

Texas Creditor's Bar Association

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June 1, 2012

Supreme Court Advisory Committee
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711-2248

Re: Proposed Changes to the Rules of Civil Procedure for Justice Courts

Members of the Advisory Committee

The Texas Creditor's Bar Association ("TXCBA") is an association of attorneys representing approximately twenty Texas law firms, all of whom practice in the area of debt collections. TXCBA attorneys file more than 100,000 collection cases per year in Texas courts. The majority of these cases concern consumer debts, such as credit cards and auto loans, and most are filed in the justice courts. As such, TXCBA attorneys are uniquely aware of the handling of debt collection cases by these courts and the challenges that these cases present.

While the TXCBA appreciates the significant effort undertaken by the Justice Court Rules Task Force in rewriting the Justice Court Rules of Civil Procedure, it has grave concerns regarding the proposed rules pertaining to debt collection cases. The rules significantly deviate from existing case law with respect to pleadings and default judgments to such an extent that they will render the justice courts effectively unworkable for the fair and efficient administration of justice.

Put simply, it is the position of the TXCBA that with regard to the rules pertaining to debt collection:

- ▶ The Justice Courts should require clear pleadings but not require the disclosure of irrelevancies;
- ▶ The Justice Courts should not require full trial proof in a default context;
- ▶ The Justice Courts should not adopt rules of evidence that conflict with the legislative mandate and the current status of the law.

Rule 577 – Pleading Requirements

Rule 577 includes numerous provisions that are unrelated to plaintiff's claim and that will only serve to confuse the courts and the defendants. These include the requirement that plaintiff:

- (1) State the name and address appearing on the original creditor's records. This information can become dated, cannot generally be verified at the time of suit, is vague as to the applicable date, and will contribute to confusion as to the debtor and the service address.
- (2) State the date and amount of the last payment. Neither of these items is relevant to either plaintiff's claim or defendant's affirmative defense.
- (3) Disclose collection bond information. Such disclosure is irrelevant to a debt collection suit, becoming relevant only if a claim is filed against the creditor, and serves only to encourage litigation and third-party claims against the bonds of legitimate creditors.

Rule 578 - Default Judgments

Of all of the proposed rules, Rule 578, which pertains to the granting of default judgments, is by far the most concerning to the TXCBA. This rule severely limits the justice court's ability to enter default judgments and is so harsh in its requirements for default judgments on submission that it goes far beyond what is required in courts of record. Specifically, Rule 578 requires:

- ▶ The providing of numerous account documents, none of which pertain to damages (the only element at issue in a default case);
- ▶ The filing of a business records affidavit in every case; and
- ▶ The filing of an affidavit by the original credit grantor in every assigned debt case.

Rule 578's requirement for the filing of numerous account related documents has no bearing on the issue of damages. These documents only serve to establish liability; which, as a matter of law, has been confessed by defendant's default. As such, the proposed rule seeks to completely overturn a rational rule that has applied throughout our entire history of Texas (and American) jurisprudence; dispensing with the full burden of proof upon default by the opposing party is one of the key efficiencies in an adversarial system of justice. Creditors do not seek to evade their duty to prove their damages, but are entitled to the same status as any other litigant with respect to the effect of a default.

Rule 578's requirement for the filing of a business records affidavit apparently seeks to overcome a hearsay objection that has not been raised. The rule ignores the expressed language of Texas Rule of Evidence 802 and contravenes the Supreme Court's decision in *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999). In so doing, the rule attempts to create new law.

Further, the additional requirement for the filing of an affidavit from the original credit grantor in assigned debt cases ignores Texas Rule of Evidence 803(15) and contravenes Texas case law, much of which was authored or adopted by members of the Supreme Court Advisory Committee. As a practical matter, many original lenders no longer exist, having merged with other lenders, thereby prejudicing such claims.

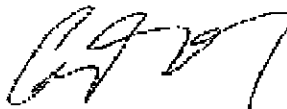
Finally, proposed Rule 578 falls short of the legislative mandate that the rules "may not be so complex that a reasonable person without legal training would have difficulty understanding or applying" the rules. In so doing, it attempts to incorporate (incorrect) rules of evidence when the statute plainly mandates dispensing with them.

TXCBA Rule Proposal

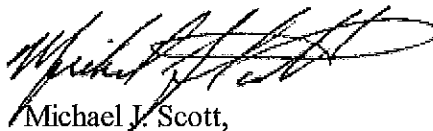
There is a better approach. Attached are proposed versions of these two rules, the effect of which is to establish clear pleading requirements in debt collection cases and to provide guidance to justices of the peace in evaluating evidence presented in support of judgment. These rules allow the court the administrative authority to process debt collection cases appropriately while ensuring due process for the defendant. As noted in the attachment, the TXCBA's proposed Rule 577 is substantially similar to that proposed by the Task Force, with only a few exceptions which are highlighted. By contrast, TXCBA's proposed Rule 578 is essentially a new rule that cannot readily be traced back to the Task Force rule.

I appreciate your consideration of these matters, as well as any input which you may have regarding our combined efforts to ensure that the Texas Rules of Civil Procedure make the courts more efficient, more accountable, and the outcome more certain.

Sincerely,



Craig Noack
TXCBA President



Michael J. Scott,
Executive Committee Chair
TXCBA Justice Rules Subcommittee

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| <p>RULE 577. PLAINTIFF'S PLEADINGS</p> <p>(a) The following information must be set forth in the petition of a suit filed under this chapter:</p> <ol style="list-style-type: none"> (1) The defendant's name and address as appearing on the original creditor's records; (2) The name of the original creditor; (3) The original account number; (4) The date of origination/issue of the account; (5) The date and amount of the last payment; (6) The charge-off date and amount; (7) If the plaintiff seeks post-charge-off interest, then the petition shall state whether the rate is based on contract default or statute, and the amount of post-charge-off interest claimed; (8) If the plaintiff is represented by an attorney, then the attorney's name, address, and telephone number; and (9) Whether the plaintiff is the original creditor. <p>(b) If the plaintiff is not the original creditor, the petition shall also state:</p> <ol style="list-style-type: none"> (1) The date on which the debt was assigned to the plaintiff; (2) The name of each previous owner of the account and the date on which the debt was assigned to that owner. <p>(c) If the plaintiff is a third-party debt collector, the debt collector must plead that it has complied with Texas Finance Code Section 392.101 requiring a bond. The petition should include the name of the bonded debt collector and the date it filed a copy of the bond with the Texas Secretary of State.</p> | <p>RULE 577. PLAINTIFF'S PLEADINGS</p> <p>(a) The following information shall be set forth in the petition of a debt collection case:</p> <ol style="list-style-type: none"> (1) Plaintiff's name and capacity; (2) Defendant's name / co-defendant's name and service address; (3) Account or card name, if different from that of the plaintiff, if known; (4) Account number (which may be masked); (5) Date of issue or origination of the account, if known; (6) Date of charge-off or breach of the account, if known; (7) The damage amount claimed as of a date certain (preferably at the time of charge-off or breach); (8) Whether plaintiff seeks continuing interest and, if so, <ol style="list-style-type: none"> (i) the effective interest rate claimed, (ii) whether the interest rate is based upon contract or statute, (iii) the reference date for beginning to compute interest, and (iv) the dollar amount of interest claimed as of a date certain. <p>(b) Additionally, if the pleading pertains to an assigned debt claim, the pleading must include:</p> <ol style="list-style-type: none"> (1) a statement that the claim has been transferred and/or assigned; and (2) the name of the original creditor, the account/card name. |

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| <p>RULE 578. DEFAULT JUDGMENTS</p> <p>(a) Default Judgment Without Hearing. The following documents may be attached to the petition, and must be served on the defendant before a default judgment can be granted without a hearing:</p> <p>(1) A copy of the contract, promissory note, charge-off statement or an original document evidencing the original debt which must contain a signature of the defendant. This document shall be supported by affidavit from the original creditor.</p> <p>(2) If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then a copy of the card member agreement in effect at the time the card was charged-off and copies of documents generated when the credit card was actually used must be attached and shall be supported by affidavit from the original creditor.</p> <p>(b) Required Documents. To support a default judgment, these documents must include:</p> <p>(1) A document signed by the defendant evidencing the debt or the opening of the account; or</p> <p>(2) a bill or other record reflecting purchases, payments, or other actual use of the credit card or account by the defendant; or</p> <p>(3) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.</p> <p>(c) Requirements of Affidavit. Any affidavit from the original creditor must state:</p> <p>(1) that they were kept in the regular course of business;</p> <p>(2) that it was the regular course of business for an employee or representative of the creditor with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information to be included in such</p> | <p>RULE 578. DEFAULT JUDGMENTS</p> <p>(a) If the defendant does not file an answer by the answer date, the judge may enter a default judgment as to such defendant based upon:</p> <p>(1) Plaintiff's pleading, if plaintiff's claim is liquidated and such claim is proved by an instrument in writing, attached to the petition, and capable of being calculated by the court; or</p> <p>(2) Plaintiff's evidence of damage, if plaintiff's claim is unliquidated and proved by plaintiff.</p> <p>(b) The court may grant a default judgment based upon the documents attached to the pleading and/or submitted by a party in support of judgment.</p> <p>(c) The court may grant default judgment on submission and need not conduct a hearing in order to do so.</p> <p>(d) Affidavit of Damages.</p> <p>(1) An affidavit in support of plaintiff's claim will be sufficient to obtain a default judgment if it:</p> <p>(i) attests to the ownership of the account,</p> <p>(ii) identifies the person obligated to pay the account,</p> <p>(iii) attests to the closing of the account, and</p> <p>(iv) attests to the amount due on the account as of a date certain after all payments, credits and offsets have been applied.</p> <p>(2) The affidavit may be made by a representative of a legal entity and may be based upon that person's review of the account information as maintained by that legal entity.</p> |

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| <p>record;</p> <p>(3) the record was made at or near the time or reasonably soon thereafter; and</p> <p>(4) the records attached are the original or exact duplicates of the original;</p> <p>(d) Default Judgment after Hearing. If the plaintiff does not file with the court and serve on the defendant the documents required above, and the defendant files a timely answer, the court will proceed with the case as usual. If the plaintiff does not file with the court and serve on the defendant the documents required above, and the defendant fails to file a timely answer, the case will proceed under Rule 525(c). If a defendant who had failed to answer appears at a default judgment hearing, the judge must reset the case or may proceed with trial on the merits, if all parties agree to proceed.</p> <p>(e) Post-Answer Default. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence and render judgment accordingly.</p> | <p>(e) If the defendant files an answer or otherwise appears in the case before a default judgment is signed by the judge, the judge may not enter a default.</p> <p>(f) If a default judgment cannot be entered as described above, the plaintiff may request a hearing at which the plaintiff shall appear, in person or by telephonic or other electronic means, and prove its damages. If the plaintiff proves its damages, the judge shall grant judgment for the plaintiff in the amounts proven; otherwise, the case shall be set for trial. Justices are encouraged to allow parties to appear by telephonic or other electronic means whenever practicable.</p> |