

James R. Morrow and Charles Adornetto
Administrator and Judicial Education Officer
Maricopa County Justice Courts
222 N Central, Suite 210
Phoenix, AZ 85004 (Bar Nos. 011630 and 010753)

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:	)	
	)	
PETITION TO ADOPT RULES OF	)	Supreme Court No. R-18-0021
SMALL CLAIMS PROCEDURE	)	
AND MODIFY RULE 101(b),	)	Comment from Administrator,
JUSTICE COURT RULES OF	)	Maricopa County Justice Courts
CIVIL PROCEDURE	)	
_____	)	

The bench of the Maricopa County Justice Courts (MCJC) authorized Presiding Judge Keith Russell to file a comment seeking an extension.¹ As its administrator and judicial education officer, we file this separate comment in support of MCJC's position and to provide a more detailed review of the critiques of the proposed rules. These critiques include:

1. Courts should provide an economical means to resolve small claims. Instead, the proposed rules increase costs to plaintiffs which will be passed onto defendants.
2. Courts should provide for an orderly resolution of cases. Instead, the proposed rules mimic those of eviction proceedings without the procedural safeguards.
3. Courts should provide a fair process for resolution on the merits. Instead, the proposed rules undercut due process in the name of perceived efficiency.
4. Forward thinking courts take advantage of technology to increase efficiency in providing judicial services. The proposed rules limit the ability to use electronic case management systems.
5. Courts should be judicious with expenditure of public resources. Instead, the proposed rules expand the provision of judicial services without regard to costs.

¹ Motion passed at the October 10, 2018, bench meeting of the MCJC.

The rules as presently proposed are expansive and expensive. As detailed in point 6 below, two straightforward amendments to the Justice Court Rules of Civil Procedure would promote the fair and timely resolution of small claims matters.

By detailing these critiques of the proposed rules, our intent is not to be critical of the members or of the work of the Committee on Improving Small Claims Case Processing. As others have done in their comments, we applaud the effort to improve the small claims process in Arizona. As can be seen in those comments, however, the Committee has not yet built a consensus as to a solution, and the Committee implicitly recognized that the proposed rules are not a workable solution in high volume courts. *See Proposed Arizona Rules of Small Claims Procedure 21 (Exception for Consolidated Justice Courts).*² By allowing MCJC the opportunity to pilot two amendments to the Justice Court Rules of Civil Procedure and tracking the results, the Committee will be taking another positive step toward building a consensus.

DISCUSSION

1. Courts should provide an economical means to resolve small claims. Instead, the proposed rules increase costs to plaintiffs which will be passed on to defendants.

The perception that small claims primarily involve disputes between two individuals concerning non-business related disputes is incorrect. The typical plaintiff pursuing a small claim in MCJC is a business entity seeking entry of a judgment on a debt

² Adam Watters, Presiding Justice of the Pima County Consolidated Justice Court, submitted a detailed comment to the Committee on March 16, 2018, seeking an exemption. We echo many of his concerns in this comment. MCJC, however, has not sought an exemption. Instead, it continues to work with the Committee in search of a proposal that is workable in the justice courts throughout the state. If a pilot of the two amendments to the Justice Court Rules of Civil Procedure proves successful in MCJC, the exemption for the Pima County Consolidated Justice Court may no longer be needed. If,

(*e.g.*, HOA's for unpaid assessments, small businesses for unpaid obligations). Of the 10,447 small claims matters filed in MCJC in the past 12 months, 72% (7,566) were filed by business entities with just 10 entities filing 36% of all small claims matters. These entities largely process their small claims in a professional, efficient manner using their own staff or with the assistance of legal document preparers. Almost all of these cases are resolved without a hearing (*e.g.*, default or stipulated judgment or dismissal for inactivity, suggesting that the parties typically resolve their disputes without moving the litigation forward). During the 2017-18 fiscal year, only 16% went before a hearing officer for a contested hearing.

By requiring that a hearing be set in every case, the proposed rules increase the costs to the parties and may lead to many of these matters being referred to law firms specializing in collections work. Currently, the costs to the parties of resolving their disputes through small claims is relatively minor: case initiation, filing fee, service of process, default or negotiated resolution. Almost all of the tasks are duplicative from one claim to the next, resulting in a cost savings to the business entity which is then passed on to the defendant through a smaller award of costs and more broadly to the entities' customer base through business efficiencies. If the proposed rules go into effect requiring that a hearing be held in every case, the expense to these entities will increase to take into account the additional work. At a minimum, this work will include having a representative of the business entity take time away from other matters to attend the hearing where they will need to be prepared to address questions concerning entry of a default judgment (service and damages) and also be prepared to proceed with a hearing on

however, the rules as presently proposed are adopted without significant changes, MCJC may need an exemption as well.

the merits should the defendant appear, including preparation of exhibits on both liability and damages. The uncertainty as to the nature of the hearing and as to whether defendants will appear and, if so, what their possible defenses are, will add to the costs for plaintiffs. Plaintiffs will be required to be over-prepared for a hearing on every case.

Naturally, these increased costs will be passed on to the defendant. *See* A.R.S. § 12-341.02 (related to document preparation fees); and more broadly to the consumer base through increased inefficiencies. If a business entity does not have a person available and willing to take on the increased workload associated with these hearings, it will either be “priced out” of pursuing its small claims matters or it will refer the matter to an attorney specializing in collections work increasing the costs to the defendant. *See* A.R.S. § 12-341.01 (award of attorney fees as businesses retain an attorney to file these as civil matters).

2. Courts should provide for an orderly resolution of cases. Instead, the proposed rules mimic those of eviction proceedings without the procedural safeguards.

Duplication of the eviction process with respect to small claims is neither necessary nor advisable. By statute, eviction actions are heard on an accelerated basis and are focused on the narrow issue concerning right to possession of the property. *See* A.R.S. § 12-1171, *et seq.* Rather than being required to file a responsive pleading, defendants are summoned directly to a hearing to state their defenses. If they do not raise an issue suitable for trial, judgment is entered against them and possession awarded to the plaintiff. Frankly, it is a brutish and short proceeding in most cases, as recently chronicled in a series of articles in the Arizona Republic. Fortunately, both the statutory scheme and procedural rules provide for protection of litigants in eviction actions, including advance notice that an eviction action will be filed and the right to appeal. Although the proposed

rules for small claims mimic those applicable to eviction actions, the corresponding statutory scheme and procedural safeguards are absent. Most notably, judgments in small claims proceedings are not appealable.

It is not difficult to envision the same confusion and frustration experienced by litigants in eviction actions being expanded to litigants in small claims. Many defendants will come to court—as summoned under the proposed rules—and admit that they did not pay their debt and then explain why they could not do so—health issue, loss of job, etc., and express frustration in having to miss work to attend the hearing. Since the explanation concerning non-payment is not a legal defense, judgment will be entered against them, and they will experience the same frustration with the system as their counterparts appearing in eviction actions. It will be brutish and short for many, and they will appropriately wonder why they were summoned to court when their reasons for non-payment were not relevant.

3. Courts should provide a fair process for resolution on the merits. Instead, the proposed rules undercut due process in the name of efficiency.

In contested cases, both parties should have some minimal information as to the other party's position prior to the small claim hearing. Instead, the proposed rules discourage defendants from providing any notice to plaintiffs concerning the defenses they intend to raise and promote trial by ambush, even by defendants who have no intention of doing. Cases that are filed as “small claims” are by definition claims of \$3,500 or less; it does not mean that they are necessarily “small” in complexity. In contested cases, defendants can and do assert as wide a range of defenses as those asserted in regular civil proceedings. Any restrictions on their ability to do so should be rejected as unfair. Likewise, it is unfair to restrict the responding party's ability to prepare to meet

the defense raised by a defendant. The proposed rules, unfortunately, do exactly that by eliminating the requirement that an answer be filed. *See* Rule 10, Proposed Arizona Rules of Small Claims Procedure.

4. Forward thinking courts take advantage of technology to increase efficiency in providing judicial services. The proposed rules limit the ability to use electronic case management systems.

MCJC uses its case management system to assist the clerk to track small claims cases. This allows cases that can be resolved short of a hearing to be resolved appropriately. Under the one-size-fits-all proposed rules, every case must be scheduled for a hearing. MCJC is aware that the newest iteration of the proposed rules allow for dismissal for lack of service beginning on the 61st day after the filing of the complaint. This is an improvement from the prior version, and MCJC would seek to take advantage of its case management system to assist the clerk in tracking and appropriately forwarding the proposed orders of dismissal to the judge through the electronic queue. This improvement, however, is limited in scope to this type of dismissal only. Hearings are not necessary in cases that can be disposed of under Justice Court Rules of Civil Procedure 140 (default judgment) or 144 (dismissal of lawsuits).

5. Courts should be judicious with expenditure of public resources. Instead, the proposed rules expand the provision of judicial services without regard to costs.

It is incumbent upon us as public officials to weigh the increased expenditure of public resources required by the proposed rules. Although the Committee indicated a desire to do so at its September 11, 2018, meeting, this writer is not aware of any analysis being undertaken by the Committee of the increased costs to the taxpayers inherent in expanding judicial services in the manner dictated by the proposed rules, but instead assumed that hearings could be set in all small claims matters without impacting resources

dedicated to other public purposes. The Committee's assumption is not well-founded in Maricopa County.

Current procedures allow for the clerk designated in accordance with A.R.S. § 22-507 to provide much of the services needed to process small claims in Maricopa County. The clerk, through the use of the electronic case management system, is able to monitor small claims cases. When a case is not timely served (within 120 days under Rule 113(i) or plaintiff fails to obtain a default judgment (within 10 months under Rule 144(e)), the clerk prepares an order of dismissal and places it in the electronic queue for the judge's review and action. Similarly, the clerk places stipulated dismissals and judgments in the electronic queue. In those cases in which an answer is filed, the clerk sets the matter for a hearing before a volunteer hearing officer appointed in accordance with A.R.S. § 22-506. The hearing officer then conducts the contested hearing and enters a judgment disposing of the matter after hearing from both sides.

Under the proposed rules, hearings will be set in every case before a hearing officer. We anticipate that there will not be a sufficient number of appointed hearing officers to handle the dramatic increase in hearings required by the new rules. Based on the experiences in two of our courts that have piloted an earlier version of the proposed rules, almost all hearing officers are not comfortable with the needlessly expedited and uncertain hearings resulting from the proposed rules and have stopped volunteering their services. (Ten hearing officers were trained and volunteered to participate in the pilot courts. Just three months later, only 3 hearing officers are still volunteering to participate.³) If a hearing officer is not available on the date of the originally set hearing,

³ MCJC posted pleas for hearing officers in local papers in August as part of our recruitment efforts for appointments taking effect for the 2019 calendar year. Based on

the court will face a dilemma. The court will need to continue the hearing to the next available date, but it will not have contact information for the defendant (the proposed rules require that a hearing be set even without any appearance by the defendant). If the hearing is continued by minute entry (which is the norm in most civil cases), then it is likely that many defendants will not be aware of the continued hearing until they come to court as originally summoned. Alternatively, the judge may substitute in for the hearing officer and continue the matters he or she were otherwise scheduled to process (presumably both parties in the other matters can be contacted via minute entry) or the judge may opt to attempt juggling both calendars at once intermixing the small claims hearings with whatever criminal, civil, eviction, or protective order matters were scheduled. The court may exercise a third option and employ a judge pro tempore to cover either the small claims hearings or the calendar that the judge was scheduled to cover, thereby freeing the judge up to cover small claims. This third option has been used on numerous occasions by the pilot courts since they started hearing small claims in July under the pilot program. Since that date, the two pilot courts have expended 52 hours of judge pro tempore time during the first three months of the program. This is not sustainable by the pilot courts and cannot be expanded to all of the 26 courts that compose MCJC.

At their essence, the proposed rules dramatically increase the involvement of the judicial officer (be it the judge, judge pro tempore, or hearing officer) without a reduction

the experiences in the two pilot courts, MCJC had hoped to recruit 125-150 new hearing officers; only 58 applied. Of those, 43 have been recommended by the bench for appointment. These individuals will need to undergo AOC training, MCJC training, and obtain a sponsor before being available for use. MCJC does not have sufficient hearing officers available and prepared for the proposed rules to go into effect in 2019.

in the involvement of the small claims clerk. (To assist with the increased work associated with the pilot programs, an additional clerk was assigned to assist those two courts on a part-time basis during the first three months of the pilot program at a cost of \$5,880. That assistance is no longer being provided.) At the same time the proposed rules would be dramatically increasing the costs of the judicial services dedicated to small claims, they would reduce the revenue generated from filing fees. MCJC took in \$62,538 in filing fees for answers filed in small claims matters during the 12 month period immediately prior to participation of two of its courts in the pilot program. The proposed rules eliminate the requirement that a defendant file an answer, but it does not appear that the Committee has made any recommendation to the Supreme Court to address the decline in revenue and the increased costs associated with its proposed rules.

6. Courts within MCJC would like the opportunity to address small claims matters in a fair and timely manner by piloting rule changes that are less expansive and expensive.

Courts within MCJC would like the opportunity to pilot two amendments to the Justice Court Rules of Civil Procedure. These two amendments will promote the fair and timely resolution of small claims matters without the added expense inherent in the proposed rules. They will also avoid the confusion accompanying the creation of an entirely new set of rules.

Amend sub-section i. of Rule 113, Serving a Summons and Complaint, to require plaintiff to file proof of service of process within 60 days after the complaint was filed:

- i. Dismissal because of lack of service; service on some but not all defendants.
(1) [Move language of current rule into sub-section (1).⁴]

⁴ The language of the current Rule 113(i) states:

After at least twenty (20) days notice to plaintiff, the court may dismiss a complaint as to any defendant who has not been served with the summons and complaint within one hundred twenty (120) days after the filing date of the complaint. Before the dismissal date, if the plaintiff shows

- (2) *Small claims.* Not later than 60 days after the filing date of the complaint in the small claims division, plaintiff must file proof of service of process or transfer the matter out of the small claims division. As to any defendant for whom proof of service of process is not timely filed, the court shall dismiss without prejudice the complaint against them.

Amend sub-section e. of Rule 144, Dismissal of Lawsuits, to allow the court to dismiss the matter within the 180 day time standard if a final judgment has not been entered:

- e. Dismissal for failure to conclude a lawsuit ~~within ten months.~~
(1) [Move language of current rule into sub-section (1).⁵]
(2) *Small claims.* If a final judgment has not been entered within 100 days from the filing date of the complaint remaining in the small claims division, the court will mail a notice to the plaintiff and to any defendant who has appeared in the lawsuit informing them that unless this requirement is met within two (2) months from the date of mailing, the court will dismiss the lawsuit for failure to have judgment timely entered. If the requirement has not been met within two (2) months from the mailing of the court's notice, the court may dismiss the lawsuit without further notice to the parties.

Implementation of these two amendments to the Justice Court Rules of Civil Procedure would address the sole charge to the Committee “to reduce the time required to resolve small claims cases.” Administrative Order No. 2016-115.⁶ Courts within MCJC would

good reasons why a defendant has not been served, the court may extend the time for service. When some but not all of the defendants in a lawsuit have been timely served, the court may dismiss from the lawsuit the defendants who have not been served, and allow the plaintiff to proceed against the defendants who have been served. [ARCP 4(i), 5(b)]

⁵ The language of the current rule 144(e) states:

Dismissal for failure to conclude a lawsuit within ten months. If a final judgment has not been entered within ten (10) months from the date a lawsuit is filed, or if a party has not filed a written motion to extend the time for entry of judgment to a particular date, the court will mail a notice to the plaintiff and to any defendant who has appeared in the lawsuit informing them that unless this requirement is met within two (2) months from the date of mailing, the court will dismiss the lawsuit for failure to have judgment timely entered. If the requirement has not been met within two (2) months from the mailing of the court's notice, the court may dismiss the lawsuit without further notice to the parties. [ARCP 38.1(d), 41(b)]

⁶ MCJC is aware that the Committee has proposed rules to address concerns outside of its original charge “to reduce the time required to resolve small claims cases.” Administrative Order No. 2016-115. To the extent it is not willing to allow MCJC to pilot the two amendments proposed here because it wants to address issues outside of its original charge, MCJC urges the Committee to consider seeking an extension to allow for the piloting of the alternative proposed rules submitted on September 25, 2018, by

like the opportunity to test that belief by piloting these two amendments. By allowing them to do so, the Committee and the Supreme Court would benefit by gaining more information on which to base its decision before making any final decision.

RESPECTFULLY SUBMITTED, this ____ day of October, 2018.

/s/ James R. Morrow
James R. Morrow
Administrator
Maricopa County Justice Courts
222 N Central, Suite 210
Phoenix, AZ 85004

/s/ Charles J. Adornetto
Charles Adornetto
Judicial Education Officer
Maricopa County Justice Courts
222 N Central, Suite 210
Phoenix, AZ 85004

Justices of the Peace Donald Watts, Miles Keegan, Craig Wismer, Frank Conti, John McComish, Cecil Ash, Gerald Williams, and David Osterfeld. Their alternative proposed rules are preferable to MCJC than those currently being offered by the Committee.