

1 John A. Furlong, Bar No. 018356  
2 General Counsel  
3 State Bar of Arizona  
4 4201 N. 24th Street, Suite 100  
5 Phoenix, AZ 85016-6288  
6 (602) 340-7236  
7 [John.Furlong@staff.azbar.org](mailto:John.Furlong@staff.azbar.org)

8 **IN THE SUPREME COURT**  
9 **STATE OF ARIZONA**

10 In the Matter of:

11 **PETITION TO AMEND RULE 10,**  
12 **ARIZONA RULES OF CIVIL**  
13 **PROCEDURE; RULE 110,**  
14 **JUSTICE COURT RULES OF**  
15 **CIVIL PROCEDURE**

16 Supreme Court No. R-16-0019

17 **COMMENT OF**  
18 **THE STATE BAR OF ARIZONA**

19 The State Bar of Arizona opposes Petition R-16-0019. Allowing parties to be  
20 named as judgment debtors after entry of judgment would deprive them of due  
21 process. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000) (reversing  
22 amendment of a judgment to add an additional defendant because “due process does  
23 not countenance such swift passage from pleading to judgment in the pleader’s  
24 favor”).  
25

1           The current rules of procedure<sup>1</sup> provide sufficient procedures to identify  
2 unknown parties that, unlike the Petitioner’s proposal, protect the due process rights  
3 of those parties.  
4

5 **I. The Proposal Would Apply Far More Broadly than the Narrow**  
6 **Circumstances Identified by the Petitioner.**

7           The Petition proposes changes to Rule 10, *Arizona Rules of Civil Procedure*  
8 and Rule 110(b)(1), *Justice Rules of Civil Procedure*, to address a very specific  
9 situation: a default judgment entered against spouses, where one of the spouses is  
10 identified fictitiously. Petition at 1–2 (discussing need to name both spouses);  
11 Petition at 7 (cases where liability is contested “would rarely fall into the scope of  
12 the proposed Amendment”). But the proposed rule changes would apply in any  
13 action where a party is named fictitiously and that party arguably has been served  
14 and has or “should have” notice of the action. Petition, Exhibit A (proposing: “If  
15 the defendant’s true name is not discovered before judgment, the court may enter  
16 judgment against the fictitiously named defendant if [listing conditions].”)  
17

18           Whether applicable narrowly or broadly, the proposed amendments violate  
19 the fictitiously-named party’s due process rights because that party would be  
20 denied the ability to challenge its post-judgment inclusion in the action.  
21  
22

---

23 <sup>1</sup> The Petition seeks to amend both Rule 10(f) of the Arizona Rules of Civil  
24 Procedure and Rule 110(b)(1) of the Justice Court Rules of Civil Procedure. For  
25 convenience, given the similarities of the rules sought to be amended, this Comment  
only discusses the changes sought to Rule 10(f).

1 **II. Adding Parties to a Judgment Violates Due Process.**

2 Due process prohibits post-judgment amendments to impose liability on a  
3 newly-named party. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000). In  
4 *Nelson*, Ohio Cellular Products Corporation (“OCP”) sued Adams USA, but the  
5 district court ultimately dismissed OCP’s claims, and awarded Adams its costs and  
6 attorneys’ fees against OCP. *Id.* at 462.

7  
8 Adams moved to amend the pleadings to add OCP’s sole owner, Nelson, as  
9 a defendant and moved to amend the judgment to add him as a judgment debtor.  
10 The district court granted both motions, simultaneously making Nelson a party and  
11 subjecting him to the judgment against OCP. *Id.* at 463.

12  
13 The Court of Appeals affirmed, but the Supreme Court reversed. “Due  
14 process, as reflected in Rule 15 as well as Rule 12, required that Nelson be given  
15 an opportunity to respond and contest his personal liability for the award after he  
16 was made a party and before the entry of judgment against him.” *Id.*

17  
18 When an amendment is granted, Rule 15 gives the party ten days to respond  
19 to the amended pleading. *Id.* at 466. “This opportunity to respond, fundamental to  
20 due process, is the echo of the opportunity to respond to original pleadings secured  
21 by Rule 12. Thus, Rule 15 assumes an amended pleading will be filed and  
22 anticipates service of that pleading on the adverse party.” *Id.* Because no amended  
23 pleading was served on Nelson, and because he was not allowed to state his  
24  
25

1 defenses before judgment was entered against him, his due process rights were  
2 violated, requiring reversal of the judgment against him. *Id.*  
3

4 A fictitiously-named party's awareness of a lawsuit and its potential liability  
5 does not substitute for identification of the party *before* judgment is entered, so  
6 that the party can understand and defend the claims against it:  
7

8 Where suit is brought against a fictitious defendant, it  
9 must be made known to the defendant when he is served  
10 with process that he is a defendant and is being served as  
11 a fictitious defendant. That was done here. The alias  
summons clearly gave Elco notice that it was being served  
as a defendant who had been *previously* designated by a  
fictitious name.

12 *Lane v. Elco Indus., Inc.*, 134 Ariz. 361, 364 (App. 1982) (citation omitted;  
13 emphasis added). A fictitiously-named party must be served with a complaint *and*  
14 a summons containing the party's true name:  
15

16 In summary, we hold that where rule 10(f) is properly  
17 used to allege a claim against a fictitious defendant, it is  
18 not necessary for a plaintiff to comply with rule 15(c).  
19 Where so named in a complaint filed within the statute of  
20 limitations, such a defendant may be served within one  
year of the filing of the complaint by the use of an alias  
summons in which the true name is set forth.

21 *Id.* at 367. Stating a party's true name in a summons allows a party to determine  
22 which allegations in the Complaint are directed against it and respond thereto.

23 Even under Petitioner's example (Linda sues Dave and Dave's fictitiously-  
24 named spouse for negligence), the proposed rule change could deprive a party of  
25

1 its rights. In this example, Linda obtains a default judgment against Dave when he  
2 does not respond to the lawsuit, but because Linda had no information about  
3 Dave's spouse when the complaint was drafted, judgment is entered only against  
4 Dave. Only later does Linda learn the true name of Dave's spouse.  
5

6 The Petitioner asks that Rule 10(f) be rewritten to allow the judgment against  
7 Dave to be amended to add the name of Dave's spouse. But the proposal does not  
8 require that Linda serve Dave's spouse with this motion, or require proof that  
9 Dave's spouse knew that she was the person named fictitiously. Linda only need  
10 prove that the spouse "knew or should have known" of the lawsuit generally. Under  
11 *Lane*, Linda must prove that Dave's spouse was actually served and that she was  
12 specifically informed that she was the person identified fictitiously.  
13

14 If Linda identifies the wrong person as Dave's fictitiously-named spouse,  
15 the misnamed individual would be immediately subject to a judgment without ever  
16 having been served with the action.  
17

18 Even if Linda correctly identifies Dave's current spouse after entry of  
19 judgment, the spouse may still not be properly subject to judgment. She could have  
20 her own defenses to community liability, e.g., if she were not married to Dave at  
21 the time of the alleged negligent actions. In that event, a complaint alleging that  
22 Dave *may* have been married and, if so, his marital community is liable would not  
23 state a claim against Dave's current spouse. But the proposal would nonetheless  
24 allow Linda to have judgment entered against the current spouse based on Dave's  
25

1 default alone because of Linda's unchecked ability to add alleged spouse's names  
2 to existing judgments.  
3

4 Under Arizona and federal law, due process requires that a party be correctly  
5 named, either in the complaint or in a summons, prior to entry of judgment against  
6 that party. Because the proposal allows entry of judgment against a party without  
7 providing the opportunity to respond to the allegations against it, the proposal  
8 should be rejected.  
9

10 **III. Rule 15 Is Widely Recognized as the Proper Vehicle for Amending a**  
11 **Pleading to Identify a Fictitiously-Named Party.**

12 The Petition dismisses the utility of Rule 15, asserting that "Rule 15(c) is  
13 aimed at a different, though related, problem: naming the wrong party." Petition at  
14 8 (footnote omitted). But Rule 15 – not just Rule 15(c) – does apply, and is used  
15 in Arizona courts and elsewhere to allege the true name of a fictitiously-named  
16 party. *E.g., Cook v. Superior Court*, 135 Ariz. 1, 1–2 (1983) (referencing  
17 amendment to add true names of fictitiously-named parties); *Gittner-Louviere*  
18 *Engineering v. Superior Court*, 115 Ariz. 409, 411 (App. 1977) (same).

19 Amendment of pleadings before judgment ensures that fictitiously-named  
20 parties are given sufficient opportunity to contest the allegations against them.  
21 Waiting until after judgment is entered may be more expedient for plaintiffs, but  
22 expediency is not a substitute for due process.  
23  
24  
25

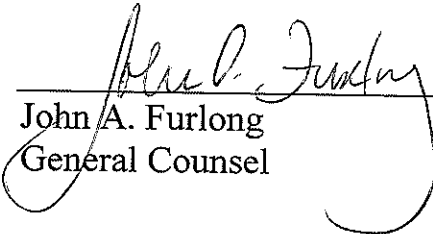
1 **IV. Perceived Difficulties in Obtaining Spouse Information Cannot Justify**  
2 **Depriving Fictitiously Named Parties of Their Due Process Rights.**

3 The Petitioner suggests that when a defendant defaults, it may be more  
4 difficult to obtain information concerning the defendant's potential spouse. This  
5 may be true, but it cannot justify the relief sought, namely granting plaintiffs the  
6 ability to decide unilaterally whether the defaulting defendant is married and if so,  
7 to add the name of the suspected spouse to an existing judgment.

8 **CONCLUSION**

9  
10 Allowing individuals to be named for the first time in a judgment violates  
11 due process. The existing Arizona Rules of Civil Procedure (and the Justice Court  
12 Rules of Civil Procedure) provide the means to discover the true names of  
13 fictitiously-named parties, and to add those names by amendment to existing  
14 pleadings. Shortcutting these established procedures may be more convenient, but  
15 a desire for convenience cannot displace the requirements of due process. Petition  
16 R-16-0019 should be denied.

17  
18 RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2016.

19  
20   
21 \_\_\_\_\_  
22 John A. Furlong  
23 General Counsel

22 Electronic copy filed with the  
23 Clerk of the Arizona Supreme Court  
24 this 12<sup>th</sup> day of May, 2016.

25 by: P. Segre