systemic ways for persons living in poverty in the District. Attorneys from Legal Aid’s Consumer Law Unit are present for the call of the debt collection and subrogation calendar in the Small Claims Branch each week and provide both same-day and extended representation to otherwise unrepresented defendants in cases on that calendar.

<sup>2</sup> Tzedek DC is an independent public interest center headquartered at the UDC David A. Clarke School of Law with the sole focus of safeguarding the legal rights of DC residents with low and moderate incomes dealing with debt collection and other consumer protection issues. Tzedek DC attorneys are present for the call of the debt collection calendar in the Small Claims Branch each week and provide both same-day and extended representation to otherwise unrepresented defendants in cases on that calendar.

initially unrepresented) and other small claims matters (in which there are typically unrepresented individuals on both sides of the case). We highlighted the need for rules tailored to the special access-to-justice issues presented by collections calendar cases, in lieu of the one-size-fits-all approach in the current small claims rules. To that end, Legal Aid proposed several new or amended rule provisions specifically aimed at enhancing access to justice for unrepresented litigants with cases on the high-volume collections calendar.

After consideration of Legal Aid's comments by a Small Claims Rules Advisory Subcommittee, the Rules Committee has proposed a new Rule 19 that recognizes that the collections calendar requires tailoring and addresses a modest subset of the proposals we presented. We appreciate the Court's effort to engage on our proposals. Still, we believe that more can and should be done to address important access-to-justice goals, especially reducing defaults and making the court process easier to navigate for unrepresented litigants. This can be done by continuing efforts to enhance the rules and through collaborative working groups of interested stakeholders. With regard to default judgments in particular (which in 2018 represented almost 30% of all small claims case dispositions in cases not dismissed for lack of service),<sup>3</sup> we look forward to continued collaboration with the Court on implementing practical, carefully-tailored solutions that increase litigants' actual notice of court proceedings and recognize that the Court of Appeals has repeatedly emphasized the importance of deciding cases on the merits.

As to the specific provisions included in proposed new Rule 19, we generally support them, subject to the below suggestions for clarification or amendment.

### **Inclusion of a Comment to Rule 19**

As an initial matter, we suggest that the proposed addition of Rule 19 come with a formal comment explaining briefly that the Court maintains a separate small claims calendar for most liquidated debt and subrogation cases and that this rule applies only to those cases. Our comments on specific subsections of Rule 19 below also highlight individual instances in which a comment would be useful for clarifying the purpose of certain provisions.

### **Subsection (b)(1) – Particular Pleading Requirements; Original Creditor**

We support this provision, which would require filers in liquidated debt cases who are not the original creditor to specifically state the identity of the original creditor and that the plaintiff is a successor in interest. Many or most of the cases on the debt collection calendar are filed by debt buyers, i.e., companies that purchase pools of charged-off debt for pennies on the dollar. But the debt buyers that regularly file cases in the Small Claims Branch often do not identify the original creditor in the statement of claim itself. Instead, the identity of the original creditor and the status of the plaintiff as an alleged assignee of that creditor can be determined (if at all) only from a review of exhibits attached to the statement of claim. This makes it difficult for unrepresented

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<sup>3</sup> This percentage is based on information in the case disposition table in the Court's recently published 2018 statistics. It treats what the table characterizes as "Default Judgment" dispositions and as "Ex parte Proof-Affidavit" dispositions as a default judgment and disregards cases dismissed under Rule 4 for lack of service of process.

defendants to understand why they are being sued by an entity with which they usually have had no prior dealings. Subsection (b)(1) would address that problem by making it easier for defendants to at least understand that they are being sued on a particular account with a creditor that they may recognize.

To clarify that Rule 19(b)(1) requires the identification of the original creditor and the plaintiff's status as a successor in interest to be contained in the statement of claim itself (rather than just included in the attachments), the provision should be amended to state: "If the plaintiff files a small claims action identified in Rule 19(a)(1)(A) and is not the original creditor, the ~~statement of claim must include~~ simple but complete statement of the plaintiff's claim required by Rule 3(a)(2) must contain: . . . ." Because existing Small Claims Rule 3 already distinguishes between what the statement of claim must "contain" and what it must attach, this would clarify that the Rule 19(b)(1) pleading requirements apply to the statement of claim itself.

### **Subsection (b)(2) – Particular Pleading Requirements; Credit Card or Account**

We support subsection (b)(2) as requiring the statement of claim in credit card or credit account cases to specifically inform defendants that an account statement is attached. Similar to the goal of subsection (b)(1) – to make it easier for a defendant to quickly ascertain what account a court case is based upon – subsection (b)(2) would encourage a defendant to review an account statement that may be more familiar-looking than other documents included in the statement of claim package. This is particularly important in the frequent case of retail-branded credit cards (cards issued by a financial institution but branded by a retailer that the consumer associates with the card).

While we support the addition of this basic pleading requirement, it should not be limited to credit card cases. Therefore, we suggest that subsection (b)(2) be amended to apply to any of the liquidated debt cases identified in Rule 19(a)(1) rather than only those identified in (a)(1)(A).

### **Subsection (c) – Time Allowed for Service of Process**

Subsection (c) regarding the time allowed for service of process is substantively identical to the applicable provision of Rule 4(m), which is in the existing small claims rules but is being amended for conformity with Rule 19. If the goal of restating within the new Rule 19 what is already in Rule 4(m) is merely user-friendliness, we suggest the inclusion of a comment to Rule 19 stating that the rule on service is identical to the applicable provision in Rule 4(m) and is being restated in Rule 19 solely to consolidate special provisions relating to the collections calendar in one rule. Without such an explanation, readers may otherwise be confused and assume that the separate rule implies differences between Rule 4(m) and Rule 19(c). Alternatively, we suggest that subsection (c) be deleted as unnecessary.

### **Subsection (e) - Plaintiff's Consent to Magistrate Judge Calendar**

The Small Claims rules currently incorporate Superior Court Rule of Civil Procedure 73, which comprehensively addresses procedural matters relating to magistrate judges, including party consent and waiver of consent. Consent to a magistrate judge is required by D.C. Code § 11-1732(j)(5), implemented through Civil Rule 73(a).

Currently, the practice in the Small Claims Branch is to ask the parties for consent when the case first comes before the Court, generally at the initial hearing stage. Proposed Rule 19(e) would authorize plaintiffs filing cases on the collection and subrogation calendar to elect to file their written consent when they file their statement of claim. It also defines the scope of that consent and the scope of waiver of consent by a non-appearing defendant.

It is not clear why it is necessary for this authorization for early consent to be placed in a rule, rather than treating it as a Clerks Office business practice. Rule 73 already allows complete flexibility as to how and when a party's consent is submitted, as well as expressly covering the scope of consent and waiver of consent.

Proposed Rule 19(e) also uses terminology concerning the nature and scope of consent and waiver that differs from the way Rule 73(a)(1) addresses those same issues. With regard to the scope of the plaintiff's consent, the proposed rule states that "the plaintiff may file a written consent to have the statement of claim assigned to *a magistrate judge calendar*." (Emphasis added.) But Rule 73(a)(1), consistent with the D.C. Code provision,<sup>4</sup> does not address consent to assignment of a claim to a calendar. Rather, it states that party consent allows a magistrate judge to "conduct any or all uncontested or contested proceedings, determine non-dispositive and dispositive pretrial matters, make findings and enter final judgments and orders *in a civil case*."<sup>5</sup> (Emphasis added.) With regard to the scope of a non-appearing party's waiver, the proposed rule states: "If [a plaintiff's] consent is filed, the magistrate judge may rule on any motion, and take any other judicial action (including ex parte proof of damage hearings), as to any defendant who has not appeared or otherwise responded to the statement of claim." But Rule 73(a)(3) already covers this territory with a more general statement that a non-appearing party "is deemed to have consented that a magistrate judge conduct all proceedings in the case."

Unless the Court intends that the scope of magistrate judge consent and waiver be different for cases on the small claims collection and subrogation calendar or different for plaintiffs, we suggest that subsection (e) be deleted from the rule, perhaps with a reference in the comment apprising readers of the existing requirements in Civil Rule 73. If the Court does intend that it be different, we suggest the rule be clarified and the difference noted in a comment.

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<sup>4</sup> The D.C. Code provision is drawn in more general terms. It requires consent to allowing a magistrate judge to "make findings and enter final orders or judgments in . . . uncontested or contested proceedings . . . ."

<sup>5</sup> Rule 73 does contain a reference to assignment to a magistrate judge's calendar, but in an entirely different context. Subsection (d) of Rule 73 addresses the power of a magistrate judge to refer a case for "redistribution" in instances where it was initially assigned to the magistrate judge's calendar (as all small claims cases are), but a "party does not consent to a magistrate judge." That subsection makes clear that there is a difference between a case being assigned to a magistrate judge's calendar in the first place (which does not require consent) and a magistrate judge actually conducting proceedings in a case (which does).

**Conclusion**

We appreciate the Committee's consideration of these comments and recommendations.

Sincerely,

**The Legal Aid Society of the District of Columbia**

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