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January 14, 1988

The Honorable Bobby Raymond
Arizona State Representative
State Capitol - House Wing
Phoenix, Arizona 85007

Re: I88-008 (R87-194)

Dear Representative Raymond:

You have asked numerous questions relating to the interpretation and application of the special detainer action notice provisions of A.R.S. § 33-1377(B). Your questions will be addressed in the order presented.

1. What suffices as "attempted personal service?"

In 1987 the legislature amended the Arizona Residential Landlord-Tenant Act to provide that special detainer actions be instituted for remedies prescribed in A.R.S. § 33-1368. Laws 1987 (1st Reg. Sess.) Ch. 263. A.R.S. § 33-1377(B) provides:

The summons shall be issued on the day the complaint is filed and shall command the person against whom the complaint is made to appear and answer the complaint at the time and place named not more than six nor less than three days from the date of the summons. The tenant is deemed to have received the summons three days after the summons is mailed if personal service is attempted and [sic] within one day of issuance of the summons a copy of the summons is conspicuously posted on the main entrance of the tenant's residence and on the same day the summons is sent by certified mail, return receipt requested, to the tenant's last known address. The summons in a special detainer action shall be served at least two days before the return day and the return day made on the day assigned for trial.

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The words "personal service of process" mean "the actual or direct delivery of the summons or a copy thereof to the person to whom it is directed or to someone who is authorized to receive it in his behalf." 62 Am.Jur.2d Process § 41 (1972). Personal service in Arizona is effectuated pursuant to Arizona Rules of Civil Procedure, Rule 4. The word "attempt" means "to make an effort to do, accomplish, solve or effect." Webster's Third New International Dictionary at 140 (1976). Construing these words together we conclude that the term "attempted personal service" is any good faith, reasonable effort to effect personal service in the manner provided for in Arizona Rules of Civil Procedure, Rule 4. See A.R.S. § 1-211(B) ("Statutes shall be liberally construed to effect their objects and to promote justice.").

2. To comply with A.R.S. § 33-1377(B) must the process server attempt personal service, post the summons, and mail a copy of the summons by certified mail the same day the summons is issued?

Attempting personal service, posting and mailing of the summons ("the deemed receipt of the summons provision") need not occur on the same day the summons is issued. For the tenant to be "deemed to have received the summons three days after the summons is mailed" a copy of the summons must be conspicuously posted on the main entrance of the tenant's residence "within one day of issuance of the summons." A.R.S. § 33-1377(B) (emphasis added). "[O]n the same day" the summons is conspicuously posted the summons must be "sent by certified mail, return receipt requested to the tenant's last known address." Id. (emphasis added).

The statute does not provide a specific day when personal service need be attempted for the tenant to be deemed to have received the summons. The tenant, however, is not deemed to have received the summons until "three days after the summons is mailed." Id. Prior to that time the three conditions precedent of posting, mailing and attempted personal service must occur. Therefore, any attempted personal service between the time the summons is issued and three days after the summons is mailed satisfies the statute.

3. What is the effect of a deemed receipt of the summons?

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The word "deem" means to hold; consider; adjudge. Blacks Law Dictionary at 374 (5th ed. 1979). A tenant "deemed to have received the summons" is considered to have received notice of the special detainer action. "[D]ue process requires that a party defendant be notified of an impending action in which his interests may be adversely affected, and until the notification procedure prescribed by rule or statute is complied with, the court has no jurisdiction over the person." Rohan v. First National Bank of Arizona, 90 Ariz. 341, 348, 367 P.2d 950, 954 (1962). "The purpose of process is to give the addressee actual notice of the action filed against him and an opportunity to respond. 'It is this notice which gives the Court jurisdiction to proceed.'" Liberty Mutual Insurance Co. v. Rapton, 140 Ariz. 60, 62, 680 P.2d 196, 198 (App. 1984) (quoting Scott v. G.A.C. Finance Corp., 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971)).

3(a). Is deemed receipt of the summons a proper form of substituted service of process which will convey in personam jurisdiction over a defendant/tenant?

The deemed receipt of the summons provision of A.R.S. § 33-1377(B) is a proper form of substituted service which will convey in personam jurisdiction over a tenant provided it is applied in a manner consistent with the constitutional requirements of due process.

To withstand constitutional scrutiny the notification procedure set forth in A.R.S. § 33-1377(B) must provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865, 873 (1950). It is against this standard that we evaluate the notice procedures set forth in A.R.S. § 33-1377(B).

The statute requires that before the tenant can be deemed to have received the summons there must be an attempt to personally serve the tenant with the summons. The United States Supreme Court in Green v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982), in construing a similar provision, rejected the contention that an attempt at personal service constituted adequate notice. The court stated that "[t]he failure to effect personal service on the first visit hardly suggests that the tenant has abandoned his interest in the

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apartment such that mere pro forma notice might be held constitutionally adequate." Green v. Lindsey, 456 U.S. at 454, 102 S.Ct. at 1880, 72 L.Ed.2d at 258.

A.R.S. § 33-1377(B) also requires that a copy of the summons be "conspicuously posted on the main entrance of the tenant's residence." This action fails to meet the Mullane standard to provide notice reasonably calculated under all the circumstances to apprise the tenant of the pendency of the action as such posted notice could be removed by other tenants or children. "Under these conditions, notice by posting on the apartment door cannot be considered a 'reliable means of acquainting interested parties of the fact that their rights are before the courts.'" Green v. Lindsey, 456 U.S. at 453-454, 102 S.Ct. at 1880, 72 L.Ed.2d at 257-258 (quoting Mullane, 339 U.S. at 315, 70 S.Ct. at 657, 94 L.Ed. at 874).

The provision in A.R.S. § 33-1377(B) that the summons be sent by certified mail to the tenant's last known address minimally meets the constitutional due process requirement that notice be provided to the affected tenant. Mennonite Board of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180, 188 (1983) ("Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.") (Emphasis in original.)

Although the deemed receipt of the summons provision constitutes a minimum generally valid notice procedure, the provision still may be held to be constitutionally invalid as applied because of the circumstances of a particular tenant. Boddie v. Connecticut, 401 U.S. 371, 380, 91 S.Ct. 780, 787, 28 L.Ed.2d 113, 120 (1971). The myriad of factual circumstances where such a ruling might result is beyond the scope of this opinion. Where "under all the circumstances" there is doubt as to whether a tenant actually would receive notice pursuant to A.R.S. § 33-1377(B) an individual desiring to pursue a special detainer action would be well advised to seek with due diligence court jurisdiction of the tenant through personal service of process.

We also must consider whether the deemed receipt of the summons provision is an unconstitutional invasion into the

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Supreme Court's powers by the legislature. The Arizona Constitution gives the Arizona Supreme Court the power to make rules relative to all procedural matters in any court. Ariz. Const., art VI, § 5(5); State v. Blazak, 105 Ariz. 216, 217, 462 P.2d 84, 85 (1969). Pursuant to this power the Court has adopted the Arizona Rules of Civil Procedure making them applicable to all actions or proceedings. See Ariz Rules of Civil Procedure, Rule 81.

Rule 4 of the Arizona Rules of Civil Procedure, with some exceptions, requires personal service to obtain jurisdiction over an in-state defendant. This rule cannot be repealed by the legislature. State ex rel Collins v. Seidel, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984). Here, however, the deemed receipt of the summons provision does not repeal Rule 4 but rather provides an additional method by which jurisdiction can be obtained over a defendant in a single, newly authorized action, the special detainer action. The Supreme Court recognizes statutory arrangements which seem reasonable and workable and which supplement the rules it has promulgated. Id. Given the limited nature of the legislature's addition to Rule 4 and the fact that a statute is presumed to be constitutional, New Times Inc. v. Arizona Board of Regents, 110 Ariz. 367, 370, 519 P.2d 169, 172 (1974), we conclude that the deemed receipt of the summons provision does not constitute an undue infringement upon the Court's powers.^{1/}

3(b). If the deemed receipt of the summons provision is not a proper form of substituted service of process which will convey in personam jurisdiction over a defendant/tenant will it convey in rem jurisdiction over the property?

No. The constitutional right to receive notice of an action applies irrespective of whether the action is classified as in personam or in rem.

^{1/}Statutory rules, in any event, are deemed to be rules of court and remain in effect until modified or suspended by rules promulgated by the Supreme Court. See A.R.S. § 12-111; State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969); State v. Garza, 128 Ariz. 8, 623 P.2d 367 (App. 1981).

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The requirements of due process do not vary depending on a controversy's characterization as either in personam or in rem. See Mullane v. Central Hanover Bank & Trust Co., supra 339 U.S. at 312, 70 S.Ct. at 656. Notice must, in either case, be reasonably calculated to apprise interested parties of the pendency of the action. Id. 339 U.S. at 314; 70 S.Ct. at 657.

Shipley v. First Federal Savings and Loan Association of Delaware, 619 F.Supp. 421, 437 (D.Del. 1985).

4. In reliance upon A.R.S. § 33-1377(B), what proof is necessary for the judge?

To properly consider your question we first must resolve an apparent conflict in the statute. The last sentence of A.R.S. § 33-1377(B) provides that "[t]he summons in a special detainer action shall be served at least two days before the return day and the return day made on the day assigned for trial." (emphasis added). Read literally the sentence requires that the affected tenant be personally served with the summons. That interpretation, however, would make the deemed receipt of the summons provision meaningless. "The presumption is the legislature did not intend to do a futile thing by including in a statute a provision which is nonoperative or invalid." State v. Cassius, 110 Ariz. 485, 487, 520 P.2d 1109, 1111 (1974), cert. dismissed, 420 U.S. 514, 95 S.Ct. 1345, 43 L.Ed.2d 362 (1975). The statute can be harmonized by interpreting the last sentence to mean that if a summons is personally served "it shall be served at least two days before the return day." Such a construction is consistent with the deemed receipt of the summons provision.

A cardinal rule of statutory interpretation is to give full effect to the legislative intent, and each word or phrase must be given meaning so that no part is rendered void, superfluous, contradictory or insignificant. (citations omitted). If certain portions appear to be in conflict, they must be harmonized if possible, to give full effect to the statute.

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Weitkamp v. Fireman's Fund Insurance Co., 147 Ariz. 274, 275-276, 709 P.2d 908, 909-910 (App. 1985).^{2/}

With this clarification, we address your question of proof necessary for each method of obtaining jurisdiction. If the jurisdiction over the tenant is obtained through personal service, proof of such service should be in the manner set forth in Arizona Rules of Civil Procedure, Rule 4. If jurisdiction is sought through the deemed receipt of the summons provision of A.R.S. § 33-1377(B) the statute does not prescribe any specific type of proof. One seeking to prove facts to establish compliance with the statute to obtain jurisdiction in this manner would proceed in the same way one would establish any fact necessary to one's action.

4(a). Is the affidavit comprising the return of service satisfactory or must the green card (return receipt from the post office) be appended to the affidavit?

If jurisdiction is obtained over the tenant through personal service of the summons and proof of such service is shown as provided for in Arizona Rules of Civil Procedure, Rule 4 the individual seeking the special detainer action is not required to also seek jurisdiction of the tenant through the deemed receipt of the summons provision of A.R.S. § 33-1377(B). When a tenant is personally served, no "green card" need be produced as no certified letter is required.

If jurisdiction is obtained through the deemed receipt of the summons provision of A.R.S. § 33-1377(B) a certified letter must be sent to the tenant's last known address. Proof of mailing of the summons raises a presumption that the summons

^{2/}Our interpretation also is consistent with a legislative analysis of the statute which was attached to, and made a part of, the February 16, 1987 minutes of the Arizona House of Representatives Commerce Committee. The legislative analysis provides for obtaining court jurisdiction of the affected tenant through personal service or through the deemed receipt of the summons provision. The minutes of a legislative committee hearing are entitled to consideration by the trial court. O'Malley Lumber Co. v. Riley, 126 Ariz. 167, 169, 613 P.2d 629, 632 (App. 1980).

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was received by the tenant. Thompson v. Mecey, 101 Ariz. 125, 126, 416 P.2d 558, 559 (1966). This presumption, however, must be overcome when no receipt notice is returned. McPartlin v. Commissioner, 653 F.2d 1185, 1191 (7th Cir. 1981). An individual seeking jurisdiction through the deemed receipt of the summons provision, therefore, in order to maintain the presumption, should provide evidence of the receipt of the "green card" to the court or show why the "green card" was not received.

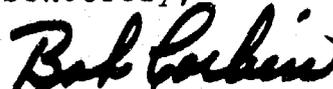
4(b). Does the presence or absence of the green card affect the type of jurisdiction the court may exercise?

No. See discussion supra at pages 3-5.

5. If the deemed receipt of summons statute conveys to the court something less than [sic] in personam jurisdiction, what relief may a court grant among those forms of relief enumerated in A.R.S. § 33-1377(B), (F) and (G)?

None. If the tenant is not afforded due process by receiving adequate notice the court will not have jurisdiction to grant any form of relief.

Sincerely,



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