Study J-1452 February 8, 2011

Memorandum 2011-10

Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case (Comments on Tentative Recommendation)

Since mid-2006, with some interruptions, the Commission has been studying whether and how to clarify which tribunal has jurisdiction of a writ petition relating to a small claims case after trial court unification. In October of last year, the Commission approved a tentative recommendation on the subject, which has been posted to the Commission's website and circulated for comment.

In developing this tentative recommendation, the Commission kept in close contact with the Civil and Small Claims Advisory Committee of the Judicial Council (hereafter, "Civil and Small Claims Advisory Committee"), which previously expressed concerns about two different attempts the Commission made to address this matter. The Commission is seeking to develop an approach that would receive broad acceptance, including support from the Civil and Small Claims Advisory Committee.

Since the October meeting, the Commission has received the following new comments on this study:

That input is described and analyzed below.

In discussing the comments, we present a number of issues for the Commission to consider. Although the Commission is working towards approval of a final recommendation, there is no urgency to take that step at the upcoming meeting. We do not expect to introduce legislation on this topic until 2012. For now, **the Commission should simply focus on resolving the issues**

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

raised in this memorandum. After it does so, the staff will prepare a draft of a final recommendation, for consideration at a future meeting. That will afford time for careful redrafting, if needed, and for further input from the Civil and Small Claims Advisory Committee and others, before making a final recommendation.

We begin this memorandum by summarizing the general nature of the new input. We then analyze each comment in detail, and pose issues for the Commission to resolve.

(Before reading further and starting to consider the comments, Commissioners and other interested persons might find it helpful to carefully re-read the tentative recommendation. We have not attempted to summarize the tentative recommendation and pertinent background information in this memorandum, because a summary of the proposal is included at the beginning of the tentative recommendation, and because this topic is complicated and not easy to explain more succinctly than in the tentative recommendation.)

GENERAL NATURE OF THE NEW INPUT

Of the three new comments, Doug Wong's simply presents some background information for the Commission to consider. The comment from Judge Maryanne Gilliard (Presiding Judge, Appellate Division of the Superior Court of Sacramento County) expresses significant concern about the tentative recommendation. In contrast, the comment from Alan Wiener (Administrative Office of the Courts) provides informal but generally positive input on behalf of the Civil and Small Claims Advisory Committee, while offering a couple of specific suggestions. That input does not constitute an official position of the Judicial Council.

The comments are described and analyzed below, in the order mentioned above.

COMMENTS OF DOUG WONG

Doug Wong (husband of a small claims litigant) submitted input earlier in this study, relating to writ review of a ruling on small claims jurisdiction. Memorandum 2010-44, Exhibit p. 11. On receiving a copy of the memorandum discussing his input, he provided the following additional information:

> Interestingly, after talking to multiple attorneys, *no one has even heard of trying to go further on a small claims case after the appeal.* Everyone has said that if you lost the appeal, that is it. In fact, most have said that it is not worth the cost — the retainer is typically over $2000, so unless the case is worth more, then paying a judgment, even if unfair, is often the cheaper alternative. Now, if the maximum damage award allowed in small claims cases starts creeping up above $7500, then I think you will see a lot more cases where people want another chance to have a small claims judgment reviewed.

Exhibit p. 6 (emphasis added). According to Mr. Wong, people are generally unaware that in certain limited circumstances it is appropriate to seek writ relief relating to a small claims ruling. **The Commission should bear his experience in mind as it considers the other new comments in this study.**

COMMENTS OF JUDGE GILLIARD

Judge Gilliard, speaking from the perspective of the appellate division of the superior court, expresses two sets of concerns about the tentative recommendation: (1) it might be construed to create an additional layer of appellate review for small claims cases, and might thereby thwart the objectives of the Small Claims Act, and (2) it inappropriately assigns jurisdiction to judges who sit in the appellate division. Each of these concerns is addressed separately below.

Potential Flood of Requests for Review

Judge Gilliard's first point is that the proposed legislation might lead to a flood of requests for review of rulings in small claims cases:

> [I]t is unclear from the legislation if the intent is to create an additional layer of appellate review for small claims cases. In this court's experience, writ petitions in small claims cases are often disguised appeals. Ordinarily, the petitioner claims that the small claims court, or the superior court after trial de novo, acted without jurisdiction because the petitioner should have prevailed.
>
> Currently, a defendant in a small claims case may appeal a small claims judgment and obtain a new trial before a superior court judge. (CCP Section 116.710, Cal. Rules of Court, Rule 8.952) A plaintiff who voluntarily elects the advantages of the small claims process has no right to appeal from an adverse judgment. (CCP Section 116.710, subd. (a).) Moreover, he is not entitled to a disguised appeal in the form of a petition for a writ of mandate. (*Yoakum v. Small Claims Court* (1975) 53 Cal.App.3d 398, 404.) The

> lack of the right to appeal cannot be relied upon to show lack of an adequate remedy at law so as to trigger writ review of issues that would be covered by an appeal. (*Parada v. Small Claims Court* (1977) 70 Cal.App.3d 766, 769.)
>
> Nothing in the proposed legislation addresses the purposes for which a writ petition could be filed in small claims cases. The provision indicating that the fee for filing this type of writ petition "is the same as the fee for filing a notice of appeal" confuses the matter and seems to equate the … petition with an additional appeal.
>
> However, the Small Claims Act exists to resolve minor civil disputes expeditiously, inexpensively and fairly. (CCP 116.120) If the proposed legislation authorizes writ review that is equivalent to an appeal, small claims cases would conceivably be entitled to even more levels of appeal than judgments in unlimited civil cases. Therefore, *to the extent that the proposed legislation seeks to provide small claims litigants with an additional level of appeal for orders made by the small claims division or small claims judgments after trial de-novo in the superior court, the proposed legislation encourages costly, wasteful and prolonged litigation over very small matters.*

Exhibit pp. 1-2 (emphasis added). Judge Gilliard also warns that some small claims litigants "believe they should be allowed to appeal until they prevail," and thus "practically speaking, the proposed legislation may do little to alleviate actual petitioners' frustration." *Id*. at 2-3.

In response to this set of concerns, the Commission should consider several points, some of which raise issues for decision.

No Intent to Create an Additional Layer of Appellate Review

First, the tentative recommendation is not intended to create any additional layer of appellate review in a small claims case. Rather, as indicated at page 9 and elsewhere, the intent is "that the proper jurisdiction for a writ petition relating to a small claims case be made clear."

The case law to which Judge Gilliard refers, regarding writ petitions filed by small claims plaintiffs, is specifically addressed in footnote 25:

> [S]ome authority holds that a small claims plaintiff cannot seek a writ to overturn a judgment entered by the small claims division, because the plaintiff forfeited the right of appeal by selecting the small claims forum, and thereby also forfeited the right to seek a writ. See, e.g., Parada v. Small Claims Court, 70 Cal. App. 3d 766, 769, 139 Cal. Rptr. 87 (1977); *Yoakum*, 53 Cal. App. 3d at 404; see also Pitzen v. Superior Court, 120 Cal. App. 4th 1374, 1380, 16 Cal. Rptr. 3d 628 (2004). The extent to which this doctrine applies is not altogether clear, particularly when the judgment is based on

> jurisdictional grounds rather than on the merits. See Taliaferro v. Locke, 179 Cal. App. 2d 777, 780-81, 4 Cal. Rptr. 223 (1960); see also *Mendoza,* 49 Cal. 2d 668; *Parada,* 70 Cal. App. 3d at 770, 772 (Roth, P.J., concurring and dissenting). *This tentative recommendation is not intended to resolve or in any way affect the extent to which a small claims plaintiff is entitled to seek writ relief.*

(Emphasis added.) If the Commission includes a similar statement in its final recommendation, and that recommendation is enacted after being presented to the Legislature in accordance with the Commission's normal procedures, the statement will be official legislative history and should definitively resolve this issue of intent. See *2009-2010 Annual Report,* 39 Cal. L. Revision Comm'n Reports 1, 16-20 (2009) & cases cited therein.

Nonetheless, it might be helpful to make the Commission's intent even more clear. For example, **the Comment to proposed Code of Civil Procedure Section 1068.5 could be revised as follows:**

> **Comment.** Section 1068.5 is added solely to clarify which tribunal has jurisdiction of a writ petition relating to a small claims case after trial court unification. This provision neither expands nor contracts the circumstances under which a small claims litigant may seek a writ of review. The proper tribunal for seeking such a writ depends on the stage of the case at the time of the act that is challenged in the writ petition.
>
> ….

Similar revisions could be made in the Comments to proposed Code of Civil Procedure Sections 1085.3 (writ of mandate in small claims case) and 1103.5 (writ of prohibition in small claims case).

Does the Commission agree that such revisions would be helpful? If so, the staff will revise the Comments as indicated, and, unless otherwise directed, **will make similar adjustments to the preliminary part (narrative discussion) of the Commission's proposal,** to help clarify the intent.

Statutory Loophole

Although the Commission's proposal is not intended to create any additional layer of appellate review in a small claims case, Judge Gilliard's comments helped remind the staff of a statutory loophole that needs to be closed.

Under the Commission's proposal, "[i]f a writ petition challenges a ruling made at the initial hearing before the small claims division of a superior court, the petition could be heard by *a member of the court's appellate division who did not*

conduct the initial hearing ….” See p. 10 (emphasis added); see also proposed Code Civ. Proc. §§ 1068.5, 1085.3, 1103.5 & Comments. **The Commission needs to make clear that the judge’s ruling on such a writ petition is not appealable.** Otherwise, Judge Gilliard may be correct in warning that “small claims cases would conceivably be entitled to even more levels of appeal than judgments in unlimited civil cases.”

A similar problem used to exist in another context, and was addressed by amending Code of Civil Procedure Section 904.1 to preclude an appeal from a superior court order granting or denying a writ of mandamus or prohibition directed to a municipal or justice court. See 1982 Cal. Stat. ch. 1198, § 63.2; *Bermudez v. Municipal Court*, 1 Cal. 4th 855, 823 P.2d 1210, 4 Cal. Rptr. 2d 609 (1992); see also *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm’n Reports 305, 315-23 (2006). After trial court unification, the pertinent language in Section 904.1 was revised to reflect unification and relocated to Code of Civil Procedure Section 904.3, which reads:

> 904.3. An appeal shall not be taken from a judgment of the appellate division of a superior court granting or denying a petition for issuance of a writ of mandamus or prohibition directed to the superior court, or a judge thereof, in a limited civil case or a misdemeanor or infraction case. An appellate court may, in its discretion, upon petition for extraordinary writ, review the judgment.

See 2007 Cal. Stat. ch. 43, § 11; *Statutes Made Obsolete by Trial Court Restructuring: Part 3*, 36 Cal. L. Revision Comm’n Reports at 315-23.

One option would be to revise Section 904.3 to also preclude an appeal in the context at hand. However, it might be easier for courts and litigants to find the pertinent law if the matter were addressed in the same provisions that would clarify the jurisdiction of a writ petition relating to a small claims case. For example, **proposed Code of Civil Procedure Section 1068.5 and Comment could be revised as follows:**

> 1068.5 (a) A petition that seeks a writ of review relating to an act of the small claims division, other than a postjudgment enforcement order, may be heard by a judge of the superior court who satisfies both of the following requirements:
>
> (1) The judge is a member of the appellate division of the superior court.
>
> (2) The judge did not make any ruling that is challenged by the writ petition.

(b) Where a judge described in subdivision (a) grants a writ of review directed to the small claims division, the small claims division is an inferior tribunal for purposes of this chapter.

(c) The fee for filing a writ petition in the superior court under subdivision (a) is the same as the fee for filing a notice of appeal under Section 116.760.

(d) The Judicial Council shall promulgate procedural rules for a writ proceeding under subdivision (a).

(e) An appeal shall not be taken from a judgment granting or denying a petition under subdivision (a) for issuance of a writ of review. An appellate court may, in its discretion, upon petition for extraordinary writ, review the judgment.

~~(e)~~(f) ….

~~(f)~~(g)(1) ….

~~(g)~~(h)(1) ….

Comment. Section 1068.5 is added to clarify which tribunal has jurisdiction of a writ petition relating to a small claims case after trial court unification. The proper tribunal depends on the stage of the case at the time of the act that is challenged in the writ petition.

Subdivisions (a) and (b) make clear that a writ petition relating to the initial hearing in the small claims division of the superior court may be heard by a member of the court's appellate division, who did not conduct the initial hearing. See Cal. Const. art. VI, § 10 ("The … superior courts, and their judges have original jurisdiction … in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."); see also People v. Konow, 32 Cal. 4th 995, 1019-21, 88 P.3d 36, 12 Cal. Rptr. 3d 301 (2004) (superior court judge who considers order entered by another superior court judge does not unconstitutionally enjoin, restrain, or otherwise interfere with judicial act of another superior court judge if later judge acts under statutory authority).

Subdivision (c) specifies the filing fee for a writ petition relating to the initial hearing in the small claims division, and subdivision (d) directs the Judicial Council to provide guidance on the procedures applicable to such a writ proceeding.

Subdivision (e) is similar to Code of Civil Procedure Section 904.3.

….

Similar revisions could be made in proposed Code of Civil Procedure Sections 1085.3 (writ of mandate in small claims case) and 1103.5 (writ of prohibition in small claims case) and the corresponding Comments.

Are revisions along these lines acceptable to the Commission?

Steps to Prevent Abuse of the Writ Procedure

Finally, Judge Gilliard appears concerned that small claims litigants will abuse the writ procedure by filing unmeritorious petitions and thus burdening the courts and the small claims process. As she recognizes, however, writ relief is sometimes appropriate and needed in a small claims case. See Exhibit p. 2; see also p. 1 & n. 1 of the tentative recommendation.

Both the Commission and the Civil and Small Claims Advisory Committee have previously considered the possibility that clarifying the jurisdiction of a small claims writ petition may prompt a deluge of such petitions, and thereby impede the statutory goal of resolving small claims cases expeditiously, inexpensively, and fairly (Code Civ. Proc. § 116.120). While safeguarding the small claims process is a valid concern, both organizations have noted that (1) information on the potential availability of writ relief should not be suppressed and hidden from those who may need it, and (2) jurisdictional guidance on small claims writs is lacking and should be provided.

That said, perhaps a number of steps could be taken to help prevent the filing of unmeritorious writ petitions relating to small claims cases. For example,

- **The preliminary part of the Commission's proposal** (and maybe also the proposed Comments) **could be revised to make clear that although writ relief is sometimes appropriate in a small claims case, that situation is not common and writ relief should not be sought routinely.** If the Commission approves this idea in concept, the staff will assess how to implement it and bring the matter back to the Commission at a later date.

Further,

- The procedural rules that the Judicial Council develops under proposed Code of Civil Procedure Sections 1068.5(d), 1085.3(d), and 1103.5(d) could require the use of Judicial Council forms that are designed to educate small claims litigants about when writ relief is and is not appropriate.
- Small claims advisory services, self-help websites for small claims litigants, and other such resources could help educate small litigants about when writ relief is and is not appropriate.

Finally, perhaps there should be some disincentive to filing an unmeritorious writ petition relating to a small claims case. An obvious idea would be to make the losing petitioner responsible for paying the other side's costs and attorney's fees, as is already done for a small claims appeal (see Code Civ. Proc. § 116.780).

But most writs are denied summarily, in which case the respondent might not incur any costs or attorney's fees. Thus, a better way to protect the small claims process might be to **make clear that the respondent in a writ proceeding need not take any action unless the court issues an order to show cause.** That could be done by **revising proposed Sections 1068.5(d), 1085.3(d), and 1103.5(d) as follows:**

> (d) The Judicial Council shall promulgate procedural rules for a writ proceeding under subdivision (a). Under those rules, a response to the writ petition shall not be required or filed unless the court issues an order to show cause. The court shall not grant a writ without first issuing an order to show cause and providing an opportunity to respond to the petition.

We encourage input on the above ideas, and on other ways to ensure that small claims writ procedures are used appropriately.

Nature of Tribunal

Judge Gilliard also questions the Commission's proposed allocation of jurisdiction. In particular, she is concerned about the jurisdiction of a writ petition relating to an initial hearing in the small claims division.

The tentative recommendation would give jurisdiction of such a petition to a member of the appellate division who did not make any ruling that is challenged by the petition. See proposed Code Civ. Proc. §§ 1068.5(a), 1083.5(a), 1103.5(a). Judge Gilliard believes jurisdiction should instead be assigned to any superior court judge who did not make any ruling that is challenged by the petition. She explains:

> [T]o the extent that the proposed legislation is designed to provide guidance for writ review in the rare instances where petitioners properly seek extraordinary prejudgment relief, assigning jurisdiction to a single judge of the Appellate Division appears to create an unnecessary level of review that appears to be inconsistent with preexisting statutes and law.
>
> [A] defendant in a small claims case may appeal a small claims judgment and obtain a new trial before a different superior court judge. Therefore, the superior court is the appellate level for orders from the small claims division. If the legislature wants to specifically provide a superior court judge with statutory writ jurisdiction over prejudgment small claims cases, it seems arbitrary to divide the writ jurisdiction from the general appellate jurisdiction and to assign one to a superior court judge and the other to a superior court judge who is assigned to the Appellate Division. *If anything, writ jurisdiction for pre-judgment writs should*

> *follow the appellate jurisdiction, and should be assigned to any superior court judge who did not make the ruling.*

Exhibit p. 2 (emphasis added, citations omitted).

The Commission already tried the approach Judge Gilliard suggests. See Tentative Recommendation on *Statutes Made Obsolete by Trial Court Restructuring: Part 3,* pp. 9-13, 35-38 (Aug. 2006). It was unacceptable to the Civil and Small Claims Advisory Committee, which has repeatedly reiterated that position. See, e.g., Second Supplement to Memorandum 2009-34, p.3; Memorandum 2010-25, p. 1.

The concern is that "[j]udges of equal rank and dignity should not issue writs to each other because that may generate friction and impede court collegiality and functioning." See p. 10 of the tentative recommendation; see also Memorandum 2010-25, p. 39. In light of that concern, the Commission previously concluded that the approach was not worth considering further. Minutes (June 2010), p. 6.

The Commission should stick with that decision. It is consistent not only with the views of the Civil and Small Claims Advisory Committee, but also with the Commission's own policy assessment in connection with trial court unification. See *Trial Court Unification: Constitutional Revision (SCA 3)*, 24 Cal. L. Revision Comm'n Reports 1, 30 (1994).

INFORMAL INPUT OF THE CIVIL AND SMALL CLAIMS ADVISORY COMMITTEE

The Civil and Small Claims Advisory Committee "is very grateful for the extensive research and analysis that CLRC staff has performed regarding small claims writ jurisdiction and for the consideration that the Commission has given to the committee's views concerning this issue." Exhibit p. 4. The committee informally supports much of the current tentative recommendation. In particular, it supports the following aspects of the tentative recommendation:

1. A writ petition relating to an act of the small claims division, other than a postjudgment enforcement order, may be heard by a single judge of the superior court who is a member of the appellate division of the superior court, the appropriate court of appeal, or the Supreme Court;
2. A writ petition relating to a postjudgment enforcement order of the small claims division may be heard by the appellate division of the superior court, the appropriate court of appeal, or the Supreme Court;

3. A writ petition relating to an act of a superior court in a small claims appeal (trial de novo) may be heard by the appropriate court of appeal or the Supreme Court;
4. The court of appeal or the Supreme Court may deny a small claims writ petition on the basis that it was not first presented to a lower tribunal;
5. Where a small claims writ petition is granted by a single judge of the appellate division or by the appellate division, the small claims division is an inferior tribunal for purposes of the writ proceeding;
6. The fee for filing a small claims writ petition that is to be heard by a single judge who is a member of the appellate division is the same as the fee for filing a notice of appeal (i.e., request for a trial de novo) under section 116.760 of the Code of Civil Procedure; and
7. The Judicial Council shall promulgate procedural rules for a small claims writ proceeding that is to be heard by a single judge who is a member of the appellate division.

Exhibit pp. 4-5.

The committee makes two suggestions for modification of the Commission's proposal. Those points are discussed below.

Put the Jurisdictional Guidance in the Small Claims Act

The tentative recommendation proposes to clarify small claims writ jurisdiction by adding three new provisions to the title in the Code of Civil Procedure that relates to writs of review, mandate, and prohibition. One provision (proposed Code Civ. Proc. § 1068.5) would be in the chapter on writs of review, another provision (proposed Code Civ. Proc. § 1085.3) would be in the chapter on writs of mandate, and the third provision (proposed Code Civ. Proc. § 1103.5) would be in the chapter on writs of prohibition.

The Civil and Small Claims Advisory Committee recommends that the jurisdictional rules "be set forth in a single section of the Small Claims Act (Code Civ. Proc. § 116.110, et seq.), rather than in three separate sections in the title and chapters of the Code of Civil Procedure that govern writs of review, mandate, and prohibition in other types of actions." Exhibit p. 4. The committee believes this would "make these statutory provisions more accessible and understandable to small claims litigants …." *Id.*

In a phone conversation with Commission staff, Alan Wiener further explained that the committee reached this conclusion because (1) the Small Claims Act is where small claims litigants look for the law, (2) writ procedures are complicated and hard to understand, even for attorneys, and (3) it would

simplify matters to address all three types of writs in a single code section, and that would easier to do in the Small Claims Act than in the title on writs of review, mandate, and prohibition.

Those are all valid points, which the Commission should carefully consider. The countervailing concern is that putting the jurisdictional guidance in the Small Claims Act might draw undue attention to the provision, and thus might generate a flood of unmeritorious writ petitions. Means of alleviating that type of problem have already been discussed above. If the small claims writ provisions were instead placed in the title on writs of review, mandate, and prohibition, a litigant would have to do more research to find them. That might increase the likelihood that the provisions would only be invoked where writ relief is actually warranted.

The staff does not have strong feelings on whether it would be preferable to put the jurisdictional guidance in the Small Claims Act, or leave it with the writ statutes. The Commission should assess the competing considerations, and reach a conclusion on this point. If the Commission decides to relocate the jurisdictional guidance to the Small Claims Act, the staff will redraft the statutory language and present the new language to the Commission at a future meeting.

Disqualification Issue

The Civil and Small Claims Advisory Committee also suggests that proposed Code of Civil Procedure Sections 1068.5(a), 1083.5(a), and 1103.5(a) be redrafted. Proposed Section 1068.5(a) would provide:

> 1068.5 (a) A petition that seeks a writ of review relating to an act of the small claims division, other than a postjudgment enforcement order, may be heard by a judge of the superior court who satisfies both of the following requirements:
>
> (1) The judge is a member of the appellate division of the superior court.
>
> (2) *The judge did not make any ruling that is challenged by the writ petition.*

(Emphasis added.) Proposed Sections 1083.5(a) and 1103.5(a) are similar provisions for a writ of mandate and a writ of prohibition, respectively.

The Civil and Small Claims Advisory Committee "recommends that any statutory clarification of which tribunals have jurisdiction to issue extraordinary writs in small claims actions *not* address the disqualification of judges based on

their prior involvement in the case that is the subject of the writ petition." Exhibit p. 5 (emphasis in original). In making this suggestion,

> [t]he committee notes that Code of Civil Procedure sections 170.1 et seq. addresses the disqualification of judges, and opposes establishing a different standard for disqualification in the small claims writ proceedings. The committee is also concerned that a statutory provision specifically addressing disqualification in small claims writ proceedings might be construed as superseding the existing disqualification requirements in this context.

Id.

Based on a phone conversation with Alan Wiener, the staff understands that the committee's suggestion originated with debate over how to phrase proposed Sections 1068.5(a)(2), 1083.5(a)(2), and 1103.5(a)(2). Specifically, should the requirement be that "the judge did not make any ruling that is challenged by the writ petition," or should it be broader, such as "the judge did not make any ruling in the case in the small claims division"? The committee ultimately decided that it would be better to omit any requirement along these lines, and simply rely on the general provisions governing judicial disqualification.

The staff tends to agree with this suggestion. We do note, however, several countervailing points:

- Courts do not seem to have had any trouble applying Code of Civil Procedure Section 116.770(a), which says that a small claims appeal "shall consist of a new hearing before a judicial officer *other than the judicial officer who heard the action in the small claims division*." (Emphasis added.)
- The general provisions governing judicial disqualification might not address this situation as clearly as they should. See generally *Housing Authority of the County of Monterey v. Jones*, 130 Cal. App. 4th 1029, 1042, 30 Cal. Rptr. 3d 676 (2005), in which the court invited the Legislature to re-consider the disqualification statutes post-unification. That matter is on our trial court restructuring "to do" list.
- If jurisdiction were simply given to "a member of the appellate division," one could argue (1) that is tantamount to giving jurisdiction to the appellate division itself, and (2) the statute is therefore unconstitutional.

  The staff regards this as an uphill argument, on both points. The constitutional issue is murky and the outcome is difficult to predict. See pp. 7-8 of the tentative recommendation; see also Memorandum 2010-25. Further, the Legislature knows how to assign a matter to the appellate division to be heard by a panel of

> one. See Code Civ. Proc. § 77(h). Here, the proposed legislation would take a different approach, assigning the matter directly to a judge who is a member of the appellate division, to be heard in accordance with new rules to be developed by the Judicial Council. It seems likely that this distinction will be recognized and respected.

What is the Commission's view on this matter? If it agrees with the suggestion by the Civil and Small Claims Advisory Committee, the staff will redraft the proposed legislation accordingly, and present the new draft to the Commission at a future meeting.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

TO: California Law Revision Commission

FROM: Honorable Maryanne G. Gilliard
Presiding Judge of the Appellate Division
Superior Court of California, County of Sacramento

DATE: January 18, 2010

SUBJECT: Comments on Small Claims Writ Jurisdiction Proposed Legislation

This memorandum is in response to the California Law Revision Commission's request for public comment on proposed legislation addressing writ jurisdiction for small claims cases.

The proposed legislation appears to specify that a writ petition seeking review of an order from the small claims division, other than a post-judgment enforcement order, may be resolved by a single judge of the Appellate Division. The statute indicates that the Court of Appeal and Supreme Court could also resolve the petition, but that they could deny the petition if it is not first presented to "a judge of the superior court." The proposed legislation specifies that the superior court judge who must resolve the petition "is a member of the appellate division." The commission is proposing three separate and new statutes to be included in the part of the CCP addressing writs. The proposed statutes are " CCP §1068.5 (added) Writ of Review in Small Claims Case," "CCP §1085.3 (added) Writ of Mandate in Small Claims Case," and "CCP 1103.5(added) Writ of Prohibition in Small Claims Case." The proposed statutes indicate that the fee for filing one of these writ petitions "is the same as the fee for filing a notice of appeal."

Because all three proposed statutes present the same concerns, this memorandum addresses them together.

To begin with, it is unclear from the legislation if the intent is to create an additional layer of appellate review for small claims cases. In this court's experience, writ petitions in small claims cases are often disguised appeals. Ordinarily, the petitioner claims that the small claims court, or the superior court after trial de novo, acted without jurisdiction because the petitioner should have prevailed.

Currently, a defendant in a small claims case may appeal a small claims judgment and obtain a new trial before a superior court judge. (CCP Section 116.710; Cal. Rules of Court, Rule 8.952) A plaintiff who voluntarily elects the advantages of the small claims process has no right to appeal from

an adverse judgment. (CCP Section 116.710, subd. (a).) Moreover, he is not entitled to a disguised appeal in the form of a petition for writ of mandate. (*Yoakum* v. *Small Claims Court* (1975) 53 Cal.App.3d 398, 404.) The lack of the right to appeal cannot be relied upon to show lack of an adequate remedy at law so as to trigger writ review of issues that would be covered by an appeal. (*Parada v. Small Claims Court* (1977) 70 Cal.App.3d 766, 769.)

Nothing in the proposed legislation addresses the purposes for which a writ petition could be filed in small claims cases. The provision indicating that the fee for filing this type of writ petition "is the same as the fee for filing a notice of appeal" confuses the matter and seems to equate the a petition with an additional appeal.

However, the Small Claims Act exists to resolve minor civil disputes expeditiously, inexpensively and fairly. (CCP 116.120) If the proposed legislation authorizes writ review that is equivalent to an appeal, small claims cases would conceivably be entitled to even more levels of appeal than judgments in unlimited civil cases. Therefore, to the extent that the proposed legislation seeks to provide small claims litigants with an additional level of appeal for orders made by the small claims division or small claims judgments after trial de-novo in the superior court, the proposed legislation encourages costly, wasteful and prolonged litigation over very small matters.

Second, to the extent that the proposed legislation is designed to provide guidance for writ review in the rare instances where petitioners properly seek extraordinary prejudgment relief, assigning jurisdiction to a single judge of the Appellate Division appears to create an unnecessary level of review that appears to be inconsistent with preexisting statutes and law.

As mentioned above, a defendant in a small claims case may appeal a small claims judgment and obtain a new trial before a different superior court judge. (CCP Section 116.710; Cal. Rules of Court, Rule 8.952) Therefore, the superior court is the appellate level for orders from the small claims division. If the legislature wants to specifically provide a superior court judge with statutory writ jurisdiction over prejudgment small claims cases, it seems arbitrary to divide the writ jurisdiction from the general appellate jurisdiction and to assign one to a superior court judge, and the other to a superior court judge who is assigned to the Appellate Division. (See *GE Capital Auto Fin. Serv. v. Appellate Div.* (2001) 88 Cal.App.4th 136, 144 (explaining that appellate division has no appellate jurisdiction over appeal from small claims judgments.)) If anything, writ jurisdiction for pre-judgment writs should follow the appellate jurisdiction, and should be assigned to any superior court judge who did not make the ruling.

The proposed legislation also provides that the Appellate Division has jurisdiction over writ petitions seeking review of post-judgment enforcement orders.

A small claims case is a limited civil case, so, if no small claims statute or rules are applicable to the matter being appealed, the appellate division would have jurisdiction to review the matter. (*GE Capital Auto Fin. Serv. v. Appellate Div.* (2001) 88 Cal.App.4th 136, 144.) This portion of the proposed legislation appears to be consistent with the current law since no small claims statutes address appeals from post-judgment enforcement orders.

The tentative recommendation indicates that the proposed legislation is designed to clarify where a person should file a small claims writ petition and alleviate petitioners' frustrations. However, in this court's experience, small claims litigants are more likely frustrated because they believe that they

should be allowed to appeal until they prevail. Therefore, practically speaking, the proposed legislation may do little to alleviate actual petitioners' frustration.

EMAIL FROM ALAN WIENER ON BEHALF OF THE CIVIL AND SMALL CLAIMS ADVISORY COMMITTEE OF THE JUDICIAL COUNCIL (NOV. 30, 2010)

Re: ***Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case***

Dear Commissioners and Staff:

The Civil and Small Claims Advisory Committee of the Judicial Council (the committee) considered California Law Revision Commission (CLRC) Tentative Recommendation J-142, *Trial Court Restructuring: Writ Jurisdiction in a Small Claims Case* (TR J-1452) on November 17, 2010. The committee's informal input regarding this tentative recommendation, which does not constitute a position of the Judicial Council, follows.

The committee is very grateful for the extensive research and analysis that CLRC staff has performed regarding small claims writ jurisdiction and for the consideration that the Commission has given to the committee's views concerning this issue. The committee hopes to continue collaborating with the CLRC to ensure that any legislative reform in this area addresses the interests of all concerned.

The committee remains of the view that it is important to clarify which tribunals have jurisdiction to issue extraordinary writs related small claims actions and supports most of the substantive provisions of TR J-1452. However, to make these statutory provisions more accessible and understandable to small claims litigants, the committee recommends that they be set forth in a single section of the Small Claims Act (Code Civ. Proc. § 116.110, et seq.), rather than in three separate sections in the title and chapters of the Code of Civil Procedure that govern writs of review, mandate, and prohibition in other types of actions.

More specifically, the committee supports the substantive provisions of TR J-1452 that:

1. A writ petition relating to an act of the small claims division, other than a postjudgment enforcement order, may be heard by a single judge of the superior court who is a member of the appellate division of the superior court, the appropriate court of appeal, or the Supreme Court;
2. A writ petition relating to a postjudgment enforcement order of the small claims division may be heard by the appellate division of the superior court, the appropriate court of appeal, or the Supreme Court;
3. A writ petition relating to an act of a superior court in a small claims appeal (trial de novo) may be heard by the appropriate court of appeal or the Supreme Court;
4. The court of appeal or the Supreme Court may deny a small claims writ petition on the basis that it was not first presented to a lower tribunal;

5. Where a small claims writ petition is granted by a single judge of the appellate division or by the appellate division, the small claims division is an inferior tribunal for purposes of the writ proceeding;
6. The fee for filing a small claims writ petition that is to be heard by a single judge who is a member of the appellate division is the same as the fee for filing a notice of appeal (i.e. request for a trial de novo) under section 116.760 of the Code of Civil Procedure; and
7. The Judicial Council shall promulgate procedural rules for a small claims writ proceeding that is to be heard by a single judge who is a member of the appellate division.

The committee recommends that any statutory clarification of which tribunals have jurisdiction to issue extraordinary writs in small claims actions *not* address the disqualification of judges based on their prior involvement in the case that is the subject of the writ petition. The committee notes that Code of Civil Procedure sections 170.1 et seq. addresses the disqualification of judges, and opposes establishing a different standard for disqualification in the small claims writ proceedings. The committee is also concerned that a statutory provision specifically addressing disqualification in small claims writ proceedings might be construed as superseding the existing disqualification requirements in this context.

As indicated above, the foregoing is informal input from the Civil and Small Claims Advisory Committee, and is not a position of the Judicial Council of California.

Thank you again for your collaboration with the Civil and Small Claims Advisory Committee and consideration of its views regarding small claims writs jurisdiction. And, please do not hesitate to contact me if you have any questions about the committee's views or comment concerning this tentative recommendation.

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EMAIL FROM DOUG WONG (10/25/10)

Re: Writ Jurisdiction in a Small Claims Case

Dear Ms. Gaal,

Thank you for the information. I'll study it.

Interestingly, after talking to multiple attorneys, no one has even heard of trying to go further on a small claims case after the appeal. Everyone has said that if you lost the appeal, that is it. In fact, most have said that it is not worth the cost — the retainer is typically over $2000, so unless the case is worth more, then paying a judgment, even if unfair, is often the cheaper alternative. Now, if the maximum damage award allowed in small claims cases starts creeping up above $7500, then I think you will see a lot more cases where people want another chance to have a small claims judgment reviewed.

Sincerely,

Doug