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IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN THE MATTER OF: PETITION TO AMEND THE RULES 5(a), 5 (b)(6), 5 (b)(7) and ADD RULEs 13(h) and 20 OF THE RULES OF PROCEDURE FOR EVICTION ACTIONS	**NO. R-16-0040** **COMMENT UPON AND OBJECTION TO PROPOSED RULE AMENDMENTS**

I. INTRODUCTION

The Arizona Commission on Access to Justice (hereinafter "ACAJ") filed this Petition to revise the Rules of Procedure for Eviction Actions (hereinafter "RPEA"). The Petitioner seeks to require certain litigants, and their attorneys, to use specific mandatory forms. Pursuant to Rule 28(D) of the Rules of the Supreme Court, attorneys Denise Holliday and Paul Henderson 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.

Denise Holliday and Paul Henderson, the undersigned authors of these comments, are attorneys who regularly represent landlords and property owners in eviction actions in both Justice and Superior Court. We both volunteered many hours to the working group organized by the

Maricopa County Justice Courts Administration and chaired by West McDowell Justice of the Peace Rachel Torres Carrillo. Of the more than 20 people on the committee, we were the only individuals representing the interests of landlords and property owners. Additionally, we filed a joint comment on the original version of the proposed forms. The issues raised regarding the original version of the proposed forms have not been adequately addressed nor overcome by Petitioner's Reply to our original joint comments. The minimal changes made to the newest attempt at submitting these forms do nothing but create additional concerns. If "access to justice" is truly the goal, such access must equally affect both Landlords and Tenants, not favor one party over the other.

Despite the Petitioner's statements in the reply to our original comments, **the Working Group was not presented with the truth of how these forms were to be used.** The Petitioner's Reply contains a statement that the committee members were never promised the forms would not become mandatory. That simply is not true. In fact, many of the members of that working group have expressed their shock that such a misstatement would be made to this Court. The reason it is important to reiterate this fact is that the working group members were told these forms were being created solely as a tool to help reduce barriers for unrepresented litigants to the Justice Court system. [1]It is important to understand our entire focus was on meeting the stated, admirable goal of the committee. We worked very hard to minimize the legal-ease so often used by our legal community that may not clearly articulate the nature of the forms and pleadings to both an unrepresented landlord and tenant. During that process, we repeatedly voiced our concerns that these forms do not comply with the Arizona Residential Landlord Tenant Act (hereafter "ARLTA") and are a clear misstatement of the law. The working group committee, unfortunately, did not seek to equally represent the competing interests of the various members of the public and the court system. Simply put, these forms do not fully comply with all statues and rules. To make them mandatory is to strip the public of rights and remedies granted them by the legislature through the enactment of the

[1] While we now recognize why the true motivation behind creating a working group was not disclosed, we previously addressed the propriety of and the obvious political agenda contained within that decision in our previously filed Comments.

ARLTA and other Landlord Tenant Acts.

Our first Comment discussed the fact the Petition did not recognize the differences between the different types of eviction actions. The Petitioner's Reply, including his most recent versions of the forms, falls short of addressing the concerns in our original Comments, and the newest attempt of creating mandatory forms fails to comply with the statutory construction set out by the legislature.

The Petitioner noted on page six of his Reply that the ACAJ "continues to welcome input from the industry and individuals in order to revise notices and forms that provide accurate and useful information." He further stated that, based on the feedback from the Comments to the Petition, "the Commission is recommending further changes to the forms and rules." Simply put, "We still don't have it right." His Reply acknowledges important issues the Supreme Court should carefully consider before making such a drastic change to the law, and denying both landlords and tenants the rights afforded them under the ARLTA.

For example, an argument was presented that the Court shall not violate ARS §41-2752(A) and (B) by mandating forms that are already published and sold by numerous private entities. The Petitioner argues that self-help centers (both in person and on-line) have made sample forms available for litigants for decades. He fails to note all of those forms are voluntary and offered to help the self-represented litigants. This argument does not change the fact that by creating **mandatory** forms, the Court is engaged in the business of manufacturing, processing, publishing and distributing proprietary-type forms that have been manufactured, processed, published and distributed in the marketplace for decades.

The one remaining body that can ensure all litigants are treated equally and fairly, without bias or agenda, is this Court. We urge you to carefully consider the barriers that are now being proposed and deny this Petition.

II. ANALYSIS

The latest version of the proposed mandatory Complaint attempts to remedy a few of the concerns raised in the Comments filed by experts in this area of law and involved in this field on a

daily basis. This version, now offered by the Petitioner, includes the following "new" changes: 1) removes commercial and mobile home eviction actions from the checkbox options; 2) adds a section that allows 'Other fees, charges or damages (as authorized by law)'; 3) expands two sections entitled 'Other' to 'Other allegations of damages'. These changes further illustrate the Petitioner does not understand the nuances of this area of law and the objection to the use of **any mandatory forms**, especially forms that do not legally, practically or fairly comply with the current statutes. It appears, through comments previously submitted on Petitioner's behalf, these proposed forms are intended to limit the damages a party may recover in an eviction action. This essentially changes the law by completely removing damages a landlord is entitled to recover as stated in the ARLTA. Petitioner's newest version raises many new issues, while failing to address the numerous issues previously discussed in our original Comments.

One of the most concerning aspects of the Petition is the apparent intent to make certain pleadings and forms mandatory in Justice Court, but not Superior Court. The proposed change offered in the Reply notes the changes were made to address concerns raised by the Committee on Superior Court, but this new language **as written** only applies to a Summons filed in Justice Court. [2] If, however, the Petitioner's intent is to make all three of the proposed pleadings (the Summons, Complaint and Judgment) mandatory **only** in the Justice Courts, this would create a clear and disparate treatment of parties, depending on where they choose or can afford to file an eviction action.

Presuming that was the intention, this newest change makes it obvious that all Justices of the Peace, attorneys that file evictions in Justice Court, and litigants that have a case in Justice Court are now going to be governed by a different set of rules than Superior Court judges, attorneys, and parties that have an action in Superior Court. Rule 1 specifically states that the Rules of Procedure for Eviction Actions ("RPEA") shall "govern the procedure in the Superior Courts and Justice

[2] As pointed out by a strong majority of the Justices of the Peace, the newest change to Rule 5, as written, applies only to the Summons. However, the language included in the Petitioner's Reply appears to request that all three proposed court pleadings become mandatory.

Courts." The suggested change to Rule 5 now makes this form mandatory in Justice Court but not in Superior Court. By mandating forms only in Justice Court, the unintended consequence would be that eviction actions filed by attorneys would need to be filed in the Superior Court to allow the practitioner the ability to craft the specific language appropriate to the specific facts of a particular case. This will quadruple the cost to the tenant in both the filing fees and the attorney's fees. Additionally, mandatory use of this form in only one forum creates a different set of rules for the 'haves' and the 'have nots'.

For example, the language in Rule 5(b)(6) that states, in bold print, "YOUR LANDLORD IS SUING TO HAVE YOU EVICTED, PLEASE READ CAREFULLY" would no longer be required in a Superior Court eviction action. This language was included when the RPEA was created to help litigants understand the nature and significance of this legal action. The removal of this mandatory language for one group of litigants is without any valid purpose. All defendants, including those in Superior Court, need to understand the paperwork they have been served seeks to remove them from a place where they are either living or working.[3] This is but one example of how these proposed rule changes fundamentally alter Rules without the careful consideration and understanding of how these changes will impact the public. The proponents of these changes to the Rules are arguing for changes without the full understanding of this area of law and the practical implications to the court system and the litigants. The proposed mandatory use of forms in one forum but not another is a barrier to justice, results in the unequal application of certain laws to one class of litigants, attorneys and judges, and the removal of protections appropriately added to these proceedings by the creation of the RPEA.

We fully support and join the comments filed by Justice of the Peace Gerald Williams, and the **over 20** Justices of the Peace that join the Additional Objections filed on January 27, 2017.

[3] Even CLS points out in their Comments that "If the forms are not mandatory, only those tenants whose landlord chose to use the form will be lucky enough to receive the information in a way they can understand. Don't all tenants in Arizona, regardless of whether they or the landlord are being represented, deserve to be given the same information? Shouldn't all tenants in Arizona who are facing eviction be given the same, meaningful information?" (Pamela Bridges Comments on behalf of CLS at page 5)

These judges raise the issue of the apparent distinction of the forced use of these forms in their courts and appropriately note the Petitioner failed to articulate the reason why only one class of judges and litigants would be required to use this new mandatory Summons. It should be noted that Petitioner's Reply includes a comment that only one justice of the peace filed an Objection to the Petition and included a footnote that during the vetting process, "the Committee on Limited Jurisdiction Courts (LJC) discussed this issue. The LJC committee unanimously approved the forms, and suggested the Court consider adopting these as 'model' forms, to be used for a year before deciding to mandate their use." Reply at page 6. The Court is urged to seriously consider the comments by these Justices of the Peace that represent Maricopa County, Pima County, Graham County, and Gila County. The Petitioner has included statements that the courts of limited jurisdiction are in unanimous agreement these forms should become mandatory. However, to dismiss out of hand over 20 Justices of the Peace, elected by the people, that handle over 90% of the eviction actions in the state, with serious concerns about this Petition, suggests a bias bordering on contempt of the Justice Court System.

Although it has not been publically stated, making these forms mandatory only in the Justice Court very likely was offered to avoid the objections that would be filed by the broader legal field (Commissioners and lawyers alike) that would now have their hands tied by forms that do not adequately comply with the law or the issues they need to address in a Superior Court eviction action. Such an act of disrespect for the judges and attorneys in the Justice Courts is surprising and disheartening if that is the reason for creating this disparate treatment proposed by the Petitioner. If the goal of the Petition was to ensure the eviction process to be "more transparent, efficient, and more understandable to the unrepresented litigants who are overwhelmingly low-income tenants," why would that goal not be appropriate for the litigants in Superior Court?

The Petitioner's Reply also points out the proposed new language in Rule 20 that states "In the interest of justice in a particular case, the court may permit use of a form other than the approved form the court finds to be consistent with law as the approved form." This verbiage continues to

be objectionable because it specifically states "in a particular case". Does this now require the litigant to file the proposed pleadings and forms without knowing if the court in question will deem those particular forms sufficiently consistent to move the case forward? Will the court be required to make a specific finding when reviewing the Summons, Complaint, proposed form of Judgment and attached breach notice, that the physical layout of the form is sufficiently consistent or is this only for the new language and category restrictions now mandated by the adoption of this Rule?

As practitioners, we can chose to file an eviction action in either forum. It matters not the income level of the tenant. However, the choice of forum does matter to the Tenant. In Justice Court, the filing fee is $65.00. In Superior Court, the filing fee is over $300.00. Likewise, the difference in attorney fees in Justice Court and attorney fees in Superior Court are drastically different. As is often the case, the unintended consequence is an increased financial burden placed on the tenants, the ones this Petition supposedly seeks to help.

In the initial round of Comments, many commentators pointed out there are many other types of eviction actions the mandatory Complaint fails to even contemplate. These involve Mobile Home Parks, RV Parks, Post-Trustee Sales, Commercial leases, Employee Terminations, Post Traditional Sale Holdovers, and Trespassers to name but just a few. The Reply filed by the Petitioner now recommends the removal of the commercial and mobile home park action check boxes. The failure to include options for other types of eviction actions raises significant issues. The intentional removal of those categories of eviction actions would arguably result in the immediate prohibition of those eviction actions being filed in Justice Court, a court with clear statutory authority to hear these cases. The decision to remove all eviction action options, other than residential evictions, from this mandatory form, creates a large barrier to justice. A Plaintiff, with the legal right to file those other forms of eviction actions in a court of competent jurisdiction that is vastly less expensive and more accessible than Superior Court, would be denied that right by the Supreme Court of this state. If the intent of the ACAJ was to set up a different set of rules for residential evictions, this creates a barrier to justice by treating litigants differently based upon which Act or Statute expressly

provides the rights or remedies. A tenant in a mobile home park would be afforded rights denied a tenant in an apartment community. Whether the Supreme Court intends to limit all eviction actions in Justice Courts to cases involving the ARLTA or not, enacting these rule changes will now create a new appeal tactic for litigants, and tenant advocate groups, claiming the Supreme Court, by adopting this rule, intended to only allow evictions specifically stated in the mandatory forms. All other evictions, including those affecting low income mobile home park residents, must now be filed only in Superior Court.

It is a well-known fact the lawyer who represents multiple plaintiffs is able to keep the cost of eviction actions to one of the lowest legal costs in the legal industry by creating forms and pleadings that can be modified to meet the various legal issues raised in the different types of cases. Those attorneys have paid tens of thousands of dollars to create software that can be modified to accurately reflect the necessary legal requirements of each of those different types of cases and fact patterns. To create a mandatory form for only one particular type of eviction will potentially require the firm to continue to use the software already created for all non-residential eviction cases and create new software for residential evictions with mandatory forms. The necessary result will be increased fees charged to the client and passed on to the tenants. As stated above, the increase in costs and attorney fees assessed against those tenants only causes more harm. If the Court adopts these changes, whether or not the intent is to allow all types of eviction actions to be filed in the justice courts, the ARLTA, Title 33, Title 12, the Mobile Home Park Act, and the RV Park Act, would all need to be amended to comply with the mandatory language.

There are two choices of evictions listed in the current form of Complaint. The author of this form fails to recognize that an Immediate Eviction is but one type of Residential eviction action. The form appears to force the Plaintiff to choose between these two options when, in fact, a majority of Immediate Evictions involve a Residential situation. However, because a Plaintiff may have legal grounds for an Immediate Eviction under the Mobile Home Park and RV Park Acts, this form now appears to allow only those two species of evictions out of those Acts. If that is true, the

remainder of this form fails to properly identify the law supporting the claims by that Plaintiff. If the Petitioner wanted to create a special area on the Complaint to note the action involves special rules that expedite the eviction process, perhaps the Petition should fully recognize the areas of law impacted by those types of evictions. Any form must be legally accurate before it is mandated for use.

If this Court determines only one narrow type of eviction action, namely a Residential eviction filed only in a Justice Court, is required to use this form, then the above language is still legally false. There are several circumstances when the Plaintiff is not technically the "Landlord" but is still entitled to bring this action under the ARLTA. The same is true that the term "Rental" does not always apply and should not be forced to be used by the Plaintiff. These arguments were made but ignored during the committee meetings. In fact, one commentator stated, "The Institute suggests that eviction cases are rather straightforward……" (Katz Comments at page 5). This statement may be generally true, but if this Court is going to mandate forms and pleadings, it must be understood that the creation of a "Generic Eviction" will now have the effect of prohibiting the use of the correct legal verbiage that articulates the statutory basis for the claims made, and re-writes the statutory language established by the legislature. Simply put, trying to create a one-size fits all pleading simply does not work in this real life legal world where the actual words used are of vital importance to both litigants.

One of the most hotly contested issues in the working group was the issue of the definition of "Rent" and what could and should be included in the Complaint, 5 Day Non-Pay Notice, and Judgment. This issue was never resolved despite the **assurances** by multiple members of the working group the forms created by this working group would **NEVER** become mandatory because their format would essentially attempt to change the statutory law without going through the legislative process.[4] In fact, the record of the final meeting will show the version proposed to the

[4] While this fact has been denied by the proponents of the Rule change, a review of the notes taken by us during the actual meetings and a quick poll of the members of the work group overwhelmingly support the statements made that the discussion of the mandatory use of the forms was repeatedly discussed by the group. Katz and CLS members

ACAJ were not approved by the landlord attorney representatives. Our concerns, that the forms were not ready to be proposed because they failed to comply with existing law and did not fully address all types of eviction actions, were overlooked because of the decision to get the committee something. Those "somethings" were the items presented in the Petition and the Petitioner has admitted that those forms need additional work. The creation of voluntary forms offered by the court system to unrepresented litigants is a worthy project, but if those forms are mandatory, the litigants lose the right to be secure in knowing those forms comply with the law and adequately protect and promote their statutory and procedural rights.

The courts have continually upheld the fact that ARS 33-1310(11) states "'Rent' means payments to be made to the landlord in full consideration for the rented premises." If the Plaintiff does not seek the amounts owed by the Tenant "in full consideration for the rented premises" (i.e., charges pursuant to the lease agreement) in the Complaint, the Plaintiff could be barred by the principle of Res Judicata from seeking those amounts in another action. For many years, CLS has unsuccessfully argued that only the rent paid monthly can be awarded in an eviction judgment. By way of example, one commentator argues the landlord can't include NSF fees in a 5 Day Non-Payment of Rent Notice because the landlord is required to sue the tenant for that small fee in a different civil case for those damages. (See CLS Comment at pages 5-7). This position has been repeatedly rejected by both trial courts and appellate courts alike and is one of the very arguments made over and over by the CLS representatives during the working group meeting. It should be noted the three tenant advocates continued to make this argument even though the rest of the entire committee disagreed with that position. The inability to modify existing statutes through legislation is one of the articulated motivations for mandating these forms. These commentators seek to define appropriate rental charges in the 5 Day Non-Payment Notice, Complaint and Judgment, despite the plain language of the ARLTA.

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specifically argued that the forms would never become mandatory as part of their attempt to get a consensus to an otherwise impassible position of the working group members. Obviously, those "assurances" were false.

This version of the Complaint fails to correctly allow the Plaintiff to request multiple amounts that ultimately makeup the "Rent" allowed under both the ARLTA and the RPEA. The right to claim NSF fees, pet rent, garage rent, daily/biweekly/bimonthly rent, fair market rent, and other various categories are statutorily allowed, but must be specifically plead under both the ARLTA and the RPEA. These claims would be virtually eliminated by removing these options from the mandated form.

This form also fails to allow for rent that accrues after the filing date (which is statutorily permitted but must be specifically pled), holdover damages pursuant to ARS 33-1375, utilities that are part of the monthly rent owed pursuant to the lease terms, other types of rent like pet and garage rent, and fees like pet fees and other fees. All of these are allowed under the ARLTA and the RPEA, but as argued above, CLS has repeatedly argued these damages should not be permitted in an eviction action and are now attempting to modify the statutes that create these damage claims. They cannot cite any statutory authority for their position, other than they don't like what the legislature wrote and passed.

This form does not allow a Plaintiff, or their legal counsel, to list a fax number or email address. RPEA Rule 6(a) requires every pleading to be served upon the opposing party. Subsection (c) allows electronic service but this mandatory form does not allow for the inclusion of this information. By not allowing the inclusion of information necessary for electronically communicating with the Plaintiff, the court is mandating that a Defendant mail or physically deliver a copy of a pleading to the Plaintiff when other forms of delivery are allowable and easily accessible by the public. In addition, Rule 5 of the RPEA requires the Plaintiff to specify the reason for the eviction but this mandatory form fails to allow the Plaintiff to comply with that statute and creates another reason for the eviction to be overturned on appeal.

The above issues are not the full extent of the problems with the proposed mandatory Complaint, and the Complaint is but one of the proposed mandatory forms. The others are equally replete with problems, both factual and statutory. Many of the same problems that exist with the

Complaint are carried into the Judgment, and will not be rehashed. However, the Judgment contains problems **in addition** to those contained in the Complaint. For example, the Judgment does not comply with the ARLTA, and limits the Landlord's rights as set forth in A.R.S. 33-1377 by failing to allow the monetary claims permitted by law.

Additionally, the Judgment form specifically states, "If a partial payment was accepted . . ." The acceptance of a partial payment does not necessarily mean "a non-waiver" must be produced. This form presupposes the most elementary understanding of the ARLTA, without considering legal positions contained within the ARLTA. There are many legal nuances in the Landlord/Tenant arena. When must a partial payment, non-waiver agreement be signed? What language must it contain? The Judgment form does not address those issues.

The Judgment also sets forth the Defendant's plea. Rather than give two options, as in every other matter within our jurisprudence, the Defendants in an eviction action have three: Not Guilty/Not Responsible (although the Statute does not provide for a "Not Responsible" plea); Guilty/Responsible (again, no statutory basis for "Responsible"); and the third plea of "Defendant has filed a counterclaim". Under what theory is a Counterclaim a defense to the allegations made in a complaint? When did "I filed a Counterclaim" substitute for guilty or not guilty? Apparently, the Petition does not contemplate that Counterclaims, by statute, are only permitted in non-payment of rent cases. If there is an allegation of Material and Irreparable Breach, or an eviction brought for Non-compliance of the rental agreement pursuant to a 10-Day Notice or 5-Day Health and Safety breach, counterclaims are specifically barred by statute. Even if a counterclaim is allowed, it must be specifically provided by statute and proper Notice must be provided and attached to the counterclaim. Speaking of the requirement to attach a Notice to a counterclaim, what mandatory Notice do Tenants have to use? Doesn't "equal protection under the law" apply to both sides of the lawsuit? The Petition seeks to bind only one litigant to forms that take away rights granted to them under the law, but does not seek to hold the other party to that same standard. This disparate treatment of litigants does not further justice, but creates another barrier to equal justice.

III. CONCLUSION

The Petitioner seeks to change the law and force every Landlord in the State of Arizona to use mandatory forms that are contrary to Title 33 and Title 12. The lack of any discussion requiring a Tenant to use a mandatory form for any reason, shows this Petition is a partisan attack on Landlords, and their legal counsel, to advance a political agenda, not to further justice. However, the real life result of the imposition of this Petition will be to further harm those this Petition purports to help, namely, the low income, unsophisticated tenant. The Petition should be denied.

RESPECTFULLY SUBMITTED this day, February 17, 2017.

By /s/ *Denise Holliday*
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