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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	No. **R-16-0040**
PETITION TO AMEND RULES 5(a), 5(b)(6), 5(b)(7) and ADD RULES 13(h) and 20 of the Rules of Procedure for Eviction Actions	**Comment upon and Objection to Proposed Rule Amendments**

Pursuant to Rule 28(D), Rules of the Supreme Court, Paul A. Henderson and Denise M. Holliday respectfully submit this Comment for the Court's consideration. For the reasons set forth below, the proposed amendments to the Rules of Procedure for Eviction Actions should not be adopted and this petition should be denied.

I. BACKGROUND.

Paul A. Henderson and Denise M. Holliday, the authors of this comment, are attorneys who regularly represent landlords and property owners in residential eviction proceedings before the Justice Courts and Superior Courts in the State of Arizona. They participated in the working group organized by Maricopa County Justice Courts Administration and chaired by West McDowell Justice Court Justice of the Peace Rachel Torres Carrillo. Of the approximately twenty participants in the working group, they were the sole individuals who represented the interests of landlords and property owners.

II. EXPLICIT PROMISES WERE MADE THAT THE FORMS WOULD NEVER BECOME MANDATORY FOR REPRESENTED PARTIES.

The working group was convened with the stated intention to revise pleadings made available to the general public and create sample notices for general availability. It was expressly declared to the working group and agreed by all participants – judicial officers and court employees, attorneys aligned with the tenant's perspective, and those attorneys who represent landlords – that the purpose of the working group's efforts would be to generate and prepare documents that were to be used solely on a voluntary basis. It was further agreed that the documents were never to become mandatory for use by any litigant, especially those who were represented by counsel or who were sufficiently sophisticated to prepare their own notices and pleadings.

It is important to reiterate that from the very beginning of the working group, all factions agreed that the forms produced would never be made mandatory-use items. The two attorneys who represented landlords were assured by the three attorneys who represented tenants that the forms were being made available for *pro se* parties' voluntary use. Further declarations were made that the forms would never be needed for landlords who used the services of attorneys, due to those landlords having legal counsel to aid and assist in preparing their own notices. Discussions on forms design were predicated upon those promises. Had these reassurances not been made, the inequitable representation of parties in the working group would have led to a decision of landlords' counsel to withdraw or to insist upon equitable representation for all stakeholders, including the judicial officers who will hear the eviction actions. It is further important to note that adoption of the forms broke down on strict factional lines, with the lesser-represented side (landlords) outnumbered by the greater-represented side (tenants).

The petitioner admits that the stated purpose of the working group, to produce conceptual forms and information that are "easily understandable," was changed between the Commission's March 2015 meeting and the May 18, 2016 meeting. Petition, p. 3. This changed purpose was not a spur-of-the-moment decision; the Commission's agenda for the May 18, 2016 meeting of the Commission contained a "Formal Action/Request" line item under the Limited Jurisdiction Courts Workgroup section. The agenda made it clear that at least one Commission member intended for this change to occur. Moreover, at least two Commission members were participants in the working group, yet there is no indication within that meeting's minutes that express guaranties were given to the participants of the working group that the forms would never be considered for mandatory use. *See* Minutes of May 18, 2016 Meeting.

There is also the petitioner's comment declaring that the Arizona Judicial Council "approved in concept an ACAJ revision to eviction action forms to make them easier to read and understand." Petition, pp. 2-3. If it is true that the working group was convened with the intention of the Commission to create mandatory forms, then the participants were not simply laboring under false pretenses, they were the victims of intentional acts.

As such, the veneer of "full participation" by all parties was built upon a falsehood.

III. THE PETITION IGNORES DIFFERENCES BETWEEN TYPES OF EVICTIONS.

It was well-settled, even before the adoption of the Rules of Procedure for Eviction Actions ("RPEA"), that forcible and special detainer lawsuits were different from "normal" civil litigation. The "forcible detainer was created by our legislature to provide 'a summary, speedy and adequate remedy for obtaining possession of the premises.'" Mason v. Cansino, 195 Ariz. 465, 466, 990 P.2d 666, 667 (Ct.App. 1999), citing Olds Bros. Lumber

Co. v. Rushing, 64 Ariz. 199, 204, 167 P.2d 394, 397 (1946). In addition to these specific statutes that authorize, describe, and constrain these actions, the RPEA set forth rules that "shall govern the procedure in the superior courts and justice courts involving forcible and special detainer actions." Rule 1, RPEA.

Eviction actions include residential (*see* A.R.S. §§ 33-1304 and 1308), mobile home park (A.R.S. §§ 33-1402 and 33-1406), recreational vehicle long-term storage (A.R.S. § 33-2101), innkeeper and other forms of commercial tenancy (A.R.S. § 33-381), and forcible entry and detainer proceedings (A.R.S. §§ 12-1172 through 1173.01). They also include actions with different rules for service (*see* A.R.S. § 33-1377) and timeframes for the execution of the writ of restitution (*cf.* A.R.S. § 12-1178 and A.R.S. § 33-1377(E)).

The petitioner requests that the Supreme Court compel all persons with the right to control private property (both landlords and victims of forcible entry or detainer) to use notice forms that only cursorily align with the residential statutes and which fail to satisfy the requirements of Title 33, Chapters 3, 11, and 19, and Title 12, Chapter 8, Article 4, Arizona Revised Statutes. Moreover, the petitioner requests compulsion of landlords to use only forms created by the Administrative Office of the Courts, when the petition's five forms fail to account for a myriad of required notices and specialized versions of those notices necessary for appropriate practice in landlord-tenant actions. These forms do not account, for example, for non-payment of rent caused by non-sufficient funds tender of rent (including inclusion of relevant language from A.R.S. § 12-671) or partial payment rejection (which the landlord is not required to accept; *see* A.R.S. § 33-1371); repeated material breach or repeated health-and-safety breach (A.R.S. § 33-1368(A)); material falsification (*Ibid*.); or non-renewal of month-to-month tenancies (A.R.S. § 33-1375), an action different from non-renewal of a term lease (which is contractual in duration).

The examples above address only a few of these issues in residential cases. Other types of cases and their relevant statutes have been wholly ignored by the petition.

IV. THE PROPOSED NOTICES ARE DEFECTIVE.

A. The actual legal requirements of notice are set forth by statute.

In residential eviction actions, "[a] person 'notifies' or 'gives' a notice or notification to another by taking steps reasonably calculated to inform the other in ordinary course whether or not the other actually comes to know of it." A.R.S. § 33-1313(A). The nature of mobile home park notices is not materially different (*see* A.R.S. § 33-1412(B)), even if the notices themselves are (*cf.* A.R.S. §§ 33-1368(B) and 33-1476). In an eviction action, the landlord must allege proper statutory grounds for proceeding. Prior to commencing that action, the landlord usually must inform the resident of the nature of the breach of the lease. For a non-payment of rent action in a residential setting, for example, the landlord's written notice must include declaration that "rent is unpaid when due" and demands that the resident "pay rent within five days after written notice by the landlord of nonpayment" while making clear the landlord's "intention to terminate the rental agreement if the rent is not paid within that period of time." A.R.S. § 33-1368(B).

Notices must reflect the requirements of these relevant statutes.

B. The notice forms, as a whole, are misleading.

The notice forms that petitioner desires to be made mandatory-use documents are replete with language issues that mislead the reader. The errors are as simple as the naming of the document: a "Notice for Failure to Pay Rent [¶] 5 Day Notice to Move," for example, implies the landlord-plaintiff simply desires the resident to vacate the dwelling. Aside from being a gross oversimplification of the end-result of an uncured notice, it

actually suggests a goal that is simply not true. The purpose of a notice of non-payment of rent, which is a material breach of the lease agreement, is to enforce the obligation to pay the rent. If the resident pays the past-due rent and appropriate late fees in full within the cure period, the leasehold will not terminate and the landlord has been satisfied. The notice is a notice of intention to terminate the lease, not a "notice to move." There is a distinct difference in the language, and technical language is not fungible. Similar words do not provide the same meaning, and a "notice to move" is not the same thing as a "notice of intention to terminate." Moreover, speaking (or writing, as it were) down to the reader is worse than writing in an overly complicated manner; it treats the reader as incapable of comprehending the notice, which is a grave injustice to the reader.

C. The proposed mandatory forms are factually and legally defective for actions not brought pursuant to Chapter 10 of Title 33, Ariz.Rev.Stat.

The petition blithely claims that "the forms should be mandated […] to promote improved readability of and consistency in forms." Petition, p. 3. Most of these forms are five-day and ten-day notices. Petition, Appendix A, p. 2 (Rule 20(b)). In no location in the petition is there acknowledgment that the notice requirements of the Arizona Mobile Home Parks Residential Landlord and Tenant Act (A.R.S. §§ 33-1401 *et seq*.) and the Recreational Vehicle Long Term Rental Space Act (A.R.S. §§ 33-2101 *et seq*.) are not identical to those in the Arizona Residential Landlord and Tenant Act (A.R.S. §§ 33-1301 *et seq*.). The timeframes for mobile home park rent (seven days versus five; A.R.S. § 33-1476(E)), material breach (fourteen to cure or thirty to surrender possession versus ten to cure or quit; A.R.S. § 33-1476(D)(1)), and health-and-safety material breach (ten to cure or twenty to quit versus five to cure or quit; A.R.S. § 33-1476(D)(2)) differ from the residential matters. A notice that provides the shorter residential timeframe is invalid in

mobile home park matters, and should the landlord edit the notice to comply with the statutory requirements, the landlord will have a void notice under the petition's proposed rules change. Timeframes under the recreational vehicle act are similarly different.

Commercial (or innkeeper) evictions also do not correlate with these residential-based notices. Non-payment notices are required only if the contract so demands them, and the contract can insist upon longer timeframes than five days. If the contract is silent, then the statute places no requirement upon the landlord for written notice:

> When a tenant neglects or refuses to pay rent when due and in arrears for five days, or when a tenant violates any provision of the lease, the landlord or person to whom the rent is due, or the agent of the landlord or person to whom the rent is due, may renter and take possession or, without formal demand or recently, commence an action for recovery of possession of the premises.

A.R.S. § 33-361(A). If the form non-payment of rent notice (or any notice) must be used in order to perfect an eviction action under the RPEA, landlords who exercise their rights under statute will find their commercial eviction filings deemed defective. Additionally, there is no right to immediate termination of the lease in a commercial action; immediate termination is a creation of statute (*see* A.R.S. §§ 33-1368(A) and 33-1476(D)(3)).

The petition draws no distinction between these blatant legal differences.

D. The proposed non-payment of rent notice is both deficient in its compliance with statutory requirements and replete with extraneous and erroneous information.

1. <u>The theory advanced in the notice concerning "rent" is wrong.</u>

The form notice of non-payment of rent advances a theory of the law that the landlord is entitled only to the monthly rent and late fees. Section "A" of this form allows the landlord to claim "current month/week $," "prior month $," and "other $" – but only

where it is "listed in rental agreement."

The form fails to account for lawful claims that do not fall under these limited interpretations. In non-payment notices, landlords may make claims against residents of "an itemized bill for the actual and reasonable cost or the fair and reasonable value" of the "repair, replacement of a damaged item or cleaning" within the residence (A.R.S. § 33-1369); for utilities, "charges imposed on the landlord by the utility provider plus an administrative fee for the landlord for actual administrative costs" (A.R.S. § 33-1314.01(B)); and "a service fee of not more than twenty-five dollars plus any actual charges assessed by the financial institution" charged to the landlord "as a result of the dishonored instrument" (A.R.S. § 44-6852). None of these items require the rental agreement to authorize their specific monetary amounts.

These charges may be due and payable as additional rent, but the intention of the RPEA at the time of its drafting was to put more information into the hands of the tenant-defendant. By handcuffing the landlords in presenting the balances that are due, the form hinders the open exchange of information between the parties – or operates to prevent the landlord from making lawful claims against their lease-breaching tenants.

Moreover, there is a consequence to their omission if they are not pled: claims that are omitted and which properly should have been included in the lawsuit (and which the statutes decree are items a landlord-plaintiff may claim) may be barred from recovery in a later action under the principle of claim preclusion (*res judicata*).

2. <u>The landlord is discouraged from making claim to all late fees.</u>

Landlords may seek late fees that comply with the lease contract, and most contracts contain a provision that the late fees accrue until all sums – including the late fees – are paid in full. Section "B" does not allow the landlord to claim late fees beyond

the date of the notice. Instead, the continuing process is referenced above Section "A," which is an illogical placement for this term.

Section "B" also sets forth only a single mechanism for charging late fees. Late fees in common usage in Arizona include daily charges, one-time "flat" fees, percentage late fees, and a mixture thereof. According to the inalterable notice, landlords may charge only for daily late fees, even if the lease contract does not support such a charge.

3. The "conversation" presented to the notice's reader is misleading.

The law requires, in most cases, that the landlord present a demand for cure to the tenant. The notice operates as that demand, and any language that discourages the reader from considering the notice as a serious instrument is a disservice. The landlord will not "file an eviction action asking the judge to order you to move;" the landlord will file an eviction action to recover possession of the leased premises. The payment of rent is not conditional upon surrendering possession prior to the expiration of the cure period of the notice ("You may still be responsible for the total owed"); instead,

> Rent shall be payable without demand or notice at the time and place agreed upon by the parties. Unless otherwise agreed, rent is payable at the dwelling unit and periodic rent is payable at the beginning of any term of one month or less and otherwise in equal monthly installments at the beginning of each month.

A.R.S. § 33-1314(C). The judicial officer will also not "decide if you have to move or can remain in the rental;" the judge, commissioner, or justice of the peace will decide if the tenant-defendant is detaining the premises and whether legal right of possession will be granted to the landlord-plaintiff. Additionally, it is not within judicial authority to determine "if [the tenant-defendant has] to move or can remain," as "any reinstatement of the rental agreement is solely in the discretion of the landlord." A.R.S. § 33-1368(B).

The conversation misleads the reader of any notice, whether it appears within the

rent notice or a material breach notice. It allows the reader to conclude, erroneously, that this is not a serious process, or that the problem may be fixed simply by moving out of the dwelling unit. Any notice of intent to terminate the lease should not be viewed as a desultory effort by the landlord. Paradoxically, those affiliated with the tenant argued that current notices encouraged the resident to vacate without fighting the case, yet these notices, with their "notice to move" language and the comment that the resident may cure the breach by "mov[ing] out of the rental and return[ing] the keys to the landlord," actually encourage the resident to give up and move out, perhaps to the residents' detriment.

The conversation further misleads the reader as to the power of the courts. The language used creates a false impression that the judicial officer has the discretion to ignore the law and enter an order permitting the tenant-defendant to remain regardless of the facts. On a daily basis our courts engage with a public that does not understand the role of the judicial branch. Just as crime procedurals have corrupted the public's understanding of police investigations, legal dramas have influenced the opinion of their viewers as to how the courts operate. The conversation implies that the judicial officer will be able to act like a television judge, and a tenant-defendant may feel slighted or deprived of "rights" when informed that the judicial officer's options are not so extensive.

V. THE PROPOSED COMPLAINT IS FATALLY DEFECTIVE.

A. The one-size-fits-all approach to litigation pleadings produces a product that fails to satisfy the requirements of statute or the RPEA.

The RPEA in its current form sets forth goals in broad brush strokes, setting certain elements that the landlord-plaintiff must satisfy to proceed forward in an eviction action. These goals ostensibly require the parties to provide sufficient notice to the opposing

tenant-defendant so that the tenant-defendant has ample knowledge concerning the allegations raised by the landlord-plaintiff. The proposed, mandatory-use complaint form cannot satisfy these goals, and to change the RPEA to require its use eviscerates the very intent of the RPEA. The proposed complaint lacks both adaptability and specificity, rendering it incapable of properly advancing legal averments. The flaws are numerous:

1. The form presents a large quantity of extraneous allegations. Most eviction actions are single-breach cases; i.e., the average case solely concerns only one claim, whether non-payment of rent or a material term of the lease. The form presents every single available option for bringing an eviction (at least in the drafters' eyes, but not necessarily those that the legislature contemplated). The unsophisticated end-user of the form may very well be encouraged to fill in every possible space, even where inapplicable. Landlords are already compelled to eradicate blanks within a lease (A.R.S. § 33-1322(E): "A written rental agreement shall have all blank spaces completed.") and therefore are averse to leaving areas incomplete. The Maricopa County Justice Courts, where a form of complaint is currently available to *pro se* litigants, are familiar with *pro se* litigants who complete all these "select-an-allegation" fields even when not applicable to their cases.

2. The form permits only one cause of action to be pled. While there are multiple check-boxes for alleging various breaches, the form itself does not permit a multiple-allegation action to be pled properly. Section 3, which discusses the issuance of notice, allows the description of a single notice and the choices for describing the notice's delivery method do not permit the landlord to indicate two separate delivery methods (or even two separate dates). Under Arizona law, there are four timeframes for notices (one day for immediate termination, five days for rent and health-and-safety breaches, ten days for other material breaches, and thirty days for discontinuation of month-to-month

tenancies) and two mechanisms for their delivery (hand-delivery, where the "clock" starts running upon delivery, and certified mail, where the "clock" doesn't start ticking until five days after mailing). A two-element eviction action, of rent (five days to cure or quit) and a material breach (ten days), may see a wild variance between the delivery dates and the effective dates of those notices. The form, however, fails to take this into account.

3. The rent for the leased premises, a material issue in nearly every action, cannot be properly pled in actions where the non-payment of rent was not the triggering issue. The opportunity to plead the material elements of the rent obligation occurs only within "Subsidized Housing" and "Rent Owed" allegations. If the eviction is not based upon the issuance of a notice of non-payment of rent, the landlord is effectively precluded from the opportunity to plead the specifics of rent. Section 6 of the form may be completed without the specific information available in Section 5's "Rent Owed" allegation, but such a claim will be unsubstantiated without the previous section's information, and thus the complaint will be vulnerable to attack on technical grounds. For a pleading that clearly values form over function, this flaw in its structure gives rise to many opportunities for failure – thereby imposing a significant barrier to justice upon the landlord-plaintiff.

4. The non-payment of rent allegation in the form is flawed. Rule 5(c), RPEA allows the landlord to plead for "the total amount of rents, late fees, and other fees, charges or damages permitted by law that are due on the date of filing." The form, however, allows the landlord-plaintiff to pray for "unpaid balance," "rent," and "late fees." Permissible "other fees" have been excluded without any rational basis.

While not explicitly stated in the RPEA, notice and complaint specificity is the goal of the Rules. The form discourages, if not outright prohibits, the landlord-plaintiff from explaining how the monetary damages are calculated. Utilities, month-to-month

premiums, and charges permissibly assessed and aggregated into rent through A.R.S. § 33-1369 cannot be described in this form, leaving the tenant-defendant at a distinct disadvantage in determining the nature and composition of the landlord-plaintiff's monetary damages claim. A line in this section stating "Other (as authorized by law)" does not satisfy Rule 5(b)(7)'s requirement to "state the specific reason for the eviction."

The most egregious omission is the ability to plead utilities charges separately from the rent. While utilities charges are generally due and payable as additional rent where the contract permits such charges, fluctuating utilities charges (either actual usage billing or ratio utility billing under A.R.S. § 33-1314.01) will cause the "rent" allegation to change monthly. Only those contracts where the price of the utilities is fixed to a specific amount will the rent stay the same each month. Variances in consumption for ratio or actual billing denies the tenant-defendant the ability to know, with certainty, what the landlord-plaintiff is seeking in the complaint.

Such lack of specificity will cause more disputes, leading to delays in eviction proceedings which the delivery of additional information could avoid.

5. The language of the "Non-Compliance" cause of action fails to properly permit allegations that arise under A.R.S. § 33-1368(A). Aside from the material-and-irreparable breach allegation, which is segregated into its own cause of action in the form, claims may be brought under this statute for violations relating to material falsification (of which there are two separate varieties of breach, curable and non-curable), health-and-safety material breach (which has a cure period of five days, half that of any other curable material breach notice), material breach (which is curable), and repeated material breach (of either a health-and-safety or "regular" variety, neither of which are curable).

The form's allegation further requires the landlord-plaintiff to perform mental

gymnastics when completing the allegation paragraph. The form-required language states that the tenant-defendant "failed to do the following." To make the facts fit the allegation, the landlord may have to torture the language used in the notice in order to satisfy the lack-of-performance allegation (especially for material falsification claims, unless the landlord simply states the insulting "failed to do the following: tell the truth").

6. The form bars the landlord-plaintiff from seeking all its damages. Rule 13(c)(2)(A) allows the award of "any additional rent that has accrued since the complaint was filed." Rule 13(c)(2), however, decrees that "[t]he court shall not award any amount for damages or categories of relief not specifically stated in the complaint or counterclaim." If this form is adopted, the landlord-plaintiff may not seek the new month's rent in the all-too-common event when the action is filed in one month but the date upon which the action is called (or when the trial occurs) is in the following month. The form, therefore, constitutes a judicial taking from the landlord-plaintiff.

B. Technical pleading has long been abolished in Arizona, yet the proposed form of complaint seeks to revive "style over substance."

Rule 8(e)(1), Ariz.R.Civ.P. mandates that "[e]ach averment of a pleading shall be simple, concise, and direct" and that "[n]o technical forms of pleading or motions are required." While most of the Rules of Civil Procedure were declared inapplicable in eviction actions (*see* Rule 1, RPEA), this guiding spirit of legal practice is uniform throughout Arizona – unless the petitioner's petition succeeds. The end-result of the petition would contravene the very goal of the Commission – to improve access to justice.

A mandatory form of complaint does not permit the filing party to adjust the language when needed to satisfy the elements of and the facts alleged therein. With the exception of protective orders proceedings, Arizona legal practice does not require the

use of court-mandated complaints. Protective orders in the Maricopa County Justice Courts (injunctions against harassment and orders of protection) utilize a single form of pleading as there is a logical need for obtaining information in an unchanging format. Eviction actions are not analogous; the facts and legal issues vary between actions. The form cannot accommodate all scenarios presentable, and presented, in eviction actions.

Moreover, this form defeats the ability of landowners from bringing effective forcible detainer actions. Those who commit forcible entry and/or detainer of real property are not "tenants," yet the form complaint regularly references "tenant." Commercial eviction actions – also forcible detainer cases – do not fall under the RPEA and, unless required by the contract, lack notice requirements, yet the form complaint mandates that notices are served and that this form be utilized.

This form-over-function pleading cannot be made to fit every eviction action, and its use will be fatal to eviction proceedings as a whole. If the intention is to abolish evictions, or to make them exceedingly difficult, the form notices and the form complaint advance this goal nicely. The legislature, and the courts, however, have previously declared the intention to have "a summary, speedy and adequate remedy for obtaining possession of the premises." Olds Bros. Lumber Co., *supra*.

VI. THE FORM OF JUDGMENT THE PETITION SEEKS TO USE IS ONE THAT IS BOTH OVERLY SIMPLISTIC AND UNNECESSARILY COMPLICATED.

A. The judgment form is defective.

There are many problems present in this form:

1. Attorneys are omitted. There is no space allotted upon the form for attorney information, including their names, Bar numbers, address, and telephone number – all of

which are important to the tenant-defendant who might wish to reach out to counsel in an attempt to resolve the action short of trial. Rule 5(b)(3) requires this language.

Similarly, identification blanks for *pro se* landlord-plaintiffs are omitted. Rule 5(b)(4) requires the *pro se* plaintiff to make a similar declaration in the top left corner of the first page of the complaint.

2. The judgment form includes many extraneous fields. The Court is required to review certain elements: method of service (Rule 13(a)(1)), delivery of appropriate information (*ibid*.), delivery of notice (Rule 13(a)(2)), the legal basis for the actions (Rule 13(a)(3)), and whether a partial payment was accepted (Rule 13(a)(4)). However, judgment may be entered *only* if all elements are satisfied. The Court need only conclude that all elements were either satisfied or not; the multiple checkboxes unnecessarily complicate the form without providing any benefit to the post-judgment reviewing party.

3. The partial payment field is legally deficient. This field implies that a partial payment was accepted; no provision is made to indicate that there was no partial payment. In compelling the trial court to complete this form, the petitioner presents with judicial officer with a question to which an answer cannot be provided in the vast majority of actions. A judgment form that does not reflect an answer will be subject to post-judgment attack in the hyper-technical environment created by the petition.

4. The language used is frequently wrong. The statutes discuss “guilty” and “not guilty” decisions by the trial court. The Legislature chose to maintain the traditional language. In the judgment, however, the courts are presented with both the civil and criminal language, when the criminal language (even though not a criminal proceeding) is the only language permitted by law. The judgment also uses the term “rental,” which is not legally sufficient. The term of art is either “dwelling unit” (A.R.S. § 33-1310(4)) or

"premises" (A.R.S. § 33-1310(10)). A "rental" is not defined by the Act except as part of the term "rental agreement" (A.R.S. § 33-1310(12)) and is not used within the Act. Additionally, the Writ of Restitution is not an "order to vacate rental;" it is the order of the court to the Constable or Sheriff to remove the detaining occupants, by force if necessary, from the leased premises. The non-prevailing tenant-defendant might assume, reasonably, that under the language of the judgment he/she did not have to vacate the dwelling unit until the writ of restitution is served, yet legal possession is conveyed by the judgment and physical possession is conveyed, if necessary, by that writ.

B. The judgment form lacks language required by statute.

Eviction actions are brought for the primary goal of restoring possession of the leased premises (or real property) to the landlord-plaintiff. To enforce the restoration of the legal right to possession thereto, the forcible detainer and special detainer statutes permit the successful landlord-plaintiff to obtain the writ of restitution to return physical possession of the property.

The trial court must give notice to the non-prevailing tenant-defendant that the decision to remain in or return to the property shall be construed as trespass.

> If the defendant is found guilty of forcible entry and detainer or forcible detainer, the court shall give the defendant notice that a defendant who is lawfully served with a writ of restitution and who remains in or returns to the dwelling unit or remains on or returns to the mobile home space or the recreational vehicle space without the express permission of the owner of the property or the person with lawful control of the property commits criminal trespass in the third degree pursuant to section 13-1502.

A.R.S. § 12-1178(E). The language which is traditionally appended to the bottom of the judgment form is that which appears in A.R.S. § 12-1178(D). The proposed judgment fails to include the statutory warning; simplification does not meet its legal requirements.

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C. The judgment impermissibly abolishes the ability of the parties to enter into stipulation or otherwise renders them void.

Parties to a lawsuit traditionally have the right to settle litigation prior to trial. The ability to do so is even codified in the Rules of Evidence, which prohibit the disclosure of the negotiations for settlement. Rule 408, Ariz.R.Evid. Rule 13(b)(4), RPEA recognizes the right to settle and to enter into stipulated judgments, and only requires that certain warning language be included at the place of the indication of acceptance:

> Read carefully! By signing below, you are consenting to the terms of a judgment against you. You may be evicted as a result of this judgment, the judgment may appear on your credit report, and you may NOT stay at the rental property, even if the amount of the judgment is paid in full, without your landlord's express consent.

The form judgment omits this clause, eliminating the creation of valid settlements. Alterations to the judgment form, to manually add the language, would render the judgment void due to it not being the exact format required by the petition.

VII. EVICTIONS ARE NOT ELECTIONS, AND ITS STYLE-OVER-SUBSTANCE APPROACH SHOULD NOT BE APPLIED TO THESE ACTIONS.

There is one field of Arizona law that values style over substance: elections. A candidate's petition signatures must be collected on a form that satisfies the exact requirements, down to the margins, of the format of the petition. Candidates regularly sue each other over technicalities to have their opponents' petitions thrown out in order to disqualify those electoral foes and deny them participation in the coming election. Adoption of mandatory forms will produce a similar result in eviction actions, where the tenant-defendant seeks to attack the form of the case rather than litigate the facts.

Arizona – and American – law has long held a preference for matters to be resolved

upon their merits. The end-result of the petition encourages technical battles. While this might serve some short-sighted plans, in the long run it will only harm the very people the Access to Justice Commission is charged to assist.

VIII. THE END-GOAL OF THE PETITION APPEARS TO SEEK SLOWING THE EVICTION PROCESS, WHICH DOES NOT SERVE JUSTICE.

It is clear that the end-goal of the petition is the imposition of mandatory-use forms that increase inefficiencies and raise the probability of fatal errors appearing in eviction actions. Eviction actions are designed by statute to be swift proceedings, focused upon the merits of landlord-plaintiff's case and permitting only those claims that are supported by fact and law. The petition introduces forms that cannot satisfy the requirements of statute, and simply decreeing that the notices and complaint forms are sufficient does not make them so at law.

Should this petition succeed, eviction actions will become drawn-out affairs, vulnerable to attacks for defective forms and improper allegations. It will increase costs of these matters, and these increased costs will ultimately be borne not only by the residents who face the eviction proceedings but also those individuals who abide by their contracts and satisfy their obligations without issue. This does not serve justice.

IX. CONCLUSION.

The petition seeks to advance "access to justice," but it does no such thing. Mandatory notices will never be sufficient to meet the requirements of the authorizing statutes and real-life events. A mandatory form of complaint is insulting to attorneys, who are legally trained and are competent to prepare their own pleadings, and this form is

replete with errors that will render any eviction action defective. The proposed form of judgment is inefficient, unwieldy, and deficient.

All told, the petition advances a solution in search of a problem. There is no reason why parties cannot draft their own notices that comply with the statutes. Precluding them from doing so denies them access to justice, and when the forms presented are deficient, landlord-plaintiffs are doubly denied justice.

RESPECTFULLY SUBMITTED,

/s/ Paul A. Henderson
Paul A. Henderson, Esq.

September 9, 2016
Date

/s/ Denise M. Holliday
Denise M. Holliday, Esq.

September 9, 2016
Date

Mailing Declaration

The original of this Comment was filed electronically at rules.azcourts.gov.

Copies of this Comment were mailed to the following recipients:

- Arizona Commission on Access to Justice
  c/o Honorable Lawrence Winthrop
  1501 W. Washington Street, Suite 410
  Phoenix, Arizona 85007

- Honorable Gerald A. Williams
  North Valley Justice Court
  14264 W. Tierra Buena Lane
  Surprise, Arizona 85374

By /s/ Paul A. Henderson
On September 9, 2016