Promoting Industry Professionalism
Texas Creditor's Bar Association
P.O. Box 110826 ◊ Carrollton, TX 75011-0826 ◊ Phone: 469.568.8741 ◊ Fax: 972.428.3494 ◊ E-Mail: info@txcba.org



March 14, 2012

The Honourable Russell B. Casey
Chairman, Texas Supreme Court
Justice Court Task Force
Southlake Government Complex
1400 Main St. Suite 220
Southlake, Texas 76092

**Re: Texas Creditor's Bar Response to the Proposed Rules Under Consideration by The Supreme Court Task Force**

Dear Judge Casey and
Honourable Members of the Supreme Court Justice Court Task Force:

This response is made by the Texas Creditor's Bar Association ("TXCBA") to the Justice Court Rules Task Force appointed by order of the Texas Supreme Court on September 17, 2011 ("Task Force"), and pertains to the proposed rules governing debt collection cases in Justice Courts first circulated on or about February 8, 2012, and as subsequently revised on March 7, 2012 (the "Proposed Rules"). Members of the TXCBA Executive Committee have had an opportunity to review the Proposed Rules and to speak with various members of the Task Force regarding the legal basis and practical effect of these rules.

The TXCBA believes that it is necessary to convey to the Task Force our extreme concern over these rules and their effect, should they be enacted. By separate document, the TXCBA will address the specifics of each rule and provide to the Task Force its recommendations.

The critique which follows is based upon four tenets. It is the position of the TXCBA that the Proposed Rules:

- cannot be implemented by the justice courts;
- do not treat all parties equally;
- run contrary to the clear legislative mandate; and
- are contrary to established Texas law.

The details of our concerns follow:

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## The Proposed Rules Cannot Be Implemented

The Proposed Rules are so unwieldy that they cannot be implemented in a fair or efficient manner. The TXCBA proposed an alternative procedure that conformed to current case law and where creditors could elect to put on a *prima facie* showing in exchange for consistency amongst the hundreds of justice courts in considering the evidence and rendering default judgments. The Proposed Rules have turned that on its head; it has made mandatory a system whereby *justice court clerks* are the arbiters of justice, by denying creditors even an opportunity to have citation issued unless a laundry list of requirements and evidence is met to the clerk's or the judge's satisfaction.

The Proposed Rules also would likely not survive a constitutional challenge. The Proposed Rules prohibit claims from being heard unless a creditor's entire case is proven up front, and effectively require third-party testimony for assignees before a plaintiff may even present its claim. No other state has such a requirement, because it bars a class of claimant access to the courts for no reason. Gone are confessions of judgment, friendly suits, and the typical result of a justice court suit: a settlement beneficial to both creditor and consumer, whereby the creditor takes less than is owed and the consumer cleans up his or her credit.

The practical effect of these rules would be to reduce case filings in the Justice Courts by somewhere between 50,000 and 100,000 cases statewide per year, with the commensurate loss of filing fees to each county and court. This is because the burdens placed upon the claimants by Rule 586, Plaintiff's Pleadings, would exceed either their ability or willingness to comply.

## The Proposed Rules Do Not Treat All Parties Equally

Many of the pleading requirements and all of the documentation requirements included in the Rule 586 are not necessary to state a claim. The Proposed Rules shift the plaintiff's burden from that of articulating the legal and factual basis of a claim, to actually proving its case at the time of suit; and yet they go even further, to demand that a plaintiff defeat the defendant's affirmative defenses, verified denials, and possible counterclaims . . . ***all before the defendant is actually served***.

In short, the Proposed Rules scrap the adversarial system of justice that has been present in Texas and in the United States since their founding, in favor of a stacked deck against creditors from the very start. The Proposed Rules represent a "Main Street" versus "Wall Street" bias that is inappropriate in judicial rules, and inaccurately paints all creditors with the same brush. The truth is that creditors would no longer be equal under the law with other parties. While any other party in justice court could allege a fact and, if not denied, rely upon the court to accept the allegation as true (excluding damages), the Proposed Rules would effectively refuse to believe creditors on any fact issue unless evidence is produced.

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Both the Federal Trade Commission and the Texas Attorney General's Office have each reviewed the issue of pleading requirements in debt collection cases. (See Exhibits 1 and 2, attached). Their conclusions were remarkable similar to the TXCBA's proposal and radically different than the Proposed Rules. Given that these two organizations each exist, in part, to protect the consumer, it is clear that the Task Force has created rules that seek to accomplish something more: to create an environment favorable to a defendant in a creditor lawsuit. While such a scheme may be a politically popular amongst some, it is not justice. The TXCBA believes that justice lies in creating rules that allow for claims to be heard and all parties to settle their claims fairly and equitably if possible.

**The Proposed Rules Run Contrary to the Clear Legislative Mandate**

As described by Texas Supreme Court Justice Thomas R. Phillips (Ret.), the current efforts by both the legislature and the judiciary seek to make the courts more efficient, more accountable, and the outcome more certain.

Texas Government Code Sec. 27.060 establishes these objectives. The statue mandates that the Texas Supreme Court develop rules of civil procedure ***"to ensure the fair, expeditious, and inexpensive resolution of small claims cases***."[1] And while the statute specifically provides for the creation of a unique set of procedural rules for credit grantor and assigned debt claims ("Debt Collection Cases"), it retains the overall expectation that ***all justice court rules***:

> (1) not require that a party be represented by counsel;
>
> (2) not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules; or
>
> (3) not require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied. [11]

Many of the Proposed Rules are so complex that a reasonable person, acting on behalf of a plaintiff *or* defendant, could not apply them. Any small plaintiff, whether the original creditor or an assignee, attempting to apply Rule 586 would almost certainly fail, rendering their claim's resolution unfair, not expeditious, and expensive. Additionally, it is absurd that the Proposed Rules essentially enshrines a particular (and incorrect) view of evidentiary law under the guise of doing away with the application of the Texas Rules of Evidence.

The legislative mandate was to make a simple system of justice that anyone could use. The Task Force has done the opposite; it has decided to impose complex and expensive rules upon creditors. Respectfully, the TXCBA submits that a simple system of justice must apply through ***all*** Justice Court Rules, not just through some; and to ***all*** parties, not just to defendants.

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[1] Sec. 27.060(d).

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**The Proposed Rules are Contrary to Established Texas Law**

The issues taken up in this section pertain to the requirement in the Proposed Rules that an assignee must file an affidavit from the original issuer before the justice court can issue a citation.

The Proposed Rules seem to be directed at the hearsay nature of an assignee's affidavit. It is, of course, hearsay, just as all business records affidavits, regardless of their source, are technically hearsay. Any affiant testifying to any business records has no personal knowledge of the claim other than that which he gleaned from a review of the company's records. Yet the laws of our country and our state have determined that their reliability is such that an *exception* to hearsay is warranted for such testimony and documentation. The only remaining issue, then, is whether there is something in an assignee's affidavit testimony to justice court that changes this time-honored rule.

First, the Texas Supreme Court has squarely held that in the absence of an objection, a court *must* admit and consider the testimony. In *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999), the Texas Supreme Court held that an affidavit may be offered as evidence at a default judgment hearing and that the testimony therein, though hearsay, is admissible to prove-up a claim. The *New* decision was important for a number of reasons: (1) it confirmed that when proving-up a default judgment, the court may rely upon affidavit testimony, (2) it held that the affiant's affidavit may be based upon a review of the businesses records, and not be solely limited to the affiant's personal knowledge, and (3) it reminded the courts that hearsay testimony is admissible as evidence in Texas, absent an objection, and that it is an abuse of discretion to exclude such evidence in a unopposed prove-up hearing. As noted by the Court,

> "Rule 802 says, 'Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.' Nothing in rule 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication."

*Id.* at 517. The Court's rather curt treatment of any argument to the contrary is instructive and should be heeded by the Task Force.

Second the information about which the assignee is testifying is derived from information obtained from the predecessor-in-interest as the result of a business transaction wherein the information was material to the transaction. As such, this information qualifies for a hearsay exception under Tex.R.Evid. Rule 803(15). [1] Supporting this is the fact that *eight* Texas District Courts of Appeal have held that the records of a third-party may be adopted and incorporated by a successor-in-interest or assignee, ***thereby becoming the business records of the current claim holder*** and thus qualifying as an exception to hearsay rule under Tex.R.Evid. Rule 803(6). [2, 3] As such,

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[1] **Tex.R.Evid. 803(15) Statements in Documents Affecting an Interest in Property.**
A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the

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an affiant's testimony satisfies multiple exceptions to the hearsay rule and would be admissible even over objection.

Third, *Simien* [4] and its brethren opinions from several other appellate courts require the admission of third-party derived business records ***over the defendant's objection, and specifically in the context of collection cases***. Over the past two years, every court considering the *Simien* rule has adopted it, recognizing that due to the high level of federal regulation over major lenders, the documents referenced in a collection case are inherently reliable and admissible, noting the strong possibility of business failure and heavy criminal and civil penalties if it were otherwise.

The Proposed Rules, in short, go against the great weight of Texas jurisprudence in numerous ways: in excluding unobjected-to testimony, regardless of its nature; in singling out one class of plaintiff for heighted evidentiary requirements; and in disregarding the learned opinions of numerous courts who have recently considered these issues. The TXCBA respectfully suggests a reworking of the Proposed Rules to more accurately reflect Texas law.

**Conclusion**

It is the belief of the TXCBA that the current effort of the Task Force is misguided on the above issues and that there is no substantive basis for several of the rules that are being proposed. The effect of the Proposed Rules are devastating to the clients we represent, will be devastating to the courts we practice in, and are ruinous to the concept of simple and fair justice.

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document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

[2] **Tex.R.Evid. 803(6) Records of Regularly Conducted Activity.**
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

[3] See Exhibit 3 for article regarding business records obtained from third-party.

[4] *Simien v Unifund CCR Partners*, 321 S.W.3d 235 (Tex.App--Houston[1st] 2010).

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The TXCBA continues to be willing to work with the Task Force in an effort to develop a set of rules which it and its members can support. In addition, there are many other organizations that would be affected by the Proposed Rules, such as the Texas Bankers Association, the Texas Process Servers Association, the National Association of Retail Collection Attorneys, the International Association Credit and Collection Professionals and the Debt Buyers Association International. We are in the process of reaching out to these organizations so that we can, with a common voice, work with the Task Force. But this must be said: if the Proposed Rules stand as they are currently written, then the TXCBA will have no choice but to actively oppose them.

As always, the Texas Creditors Bar Association appreciates the opportunity to work with the Task Force, and eagerly looks forward to a fair set of rules governing our practice.

We remain respectfully yours,

Michael J. Scott, Chair
Executive Committee
Texas Creditor's Bar Association