

APPEARANCES CAN BE DECEIVING: DEFAULT JUDGMENTS BY MOTION OR HEARING UNDER RULE 55(B) OF THE ARIZONA RULES OF CIVIL PROCEDURE

Julie A. Wilson-McNerney*

Within the span of nine months, the Arizona Court of Appeals issued two directly conflicting rulings on the correct procedures required to obtain a default judgment under Rule 55(b) of the Arizona Rules of Civil Procedure. Although Rule 55(b) seems unambiguous on its face, the Arizona Court of Appeals arrived at two distinct interpretations regarding three key aspects of the rule—namely, what constitutes an appearance; when an appearance triggers the noticed hearing requirement; and when it is appropriate to grant a default judgment by motion or hearing. These competing interpretations hinge on how the policies behind the rule are balanced: Should Arizona favor conserving judicial resources or resolving cases on the merits? As it stands, Rule 55(b) most likely should be read to favor judicial economy given the history of amendments to the rule and a full reading of its plain language. If the Arizona Supreme Court ever takes up the issue, however, the Court ought to consider whether judicial economy should trump a defaulted defendant's interest in participating in a damages hearing when that defendant has shown an interest, albeit imperfect, in defending the claim.

* J.D. Candidate, University of Arizona James E. Rogers College of Law, 2013. The Author would like to thank Stuart Kottle, Sabrina Lochner, Brian Mosley, Victor Nilsson, and Grant Wille for their exceptional feedback. The Author would also like to thank Katie McNerney, without whom none of this would be possible.

TABLE OF CONTENTS

INTRODUCTION	236
I. DEFAULT JUDGMENT RULES IN ARIZONA.....	238
A. How to Obtain a Default Judgment in Arizona: The Text of Rule 55(b) ...	238
1. Rule 55(b)(1): Default Judgment by Motion	238
2. Rule 55(b)(2): Default Judgment by Hearing	239
3. The Interpretive Battleground: How Should <i>Appearance</i> Be Defined? .	239
B. Why Does Arizona Allow Default Judgments by Motion and Hearing?: The Policy Behind Rule 55(b)	240
II. JUDICIAL ATTEMPTS TO DEFINE <i>APPEARANCE</i> : <i>BYS</i> AND <i>SEARCHTOPPERS</i>	243
A. A Single Definition of <i>Appearance</i> : <i>BYS Inc. v. Smoudi</i> and Judge Orozco's Dissent in <i>Searchtoppers.com, L.L.C. v. TrustCash, LLC</i>	243
B. <i>Appearance</i> Two Ways: <i>Searchtoppers.com, L.L.C. v. TrustCash, LLC</i> ...	247
III. WHAT PROCESS SHOULD RULE 55(B) REQUIRE?	251
CONCLUSION	252

INTRODUCTION

When a plaintiff seeks definite, clearly calculable damages from a defaulted defendant, should a court simply do the math and award the plaintiff damages? Or might a defaulted defendant's late appearance in the case entitle that defendant to a noticed hearing on damages before judgment? In 2012, Division One of the Arizona Court of Appeals provided two different answers to this question when it offered contradictory interpretations of the verb *to appear* and the notice requirement in Rule 55(b) of the Arizona Rules of Civil Procedure. Although Rule 55(b) seems unambiguous on its face, the court of appeals has arrived at distinct definitions of key language in the rule—namely, what constitutes an appearance; when does an appearance trigger the noticed hearing requirement; and what is the dividing line between obtaining a default judgment by motion and by hearing.¹ These competing interpretations hinge on the appropriate

1. Compare *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1201–03 (Ariz. Ct. App. 2012) (defining *appearance* as merely subjecting oneself to the jurisdiction of the court; stating notice requirement triggered anytime defendant submits herself to the jurisdiction of the court, regardless of damages; and finding appearance as the dividing line between the rule's motion and hearing requirements), with *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293 P.3d 512, 515–17 (Ariz. Ct. App. 2012) (defining *appearance* differently in both subsections, as a default under Rule 55(a) in subsection (1) and a submission to jurisdiction in subsection (2); stating notice requirement only triggered when plaintiff claims unliquidated damages and defendant has submitted to jurisdiction; and finding damages as the dividing line between rule's motion and hearing requirements). These conflicting Rule 55(b) interpretations come just a year and a half after the Arizona Supreme Court introduced uncertainty into the interpretation of the attorney-notice requirement in Rule 55(a) of the Arizona Rules of Civil Procedure. See Grant D. Wille, Case Note, *Valid*,

policy behind the rule—whether Arizona should favor conserving judicial resources or resolving cases on the merits.

Rule 55(b) establishes two different procedures a plaintiff can use to obtain a default judgment against a defaulted party: The plaintiff can request a default judgment by motion² or by hearing.³ Default judgments by motion allow the court to dispose of cases quickly, whereas judgments by hearing require more judicial resources. A plaintiff may request a default judgment by motion when a defendant “has been defaulted for failure to appear” and the suit involves only liquidated damages.⁴ “In all other cases,” a plaintiff must apply to the court for a default judgment by hearing.⁵ The defaulted defendant is then entitled to notice of the hearing if she has appeared in the action.⁶

In 2012, two cases before the Arizona Court of Appeals raised the question of whether a late appearance in an action by itself entitles a defaulted defendant to a noticed hearing on damages. In *BYS Inc. v. Smoudi*, the court found that if a defaulted defendant had appeared in the action, she must be given a noticed hearing on the issue of damages, regardless of the type of damages the plaintiff claimed.⁷ Just nine months later, *Searchtoppers.com, L.L.C. v. TrustCash LLC* held that the type of damages the plaintiff claims, and not whether a defaulted party has appeared, determines when a hearing is required.⁸ Under *Searchtoppers*, the plaintiff must provide the defaulted defendant with notice of a hearing only when damages are unliquidated and the defendant has appeared in the action.⁹

BYS and *Searchtoppers* have thrown the requirements for default judgments by motion and hearing into confusion. This drastic split in the court is highlighted by the fact that Judge Patricia Orozco wrote both the majority opinion in *BYS* and the dissent in *Searchtoppers*.¹⁰ If the Arizona Supreme Court ever decides to take up this issue, the Court should examine the competing policy goals that underlie these two divergent interpretations to determine which interpretation

Voidable, or Void? Default Judgments and Attorney Notification Under Rule 55(a) of the Arizona Rules of Civil Procedure, 53 ARIZ. L. REV. 1363, 1379 (2011).

2. ARIZ. R. CIV. P. 55(b)(1).

3. ARIZ. R. CIV. P. 55(b)(2).

4. ARIZ. R. CIV. P. 55(b)(1). A plaintiff may only obtain a default judgment by motion following Rule 55(b)(1) if the defendant “is not an infant or incompetent person.” *Id.* Rule 55(b)(1) uses the term *sum certain* damages. *Id.* For ease of use, I follow *Searchtoppers* in using the term *liquidated damages* to cover *sum certain*, easily calculable, and liquidated damages. See 293 P.3d at 515 n.5.

5. ARIZ. R. CIV. P. 55(b)(2).

6. *Id.* (“If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.”).

7. 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

8. 293 P.3d at 515, 517.

9. *Id.* at 515.

10. *Id.* at 518–20 (Orozco, J., dissenting); *BYS Inc.*, 269 P.3d at 1198–1203.

of Rule 55(b) is correct.¹¹ Given the history of the rule¹² and a complete reading of its text, the underlying principle of *Searchtoppers* seems poised to win the day. That is, courts should read Rule 55(b) to favor judicial economy in all liquidated damages suits. However, before adopting this policy rationale, the Arizona Supreme Court ought to consider whether judicial economy should trump a defaulted defendant's interest in participating in a damages hearing when that defendant has shown an interest, albeit imperfect, in defending the claim.

I. DEFAULT JUDGMENT RULES IN ARIZONA

A. How to Obtain a Default Judgment in Arizona: The Text of Rule 55(b)

In Arizona, a defendant in a civil case has 20 days to file an answer after the service of a summons and complaint.¹³ If a defendant fails to “plead or otherwise defend” within the 20-day window, the plaintiff may apply for an entry of default with the court clerk.¹⁴ The plaintiff must serve the application for entry of default on the defendant, who then has ten days to “plead or otherwise defend.”¹⁵ If the defendant fails to respond within the ten-day grace period, the clerk will enter a default against the defendant.¹⁶

Once a default has been entered against a defendant, the plaintiff can seek a damages award through a default judgment under Rule 55(b). The plaintiff can obtain a default judgment from the court by motion or hearing.¹⁷

1. Rule 55(b)(1): Default Judgment by Motion

Under Rule 55(b)(1), a plaintiff may apply for a default judgment by motion “[w]hen the plaintiff’s claim against a defendant is for a *sum certain* or for a sum which can by computation be made certain, . . . if the defendant has been *defaulted for failure to appear*”¹⁸ In other words, Rule 55(b)(1) contains two main requirements that must be met before a plaintiff can obtain a default judgment by a motion.¹⁹ First, the plaintiff must claim liquidated, or clearly

11. Neither TrustCash nor BYS appealed their cases to the Arizona Supreme Court. See Westlaw search of case history for *BYS Inc.*, 269 P.3d 1197; COURT OF APPEALS DIVISION ONE, CIVIL APPEAL, DOCKET NO. 1 CA-CV 11-0171, *SEARCHTOPPERS.COM V. TRUSTCASH* (2013), available at <http://apps.supremecourt.az.gov/aacc/1ca/1cacase.htm> (follow “Active Civil Cases” hyperlink; then follow “1 CA-CV 11-0171” hyperlink) (last visited Mar. 4, 2013) (on file with Author); ARIZ. R. CIV. APP. P. 23(a) (stating parties may file a petition of review with the Arizona Supreme Court “within 30 days after the Arizona Court of Appeals issues its decision”).

12. See generally *infra* notes 31–42 and accompanying text.

13. ARIZ. R. CIV. P. 12(a)(1)(A).

14. ARIZ. R. CIV. P. 55(a).

15. *Id.*

16. *Id.*

17. ARIZ. R. CIV. P. 55(b).

18. ARIZ. R. CIV. P. 55(b)(1) (emphasis added).

19. Rule 55(b)(1) also contains a third requirement—that the defaulted defendant not be an “an infant or incompetent person.” *Id.* This provision of Rule 55(b)(1) is not addressed in *BYS* or *Searchtoppers*. See *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293

calculable, damages.²⁰ Second, the defendant must have been “defaulted for failure to appear.”²¹ The meaning of this second prong is the subject of the dispute between the *Searchtoppers* majority and Judge Orozco, the author of the dissenting opinion in *Searchtoppers* and the majority opinion in *BYS*. Both panels of the court of appeals reach different conclusions about the meaning of the verb *to appear* and when a noticed hearing is required.²²

2. Rule 55(b)(2): Default Judgment by Hearing

“In all other cases”—that is, if the motion requirements mentioned above are not met—a party seeking a default judgment must ask for a hearing.²³ Despite the lack of clarity in the motion requirements in subsection (1), it is clear that once a hearing is warranted, a party seeking a default judgment must give notice under Rule 55(b)(2) if the defaulting party has appeared in the action.²⁴ A trial court may also hold a hearing and even a jury trial on damages where “it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter.”²⁵

3. The Interpretive Battleground: How Should Appearance Be Defined?

The confusion created by the recent Arizona Court of Appeals cases stems from the panels’ differing interpretations of the following phrases: *in all other cases* in Rule 55(b)(2), *has appeared* in Rule 55(b)(2), and *failure to appear*

P.3d 512, 513–18 (Ariz. Ct. App. 2012); *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1198–1202 (Ariz. Ct. App. 2012).

20. ARIZ. R. CIV. P. 55(b)(1).

21. *Id.*

22. *See infra* Parts I.A.3, II.

23. ARIZ. R. CIV. P. 55(b)(2).

24. *Id.* (“If the party against whom judgment by default is sought has appeared in the action, that party . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.”).

25. *Id.* The full text of Rule 55(b)(2) reads as follows:

2. *By hearing. In all other cases* the party entitled to a judgment shall apply to the court therefor, but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, or other such representative who has appeared therein. If the party against whom judgment by default is sought *has appeared* in the action, that party or, if appearing by representative, that party’s representative, shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when required by law.

Id. (emphasis added).

in Rule 55(b)(1). The court of appeals has proposed two different interpretations of the verb *to appear*. The first interpretation finds two definitions of the verb in both subsections of Rule 55(b): In subsection (1), the verb means that a defendant has been defaulted for a failure to plead or otherwise defend under Rule 55(a) of the Arizona Rules of Civil Procedure.²⁶ In subsection (2), the verb is more liberally defined as merely subjecting oneself to the jurisdiction of the court.²⁷ The second interpretation finds that the liberal definition of *appearance* in subsection (2) also applies to subsection (1).²⁸

The court's divergent interpretations of the verb *to appear* affect how the rule operates in practice. The phrase *in all other cases* suggests that the two subsections are mutually exclusive. That is, if the requirements for a default judgment by motion are not met, then a judgment must be obtained by hearing. If the subsections are mutually exclusive, then only one test should apply to determine whether a plaintiff should seek a default judgment by motion or hearing. The question then is which definition of *appearance* should be incorporated into that test. If the word *appearance* has two definitions, a noticed hearing will be required whenever damages are unliquidated and the defendant has not "*defaulted for failure to appear.*"²⁹ If a single definition of *appearance* is used, a noticed hearing will be required whenever the defendant has appeared in any form, even if late, and regardless of the type of damages plaintiff seeks.³⁰ Thus, the first interpretation draws the line between the motion and hearing procedures based on the type of damages the plaintiff seeks, whereas the second interpretation draws the line based on a defaulting party's appearance, or lack thereof.

B. Why Does Arizona Allow Default Judgments by Motion and Hearing?: The Policy Behind Rule 55(b)

These conflicting interpretations stem from two different views of the appropriate policy goals behind the rule. Rule 55(b) balances two competing policy concerns—judicial efficiency and resolving suits on their merits. Prior to 1975, Rule 55(b) contained a single procedure for obtaining a default judgment—by application to the court, which had discretion to conduct a hearing.³¹ This

26. *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293 P.3d 512, 515 (Ariz. Ct. App. 2012) (defining the phrase "has been defaulted for failure to appear," as equivalent to the definition "provided in Rule 55(a)[:] the defendant has been defaulted for failing to plead or otherwise defend before the entry of default became effective").

27. *Id.* at 515 n.7, 516 (defining *appearance* in subsection (2) as when defendants "submit[] themselves to the jurisdiction of the court" (quoting *Tarr v. Superior Court*, 690 P.2d 68, 71 (Ariz. 1984))).

28. *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012) ("'Appearance' is construed liberally and generally applies to any action taken by the defendant in which he recognizes that the case is in court and submits himself to the court's jurisdiction." (citing *Tarr*, 690 P.2d at 70)).

29. *Searchtoppers.com, L.L.C.*, 293 P.3d at 515 (emphasis added).

30. *See BYS Inc.*, 269 P.3d at 1202.

31. ARIZ. R. CIV. P. 55(b) (1956); *see also Searchtoppers.com, L.L.C.*, 293 P.3d at 515 n.8; *Rogers v. Tapo*, 230 P.2d 522, 525 (Ariz. 1951). Under the old Rule 55(b), the

version of the rule afforded a defaulted party who had appeared in an action a “reasonable opportunity to litigate his claim or defense on the merits.”³² In 1975, Arizona amended Rule 55(b) to create a bifurcated procedure for obtaining a default judgment.³³ Under the modern Rule 55(b), parties can seek a default judgment by a motion or a hearing.³⁴ By allowing a judge to enter a judgment on a motion in certain instances, this revision introduced a faster, more efficient way for parties to obtain a default judgment.

In effect, the Arizona Court of Appeals has found that the purpose of the modern version of Rule 55(b) is to conserve judicial resources by eliminating unnecessary hearings on damages.³⁵ Arizona treats an entry of default as an “admission of liability.”³⁶ Therefore, upon the entry of default, the defaulted party can no longer litigate liability.³⁷ With the issue of liability resolved, a court only needs to determine damages. In liquidated damages cases, holding a full damages hearing would waste judicial resources.³⁸ Often a court can simply do the math for itself, or it can enforce a liquidated damages clause in a contract.³⁹ In such cases, the court does not need to hold a damages hearing because the court has no

party seeking the judgment was required to serve notice of the application for default judgment on a defaulted defendant if the defaulted party had appeared in the action. ARIZ. R. CIV. P. 55(b) (1956). The court could hold a hearing before granting a default judgment if it needed more information to determine the amount of damages to award. *Id.*

The relevant text of Rule 55(b) prior to the 1975 amendment reads:

Rule 55(b) Judgment by default. Judgment by default may be entered as follows:

1. In all cases the party entitled to judgment by default shall apply to the court therefor If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.
2. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages . . . , the court may conduct such hearings . . . as it deems necessary and proper[.]

Searchtoppers.com, L.L.C., 293 P.3d at 515 n.8 (quoting ARIZ. R. CIV. P. 55(b) (1956)).

32. *Rogers*, 230 P.2d at 525.

33. *Searchtoppers.com, L.L.C.*, 293 P.3d at 515–16. The 1975 amendment changed the language of Rule 55(b)(1) to establish a procedure for obtaining a default judgment by motion. See ARIZ. R. CIV. P. 55(b)(2). The text of the old Rule 55(b) was combined and moved into what is now Rule 55(b)(2). Compare ARIZ. R. CIV. P. 55(b) (1956), with ARIZ. R. CIV. P. 55(b)(2).

34. ARIZ. R. CIV. P. 55(b).

35. See *Searchtoppers.com, L.L.C.*, 293 P.3d at 515–16; see also *Monte Produce, Inc. v. Delgado*, 614 P.2d 862, 863–64 (Ariz. Ct. App. 1980).

36. *Dungan v. Superior Court*, 512 P.2d 52, 53 (Ariz. Ct. App. 1973).

37. *Tarr v. Superior Court*, 690 P.2d 68, 70 (Ariz. 1984).

38. See *Searchtoppers.com, L.L.C.*, 293 P.3d at 517 (finding that a hearing is unnecessary when damages are certain because the court lacks discretion to calculate the monetary amount).

39. See *Monte Produce, Inc.*, 614 P.2d at 863–64.

discretion in determining damages.⁴⁰ Therefore, awarding a default judgment by motion is appropriate.⁴¹ As the Arizona Court of Appeals has described, an entry of default in a liquidated damages case essentially constitutes an admission of both liability and the amount of damages owed.⁴²

The second policy behind Rule 55(b) reflects a preference that most cases be decided on their merits. The rule protects this policy in three ways. First, the Arizona Court of Appeals has narrowly interpreted the definition of liquidated damages. Liquidated damages only include those claims that have “been fixed, settled, or agreed upon by the parties.”⁴³ A plaintiff cannot transform an unliquidated damages claim into one for liquidated damages just by asking for a specific amount of money.⁴⁴ This narrow definition limits the scope of the motion procedure and prevents plaintiffs from turning every complaint into a claim for liquidated damages in order to quickly receive a judgment without dispute.⁴⁵

Second, a hearing, notice, and even a jury trial may be required under Rule 55(b)(2) if the damages are uncertain.⁴⁶ When the trial court decides to hold a damages hearing, the defaulted party may fully participate in the hearing by contesting damages, cross-examining witnesses, and offering evidence that contradicts the plaintiff’s claim.⁴⁷

Finally, some cases suggest that if a defendant has ever submitted herself to the jurisdiction of the court, even if such an appearance has been late, the defendant should be invited to participate in a hearing to contest damages.⁴⁸ This liberal definition of *appearance* evinces the Arizona Supreme Court’s reluctance to take away a defaulted defendant’s ability to be heard on damages when a defaulted party has appeared after the entry of default.⁴⁹ By employing “an

40. *Searchtoppers.com, L.L.C.*, 293 P.3d at 517.

41. *Id.*

42. *Monte Produce, Inc.*, 614 P.2d at 864.

43. *Beyerle Sand & Gravel, Inc. v. Martinez*, 574 P.2d 853, 856 (Ariz. Ct. App. 1977).

44. *Id.* To have a rule to the contrary would mean that “almost any unliquidated claim [could] be transformed into a claim for a sum certain merely by placing a monetary amount on the item of claimed damage even though such amount has not been fixed, settled, or agreed upon by the parties and regardless of the nature of the claim.” *Id.*

45. *See id.*

46. ARIZ. R. CIV. P. 55(b)(2); *see* *Mayhew v. McDougall*, 491 P.2d 848, 853 (Ariz. Ct. App. 1971); *see also* *Dungan v. Superior Court of Pinal County*, 512 P.2d 52, 53–54 (Ariz. Ct. App. 1973). It should be noted that these cases interpret the old version of Rule 55(b).

47. *See* *Hilgeman v. Am. Mortg. Sec., Inc.*, 994 P.2d 1030, 1039 (Ariz. Ct. App. 2000) (“contested evidentiary hearing, on the record”); *Tarr v. Superior Court*, 690 P.2d 68, 70 (Ariz. 1984) (full participation in hearing); *Monte Produce, Inc.*, 614 P.2d at 864 (ability to contest damages); *Dungan*, 512 P.2d at 54 (ability to cross-examine witnesses and offer contradictory evidence).

48. *Tarr*, 690 P.2d at 70; *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

49. *Tarr*, 690 P.2d at 70.

adversary system of justice,” the court can ensure that damages will be decided justly on the merits.⁵⁰

This second policy consideration, which expresses a preference that most cases be decided on their merits, could provide an answer to the ambiguous definition of *appearance* discussed above. To allow a defendant who has made a late appearance to participate in a damages hearing, Rule 55(b) must be interpreted to have a single, liberal definition of *appearance*. The next Part considers whether Rule 55(b) should be understood in terms of this policy goal.

II. JUDICIAL ATTEMPTS TO DEFINE *APPEARANCE*: *BYS* AND *SEARCHTOPPERS*

Within the span of nine months, Division One of the Arizona Court of Appeals issued two rulings, on similar sets of facts, that came to contrary conclusions regarding the following question: Is a defaulted defendant entitled to a noticed hearing on the issue of damages if she subsequently appears in a case after a default has been entered? Under *BYS*, a defaulted defendant receives a noticed hearing whenever she has appeared in the action.⁵¹ Under *Searchtoppers*, a defaulted defendant does not receive a noticed hearing when the plaintiff claims liquidated damages, even when the defendant has appeared.⁵² The two interpretations favor either resolving cases on their merits or promoting judicial efficiency, respectively.

*A. A Single Definition of Appearance: **BYS Inc. v. Smoudi and Judge Orozco’s Dissent in Searchtoppers.com, L.L.C. v. TrustCash, LLC***

BYS involved a liquidated damages claim, a defaulted defendant who appeared late in the action, and a default judgment by motion.⁵³ *BYS* sued the Smoudis for breach of contract on a lease agreement for failure to pay rent and maintenance charges.⁵⁴ The Smoudis failed to file an answer in the case, and *BYS* filed an application for entry of default.⁵⁵ Nearly a month later, the defendants filed a request for a time extension and paid the answer fee.⁵⁶ *BYS* responded to the Smoudis’ request, but later filed a motion for default judgment, which the court granted.⁵⁷ The Smoudis filed a motion to set aside the judgment, arguing that they had appeared in the action through their request for a time extension and were

50. Neis v. Heinsohn/Phoenix, Inc., 628 P.2d 979, 984 (Ariz. Ct. App. 1981) (quoting *Dungan*, 512 P.2d at 54).

51. 269 P.3d at 1202.

52. *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293 P.3d 512, 515 (Ariz. Ct. App. 2012).

53. *BYS Inc.*, 269 P.3d at 1198–99, 1202.

54. *Id.* at 1198.

55. *Id.* at 1198–1200.

56. *Id.* at 1199.

57. *Id.*

therefore entitled to notice and a hearing per Rule 55(b)(2).⁵⁸ The Arizona Court of Appeals agreed and voided the default judgment.⁵⁹

The *BYS* court interpreted Rule 55(b) as containing a single definition of *appearance*. In an opinion that relied on case law decided under the pre-amendment version of Rule 55(b),⁶⁰ the *BYS* court defined *appearance* as “any action taken by the defendant in which he recognizes that the case is in court and submits himself to the court’s jurisdiction.”⁶¹ Under this interpretation, a plaintiff may seek a judgment by motion if two conditions are met: (1) The plaintiff has claimed liquidated damages, and (2) the defendant has never appeared in the action.⁶² A default for “failing to plead or otherwise defend as set forth in Rule 55(a)” does not prevent a party from appearing in the case to contest damages.⁶³ On the contrary, a hearing is required “when a party has: (1) appeared, regardless of whether the damages are liquidated or unliquidated; and (2) when a party has not appeared, and the damages are unliquidated.”⁶⁴ A plaintiff must give a defaulted defendant notice of the upcoming damages hearing when the defaulted defendant has appeared in the action.⁶⁵

This interpretation has significant real-world effects on the way Rule 55(b) functions. For example, picture a defendant in a liquidated damages case who has been defaulted for failing to plead or otherwise defend under Rule 55(a). This defendant did not file a timely answer; however, she did file a late answer *after* the entry of default but *before* the default judgment. Because the defaulted defendant has submitted herself to the jurisdiction of the court and has shown an interest in defending the suit, the plaintiff must now seek a default judgment by hearing. The plaintiff must also provide the defaulted defendant with notice three days prior to the hearing. Although this might not be the most efficient outcome, this interpretation of the rule ensures an adversarial hearing where damages will most certainly be decided on the merits.

This is not to say that the *BYS* interpretation always has inefficient results. Imagine a defaulted defendant in a liquidated damages case who has never appeared in the action. She does not file a timely answer, and she never contacts the court or submits herself to its jurisdiction. In this fact pattern, the plaintiff must obtain a default judgment by motion. Therefore, while this interpretation of Rule 55(b) generally favors deciding cases on the merits and not by the application of procedural rules, it does not always do so at the expense of efficiency.

58. *Id.*

59. *Id.* at 1202.

60. *Id.*

61. *Id.* (citing *Tarr v. Superior Court*, 690 P.2d 68, 70 (Ariz. 1984)).

62. *See id.*; *see also Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293 P.3d 512, 518–19 (Ariz. Ct. App. 2012) (Orozco, J., dissenting).

63. *Searchtoppers.com, L.L.C.*, 293 P.3d at 519 (Orozco, J., dissenting) (emphasis omitted); *see also BYS Inc.*, 269 P.3d at 1202 (Ariz. Ct. App. 2012) (citing *Tarr*, 690 P.2d at 70).

64. *BYS Inc.*, 269 P.3d at 1202.

65. *Id.*

Nor is the *BYS* interpretation of the word *appearance* in Rule 55(b) novel. The federal courts, under their nearly identical default judgment rule,⁶⁶ have also interpreted appearance broadly.⁶⁷ Federal Rule 55(b)(1) allows a federal clerk to enter a default judgment only if a party has “never appeared in the action.”⁶⁸ A single appearance, even if late, triggers “the special notice and judicial review protections provided in [Federal Rule 55(b)(2)].”⁶⁹ This notice requirement “protect[s] those parties who, although delaying in a formal sense by failing to file pleadings within the twenty day period, have otherwise indicated to the moving party a clear purpose to defend the suit.”⁷⁰ Federal Rule 55(b) tempers judicial efficiency goals with the concern that defaulted defendants receive procedural protections when they have appeared.

Arizona strives to achieve a uniform interpretation between its rules of civil procedure and the federal rules.⁷¹ The federal rule, however, differs from

66. FED. R. CIV. P. 55(b)(1)–(2). The full text of Federal Rule 55(b) reads as follows:

(b) Entering a Default Judgment.

(1) *By the Clerk.* If the plaintiff’s claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff’s request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

- (A) conduct an accounting;
- (B) determine the amount of damages;
- (C) establish the truth of any allegation by evidence;
- or
- (D) investigate any other matter.

FED. R. CIV. P. 55(b).

67. Federal courts have defined an *appearance* under Federal Rule 55(b), as “involv[ing] some presentation or submission to the court.” CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2686 (3d ed. 2012) (citations omitted) (internal quotation marks omitted).

68. *Id.* § 2683.

69. *Id.* § 2686.

70. *Id.* § 2687.

71. Orme Sch. v. Reeves, 802 P.2d 1000, 1003 (Ariz. 1990) (“[Arizona] subscribe[s] to the principle that uniformity in interpretation of our rules and the federal rules is highly desirable.”).

Arizona's rule in an important way. Federal Rule 55(b) establishes two procedures for awarding a default judgment—entry by the clerk or entry by the court.⁷² Arizona, on the other hand, has adopted a different bifurcated procedure that allows default judgments to be awarded by motion or hearing.⁷³ This semantic difference, however, has not stopped Arizona courts from trying to harmonize the two rules.

Arizona courts certainly attempted to harmonize the two rules prior to the 1975 amendment of Arizona Rule 55(b),⁷⁴ and the Arizona Supreme Court has extended this interpretive approach to the modern version of the rule.⁷⁵ In *Tarr v. Superior Court*, the Court held that the filing of a late answer *after* an entry of default but before an application for default judgment has been made can constitute an appearance that triggers the notice and hearing requirements of Rule 55(b)(2).⁷⁶ A default under Rule 55(a) does not prevent the defaulted party from “appearing in the action.”⁷⁷ The Court went on to state that Arizona follows the “majority rule” regarding appearances and then defined the term in a familiar manner: “[A]n appearance can be any action by which a party comes into court and submits himself to its jurisdiction.”⁷⁸ This suggests that the Arizona Supreme Court may have intended to continue interpreting the modern version of Arizona Rule 55(b) to be consistent with the federal rule's liberal appearance standard. *BYS* continued to harmonize the Arizona rule with the federal rule by relying on *Tarr*'s liberal definition of *appearance*.⁷⁹

The *BYS* perspective seems plausible even under statutory interpretation rules. It ensures a single, coherent definition of *appearance* throughout the rule by adopting *Tarr*'s liberal appearance standard in both subsections. This unified reading accords with Arizona's preference for avoiding interpretations that render

72. FED. R. CIV. P. 55(b).

73. ARIZ. R. CIV. P. 55(b)(2).

74. See *Rogers v. Tapo*, 230 P.2d 522, 525 (Ariz. 1951) (“An appearance does not prevent a party from being in default for failure to plead or otherwise defend, but in order for a plaintiff to secure a default judgment against a defendant it is incumbent upon plaintiff to give the three day written notice of application for judgment required under . . . Rule 55(b).” (citation omitted)); *Austin v. State ex rel. Herman*, 459 P.2d 753, 756 (Ariz. Ct. App. 1969) (“[A]ny action on the part of defendant, except to object to the jurisdiction over his person[,] which recognizes the case as in court, will constitute a general appearance.” (citations omitted)).

75. *Tarr v. Superior Court*, 690 P.2d 68, 70–71 (Ariz. 1984) (citing Annotation, *What Amounts to an “Appearance” Under Rule 55(b)(2) of the Federal Rules of Civil Procedure, Providing That If the Party Against Whom a Judgment by Default Is Sought Has “Appeared” in the Action, He Shall Be Served with Written Notice of the Application for Judgment*, 27 A.L.R. FED. 620 (1976)) (referring to Arizona case law that interprets the notice requirement of the rule's pre-1975 version).

76. *Id.* at 69–71.

77. *Id.* at 70.

78. *Id.*

79. See *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

statutory language contradictory.⁸⁰ This approach ensures consistency in language and confirms a unitary policy goal for Rule 55(b)—to protect trials on the merits.

The *BYS* court's interpretation of Rule 55(b) favors a trial on the merits in most instances by adopting a procedure which ensures that defaulted defendants who have appeared in the action will always be entitled to a noticed hearing on damages. In adopting a liberal definition of *appearance*, *BYS* attempted to harmonize the Arizona rule with the federal rule and to follow the Arizona Supreme Court's decision in *Tarr* to continue this approach, even after the 1975 amendment to the rule. This interpretation should be afforded a certain amount of weight because it attempts to comply with Arizona Supreme Court precedent on the issue.

B. Appearance *Two Ways*: Searchtoppers.com, L.L.C. v. TrustCash, LLC

In a case with similar facts, the *Searchtoppers* court disagreed with the *BYS* court's statutory interpretation and ruled that even if a defendant files a late answer after the entry of default, that defendant is not entitled to a noticed hearing if damages are liquidated.⁸¹ *Searchtoppers.com, L.L.C.* ("Searchtoppers"), filed suit against TrustCash, LLC ("TrustCash"), alleging breach of contract for failure to pay a monthly fee.⁸² Like the *Smoudis*, TrustCash failed to file an answer within the statutorily required 20 days after service of the complaint.⁸³ So, Searchtoppers filed an application for default, which became effective ten days later.⁸⁴ Six days after the default had been entered, TrustCash filed an answer and a notice of appearance.⁸⁵ Searchtoppers then filed a motion for default judgment without a hearing, arguing that damages were liquidated and that the case fell under Rule 55(b)(1).⁸⁶ On appeal, TrustCash argued that it was entitled to a hearing on the issue of damages because its late answer constituted an appearance that triggered Rule 55(b)(2)'s noticed hearing requirement.⁸⁷ The court of appeals disagreed and found that a default judgment by motion was appropriate.⁸⁸

The *Searchtoppers* court interpreted Rule 55(b) as containing two distinct definitions of *appearance*. Unlike the *BYS* interpretation, the *Searchtoppers* court read "defaulted for failure to appear" as synonymous with Rule 55(a)'s requirement that a default be entered when a defendant has failed "to plead or otherwise defend."⁸⁹ According to *Searchtoppers*, a default judgment by motion is

80. *Searchtoppers.com, L.L.C. v. TrustCash LLC*, 293 P.3d 512, 519 (Ariz. Ct. App. 2012) (Orozco, J., dissenting) (citing *In re Moises L.*, 18 P.3d 1231, 1233 (Ariz. Ct. App. 2000) ("[W]e undertake to avoid rendering statutory language superfluous, void, contradictory, or insignificant." (internal quotation marks omitted))).

81. *Id.* at 516–17 (majority opinion).

82. *Id.* at 513.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 514.

87. *Id.*

88. *Id.* at 513.

89. *Id.* at 515.

appropriate if two requirements are met: (1) The plaintiff has claimed liquidated damages, and (2) the defendant has been defaulted for failure to appear pursuant to Rule 55(a).⁹⁰ Under this interpretation then, the phrase *in all other cases* means all cases in which the plaintiff claims unliquidated damages or where a default has been entered on grounds other than Rule 55(a).⁹¹ In other words, defaulted defendants in liquidated damages cases are not entitled to a noticed hearing; whereas, defaulted defendants in *unliquidated* damages cases are entitled to a noticed hearing if they have made a late appearance.⁹²

The real-world effects of the *Searchtoppers* court's interpretation of Rule 55(b) differ wildly from the way the rule would operate under the *BYS* interpretation. Consider the hypothetical defendants discussed above. In this hypothetical liquidated damages case, the defendant has been defaulted for failing to plead or otherwise defend under Rule 55(a). She also filed a late answer after the entry of default but before the default judgment. Under *Searchtoppers*, because the plaintiff seeks liquidated damages and the defendant has been defaulted under Rule 55(a), the plaintiff must seek a default judgment by motion. The defaulted defendant is not entitled to a hearing on damages. Nor is the defaulted defendant entitled to notice, because Rule 55(b)(1) does not contain a notice requirement. The type of damages the plaintiff seeks determines which procedure applies. Therefore, the result will be the same regardless of whether a defaulted defendant has appeared in the action.

Now take a defaulted defendant in an *unliquidated* damages case who has never appeared. This defendant is entitled to a hearing on damages. However, the notice requirement in Rule 55(b)(2) is only triggered if the defaulted defendant has appeared in the action by submitting herself to the jurisdiction of the court. This defaulted defendant, who has *never* appeared, does not receive notice of the impending default judgment hearing.

Under these hypotheticals, the *Searchtoppers* interpretation of Rule 55(b) favors judicial efficiency based on the proposition that a hearing is always unnecessary if the court has no discretion in calculating liquidated damages. In effect, this approach places judicial efficiency above procedures that favor deciding cases on the merits.

Indeed, *Searchtoppers* viewed the addition of the motion procedure in 1975 as effecting a fundamental change in the way the rule operates.⁹³ Therefore,

90. *Id.*

91. *Id.* *Searchtoppers* found that when a default has been entered as a sanction pursuant to Rule 37, the defaulted party is entitled to notice and a hearing under Rule 55(b)(2). *Id.* at 515 n.6 (citing *Poleo v. Grandview Equities, Ltd.*, 692 P.2d 309, 313 (Ariz. Ct. App. 1984) (“We hold that the party whose pleadings have been stricken as a sanction under Rule 37 must be given notice of the application for judgment as required by Rule 55(b)(2) because that party has ‘appeared’ in the action.”)).

92. *Id.* at 517 (“The nature of the claim is what distinguishes Rule 55(b)(1) (which does not require notice) from Rule 55(b)(2) (which does require notice).”).

93. See *Searchtoppers.com, L.L.C.*, 293 P.3d at 515–16; see also *supra* note 31; see generally *supra* Part I.B.

the *Searchtoppers* court rejected Judge Orozco's interpretation of the modern Rule 55(b) because her argument relied on inapposite case law that interpreted the pre-1975 version of the rule.⁹⁴ Judge Orozco centered her majority opinion in *BYS* on *Rogers v. Tapo*, which interpreted the interplay between the notice and hearing requirements in the old rule.⁹⁵ The *BYS* decision cited *Rogers* for the proposition that "[o]nce a defendant has appeared, a default judgment can be obtained only after a hearing by the court upon three days' written notice."⁹⁶ The *Searchtoppers* court found that the 1975 amendment to Rule 55(b) entitles a party seeking liquidated damages to apply for a default judgment by motion without needing to provide "any additional notice to the defaulted party," full stop.⁹⁷ The centerpiece of the *BYS* opinion, then, appears to be outdated, as is all other case law that interprets the old rule.

Searchtoppers raises the question of whether harmonizing the Arizona rule with federal policy goals is still appropriate. Most pre-1975 case law attempts to harmonize the definition of *appearance* in Arizona Rule 55(b) with the federal courts' liberal interpretation of the term in the federal rule.⁹⁸ In attempting to create such harmony, Arizona courts also imported the federal rule's policy goal of favoring decisions on the merits into Arizona case law regarding Rule 55(b).⁹⁹ However, because pre-1975 Arizona case law on Rule 55(b) is now inapposite in interpreting the modern rule, it may no longer be appropriate to look to federal policy goals to ascertain the meaning of modern Arizona rule.

With its narrow reading of the Arizona Supreme Court's holding in *Tarr*, *Searchtoppers* continues to question whether harmonizing the Arizona with federal policy goals is still appropriate. *BYS* viewed *Tarr* as a modern attempt to adopt the broad federal interpretation of *appearance*; however, *Searchtoppers* rejected this approach in favor of a narrow reading of the word.¹⁰⁰ Under the *Searchtoppers* view, *Tarr*'s definition of *appearance* applies solely to the notice requirement under Rule 55(b)(2), which is only considered after the need for a hearing has already been established.¹⁰¹ Although the Supreme Court's broad interpretation of *appearance* certainly must be respected, the *Searchtoppers* decision reasoned that *Tarr*'s definition of *appearance* in subsection (2) has no bearing on the meaning of the word in subsection (1).¹⁰² Furthermore, under the *Searchtoppers* view of Rule 55(b), subsection (1) does not even contain a notice requirement.¹⁰³ Therefore,

94. *Searchtoppers.com, L.L.C.*, 293 P.3d at 516.

95. *BYS Inc. v. Smoudi*, 269 P.3d 1197, 1202 (Ariz. Ct. App. 2012).

96. *Id.* (citing *Rogers v. Tapo*, 230 P.2d 522, 525 (Ariz. 1951)).

97. 293 P.3d at 516.

98. *See Rogers*, 230 P.2d at 524–25; *Austin v. State ex rel. Herman*, 459 P.2d 753, 756 (Ariz. Ct. App. 1969).

99. *See supra* Part II.A.

100. *Searchtoppers.com, L.L.C.*, 293 P.3d at 516–17.

101. *Id.* The *Searchtoppers* court rejected the *BYS* court's interpretation of *Tarr* in part because the Arizona Supreme Court failed to mention both Rule 55(b)(1) and whether the plaintiff in that case sought liquidated damages. *Id.* at 516.

102. *Id.* at 516–17.

103. *Id.* at 517.

Tarr could not have “implicitly engraft[ed] the notice provision of Rule 55(b)(2)” and its attendant definition of *appearance* into Rule 55(b)(1).¹⁰⁴

The rule’s own policy goals may also warrant this narrow interpretation. The Arizona Court of Appeals believes that the 1975 amendment to Rule 55(b) fundamentally changed the policy behind the rule. With the addition of the motion procedure, however, efficiency becomes a concern in the statutory analysis. The *Searchtoppers* court read the modern version of the rule as eliminating any hearings for defaulted defendants in liquidated damages cases.¹⁰⁵ Therefore, if Arizona adopts the *BYS* interpretation of the rule, it would give more noticed hearings to defaulted defendants than the amendment intended.

Furthermore, most Arizona Court of Appeals cases after 1975 point toward the interpretation in *Searchtoppers*. As early as 1978, the court of appeals turned away from appearance as the dividing line between the subsections of the rule and focused instead on liquidated damages to ensure that the rule promotes efficiency.¹⁰⁶ Now, a trial court only needs to hold a default judgment hearing when the plaintiff seeks unliquidated damages.¹⁰⁷ The court of appeals has also found that the 1975 revision of Rule 55(b) changed what a defaulted party admits to by defaulting. A default now constitutes an admission as to the amount of damages owed, in addition to an admission of liability.¹⁰⁸

The *Searchtoppers* interpretation is also plausible under statutory interpretation rules. Although the *Searchtoppers* court arrived at two separate definitions of *appearance*, this does not lead to contradictory interpretations of the same term, as Judge Orozco worries.¹⁰⁹ By tying the definition of *failure to appear* to Rule 55(a), the *Searchtoppers* court actually read the full phrase together, which states that a defendant must be “defaulted for failure to appear.” The *BYS* court’s use of a singular definition of *appearance* between the two subsections actually reads the word *defaulted* out of subsection (1), thereby rendering the word superfluous. *Searchtoppers* avoids such a result by treating the phrase *defaulted for failure to appear* as a default under Rule 55(a) and by reading the verb *appeared* in subsection (2) separately under *Tarr*’s more liberal definition of *appearance*.

104. *Id.*

105. *See id.* at 517.

106. *See S. Ariz. Sch. for Boys, Inc. v. Chery*, 580 P.2d 738, 743 (Ariz. Ct. App. 1978).

107. *See Monte Produce, Inc. v. Delgado*, 614 P.2d 862, 863–64 (Ariz. Ct. App. 1980) (“It is only when unliquidated damages are sought that the trial court must conduct a hearing to determine the amount of damages.” (citing Rule 55(b)(2))); *see also S. Ariz. Sch. for Boys, Inc.*, 580 P.2d at 743.

108. *Monte Produce, Inc.*, 614 P.2d at 864.

109. *See Searchtoppers.com, L.L.C.*, 293 P.3d at 519 (Orozco, J., dissenting) (“If we were to interpret Rule 55(b)1 [sic] as the majority suggests, we would be holding that ‘appearance’ and ‘plead and otherwise defend’ have the same meaning. I reject such an interpretation.” (citing *In re Moises L.*, 18 P.3d 1231, 1233 (Ariz. Ct. App. 2000) (“[W]e undertake to avoid rendering statutory language superfluous, void, contradictory, or insignificant.” (internal quotation marks omitted)))).

Therefore, *Searchtoppers* follows Arizona's preference against rendering language in a statute superfluous.¹¹⁰

Moreover, the *Searchtoppers* interpretation of Rule 55(b) balances the competing policy goals behind the rule by adopting a procedure that conserves judicial resources whenever a plaintiff claims liquidated damages. By making damages the distinguishing characteristic between the two subsections, *Searchtoppers* also adheres to the court of appeals' past understanding of the 1975 amendment—that the new Rule 55(b) reduces the process available to defaulted defendants in liquidated damages cases. Such an interpretation should be afforded significant weight. After all, if the rule intends to maintain a high level of due process protection for all defaulted defendants, as the *BYS* court argues, why was the rule amended to reduce the process available?

III. WHAT PROCESS SHOULD RULE 55(b) REQUIRE?

The Arizona Court of Appeals has thrown the requirements for obtaining a default judgment into confusion with its holdings in *BYS* and *Searchtoppers*. Should plaintiffs seeking default judgments in liquidated damages cases still apply for a hearing and give notice of that hearing whenever a defendant appears late in the action, as *BYS* suggests? Or should plaintiffs simply apply for a default judgment by motion so long as damages are liquidated, as *Searchtoppers* suggests? Both cases present plausible statutory interpretations of the rule. If the Arizona Supreme Court ever were in a position to choose an interpretation, the Court would need to look at the policy behind the rule to decide whether it should resolve more cases on the merits or favor judicial economy in liquidated damages cases. Given the history of the rule's amendment and a complete reading of the phrase "defaulted for failure to appear," the *Searchtoppers* interpretation is likely correct. Before adopting an interpretation of the rule that favors judicial efficiency, however, the Arizona Supreme Court should seriously consider the adverse effects of reducing the process available to defaulted parties under the *Searchtoppers* interpretation of the rule.

Allowing default judgments to be entered by an unnoticed motion where a defaulted defendant has appeared in the action may result in unjust default judgments. *Searchtoppers* itself is a perfect example of the perils of hastily awarding default judgments by motion. *Searchtoppers* initially stated that TrustCash was 38 months in arrears on payments.¹¹¹ After the trial court awarded the default judgment, however, *Searchtoppers* then claimed that the arrearage was actually for 41 months.¹¹² Forcing a defaulted defendant to pay an amount that was not explicitly claimed in the complaint violates the purpose of Rule 55(b)(1)—to allow an entry of default by motion only where damages are certain. If a plaintiff cannot settle on a damages amount, even in a liquidated damages case, perhaps a

110. See *In re Moises L.*, 18 P.3d at 1233 (quoting *State v. Tarango*, 914 P.2d 1300, 1304 (Ariz. 1996)).

111. *Searchtoppers.com, L.L.C.*, 293 P.3d at 514 n.3. TrustCash failed to raise this issue on appeal. *Id.*

112. *Id.* Again, TrustCash did not dispute this issue on appeal. *Id.*

defaulted defendant should have the opportunity to present counterevidence as to the amount of damages, especially if she has submitted herself to the jurisdiction of the court. These problems were also compounded when Searchtoppers sought interest on the missed payments.¹¹³ Yet there was no evidence that the parties agreed that TrustCash would pay a pre-determined interest rate on late payments. Default judgments by motion should only be awarded when damages have “been fixed, settled, or agreed upon by the parties.”¹¹⁴ It is not clear in *Searchtoppers* whether the parties had so agreed with respect to interest payments.

It is tempting to incorporate a broad definition of *appearance* into the rule to avoid potentially unjust default judgments, simply out of fairness to defaulted defendants who have attempted to defend but have not fully complied with procedural rules. The preference for deciding cases on the merits makes the *BYS* court’s unitary interpretation of the verb *to appear* in Rule 55(b)(2) understandable. Yet, given the 1975 amendment to the Arizona rule, which pushes for more efficiency, it is questionable whether the language of Rule 55(b) currently supports this broader interpretation.

CONCLUSION

The *BYS* and *Searchtoppers* decisions interpreted Rule 55(b) in two very different ways. These divergent interpretations will have real-world effects on the finality of default judgments in Arizona. Both interpretations of Rule 55(b) certainly are plausible. *BYS* follows Arizona Supreme Court precedent in adopting a liberal definition of *appearance*, and thereby provides a single, coherent definition of the verb *to appear* in both subsections of the rule. *Searchtoppers* follows Arizona Court of Appeals precedent that looks to the type of damages sought to determine whether a plaintiff should request a default judgment by motion or hearing. As such, *Searchtoppers* adopts two definitions of *appearance* for each subsection and follows Arizona’s preference against rendering language in a statute superfluous.

Each interpretation also favors a different policy goal—deciding cases on the merits versus conserving judicial resources. The *BYS* court grounded its interpretation in Arizona case law that attempts to harmonize the federal and Arizona rules in order to decide more cases on the merits. The *Searchtoppers* court, on the other hand, grounded its interpretation in case law that interprets the 1975 amendment to the rule as purposefully adding more efficiency to the default judgment process. Given the rule’s history and its plain language, the *Searchtoppers* interpretation likely wins the day. However, if the Arizona Supreme Court ever has occasion to resolve the split between these two cases, the Court should consider the value in offering more due process protections to defaulted defendants in liquidated damages cases, especially given the questionable nature of the damages claimed in *Searchtoppers*, before adopting a policy rationale that favors judicial efficiency.

113. *Id.* at 513.

114. *Beyerle Sand & Gravel, Inc. v. Martinez*, 574 P.2d 853, 856 (Ariz. Ct. App. 1977).