RECENT DECISIONS

I. ADMINISTRATIVE LAW AND PROCEDURE

SCOPE OF THE JURISDICTION EXCEPTION TO THE DOCTRINE OF EXHAUSTION IN ARIZONA'S ADMINISTRATIVE REVIEW ACT: A.R.S. SECTION 12-902(B)

An administrative agency is an institution which may be a part of the executive or another branch of government, or it may be independent.[1] The agency is created by statute, or otherwise, for the purpose of effectuating the objective delegated to it.[2] Adjudicative and other powers coincident with the agency's specific expertise often are part of its statutory grant of power.[3] When an agency reaches a decision which one or more of the parties wishes altered, the "doctrine of exhaustion" may apply.[4] The doc-

1. *See* 1 B. MEZINES, J. STEIN & J. GRUFF, ADMINISTRATIVE LAW § 4.01 (1982). While specifically referring to federal administrative agencies, the cited section is general in nature; it is thus equally applicable in the state context. Examples of federal independent agencies which are not part of any particular government branch are the Federal Trade Commission and the National Labor Relations Board. *See generally* F. COOPER, STATE ADMINISTRATIVE LAW (1965); K. DAVIS, ADMINISTRATIVE LAW TREATISE (2d ed. 1978).

2. In Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936), the United States Supreme Court stated that "[t]he power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Id.* at 129. At the federal level, while certain agencies may be authorized by statute, they are actually created or activated by executive order. *See* B. MEZINES, J. STEIN & J. GRUFF, *supra* note 1, § 4.01 at 4-3 n.5.

3. An often used general definition is that an administrative agency is a governmental organ possessing authority to determine private rights and obligations or to adjudicate contested cases. *See, e.g.*, FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th cong., 1st Sess., at p.7 (1941) *reprinted in* ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES (1968); Cooper, *supra* note 1, at 96; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01 at 1 (1958).

In Arizona, an agency is statutorily defined as "every agency, board, commission, department or officer, authorized by law to exercise rulemaking powers or to adjudicate contested cases, whether created by constitutional provision or legislative enactment, but does not include an agency in the judicial or legislative departments of state government." ARIZ. REV. STAT. ANN. § 41-1001 (Supp. 1982).

4. In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938) the United States Supreme Court referred to the doctrine as a "settled rule of judicial administration." *Id.* at 50. The Court stated that the doctrine provides "that no one is entitled to judicial relief for a supposed or threatened injury until after the prescribed administrative remedy has been exhausted." *Id.* The policies underlying the doctrine have been described as follows: 1) because an administrative body is created for and has the expertise to apply particular statutes, the administrative process should not be prematurely interrupted; 2) efficiency is promoted by allowing the administrative

trine requires a party to go through every appellate step which an agency has made available before judicial review is proper.[5] Thus, if a party has failed to exhaust available administrative remedies, finality will result due to the unavailability of judicial review.[6]

In Arizona, the consequences of failing to exhaust administrative remedies are embodied in section 12-902(B) of the Administrative Review Act (Act).[7] The Act provides guidelines so that a party may determine whether and when judicial review is available.[8] Judicial review is expressly precluded under the Act where, for any reason, a timely and otherwise proper request for administrative review was not made.[9] The finality imposed by the exhaustion provision of the Act is not applicable, however, where judicial review is sought for the purposes of questioning agency jurisdiction over a person or subject matter[10] (the "jurisdiction exception").

In *State v. ex rel. Dandoy v. City of Phoenix*,[11] the Arizona Court of Appeals defined the scope of the jurisdiction exception to the Act.[12] The *Dandoy* controversy arose when the Arizona Department of Health Services (Department) issued a cease-and-desist order against the City of Phoenix (City). The order required that corrective measures be taken by the City to remedy alleged deficiencies in the operation of City owned or operated sanitary landfills.[13]

The City requested an administrative hearing, as allowed by statute,

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process to conclude prior to judicial review; and 3) since an agency is an autonomous entity, the courts should not interfere in the absence of the agency clearly exceeding its jurisdiction. McKart v. United States, 395 U.S. 185, 193-94 (1969). *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 424-58 (1965).

The "doctrine of exhaustion" has been recognized in Arizona law. *See* Minor v. Cochise County, 125 Ariz. 170, 172, 608 P.2d 309, 311 (1980) (when a claim is first cognizable before an administrative agency alone, judicial review is withheld until the administrative process has terminated); City of Tucson v. Superior Court, 127 Ariz. 205, 207, 619 P.2d 33, 35 (Ct. App. 1980) ("doctrine of exhaustion" applies when an agency has original jurisdiction over a claim); State Bd. of Dental Examiners v. Hoffman, 23 Ariz. App. 116, 120, 531 P.2d 161, 165 (1975) ("The principle of the necessity of exhausting the administrative remedies before seeking relief in court is well established in Arizona.").

5. *See supra* note 4.

6. *See supra* notes 4 & 25-37 and accompanying text.

7. ARIZ. REV. STAT. ANN. §§ 12-901 to 12-914 (1982).

8. See ARIZ. REV. STAT. ANN. § 12-902(B), which states in pertinent part:

> Unless review is sought of an administrative decision within the time and in the manner provided in this article, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such decision. If under the terms of the law governing procedure before an agency an administrative decision has become final because of failure to file any document in the nature of an objection, protest, petition for hearing or application for administrative review within the time allowed by the law, the decision shall not be subject to judicial review under the provisions of this article. . . .

"Administrative decision" is defined as follows:

> "Administrative decision" or "decision" means any decision, order or determination of an administrative agency rendered in a case which affects the legal rights, duties or privileges of persons and which terminates the proceeding before the administrative agency.

Id. § 12-901(2).

9. *Id.* § 12-902(B).

10. *Id.*

11. 133 Ariz. 334, 651 P.2d 862 (Ct. App. 1982).

12. *Id.* at 338, 651 P.2d at 866. *See infra* notes 56-111 and accompanying text.

13. *Id.*

to determine the reasonableness of the order.[14] At the close of the hearing but before the rendering of a decision, the city attorney agreed to the entry of a consent order.[15] The City did not seek judicial review of the consent order as authorized by the Act.[16] Seven months later the Department sought injunctive relief based upon alleged violations of the amended consent order. At the close of an evidentiary hearing, the superior court enjoined further violations of the amended consent order. The City appealed.[17]

The City claimed that its appeal came within the jurisdiction exception of the Administrative Review Act because the Department lacked subject matter jurisdiction to issue the consent order.[18] The City alleged that the Department lacked statutory authority to issue a consent order until it promulgated regulations for sanitary landfills.[19] Despite a recognition that the Department had improperly exercised its regulatory authority by failing to issue regulations for landfill operations,[20] the court of appeals affirmed the trial court's grant of injunctive relief.[21]

The court distinguished the nonexistence of jurisdiction from its improper exercise and held that the Department had subject matter jurisdiction to enter the cease-and-desist order.[22] The failure to promulgate statutorily mandated regulations was held to be legal error resulting in an improper exercise of jurisdiction rather than a lack of jurisdiction.[23] The court held that collateral attack for mere legal error was improper where jurisdiction exists.[24]

This Casenote first reviews the doctrine of exhaustion embodied in Arizona's Administrative Review Act and examines the Act's jurisdiction exception to the statutory mandate of finality. Second, the Casenote analyzes the *Dandoy* decision in the context of the Act. In particular, it explains the rationale supporting rules promulgation in relation to the jurisdiction question, distinguishing collateral attack from direct attack as they relate to *Dandoy*. Finally, the Casenote concludes that legal error is not a valid basis for collateral attack under the Act.

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14. *Id. See* ARIZ. REV. STAT. ANN. § 36-601(B) (Supp. 1982), which provides in pertinent part: "Within fifteen days after receipt of the [cease and desist] order, the person to whom it is directed may request the director [of the Department] to hold a hearing."

15. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864. The consent order was later amended. *Id.*

16. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864. *See* ARIZ. REV. STAT. ANN. § 12-904, which provides in pertinent part: "An action to review a final administrative decision shall be commenced by filing a complaint within thirty-five days from the date when a copy of the decision sought to be reviewed is served upon the party affected."

17. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864.

18. *See id. See* text at note 10.

19. *Dandoy*, 133 Ariz. at 334, 651 P.2d at 862. *See* ARIZ. REV. STAT. ANN. § 36-136(G)(11) (1974), discussed at note 62 *infra* and accompanying text.

20. *Dandoy*, 133 Ariz. at 337, 651 P.2d at 865. *See infra* notes 71-79 and accompanying text.

21. *Dandoy*, 133 Ariz. at 340, 651 P.2d at 868.

22. *Id.* at 338, 651 P.2d at 866. *See infra* notes 80-85 and accompanying text.

23. *Dandoy*, 133 Ariz. at 338, 651 P.2d at 866. *See infra* note 98 and accompanying text.

24. *Id. See infra* notes 99-111 and accompanying text. Furthermore, the court held that since the City had not attacked the city attorney's alleged lack of authority to consent to the entry of the cease-and-desist order at trial, it was precluded from doing so on appeal. 133 Ariz. at 339, 651 P.2d at 867.

OPERATION OF A.R.S. SECTION 12-902(B) AND THE JURISDICTION EXCEPTION

Section 12-902(B) of the Arizona Revised Statutes stands for several principles. First, judicial review of an agency decision is barred unless the time and procedure guidelines of the Act are followed.[25] Second, if an administrative decision has become final because of a party's late filing of documents requesting administrative review, judicial review is precluded.[26] These principles comprise the first part of section 12-902(B) and illustrate the Act's preclusiveness under ordinary circumstances.

Herzberg v. David[27] provides an example of the preclusion imposed by the Act under such ordinary circumstances. In *Herzberg*, the Arizona Real Estate Department revoked the plaintiff's salesman's license.[28] Although the Administrative Rules and Regulations of the Real Estate Commission would have allowed the plaintiff to petition for a rehearing, he chose not to.[29] Instead, he sought superior court review, which was dismissed upon the defendant's motion.[30] The plaintiff then appealed.[31] The court of appeals noted the policy underlying the doctrine of exhaustion, that an administrative body should have the first opportunity to review its own proceedings.[32] Given this rationale, the court held that the appellant's failure to request the available administrative rehearing barred him from seeking judicial review.[33]

The result in *Herzberg* was proper because section 12-902(B), as a codification of the doctrine of exhaustion, ordinarily allows judicial review only after the administrative review process has terminated.[34] Because an administrative rehearing was available but was not sought, proceedings before the Real Estate Department had not terminated. The Real Estate Department's decision, therefore, was not a final decision and accordingly could not be reviewed under the Act.[35] Based upon this analysis, the superior court's dismissal of the action was affirmed.[36] *Herzberg* is but one example of the preclusion imposed by the Act under normal circumstances; numerous other cases have recognized the unavailability of judicial review imposed by the Act or by similar statutes.[37]

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25. ARIZ. REV. STAT. ANN. § 12-902(B).
26. *Id.*
27. 27 Ariz. App. 418, 555 P.2d 677 (1976).
28. *Id.* at 410, 555 P.2d at 678.
29. *Id.* The updated rehearing provision can be found in ARIZ. ADMIN. COMP. R. 4-28-42(B) (1981), which provides in pertinent part: "Within fifteen (15) days after service of the Commissioner's final order, any aggrieved party may request a new hearing."
30. 27 Ariz. App. at 418-19, 555 P.2d at 678.
31. *Id.*
32. *See id.* at 419, 555 P.2d at 678-79.
33. *See id.*
34. ARIZ. REV. STAT. ANN. § 12-901(2).
35. *See Herzberg*, 27 Ariz. App. at 419, 555 P.2d at 668; ARIZ. REV. STAT. ANN. § 12-901(2).
36. *Herzberg*, 27 Ariz. App. at 419, 555 P.2d at 668.
37. For example, in Arizona, finality has been recognized under the Act in Arizona Comm'n of Agriculture & Horticulture v. Jones, 91 Ariz. 183, 370 P.2d 665 (1962). In *Jones*, the Commission determined that a menace existed to Arizona cotton by reason of an insect infestation. The Commission ordered that no volunteer or stub cotton be grown and that crop remnants be destroyed. *Id.* at 185, 370 P.2d at 667. Because judicial review had not been sought within the

The second half of section 12-902(B) states that judicial review is proper under certain circumstances even where there has not been a timely filing of documents requesting administrative review.[38] Judicial review is available under this section for the purpose of questioning agency jurisdiction over a person or subject matter.[39] *Pacific Greyhound Lines v. Sun Valley Bus Lines* provides a clear example of the operation of this jurisdiction exception.[40] *Pacific Greyhound* was cited in *Dandoy* for its holding that an administrative decision rendered without jurisdiction may be judicially reviewed without the prior exhaustion of administrative remedies.[41]

Pacific Greyhound arose because Arizona followed a policy of regulated monopoly in the certification of public service corporations.[42] With this as a backdrop, one bus company challenged the legality of a competitor's operations over routes claimed exclusively by the former company under a prior grant of authority.[43] The Arizona Corporation Commission had administratively issued a certificate of convenience and necessity to the defendant Sun Valley[44] allowing Sun Valley to operate over certain routes but precluding it from servicing other routes.[45] Pacific Greyhound alleged that the Commission lacked jurisdiction to issue Sun Valley additional certificates allowing it to operate over other routes claimed exclusively by Pacific Greyhound pursuant to its prior certificates.[46] As to these routes, Pacific Greyhound claimed that such certification would contravene the state's policy of regulated monopoly.[47] As a result, Pacific Grey-

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period provided in ARIZ. REV. STAT. ANN. § 12-904, the Arizona Supreme Court held that the initial decision had become final and was not subject to subsequent attack. *Id.* at 187, 370 P.2d at 668.

For cases stating that judicial review may be provided if procedural conditions in the administrative process are not met, see Neumeister v. City Dev. Bd., 291 N.W.2d 11 (Iowa 1980) (failure to mail petitions for judicial review within statutorily prescribed number of days to affected property owners after agency approval of petition for annexation, precluded judicial review by depriving the court of jurisdiction); Iowa Pub. Serv. Co. v. Iowa State Commerce Comm'n, 263 N.W.2d 766 (Iowa 1978) (judicial review of an agency decision only proper if action brought where statute authorizes venue); Townsend v. Board of Bldg. Appeals, 49 Ohio App. 2d 402, 361 N.E.2d 271 (1976) (appellate review of administrative agency decision only proper if there has been strict compliance with statute requiring timely filing of notice of appeal).

38. *See* ARIZ. REV. STAT. ANN. § 12-902(B).

39. *Id.*

40. 70 Ariz. 65, 216 P.2d 404 (1950).

41. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864. *See* 70 Ariz. at 68, 216 P.2d at 406-07 for the *Pacific Greyhound* holding.

42. 70 Ariz. at 71, 216 P.2d at 408.

43. *Id.* at 68, 216 P.2d at 406.

44. *Id.* at 72, 216 P.2d at 409-10. The certificates were issued pursuant to ARIZ. CODE ANN. § 66-506 (1939) *recodified* ARIZ. REV. STAT. ANN. § 40-607 *repealed* 1979, which provided in pertinent part: "If after a hearing on the application, the commission finds from the evidence that the public convenience and necessity requires the proposed service, or any part thereof, and that the applicant is a fit and proper person to receive such certificate, it may issue the certificate as prayed for. . . ."

45. *Pacific Greyhound*, 70 Ariz. at 72, 216 P.2d at 409-10. A limited certificate was allowed according to statute. *See* ARIZ. CODE ANN. § 66-506, which provided that certificates may issue "for the partial exercise only of the privilege sought. . . ."

46. *See Pacific Greyhound*, 70 Ariz. at 68, 216 P.2d at 406.

47. *See id.* at 71, 216 P.2d at 408. The plaintiff also claimed that the Commission lacked legal authority to issue the defendant an "Emergency Order Expanding Operations." *Id.* at 73, 216 P.2d at 410. Furthermore, plaintiff argued that the contested certificates could not be awarded because there was no prior finding that the plaintiff was rendering inadequate service. *Id.* at 75, 216 P.2d at 411-12.

hound claimed that Sun Valley was operating buses based on improperly issued certificates on routes assigned to Pacific Greyhound.[48] Therefore, Pacific Greyhound alleged that Sun Valley's operations exceeded the scope of authority granted by the defendant's properly issued certificates.[49]

Pacific Greyhound was denied injunctive relief and appealed.[50] As appellee, Sun Valley alleged that the suit constituted an improper collateral attack against its certificates, one of which concededly was issued properly.[51] Sun Valley claimed that because Pacific Greyhound had not exhausted its administrative remedies by petitioning to the Corporation Commission for review, the suit was premature.[52] In ruling for Pacific Greyhound, the Arizona Supreme Court held that a suit is properly entertainable without prior exhaustion of administrative remedies where the suit attacks the Commission's jurisdiction to issue certificates.[53] The court stated that the rule prohibiting collateral attack would have no application under such circumstances.[54]

Pacific Greyhound is only one example of an application of the jurisdiction exception; numerous other Arizona cases construing the propriety of collateral attacks of administrative proceedings have allowed such attacks for the purpose of questioning jurisdiction.[55] Having recognized this jurisdiction exception in prior cases, the Arizona Court of Appeals was urged by the City to adopt it in the context of the *Dandoy* facts.

ANALYSIS OF THE *DANDOY* DECISION

The *Dandoy* court began its analysis by noting that the City did not, after the entry of the consent order, seek judicial review as authorized by

48. *Id.* at 68, 216 P.2d at 406. *See supra* notes 46-47 and accompanying text.

49. *Pacific Greyhound*, 70 Ariz. at 68, 216 P.2d at 406. *See supra* notes 46-47 and accompanying text.

50. *Pacific Greyhound*, 70 Ariz. at 67-68, 216 P.2d at 406.

51. *Id.* at 67-68, 216 P.2d at 406.

52. *See id.* Sun Valley argued that before the equitable remedy of injunctive relief was available to Pacific Greyhound, the legal remedy of seeking redress before the Commission had to be pursued.

53. *Pacific Greyhound*, 70 Ariz. at 68, 216 P.2d at 406.

54. *Id.*

55. The two other cases cited by the court for this proposition were Tucson Rapid Transit Co. v. Old Pueblo Transit Co., 79 Ariz. 327, 289 P.2d 406 (1955) (recognized that collateral attack, though proper to question administrative agency jurisdiction, was inapplicable where the Arizona Corporation Commission had jurisdiction to issue certificates of convenience and necessity but shouldn't have done so in contravention of the state's policy of regulated monopoly); and Tucson Warehouse & Transfer Co. v. Al's Transfer, 77 Ariz. 323, 271 P.2d 477 (1954) (where the Corporation Commission rescinded an order revoking a certificate of convenience and necessity, collateral attack of the recission was proper because the Commission lacked jurisdiction to revive an annulled certificate without the holder reapplying for reissuance). *See also* Dallas v. Arizona Corp. Comm'n, 86 Ariz. 345, 346 P.2d 152 (1959) (Corporation Commission was without jurisdiction, and collateral attack was thus proper, where certificate of convenience and necessity was revoked after a hearing which, among other things, was attended by only one commissioner, had no court reporter in attendance, and of which no record was made); Walker v. DeConcini, 86 Ariz. 143, 341 P.2d 933 (1959) (jurisdiction lacking and collateral attack allowed where Corporation Commission issued a certificate of convenience and necessity without hearing evidence or having a transcript made); Kunkle Transfer & Storage Co. v. Superior Court, 22 Ariz. App. 315, 526 P.2d 1270 (1974) (court recognized rule allowing collateral attack to question jurisdiction but deemed its application inappropriate in a case still pending before the Corporation Commission which had jurisdiction to construe a certificate of convenience and necessity).

the Administrative Review Act.[56] Ordinarily, such inaction results, as it did in *Dandoy*, in the finality of the administrative body's order.[57] Such finality precludes subsequent judicial review as mandated by the Administrative Review Act[58] and is in accord with the weight of judicial authority in Arizona.[59]

The City tried to obtain judicial review by invoking the jurisdiction exception to section 12-902(B).[60] It argued that the amended consent order was void due to the Department's alleged lack of subject matter jurisdiction.[61] The City claimed that the Department ignored a statute calling for the promulgation of regulations regarding sanitary landfills.[62] The City alleged that the Department's statutory noncompliance deprived it of jurisdiction over the subject matter of sanitary landfills.[63] In the absence of regulatory standards designed to further the policy of preventing arbitrary decisionmaking,[64] the City argued that subject matter jurisdiction could not be found because nothing existed against which to compare the legality of the challenged activities.[65]

In considering these allegations, the Arizona Court of Appeals had to deal with the following questions: 1) whether the Department had failed to promulgate regulations which would satisfy the statutory mandate;[66] 2) whether such failure deprived the Department of subject matter jurisdiction or merely caused an improper exercise of jurisdiction;[67] 3) whether only an improper exercise of jurisdiction constituted a legal error;[68] 4) whether the attack on appeal was direct or collateral;[69] and 5) whether

56. 133 Ariz. at 336, 651 P.2d at 864. Judicial review should have been sought under the Act according to the terms of ARIZ. REV. STAT. ANN. § 12-904. *See supra* note 16 and accompanying text.

57. *Id.* Note that the finality referred to is that which results from a failure to seek judicial review of a "final" administrative decision within the time parameters established by ARIZ. REV. STAT. ANN. § 12-904, as opposed to the finality resulting from a failure to exhaust administrative remedies.

58. ARIZ. REV. STAT. ANN. § 12-902(B). *See supra* notes 25-37 and accompanying text.

59. This result follows from the terms of § 12-902(B). *See supra* note 7 and accompanying text. For cases construing this section, *see supra* notes 25-37 and accompanying text.

60. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864.

61. *Id.* It was conceded, however, that the Department properly had jurisdiction over the City as a party.

62. *Id.* at 336-39, 651 P.2d at 864-65. The statute requiring the promulgation of regulations was ARIZ. REV. STAT. ANN. § 36-136(G)(11) (1974), which provided:

> The director shall by regulation:
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> . . .
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> Define and prescribe reasonably necessary measures regarding storage, collection, transportation, disposal and reclamation of garbage, trash, rubbish, manure and objectionable wastes. The regulations shall prescribe minimum standards for storage, collection, transportation, disposal and reclamation of such wastes and shall provide for inspection of premises containers, processes, equipment and vehicles, and for abatement as public nuisances of any premises, containers, processes, equipment or vehicles which do not comply with the minimum standards.

63. *Dandoy*, 133 Ariz. at 337, 651 P.2d at 865.

64. *See Dandoy*, 133 Ariz. at 337, 651 P.2d at 865. See *infra* note 78 and accompanying text for a discussion of the policies favoring rulemaking.

65. *Dandoy*, 133 Ariz. at 337, 651 P.2d at 865.

66. *Id.* at 336-35, 651 P.2d at 864-66.

67. *Id.* at 338, 651 P.2d at 866.

68. *Id.*

69. *Id.*

legal error could be collaterally attacked under the Act.[70]

Were Regulations Properly Promulgated?

The court first dealt with the question of whether the Department had promulgated regulations meeting statutory requirements.[71] The City conceded that the Department had jurisdiction over the general subject matter of sanitary landfills.[72] Furthermore, the City recognized the Department's ability to obtain judicially enforceable cease-and-desist orders against conditions statutorily defined as public nuisances.[73] The statute, however, contains language implying that a public nuisance does not exist unless specified by regulation.[74] The City alleged that no such regulations existed.[75] It claimed, therefore, that the Department could not regulate landfills through cease-and-desist orders.[76]

The court noted that administrative law favors the promulgation of rules and regulations over ad hoc determinations generated through litigation.[77] Such regulatory guidelines promote fairness and efficiency by providing predictability.[78] In light of these policy considerations and the statute calling for the making of regulations relating to sanitary landfills, the court concluded that the Department had acted improperly by proceeding without first having written regulations.[79]

Improper Exercise Versus Absence of Jurisdiction

Despite the Department's noncompliance with the statute requiring regulations, the court held that the Department was not deprived of jurisdiction.[80] The court's analysis distinguished the improper exercise of jurisdiction from the absence of jurisdiction.[81] Because the statutes defining public nuisances granted broad regulatory authority to the Department, and their interpretation was subject to legitimate dispute, the Court found that jurisdiction existed.[82] Therefore, the Department's failure to promul-

70. *Id.*

71. *Id.* at 336-38, 651 P.2d at 864-66.

72. *Id.* at 336, 651 P.2d at 864. This concession was based on ARIZ. REV. STAT. ANN. § 36-601(A)(17), which provides: "The following conditions are specifically declared to be public nuisances dangerous to the public health: . . . The storage, collection, transportation, disposal and reclamation of garbage, trash, rubbish, manure and other objectionable wastes. . . ."

73. *Dandoy*, 133 Ariz. at 336, 651 P.2d at 864.

74. *See* ARIZ. REV. STAT. ANN. § 36-601(A)(17), which provides that only conditions "other than as provided and authorized by law and regulation" constitute public nuisances.

75. *Dandoy*, 133 Ariz. at 337, 651 P.2d at 865.

76. *Id.*

77. *Id.*

78. For a detailed analysis of the policy favoring rulemaking and the advantages to be derived therefrom, *see* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 929-42 (1965). Basically, the promulgation of regulations is to be favored because such a preference offers, among others, the following advantages: 1) notice and opportunity for comment, 2) advance planning by those affected, 3) uniformity of application, 4) flexibility in procedure, and 5) readily accessible codification and clarity of formulation. *Id.*

79. *Dandoy*, 133 Ariz. at 337, 651 P.2d at 865.

80. *Id.* at 338, 651 P.2d at 866.

81. *Id.*

82. *Id.* at 337-38, 651 P.2d at 865-66. For instance, the language of ARIZ. REV. STAT. ANN.

gate regulations constituted, at most, an improper exercise of jurisdiction.[83] The court held that an improper exercise of jurisdiction is not the functional equivalent of an absence of jurisdiction which would trigger the jurisdiction exception.[84] Since the Department had jurisdiction under this analysis, its final decision was not subject to the attempted judicial review under either the jurisdiction exception to the Act or the general provisions of the Act since judicial review was not sought within the time prescribed by the Act.[85]

Legal Error and the Collateral Versus Direct Attack Distinction

The court next held that where the City forfeited the right to seek judicial review by not proceeding within the time prescribed by the Act, the attempt to have the amended consent order set aside was a "collateral attack."[86] This characterization is important because where, as here, the jurisdiction exception is not applicable, collateral attack is otherwise barred under section 12-902(B).[87]

An Arizona case, *Henderson v. Towle*,[88] provides an example of a collateral attack. In *Henderson*, the plaintiff was the administrator of an estate. During his lifetime, the decedent had become indebted to the defendant bank. To secure repayment of his debt, he transferred to the bank stock certificates in a copper company. After the decedent's death, the administrator of his estate requested the return of proceeds from the disposition of the stock representing the remainder after satisfaction of the debt. Upon being informed that there was no excess, the administrator

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§ 36-601(A)(17) is broad in its scope. *See supra* note 62 and accompanying text. The court also noted that other provisions of ARIZ. REV. STAT. ANN. § 36-601(A), upon which the department affirmatively relied, are vague in their language. For instance, the court cited the following subsections:

> A. The following conditions are specifically declared public nuisances dangerous to the public health:
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> . . . .
>
> 4. Any place, condition or building controlled or operated by any governmental agency, state or local, which is not maintained in a sanitary condition.
>
> 5. All sewage, human excreta, waste water, garbage or other organic wastes deposited, stored, discharged or exposed so as to be a potential instrument or medium in the transmission of disease to or between any person or persons.
>
> . . . .
>
> 9. The pollution or contamination of any domestic waters.

Finally, noting that ARIZ. REV. STAT. ANN. § 36-601(B) confers upon the director broad powers to abate public nuisances, the court cited an Arizona Attorney General Opinion which defined the scope of § 36-601. Op. Att'y Gen. No. 58-67 (1967) provides in pertinent part:

> if the commissioner [i.e., the director], upon investigation, has reason to believe that: (1) any of the seventeen enumerated conditions exist, or (2) a nuisance exists, or (3) the health laws or regulations are being evaded or avoided, then he may follow the cease and desist procedure set forth in the statute.
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> It should be pointed out that, at least in the first instance, the commissioner has the power and authority to determine what constitutes a nuisance and the cause thereof.

83. *Dandoy*, 133 Ariz. at 338, 651 P.2d at 866.

84. *See id.*

85. *See Dandoy*, 133 Ariz. at 337-38, 651 P.2d at 865-66. *See* ARIZ. REV. STAT. ANN. § 12-902(B).

86. *Dandoy*, 133 Ariz. at 337-38, 651 P.2d at 865-66.

87. *See infra* notes 99-111 and accompanying text.

88. 23 Ariz. 377, 203 P. 1085 (1922).

brought an action. He sought recovery of the stock and an accounting of the company's affairs.[89]

The parties then discussed a stipulation that the administrator dismiss his suit in consideration for a monetary settlement. Although the administrator reserved the right to examine the copper company's books, he did not do so until after the suit was dismissed by stipulation. He then alleged that his examination showed that the decedent's indebtedness had been satisfied prior to the stock transfer. He brought suit charging that the defendants fraudulently appropriated the stock. The trial court sustained the defendant's demurrers.[90]

On appeal, defendants argued that because the stipulation led to dismissal, the administrator was estopped from claiming that the prior negotiations were tainted by fraud.[91] The court recognized that the administrator's attack was collateral because he was not contesting the adequacy of consideration received, but rather, was alleging fraud as an independent basis of relief.[92] These facts were held to violate the general rule barring a party from collaterally attacking the validity of a former judgment rendered with jurisdiction.[93] By analogy, it can be seen that the attack in *Dandoy* was impermissibly collateral because it attacked the improper *exercise* of jurisdiction and not either the content of the amended consent order or the *existence* of jurisdiction.[94]

While section 12-902(B) allows a collateral attack alleging a lack of jurisdiction,[95] no absence of jurisdiction existed in *Dandoy*.[96] As previously noted, the only defect in *Dandoy* was that jurisdiction was improperly exercised due to nonapplication of the statute calling for rules promulgation.[97] Nonapplication of the statute was construed to be "legal error."[98] This denomination was important as it put in issue the propriety of collaterally attacking the Department on a ground broader than jurisdictional absence.

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89. *Id.* at 378-79, 203 P. at 1086.

90. *Id.* at 379-80, 203 P. at 1086.

91. *Id.* at 382, 203 P. at 1087.

92. *Id.* For a definition distinguishing collateral and direct attack in the res judicata context, see 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 18.10, at 612 (1958) *citing* RESTATEMENT, JUDGMENTS § 11(a) (1942), which states in pertinent part:

> [T]he taking of independent proceedings in equity to prevent the enforcement of the judgment is a 'direct attack' . . . Where a judgment is attacked in other ways than by proceedings in the original action to have it vacated or reversed or modified or by a proceeding in equity to prevent its enforcement, the attack is a 'collateral attack.'
>
> . . . One who fails to make a direct attack upon an administrative order is barred by res judicata from making a collateral attack except when the order is void on account of such a reason as fraud or *lack of jurisdiction* or denial of fair hearing.

Id. (Emphasis added).

93. *Henderson*, 23 Ariz. at 383, 203 P. at 1087. Furthermore, the court held that this result was not altered because the judgment was entered pursuant to an agreement. *Id.*

94. *See Dandoy*, 133 Ariz. at 338, 651 P.2d at 866.

95. *See supra* note 55 and accompanying text.

96. 133 Ariz. at 338, 651 P.2d at 866; *see supra* notes 80-85 and accompanying text.

97. *See supra* notes 81-85 and accompanying text.

98. *Dandoy*, 133 Ariz. at 338, 651 P.2d at 866.

Propriety of Collaterally Attacking Legal Error

After determining that collateral attack was not proper under the jurisdiction exception, the court was asked to determine if a collateral attack of legal error was proper. The court held that such error could not be collaterally attacked.[99] In support of this holding, the court cited the Arizona Supreme Court case of *Arizona Public Service Co. v. Southern Union Gas Co.*, which held that where agency misconstruction of a statute constitutes legal error, collateral attack is not permissible.[100]

Southern Union involved competition between two utilities over the awarding of an exclusive city service franchise and the corresponding certificate of convenience and necessity. Both companies applied to the Arizona Corporation Commission for the certificate. At the close of its hearing, the Commission decided to issue the certificate to the defendant contingent only upon its presentation of evidence satisfactorily showing that the corresponding municipal franchise had been granted. Upon the production of such evidence, the Commission awarded the certificate.[101] Although application for rehearing was required by statute, the plaintiff immediately brought an action in the superior court challenging the Commission's action.[102]

The plaintiff's complaint was dismissed.[103] The plaintiff appealed, alleging, among other things, that application for rehearing was not required because, under an Arizona statute, the certificate was improperly issued to the defendant since defendant had not previously done business in Arizona.[104] The plaintiff maintained that such statutory noncompliance deprived the corporation commission of jurisdiction, and thus collateral attack was proper.[105] The Arizona Supreme Court, however, ruled that the interpretation of the statute was immaterial to the issue of whether the defendant was properly awarded the certificate.[106] This ruling followed because the Commission's misconstruction of the statute was held to constitute legal error, and the Commission's decision could not be collaterally

99. *Id.*

100. 76 Ariz. 373, 265 P.2d 435 (1954). *See Dandoy*, 133 Ariz. at 338, 651 P.2d at 866.

101. *Id.* For the statutory provisions relating to the issuance of certificates for utilities, see ARIZ. CODE ANN. § 69-235 (1939).

102. 76 Ariz. at 376-77, 265 P.2d at 437-38. For the statutory provisions relating to judicial review of Commission action, see ARIZ. CODE ANN. § 69-249, which provides that such review is proper only after a rehearing is denied or granted.

103. *Id.* at 373, 265 P.2d at 435.

104. *Id.* at 377, 265 P.2d at 438. The contested statute was ARIZ. CODE ANN. § 69-262 (1939) *recodified* ARIZ. REV. STAT. ANN. § 40-284 (1974), which provided that:

> No foreign corporation, unless authorized to transact a public service business within this state, shall transact within this state any public service business, nor transact within this state any public service business of a character different from that which it is authorized to transact; nor shall any license, permit or franchise to own, control, operate or manage any public service business be granted or transferred, directly or indirectly, to any foreign corporation not lawfully transacting within this state a public service business of like character; provided, that foreign corporations engaging in commerce with foreign nations, or commerce among the several states of the United States, may transact within this state such commerce and intra-state commerce of a like character.

105. *Southern Union*, 76 Ariz. at 379, 265 P.2d at 439.

106. *Id.* at 380, 265 P.2d at 440.

attacked on this ground alone where jurisdiction was otherwise proper.[107] Accordingly, the trial court's dismissal was affirmed.[108]

Because in *Dandoy* the Department's incorrect statutory interpretation was legal error, the court of appeals was able to apply the *Southern Union* holding that a collateral attack of a legal error is improper.[109] The court further held that because this error did not constitute jurisdictional absence, the jurisdiction exception was not applicable.[110] Therefore, the City could not collaterally attack the Department's final decision because the jurisdiction exception was the only means of collateral attack available.[111] It thus appears that the Arizona Court of Appeals was correct in holding that the trial court could not properly upset the amended cease-and-desist order through collateral attack.

CONCLUSION

In *State of Arizona ex rel. Dandoy v. City of Phoenix*, the Arizona Court of Appeals considered whether nonapplication of a statute calling for rules promulgation by an administrative agency could be relied upon as a basis for collaterally attacking a decision of that agency. The court noted that, under section 12-902(B) of the Administrative Review Act, collateral attack is proper only for the purpose of questioning the jurisdiction of an agency. In the instant case, nonapplication of the statute was held to relate only to the exercise and not to the existence of jurisdiction. In this situation, the court ruled that collateral attack should not be allowed under the terms of the Act.

The court followed a five-step approach. First, the court decided that the Arizona Department of Health Services had failed to promulgate regulations which would satisfy statutory requirements. Second, the court held that such failure constituted an improper exercise of the Department's subject matter jurisdiction. Third, the Department's improper exercise of jurisdiction constituted merely legal error, which would not deprive an administrative agency of jurisdiction. Fourth, the City's attack on appeal was deemed an impermissible collateral attack because it challenged the improper exercise of jurisdiction and not the content of the amended consent order or the existence of jurisdiction. Finally, the court concluded that since legal error does not deprive an administrative agency of jurisdiction, it does not fall within the jurisdiction exception to the Administrative Review Act. Therefore, collateral attack was not proper.

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107. *Id.*

108. *Id.* at 383, 265 P.2d at 442.

109. *Dandoy*, 133 Ariz. at 338, 651 P.2d at 866; *see Southern Union*, 76 Ariz. at 380, 265 P.2d at 440.

110. *See Dandoy*, 133 Ariz. at 338, 651 P.2d at 866. Numerous other cases have similarly held that challenges not going to the issue of jurisdiction do not provide a valid basis for collateral attack. *See* General Cable Corp. v. Arizona Corp. Comm'n, 27 Ariz. App. 386, 555 P.2d 355 (1976) (given jurisdiction, decision of the Arizona Corporation Commission was not subject to collateral attack); Colton v. Commonwealth Edison Co., 349 Ill. App. 490, 111 N.E.2d 363 (1953) (alleged defects in procedure not subject to collateral attack); Texas Eastern Transmission Corp. v. Bowie Lumber Co., Ltd. 176 So.2d 735 (La. 1965) (collateral attack based on a failure by the Federal Power Commission to hold a hearing was improper given that jurisdiction existed).

111. *Dandoy*, 133 Ariz. at 338, 651 P.2d at 866.

In following this five-step approach, the court defined the scope of the jurisdiction exception in section 12-902(B). *Dandoy*'s importance is in showing that an improper exercise of jurisdiction is not the functional equivalent of a lack of jurisdiction. Thus, where a statutory misinterpretation constitutes an improper exercise of jurisdiction, such mere legal error cannot be relied upon to collaterally attack an agency decision under the jurisdiction exception to the Act. Although legal error, as it existed in *Dandoy*, may have significance in other contexts, under the jurisdiction exception to the Administrative Review Act, such error is without significance.

Bruce Lee Skolnik

II. CIVIL PROCEDURE

EXTRAORDINARY CIRCUMSTANCES JUSTIFYING RELIEF FROM JUDGMENT UNDER RULE 60(C)(6)

Rule 60(c) of the Arizona Rules of Civil Procedure[1] sets forth the grounds upon which a party may be relieved from a default judgment.[2] While the first five reasons under Rule 60(c) provide for specific grounds

1. ARIZ. R. CIV. P. 60(c) provides:

On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(d); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be filed within a reasonable time and for reasons (1), (2) and (3) not more than six months after the judgment or order was entered or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant served by publication as provided by Rule 59(j) or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 60(c) of the Arizona Rules of Civil Procedure is taken from FED. R. CIV. P. 60(b). The principal difference between the Arizona version and the federal version is in the time for moving for relief under the first three clauses. The Arizona rule sets forth a period of six months whereas, the federal rule allows a period of one year. State Bar Committee Report, 16 ARIZ. REV. STAT. ANN. § 664 (1973).

2. The procedure for the entry of defaults is set out in Rule 55. ARIZ. R. CIV. P. 55(c) provides: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(c)." Thus, final orders and judgments arising as a result of default are expressly brought under the purview of Rule 60(c) by Rule 55(c). *Id.*

upon which a trial court may grant relief, the sixth reason under Rule 60(c) is a catch-all provision which gives the court discretion to grant relief for "any other reason justifying relief from the operation of a judgment."[3] Significantly, Rule 60(c)(6) is subject to a different time limitation than other clauses in Rule 60(c). A motion for relief from judgment under Rule 60(c)(1), (2), or (3) must be made within a reasonable time, but in no event more than six months after the judgment sought to be set aside is entered,[4] whereas a motion under Rule 60(c)(6) need be made only within a reasonable time.[5] Rule 60(c)(6) is important, then, because it both broadens the grounds for relief set out in the preceding five clauses and offers an escape from the six-month time limitation imposed on clauses (1), (2), and (3).[6]

In defining the scope of relief available under Rule 60(c)(6),[7] two contrasting approaches are notable. First, a number of courts consider Rule 60(c)(6) and the first five clauses in Rule 60(c) to be mutually exclusive, stating that Rule 60(c)(6) should be applied only to situations not covered by Rule 60(c)(1) through (5).[8] The second, more flexible approach inter-

3. ARIZ. R. CIV. P. 60(c)(6). Clause (6) of the Arizona rule is identical to clause (6) of the federal rule. *See* FED. R. CIV. P. 60(b)(6). Clause (6) of the federal rule was added in the 1948 amendment to Rule 60(b) with the intent to statutorily permit various kinds of relief equitably given in the federal courts prior to Rule 60(b). J. MOORE, 7 MOORE'S FEDERAL PRACTICE ¶ 60.27, at 341 (2d ed. 1976).

4. The six-month limitation under Rule 60(c)(1), (2), and (3) will be strictly adhered to. *See* Leahy v. Ryan, 20 Ariz. App. 110, 111-12, 510 P.2d 421, 422-23 (1973) (denial of relief under Rule 60(c)(1) was proper where more than six months elapsed between entry of default and petition for relief).

Under 60(c)(1), (2), and (3), the six-month time limit is modified by the reasonable time requirement such that an action for relief within six months could conceivably fail for lack of promptness. *See* Schildhaus v. Moe, 335 F.2d 529, 531 (2d Cir. 1964) (motion for relief under Rule 60(b)(1) of the Federal Rules was not made within a reasonable time even though made within the one-year limit (six months under the Arizona Rules)); Rhodes v. Houston, 258 F. Supp. 546, 558 (D.C. Neb.) (reasonable time might be less than the one-year limit in the Federal Rules), *cert. denied*, 397 U.S. 1049 (1966); Sandoval v. Chenowith, 102 Ariz. 241, 245, 428 P.2d 98, 102 (1967) (motion for relief made within three months of the entering of default judgment was not within a reasonable time).

Relief under Rule 60(c)(4) and (5) appears to be subject to the reasonable time requirement. *See* ARIZ. R. CIV. P. 60(c). However, in applying Rule 60(c)(4), Arizona courts have held the reasonable time requirement does not apply when a judgment is attacked as void. Springfield Credit Union v. Johnson, 123 Ariz. 319, 322, 599 P.2d 772, 775 (1979); International Glass & Mirror, Inc. v. Banco Ganandero y Agricola, S.A., 25 Ariz. App. 604, 605, 545 P.2d 452, 453 (1976).

5. ARIZ. R. CIV. P. 60(c).

6. *See generally* Kane, *Relief from Federal Judgments: A Morass Unrelieved by a Rule*, 30 HAST. L.J. 41, 46-47 (1978). Not surprisingly, the vast majority of cases arising under Rule 60(c)(6) are attempts to avoid the time limits imposed on the other clauses. *Id.* Indeed, litigation as to whether Rule 60(c)(6) is the proper grounds for relief usually does not arise where the motion is made within the time limits applicable to Rule 60(c)(1)-(3), as then it is not important to determine whether the motion comes under Rule 60(c)(6) or Rule 60(c)(1)-(3). 3 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2864, at 212 (1973).

7. For purposes of this Casenote, Rule 60(c) of the Arizona Rules of Civil Procedure is used synonomously with rule 60(b) of the Federal rules of Civil Procedure unless noted otherwise. *See supra* note 3; *infra* note 26.

8. Klapprott v. United States, 335 U.S. 601 (1949); Dunn v. Law Offices of Ramon P. Alvarez, 119 Ariz. 437, 439, 581 P.2d 282, 284 (Ct. App. 1978); Sloan v. Florida-Vanderbilt Dev. Corp., 22 Ariz. App. 572, 576, 529 P.2d 726, 730 (1974). This view is supported by the rationale that the time limit applying to Rule 60(c)(1), (2) and (3) would be meaningless if after the time limit had run the movant could be granted relief under Rule 60(c)(6) for reasons covered by clauses (1), (2), and (3). 7 J. MOORE, *supra* note 3, ¶ 60.27, at 343-44.

prets Rule 60(c)(6) as providing for situations of extreme hardship, not only those that clauses (1), (2), and (3) do not cover, but those that they do.[9] In short, this second view would give the trial court discretionary power to dispense with the time limitation of Rule 60(c)(1), (2), and (3) in cases of extreme injustice and to set aside a default judgment.[10]

The disposition of a Rule 60(c) motion generally involves a reconciliation of competing goals. The goals of preserving the finality of judgments and of judicial economy militate against granting relief from judgment,[11] while the notion that decisions should be made on the merits of cases favors a liberal construction of Rule 60(c) and its various clauses.[12] The function of the trial court in addressing a motion for relief is to decide which goal(s) should be accorded greater weight given the facts of a particular case.[13]

In *Webb v. Erickson*,[14] the Arizona Supreme Court was asked to decide whether sufficient facts existed to support the trial court's decision to set aside a default judgment. Webb had originally obtained a default judgment against the Ericksons and subsequently served a writ of garnishment on Bates, the appellee, in order to collect on the Erickson judgment.[15] Bates failed to answer the writ and Webb obtained a default judgment against him.[16] Bates filed a motion to vacate the default judg-

9. This view was first espoused by Judge Learned Hand in United States v. Karahalias, 205 F.2d 331 (2d Cir. 1953). Judge Hand felt that clauses (1) through (3) contained most, if not all, of the possible equitable grounds for relief, and thus if clauses (1) through (3) and clause (6) were treated as mutually exclusive, the power of clause (6) would be extremely meager. Hence, he stated "[W]e read the subsection [6] as giving the court a discretionary dispensing power over the limitation imposed by the Rule itself on subsections (1), (2), and (3)." *Id.* at 333. On rehearing, however, the *Karahalias* court retracted its theory of Rule 60(c)(6) because of its repugnance to the *Klapprott* decision. The court still set aside the judgment under Rule 60(c)(6), however, by merely reclassifying the defendant's inaction as resulting from forcible obstacles rather than "neglect," thus constituting an "other reason" under Rule 60(c)(6). *Id.* at 335.

10. *Id.* at 333. Later cases seem to fit the pattern of this flexible approach. Where the facts are so compelling that extreme hardship or injustice exists, the courts appear willing to allow relief under Rule 60(c)(6) in cases filed past the time limits applicable to Rule 60(c)(1), (2), and (3). *See, e.g.*, Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1308, 1311-12 (N.D. Ga. 1970) (default judgment set aside where there was inexcusable neglect of counsel, movant was a layman suffering from anxiety and illness, and the underlying obligation was that of the movant's corporation rather than the movant individually); Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968) (circumstances presented more than excusable neglect and included such factors as inaction by the government, unusual delay by the court, and insolvency of the party); Brothers, Inc. v. W.E. Grace Manufacturing Co., 320 F.2d 594, 609-10 (5th Cir. 1963) (case involved something more than newly discovered evidence or fraud because of factors of time, the public interest in the case, and the conduct of the parties). *See generally* 3 C. WRIGHT & A. MILLER, *supra* note 6, ¶ 2864, at 220-21 nn.47-48.

11. *See* Richas v. Superior Court, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); Vander Wagen v. Hughes, 19 Ariz. App. 155, 505 P.2d 1046 (1973); Sloan v. Vanderbilt Dev. Corp., 22 Ariz. App. 572, 574, 529 P.2d 726, 728 (1974).

12. Union Oil Co. v. Hudson Oil Co., Inc. 131 Ariz. 285, 288, 640 P.2d 847, 850 (1982); Sloan v. Vanderbilt Dev. Corp., 22 Ariz. App. 572, 574, 529 P.2d 726, 728 (1974); Davis v. Superior Court, 25 Ariz. App. 402, 403, 544 P.2d 226, 227 (1976).

13. *See* Richas v. Superior Court, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); Camacho v. Gardner, 104 Ariz. 555, 559, 456 P.2d 925, 929 (1969); Project, *Relief from Federal Judgments Under Rule 60(b)—A Study of Federal Case Law*, 49 FORD. L. REV. 956, 957 (1980).

14. 134 Ariz. 182, 184, 655 P.2d 6, 8 (1982).

15. *Id.* at 184-85, 655 P.2d at 8-9.

16. *Id.* at 185, 655 P.2d at 9.

ment pursuant to Rule 60(c).[17] The superior court granted the motion to vacate and Webb appealed.[18] The court of appeals reversed the ruling, finding that the superior court abused its discretion in granting the motion.[19]

The Arizona Supreme Court vacated the court of appeals decision and held that reasons existed that went beyond those enumerated in Rule 60(c)(1) through (5) and raised extraordinary circumstances of hardship justifying relief under the residual provision of Rule 60(c)(6).[20] Specifically, the court mentioned four factors which combined to create a proper situation to invoke the equitable[21] relief of Rule 60(c)(6): 1) Bates was a defaulting garnishee;[22] 2) the proceeding and the wording of the summons and writ served on Bates were of a confusing nature;[23] 3) Bates was recovering from physical injury and suffering from depression at the time the writ was served;[24] and 4) Bates did not receive any notice of the default judgment until over three years after it had been entered against him.[25]

This casenote will first review Arizona and federal case law[26] and conduct an analysis of the elements necessary to be shown when a movant attempts to set aside a default judgment under Rule 60(c)(6). Next, a discussion of how these requirements were met in *Webb v. Erickson* will follow. Finally, some important implications of the *Webb* decision will be discussed.

ELEMENTS NECESSARY TO MAKE A SHOWING FOR RELIEF UNDER RULE 60(C)(6)

A party in Arizona attempting to obtain relief from a default judgment under Rule 60(c)(6) must show each of the following: 1) that his failure to answer was not for one of the reasons set forth in the five preceding clauses of Rule 60(c);[27] 2) that he acted promptly in seeking relief from

17. *Id.*

18. *Id.*

19. Webb v. Erickson, 134 Ariz. 191, 198, 655 P.2d 15, 22 (Ct. App. 1981), *vacated*, 134 Ariz. 182, 655 P.2d 6 (1982).

20. 134 Ariz. at 187, 190, 655 P.2d at 11, 14.

21. The word "equitable" is used in this casenote to describe the court's power under Rule 60(c)(6) to grant relief where it feels justice and good conscience so require. *See* D. DOBBS, DOBBS ON REMEDIES, at 28 (1973).

It is interesting to note that the origins of Rule 60(c)(6) can be traced to early equitable remedies: "One purpose of the 1946 revision [of the Federal Rules] was to incorporate generally the substance of the old common law and equitable ancillary remedies into amended 60(b)." 7 J. MOORE, *supra* note 3, P. 60.18[1], at 201.

22. *Id.* at 187, 655 P.2d at 11.

23. *Id.* at 187-88, 655 P.2d at 11-12. For a discussion of legislative efforts to clear up garnishment confusion, see *infra* note 77.

24. *Id.* at 188, 655 P.2d at 12.

25. *Id.* at 188-89, 655 P.2d at 12-13.

26. Because Rule 60(c) has the same wording as Rule 60(b) of the Federal Rules of Civil Procedure, Arizona courts look to the federal courts' construction of federal Rule 60(b) as persuasive authority as to the meaning of Rule 60(c). *See* Leahy v. Ryan, 20 Ariz. App. 110, 112, 510 P.2d 421, 423 (1973).

27. This requirement is derived from the view that clause (6) and the first five clauses are mutually exclusive. See *supra* note 8 for cases supporting the view of mutual exclusivity.

Also inherent in this requirement is the proposition that the "other reason" being advanced must be one which justifies relief. *See* Klapprott v. United States, 335 U.S. 601, 615 (1949) (the

the entry of default;[28] and 3) that he had a meritorious defense to the underlying action.[29] In addition, several federal courts, in exercising their discretion, consider whether relief under Rule 60(c)(6) will further justice without affecting the substantial rights of the parties.[30]

Other Reasons Justifying Relief

The United States Supreme Court in *Klapprott v. United States*[31] construed Rule 60(c)(6) and the preceding clauses of rule 60(c) to be mutually exclusive; that is, a judgment could be set aside under Rule 60(c)(6) only for reasons not contained in the preceding five clauses. Even after the *Klapprott* decision, however, courts at times have abandoned the idea of mutual exclusivity and applied Rule 60(c)(6) in situations seemingly governed by another provision when it has been felt that justice required relief from the judgment.[32] For example, courts have strained to describe the case or define the type of neglect or mistake in such a way as to allow Rule 60(c)(6) to apply and thus avoid the six-month bar that otherwise would be applicable.[33] However, where Rule 60(c)(6) is apparently being relied upon to avoid the time limits for relief under another clause, the majority

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Court stated that clause (6) "vests power in the courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice"); *see also* Leahy v. Ryan, 20 Ariz. App. 110, 112, 510 P.2d 421, 423 (1973); 7 J. MOORE, *supra* note 3, ¶ 60.27, at 343. Generally, this requirement simply insures that the reasons offered are substantial enough to justify setting aside the judgment. *See* cases cited in 7 J. MOORE, *supra* note 3, ¶ 60.27, at 347 n.25.

28. Richas v. Superior Court, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); DeHoney v. Hernandez, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979). The prompt action requirement is adopted from the requirement in Rule 60(c) that the motion be made within a reasonable time. *See* ARIZ. R. CIV. P. 60(c).

29. Union Oil Co. v. Hudson Oil Co., Inc., 131 Ariz. 285, 289, 640 P.2d 847, 851 (1982); Hendrie Buick Co. v. Mack, 88 Ariz. 248, 252, 355 P.2d 892, 894 (1960); Phillips v. Findlay, 19 Ariz. App. 348, 353, 507 P.2d 687, 692 (1973). The meritorious defense requirement is not mandated by Rule 60(c). *See* Camacho v. Gardner, 104 Ariz. 555, 559, 456 P.2d 925, 929 (1969); Hendrie Buick Company v. Mack, 88 Ariz. 248, 251, 355 P.2d 892, 894 (1960); Beltran v. Roll, 39 Ariz. 417, 419, 7 P.2d 248, 250 (1932). The requirement has been used by the courts to further the interests of judicial economy under the rationale that the law does not require the doing of a useless act. *See* McCloskey & Co. v. Eckart, 164 F.2d 257, 258 (5th Cir. 1947); United States v. $3,216,59 in United States Currency, 41 F.R.D. 433, 434 (D.S.C. 1967).

30. Expeditions Unlimited Aquatic Enters., Inc. v. Smithsonian Inst., 500 F.2d 808, 810 (D.C. Cir. 1974); Smith v. Jackson Tool & Die, Inc., 426 F.2d 5, 8 (5th Cir. 1970); Mach v. Pennsylvania R.R., 198 F. Supp. 473, 475 (W.D. Pa. 1961). Courts have considered the potential prejudice to the nondefaulting party, a third party, and the movant. For a general discussion, see *Relief from Federal Judgments Under Rule 60(b)—A Study of Federal case Law*, *supra* note 13, at 1005-10.

31. 335 U.S. 601, 614-15 (1949). This interpretation appears to be in accord with the wording of the clause. *See* FED. R. CIV. P. 60(b)(6). As Justice Reed pointed out, the word "other" in Rule 60(b)(6) would be meaningless if any different interpretation were accorded the clause. 335 U.S. at 626 (Reed, J., dissenting).

32. Nelms v. Baltimore & Ohio R. Co., 11 F.R.D. 441 (N.D. Ohio 1951); Weilbacher v. United States, 99 F. Supp. 109 (S.D.N.Y. 1951); C. Meisel Music Co. v. Perl, 3 Ariz. App. 479, 415 P.2d 575 (1966). *But see* Leahy v. Ryan, 20 Ariz. App. 110, 510 P.2d 421 (1973) (mistake not an "other reason"); Sloan v. Vanderbilt Dev. Corp., 22 Ariz. App. 572, 529 P.2d 726 (1974) (neglect not an "other reason" under Rule 60(c)(6)); Vander Wagen v. Hughes, 19 Ariz. App. 155, 505 P.2d 1046 (1973) (mistake or inadvertence not an "other reason" under 60(c)(6)).

33. *See, e.g.*, United States v. Cirami, 563 F.2d 26 (2d Cir. 1977) (gross neglect of counsel coupled with client's innocence is an "other reason" for relief); Kinnear Corp. v. Crawford Door Sales Co., 49 F.R.D. 3 (S.D.C. 1970) (mistake of law deemed outside Rule 60(b)(1) and inside Rule 60(b)(6)); Gendron v. Skyline Bel Air Estates, 121 Ariz. 367, 590 P.2d 483 (Ct. App. 1979) (more than excusable neglect shown where opposing counsel was aware of defendant's intent to file answer and said nothing when default entered).

of federal courts generally agree that the movant must adequately prove the existence of an extraordinary situation[34] to obtain relief under Rule 60(c)(6).[35]

Various "other reasons" have been found sufficient to invoke the trial court's equitable power under Rule 60(c)(6). Relief under Rule 60(c)(6) has been held appropriate where judgment was entered against a client due to the inexcusable negligence of his attorney,[36] where there was no

34. Klapprott v. United States, 355 U.S. 601 (1949) provided the first example of what constitutes a sufficiently "extraordinary" situation to justify relief under Rule 60(c)(6). In *Klapprott*, the movant sought to vacate a default judgment entered against him in a denaturalization proceeding. *Id.* at 602. The combination of the movant's alleged illness, his lack of funds sufficient to hire a lawyer, his incarceration throughout the period by federal authorities, and the result that the default judgment stripped him of his naturalized citizenship was held sufficient for relief under clause (6). *Id.* at 613-15. The Court stated that the facts presented could not be classified as mere neglect by the petitioner, and thus relief could be brought under clause (6). *Id.* at 613.

In another denaturalization case, Ackermann v. United States, 340 U.S. 193 (1950), the Court had a further opportunity to define what constituted extraordinary circumstances. The Ackermanns failed to appeal from adverse judgments rendered against them in denaturalization proceedings, alleging financial inability to appeal and reliance upon the advice of a government official. *Id.* at 195-96. In holding that extraordinary circumstances did not exist, the Court appeared to rely heavily on the facts that the Ackermanns had a choice of whether to appeal and were generally free to act. *Id.* at 202. Thus, the distinction in the treatment of the two denaturalization cases appears to rest on the rationale that one who is not free to act or has no freedom of choice is not capable of mere "neglect" under Rule 60(c)(1). On the other hand, where the movant makes a fair and deliberate choice earlier not to move for relief, there should be no reason later to relieve him of that choice. *See, e.g.*, Horace v. St. Louis S.W.R.R. Co., 489 F.2d 632, 633 (8th Cir. 1974); Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972). For other cases following the choice—no choice and freedom—no freedom to act distinctions, see 7 J. MOORE, *supra* note 3, ¶ 60.27, at 363-64 n. 29.

35. Relief was denied in the following federal cases for failure to show extraordinary circumstances. Rinieri v. News Syndicate Co., 385 F.2d 818, 822-23 (2d Cir. 1967) (financial inability to enforce one's rights in a libel action does not in itself constitute extraordinary circumstances); Boehm v. Office of Alien Property, 344 F.2d 194, 195 (D.C. Cir. 1965) (no showing of extraordinary circumstances merely where mistake is alleged); Mach v. Pennsylvania R.R., 198 F. Supp. 473, 474-75 (W.D. Pa. 1961) (relief denied where movant's former counsel failed to appeal from adverse judgment). Arizona courts have also at times considered the extraordinary circumstances test. Webb v.Erickson, 134 Ariz. 182, 186-87, 655 P.2d 6, 10-11 (1982); Lone Mountain Ranch v. Dillingham Inv., 131 Ariz. 583, 585, 643 P.2d 28, 30 (Ct. App. 1982) (failure to inquire whether a default judgment had been entered precludes the existence of extraordinary circumstances); Dunn v. Law Offices of Ramon R. Alvarez, 119 Ariz. 437, 439, 581 P.2d 282, 284 (Ct. App. 1978) (conflict of interest between attorney and client resulted in extraordinary circumstances justifying relief).

The rationale for requiring a showing of extraordinary circumstances is that the movant should be required to show something more than mere neglect because he is afforded the opportunity to file a motion after the time limitation applicable to Rule 60(c)(1) has expired. *See* 7 J. MOORE, *supra* note 3, ¶ 60.27, at 343-44. However, consider the following criticism of the extraordinary circumstances test:

> The term 'neglect' as used in the law usually implies fault, and a court of equity will not exercise its power to aid one truly at fault in a matter. Therefore, when one's inattention to his legal business is due not to mere 'neglect' but rather to . . . extraordinary circumstances, usually beyond one's control, which render such neglect 'excusable,' relief may be had under 60(b). It must however . . . be had pursuant to clause (1) . . . . Rule 60(b) is an extraordinary remedy, and in all situations affords relief only in extraordinary circumstances.

Comment, *Equitable Power of a Federal Court to Vacate a Final Judgment for "Any Other Reason Justifying Relief"—Rule 60(b)(6)*, 33 MO. L. REV. 427, 439 (1968).

36. *See, e.g.*, United States v. Cirami, 563 F.2d 26 (2d Cir. 1977); Barber v. Tuberville, 218 F.2d 34 (D.C. Cir. 1954). *But see* Link v. Wabash Railroad Co., 370 U.S. 626 (1962) (the neglect of the attorney is to be treated as the neglect of the party). Although several courts have followed *Link*, a number of others have refused to adhere to it by distinguishing it or ignoring it on the assumption that Federal Rule 60(b)is one permissible way of relieving the client from the errors of

notice of the entry of judgment until the time for appeal had passed,[37] where there was fraud by one's counsel or by a third-party witness,[38] and where the movant was previously physically incapable of acting.[39]

In granting relief, courts in Arizona have also considered the movant's status as defaulting garnishee,[40] the lack of any notice of the original summons and complaint,[41] and the excessiveness of the damages awarded on default.[42] Rule 60(c) has not, however, been allowed to be used to "relievf[e] a party from free, calculated, and deliberate choices he has made."[43] A party is said to have a duty to take legal steps to protect his own interests, and this often includes getting legal representation.[44] In particular,

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the attorney. *See* Kane, *supra* note 6, at 75. The Arizona decisions appear to follow *Link*. United Imports & Exports v. Superior Court, 134 Ariz. 43, 653 P.2d 691 (1982); Cockerham v. Zikratch, 127 Ariz. 230, 619 P.2d 739 (1980).

37. *See, e.g.*, Smith v. Jackson Tool & Die, Inc., 426 F.2d 5 (5th Cir. 1970); Cavalliotis v. Salomon, 357 F.2d 157 (2d Cir. 1966). *But see In re* Morrow, 502 F.2d 520 (5th Cir. 1974).

38. *See, e.g.*, Armour & Co. v. Nard, 56 F.R.D. 61 (N.D. Iowa 1972) (fraud by a third party witness); McKinney v. Boyle, 404 F.2d 632 (9th Cir. 1968) (fraud by one's own counsel), *cert. denied*, 394 U.S. 992 (1969) *reh. denied* 395 U.S. 941 (1969).

39. *See, e.g.*, Pierre v. Bernuth, Lembcke Co., 20 F.R.D. 116 (S.D.N.Y. 1956) (mental hospital); Fleming v. Mante, 10 F.R.D. 391 (N.D. Ohio 1950) (tuberculosis sanitarium).

40. *See* Webb v. Erickson, 134 Ariz. 182, 187, 655 P.2d 6, 11 (1982); Riggs v. Huachuca Inv. Co., 2 Ariz. App. 527, 529, 410 P.2d 149, 151 (1966); Commission Monetaria v. Sonora Bank & Trust Co., 28 Ariz. 369, 371, 236 P. 1114, 1115 (1925); Gutierrez v. Romero, 24 Ariz. 382, 387, 210 P. 470, 472 (1922). *But see* Gonzales v. Whitney, 90 Ariz. 324, 330-31, 367 P.2d 668, 671-72 (1962) (court would not set aside default against garnishee-defendant where no excuse for failure to answer and no meritorious defense were alleged).

41. A number of cases arise in which an insured has not properly notified its insurer of the suit. The court of appeals in East v. Hedges, 125 Ariz. 188, 608 P.2d 327 (Ct. App. 1980) stated:

> When an insurer has not had notice of the pendency of a lawsuit against its insured, . . . part (6) of Rule 60(c) is a potential avenue for relief. . . . As a non-party with standing, the insurer enters the litigation without having received notice of the proceedings otherwise provided to a party by service of process. It therefore does not have legal notice of a default judgment entered against its insured unless it received this information by other means.

Id. at 189, 608 P.2d at 328. *See* Union Oil Co. v. Hudson Oil Co., Inc., 131 Ariz. 205, 640 P.2d 847 (1982); Camacho v. Gardner, 104 Ariz. 555, 458 P.2d 925 (1969). *But see* Rhodes Western v. Clarke, 14 Ariz. App. 62, 480 P.2d 677 (1971) (relief denied where supervisor of defendant's insured received complaint and summons and was negligent in not contacting defendant's counsel until after default judgment was entered); Mayhew v. McDougall, 16 Ariz. App. 125, 491 P.2d 848 (1971) (relief denied where insurance claims adjuster notified of complaint and failed to notify insurer).

42. In Camacho v. Gardner, 6 Ariz. App. 590, 435 P.2d 719 (1967), the Arizona Court of Appeals stated that the matter of excessiveness of damages on default judgment, if it is so great as to shock the consciences of the court, is grounds for relief under 60(c)(6). *Id.* at 594, 435 P.2d at 723. *See also* Lawrence v.Burke, 6 Ariz. App. 228, 237, 431 P.2d 302, 311 (1967). *But see* Campbell v. Frazer Constr. Co., 9 Ariz. App. 425, 426, 453 P.2d 365, 366 (1969) (relief denied where movant failed to present evidence to the trial court that damages awarded were excessive).

43. Roll v. Janca, 22 Ariz. App. 335, 337, 527 P.2d 294, 296 (1974); C. WRIGHT & A. MILLER, *supra* note 6, § 2864, at 214.

44. Homecraft Corp. v. Fimbres, 119 Ariz. 299, 301, 580 P.2d 760, 762 (1978) ("when one undertakes to represent himself, he is entitled to no more consideration than if he had been represented by counsel"); *see* Counterman v. Counterman, 6 Ariz. App. 454, 457-58, 433 P.2d 307, 310-11 (1967) (fact that defendants did not have an attorney is not sufficient in itself to show excusable neglect under Rule 60(c)(1)); Beyerle Sand & Gravel, Inc. v. Martinez, 118 Ariz. 60, 574 P.2d 853 (1977) (failure to retain counsel is carelessness and not even proper grounds for relief under Rule 60(c)(1)). *But see* 7 J. MOORE, *supra* note 3, ¶ 60.27[2], at 364-65 ("[w]hen a litigant appears pro se . . . . good reason may exist for relaxing to some extent the alertness that might be supposed to apply to a member of the bar"); Transport Pool Div. of Container Leasing, Inc. v. Joe Jones Trucking Co., 319 F. Supp. 1308, 1310-11 (N.D. Ga. 1970) (attorney negligently failed to file answer and disappeared, leaving defendant to represent himself); Kinnear Corp. v. Crawford

Rule 60(c)(6) may not be used as a substitute for failure to take an appeal.[45]

Prompt Action

Because a default judgment is entered after a delay in pleading or otherwise defending, the courts will not consider a motion for relief unless the movant acted promptly to set aside the default judgment.[46] The movant is ordinarily required to make a satisfactory showing of an excuse for his delay.[47] Indeed, the Arizona Supreme Court in *United States Imports & Exports v. Superior Court*[48] held that where the movant has not provided a reasonable explanation for the delay,[49] the trial court's granting of relief under a Rule 60(c) motion is an abuse of discretion.[50]

While the prompt action requirement is consistent with the goal of finality, some courts have stated that it is proper to consider the merits of the movant's defense in conjunction with the excusability of the delay before denying the motion.[51] If a defense is particularly meritorious, for example, a court may be inclined to excuse the delay to allow a decision to be made on the merits.[52] Some federal courts, however, still require that

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Door Sales Co., 49 F.R.D. 3, 5 (D.S.C. 1970) (defendant answered plaintiff's complaint with a letter and check for accounts payable less expenses attributable to defects but never hired an attorney or filed an answer).

45. Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 651 (1st Cir. 1972); Wagner v. United States, 316 F.2d 871, 872 (2d Cir. 1963). *But see* Simons v. Schiek's, Inc., 275 Minn. 132, 136, 145 N.W.2d 548, 552 (1966).

46. Tolson v. Hodge, 411 F.2d 123, 129-30 (4th Cir. 1969); Richas v. Superior Court, 133 Ariz. 512, 514, 652 P.2d 1035, 1037 (1982); United States Imports & Exports v. Superior Court, 134 Ariz. 43, 653 P.2d 691 (1982). *See supra* note 28.

47. Richas v. Superior Court, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982) (no reason given explaining delay in seeking to set aside judgment); *see* cases cited *supra* note 46.

48. 134 Ariz. 43, 653 P.2d 691 (1982). Although the court denied relief upon a number of grounds, it emphasized that a thirteen week delay, where unexplained, cannot, in a trial court's discretion, be held to be prompt. *Id.* at 46, 653 P.2d at 694.

49. The burden of explaining the delay is upon the party seeking relief from entry of default. Richas v. Superior Court, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982); Sloan v. Florida-Vanderbilt Dev. Corp., 22 Ariz. App. 572, 574, 529 P.2d 726, 728 (1974).

50. 134 Ariz. at 46, 653 P.2d at 694. *See also* Richas v. Superior Court, 133 Ariz. 512, 515, 652 P.2d 1035, 1038 (1982); Shemaitis v. Superior Court, 114 Ariz. 288, 289, 560 P.2d 806, 807 (1977) (quoting Marsh v. Riskas, 73 Ariz. 7, 11, 236 P.2d 746, 749 (1951)). Knowledge of the default judgment can be an important factor in determining whether there was prompt action. Phillips v. Findlay, 19 Ariz. App. 348, 507 P.2d 687 (1973); Ditto v. Decker, 14 Ariz. App. 388, 483 P.2d 801 (1971). What is a reasonable time, however, depends upon all the circumstances of a particular case. *See, e.g.*, Richas v. Superior Court, 133 Ariz. 512, 652 P.2d 1035 (1982) (five week delay in filing not prompt where movant made no explanation for the delay and failed to set forth any meritorious defense); Price v. Sunmaster, 27 Ariz. App. 771, 558 P.2d 966 (1976) (in action to vacate a judgment foreclosing a mechanic's lien, twenty-seven month delay held not untimely as a matter of law where complaint in the original action failed to state a cause of action and where there was a lack of personal jurisdiction over the defendants); Sandoval v. Chenowith, 102 Ariz. 241, 428 P.2d 98 (1967) (failure of movant to file nine weeks after knowledge that judgment had been entered was not prompt where no explanation for the delay was given).

51. *See, e.g.*, Schwab v. Bullock's Inc., 508 F.2d 353, 355 (9th Cir. 1974); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 244-45 (3d Cir. 1951); Broglie v. Mackay-Smith, 75 F.R.D. 739, 742 (W.D. Va. 1977).

52. Price v. Sunmaster, 27 Ariz. App. 771, 775-76, 558 P.2d 966, 970-71 (1976) (twenty-seven months not untimely as a matter of law where the original complaint failed to state a cause of action and there was a lack of personal jurisdiction of defendants to award money damages); *see* cases cited *supra* note 51.

some element of good faith underlie the reason for delay in responding to the complaint.[53]

Meritorious Defense

The requirement that the movant show a meritorious defense is a judicial requirement[54] created to further the interests of judicial economy.[55] The burden of proof a court imposes on the movant to establish a meritorious defense may indicate whether the court is more concerned with judicial economy or with resolving the case on the merits.[56] In *Union Oil Co. v. Hudson Oil Co., Inc.*,[57] the Arizona Supreme Court stated that an affidavit accompanying a Rule 60(c) motion is sufficient as to the requirement of a meritorious defense if it is shown from all material facts set forth in the affidavit that there is a substantial defense to the action.[58] In *Richas v. Superior Court*,[59] the court emphasized that the defense must be estab-

53. Good faith is usually demonstrated where the movant, originally unaware of the suit, promptly brings a motion to set aside the default judgment upon learning of it. *See, e.g.*, Provident Security Life Ins. Co. v. Gorsuch, 323 F.2d 839, 842-43 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); Horn v. Intelectron Corp., 294 F. Supp. 1153, 1155 (S.D.N.Y. 1968).

54. The meritorious defense requirement is not mandated by Rule 60(c). *See supra* note 29.

55. Gomes v.Williams, 420 F.2d 1364, 1366 (10th Cir. 1970); McCloskey & Co. v. Eckart, 164 F.2d 257, 258 (5th Cir. 1947); United States v. $3,216.59 in United States Currency, 41 F.R.D. 433, 434 (D.S.C. 1967).

56. Some courts favoring a resolution on the merits have taken a very liberal approach to the requirement. Tolson v. Hodge, 411 F.2d 123, 125 (4th Cir. 1969) (court inferred a meritorious defense from an earlier pleading); Trueblood v. Grayson Shops, Inc., 32 F.R.D. 190, 196 (E.D. Va. 1963) (court inferred the existence of a meritorious defense from the very nature of plaintiff's slip-and-fall complaint); Kohlbeck v. Handley, 3 Ariz. App. 469, 472, 415 P.2d 483, 486 (1966) (general denial in assault and battery action supported by affidavit was a meritorious defense).

Other courts, stressing the goal of judicial economy, have established more rigorous standards of proof for showing the existence of a meritorious defense. Madsen v. Bumb, 419 F.2d 4, 6 (9th Cir. 1969) (a general denial is insufficient to show the existence of a meritorious defense); Richas v. Superior Court, 133 Ariz. 512, 517, 652 P.2d 1035, 1040 (1982) (court refused to infer meritorious defense from trip-and-fall case); United Imports & Exports v. Superior Court, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982) (conclusory allegation that a defense exists is insufficient) (dictum).

57. 131 Ariz. 285, 640 P.2d 847 (1982). *Union Oil Co., Inc.* involved an attempt to set aside a default judgment in an action against a gas station, operated by Hudson Oil Company, for alleged negligence in failing to properly clear brush from its lot, which allegedly was the proximate cause of a grassfire that damaged the plaintiff's property. *Id.* at 286, 640 P.2d at 848. The movant, Hudson Oil, offered an eyewitness' affidavit that the fire spread through grass on the plaintiff's property and also claimed that the property on which it operated was owned by a separate corporation. *Id.* at 289, 640 P.2d at 851. The court held that Hudson sufficiently raised a defense as to whether the fire was the proximate cause of the movant's negligence and whether the movant could be charged with liability for events occurring on property owned by a separate corporation. *Id.*

58. *Id.* At least one federal court has gone so far as to require substantiation of the alleged defense through affidavits before it will pass on the merits of the movant's claims. *See, e.g.*, Tri-Continental Leasing Corp. v. Zimmerman, 485 F. Supp. 495, 497-99 (N.D. Cal. 1980). *Contra* Olson v. Stone, 588 F.2d 1316, 1320 (10th Cir. 1978) (the movant's allegations should be accepted as true). Arizona courts maintain the view that the meritorious defense requirement is not intended to be a substitute for a trial on issues of fact. Hendrie Buick Co. v. Mack, 88 Ariz. 248, 252, 355 P.2d 892, 894 (1960).

59. 133 Ariz. 512, 652 P.2d 1035 (1982). *Richas* involved an attempt to set aside a default judgment granting recovery of damages for personal injuries sustained as a result of the alleged negligence of the movant's insured. *Id.* at 513, 652 P.2d at 1036. The court noted that the only attempt to show a meritorious defense was an affidavit stating that the claim involved a trip-and-fall injury suffered by a construction worker working on the insured's cite. *Id.* at 517, 652 P.2d at 1040. The court rejected the argument that since this was a trip-and-fall case, a defense should be inferred and held that no meritorious defense was established. *Id.*

lished through facts and not through conclusions, assumptions, or affidavits based on other than personal knowledge.[60] Thus, even if a delay is deemed excusable under Rule 60(c), the default judgment would not be set aside where the movant has not made a sufficient showing of a defense to the suit.[61]

The foregoing discussion sets forth the three requirements that a movant must meet in order to obtain relief from judgment under Rule 60(c)(6). The Arizona Supreme Court's opinion in *Webb* discusses the meritorious defense requirement as well as the prompt action requirement, but focuses mainly on whether the movant demonstrated reasons going beyond those enumerated in the first five clauses to justify clause (6) relief.

ANALYSIS OF *WEBB V. ERICKSON*

On August 5, 1975, appellant Webb obtained a default judgment against the Ericksons for $6,500.[62] In order to collect on the Erickson judgment, Webb had a writ of garnishment served on appellee Bates, whose house had been recently sold by Carl Erickson and who apparently owed Erickson commissions on the sale.[63] On November 22, 1975, the writ, along with a summons, was served on Bates at his home, designating Bates as garnishee-defendant based on the underlying Webb/Erickson judgment.[64] At the time of service, Bates had recently been released from the hospital for treatment of injuries sustained in an industrial accident, was involved in divorce and custody proceedings, and was undergoing treatment for depression.[65]

Bates did not answer the writ of garnishment, and on February 27, 1976, Webb obtained a default judgment against Bates for the entire Erickson judgment of $6,500.[66] No notice of the default judgment had been sent to Bates, nor did he know that it had been entered against him until March of 1979, more than three years after entry, when Webb's attorney called Bates to undertake a settlement of the judgment.[67] Although some negotiations took place for the next five months, no settlement was reached; consequently, Webb sought to garnish Bates' wages on the basis

60. *See id. See also* Parag v. Walters, 11 Ariz. App. 276, 464 P.2d 347 (1970) (affidavit of defense counsel relating to meritorious defense was insufficient since counsel did not have personal knowledge of facts).

61. Atlantic Steamers Supply Co. v. International Maritime Supplies Co., 268 F. Supp. 1009, 1011 (S.D.N.Y. 1967). *See* United Imports & Exports v. Superior Court, 134 Ariz. 43, 46, 653 P.2d 691, 694 (1982).

62. Webb v. Erickson, 134 Ariz. 182, 184-85, 655 P.2d 6, 8-9 (1982). The judgment was based on two promissory notes and a check for insufficient funds executed by Erickson. *Id.* at 185, 655 P.2d at 9.

63. *Id.* Bates was only one of several parties whose house had been sold by Erickson and who had been served a writ of garnishment by Webb. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* Bates stated he did not believe the summons was intended for him because he had never heard of James Webb and was not connected with any dispute between Webb and the Ericksons. *Id.* The judgment was obtained pursuant to ARIZ. REV. STAT. ANN. § 12-1583 (1956) (amended 1981).

67. *Id.*

of the 1976 default judgment.[68]

Bates immediately consulted an attorney, and a motion to vacate judgment pursuant to Rule 60(c) was filed.[69] The superior court granted Bates' motion to vacate and quashed the writ of garnishment served on Bates' employer.[70] Webb appealed, and the court of appeals reversed, holding that the superior court had abused its discretion in setting aside the default judgment.[71] The Arizona Supreme Court, upon granting Bates' petition for review, vacated the opinion of the court of appeals and affirmed the judgment of the trial court.[72]

Initially, the court reiterated that in order to obtain relief under Rule 60(c) the movant must show: 1) his failure to answer was excused by one of the grounds set forth in the rule; 2) he acted promptly in seeking relief from the entry of default; and 3) he had a meritorious defense to the default action.[73] As to the first requirement, the court found that relief was proper under Rule 60(c)(6), stating that the facts in the case went beyond those factors enumerated in the first five clauses of the rule and raised extraordinary circumstances of hardship or injustice justifying relief under clause (6).[74] In this regard, the court noted initially that Bates was a defaulting garnishee and that he was being held responsible for the full amount of another person's debt without a trial on the merits.[75]

Next, the court considered the confusing nature of the summons and writ served on Bates,[76] who was not involved in and knew nothing about

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68. *Id.*

69. *Id.*

70. *Id.* The trial court did not specify the grounds for setting aside the motion. In such a situation, an appellate court is free to inquire into the applicability of any clause. *Id.* at 186, 655 P.2d at 10; Roll v. Janca, 22 Ariz. App. 335, 336, 527 P.2d 294, 295 (1974).

71. Webb v. Erickson, 134 Ariz. 191, 655 P.2d 15 (Ct. App. 1981), *vacated*, 134 Ariz. 182, 655 P.2d 6 (1982). Vacation of a default judgment lies within the sound discretion of the trial court and will not be disturbed on appeal unless clear abuse of discretion can be found. Union Oil Co. v. Hudson Oil Co., Inc., 131 Ariz. 285, 288, 640 P.2d 847, 850 (1982); DeHoney v. Hernandez, 122 Ariz. 367, 371, 595 P.2d 159, 163 (1979); Staffco, Inc. v. Maricopa Trading Co., 122 Ariz. 353, 356, 595 P.2d 31, 34 (1979).

72. 134 Ariz. at 185, 655 P.2d at 9.

73. *Id.* at 186, 655 P.2d at 10. *See supra* notes 27-29 and accompanying text.

74. *Id.* at 187, 655 P.2d at 11. *See infra* note 82 and accompanying text.

75. *Id.* at 187, 655 P.2d at 11. The court of appeals refused to consider the factor that Bates was a defaulting garnishee because it could find no distinction in the way defaults applied to garnishees as opposed to other defendants. *Id.* The Arizona Supreme Court rejected this reasoning, stating that the factor should still be considered in the overall determination of whether extraordinary circumstances exist. *Id.* *See* cases cited *supra* note 40. The purpose of garnishment is to notify the garnishee that he must answer the questions propounded and to impound a debtor's assets and property. The only issues to be determined in the garnishment action are whether the garnishee is indebted to the defendant in the main suit and to whom the garnishee shall pay the fund. *See* R. WAPLES, WAPLES ON ATTACHMENT AND GARNISHMENT §§ 469-71 (2d ed. 1895). Thus, the garnishee must often suffer the consequences of a judgment to which he was not a party in interest and in which he had no interest. In this sense, garnishment is not a true adversary proceeding. Being a harsh statutory remedy, garnishment should be construed strictly and against the one resorting to the remedy. *See supra* note 40 and accompanying text. Furthermore, the harm to the innocent garnishee who owed nothing to the garnishor usually far outweighs the harm to the successful party in the main action, since the successful party still has his final judgment and may obtain satisfaction from another source. *See* R. WAPLES, *supra*, §§ 473-75.

76. The summons served on Bates read:

> In obedience to the Writ of Garnishment served together with this Summons I do hereby summon and require you to appear and answer the accompanying Writ in the

the Webb/Erickson dispute.[77] Specifically, the court recognized that the process did not instruct Bates how to answer or when and where to appear.[78] Further, the court took notice of Bates' physical and mental condition at the time the writ was served as a reason explaining his failure to answer.[79]

Although the supreme court recognized that these last two reasons behind Bates' failure to understand and answer the writ fell within the confines of excusable neglect under Rule 60(c)(1), it concluded that such reasons would still be equitable factors to consider under Rule 60(c)(6).[80] Finally, because Bates did not receive notice that the default judgment had been entered against him until 1979, when Webb finally chose to execute on the judgment, the court acknowledged that Bates was effectively deprived of the use of Rule 60(c)(1) to set aside the judgment.[81] In concluding that the grant of relief was proper, the court emphasized that none of these factors alone would have been sufficient to invoke Rule 60(c)(6); however, their combination in a single case created a unique situation so as to have made it proper for the trial court to set aside the default

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manner prescribed by law and within TEN DAYS, exclusive of the date of service, after service of this summons upon you if served within the County of Maricopa, or within TWENTY DAYS, exclusive of the day of service, if served outside the County of Maricopa, and you are hereby notified that in case you fail to so answer, judgment by default may be rendered against you for the full amount of the balance due upon the judgment against the defendant and in favor of plaintiff and not merely for the amount that you may owe to the defendant, and that such judgment may be so rendered in addition to any other matters which may be adjudged against you as prescribed by law.

134 Ariz. at 187-88, 655 P.2d at 11-12. For a discussion of legislative efforts to clear up garnishment confusion, see *infra* note 77.

77. *Id.* at 187, 655 P.2d at 11. One of the movant's major arguments in attempting to have the default judgment set aside was that the quality of notice afforded by the summons and writ of garnishment violated procedural due process, especially in light of the fact that Bates was not a sophisticated commercial defendant. Appellant's Motion for Rehearing at 7-10. *Cf.* Lawrence v. Burke, 6 Ariz. App. 228, 431 P.2d 302 (1967) (notice under Rule 55(b) which directed the defendant to the court commissioner's office "on January 14, 10:00 a.m." was held to be ineffective notice). Instead of considering whether ARIZ. REV. STAT. ANN. § 12-1583 (1982) was unconstitutional in its application to the instant case, the *Webb* court acknowledged the confusion that resulted under the current garnishment statutes and took notice of the legislature's recent amendment of them in 1981. 134 Ariz. at 188, n.3, 655 P.2d at 12. A.R.S. § 12-1574(C) was added to insure that the garnishee would be provided with instructions on how to answer the writ of garnishment. *Id.* A.R.S. § 12-1583 was also amended to no longer permit default judgments against garnishees except after further notice to the garnishee to appear. ARIZ. REV. STAT. ANN. § 12-1583 (1982) (amended 1981).

78. 134 Ariz. at 188, 655 P.2d at 12.

79. *Id.* The court of appeals refused to even consider Bates' anxiety and hospitalization because it did not rise to the level of disability and was merely excusable neglect, 134 Ariz. 191, 197, n.1, 655 P.2d 15, 21 (Ct. App. 1981).

80. *Id.* at 188, 655 P.2d at 12.

81. *Id.* The court of appeals refused to consider the fact that Bates received no notice of the judgment until after the default judgment was entered, citing Leahy v. Ryan, 20 Ariz. App. 110, 510 P.2d 421 (1973), for the proposition that lack of notice does not toll the six-month limitation of Rule 60(c). 134 Ariz. at 197-98, 655 P.2d at 21-22. The Arizona Supreme Court, acknowledged this proposition and the rule that notice is not required in the case of default, but nevertheless held that lack of notice of the default judgment can be considered in the application of Rule 60(c)(6), 134 Ariz. at 189, 655 P.2d at 13. *See* cases cited *supra* note 41. In so holding, the court in a footnote announced its disapproval of the tactic of intentionally delaying execution on a default judgment for six months in order to deprive an unwitting default judgment debtor from asserting the grounds specified in Rule 60(c)(1), (2) or (3).

judgment.[82]

Although the circumstances of the case supported equitable relief under Rule 60(c)(6), it was still necessary to decide whether Bates acted promptly to set aside the default judgment and whether he presented a meritorious defense to the garnishment action brought by Webb. In view of the facts that Bates was not aware of the judgment until March of 1979,[83] that good-faith settlement negotiations ensued for five months thereafter, and that Bates filed a motion to vacate directly upon the breakdown of negotiations and Webb's garnishment of Bates' wages, the court ruled that it was not an abuse of discretion to find that Bates acted promptly to obtain relief even three and one-half years after entry of default.[84] The court also ruled that Bates presented a meritorious defense by his claim that he had "no control" over the payment of the commission to Erickson.[85] Here, the court applied a broad interpretation to Bates' claim and concluded that Bates had adequately raised the defense that the commission owed Erickson was being paid by someone else or had already been paid.[86]

An examination of the court's analysis in *Webb*, which focused on whether there were sufficient reasons to invoke the broad equitable power of Rule 60(c)(6), not only reveals certain factors the court deemed important in the resolution of that issue, but also further defines the scope of Rule 60(c)(6). For these reasons, the *Webb* opinion will have an important impact on the future application of Rule 60(c)(6).

IMPLICATIONS OF *WEBB V. ERICKSON*

In finding that relief was proper under Rule 60(c)(6), the Arizona Supreme Court in *Webb v. Erickson* abandoned the strictures of mutual exclusivity and ruled that a court could consider all the circumstances of a case in determining whether the case presented such an extraordinary situation as to justify relief under Rule 60(c)(6).[87] In determining whether extraordinary circumstances existed, the *Webb* court considered the movant's confusion concerning the writ of garnishment, as well as his physical and mental condition at the time the writ was served, reasons normally

82. 134 Ariz. at 189, 655 P.2d at 13. *See* Roll v. Janca, 22 Ariz. App. 335, 527 P.2d 294 (1974) (relief under Rule 60(c)(6) proper where uncertainty existed as to whether defendants secured service of process, execution of judgment did not occur until ten months later, and six more months passed from time of execution of judgment until defendants were served with subpoena for debtor's supplementary hearing).

83. See cases cited *supra* note 50 regarding knowledge. It is interesting to note that the *Webb* court never imposed a duty on Bates at any time to have ascertained the status of the garnishment action. In Lone Mountain Ranch v. Dillingham Inv., 131 Ariz. 583, 585, 643 P.2d 28, 30 (Ct. App. 1982), the court ruled that the failure of an unsuccessful party to receive a clerk's notice of entry of a default judgment did not justify relief under Rule 60(c)(6) because the litigants had a duty to inquire whether a default judgment had been entered.

84. *Id.* at 189, 655 P.2d at 13.

85. *Id.* at 189-90, 655 P.2d at 13-14. The court emphasized that the affidavit asserting the meritorious defense was not intended to be a substitute for a trial of the facts. *Id.* (quoting Union Oil Co. v. Hudson Oil Co., Inc., 131 Ariz. 285, 289, 640 P.2d 847, 851 (1982)). *See* Hendrie Buick Co. v. Mack, 88 Ariz. 248, 252, 355 P.2d 892, 894 (1960).

86. 134 Ariz. at 189, 655 P.2d at 13.

87. *See supra* notes 74-82 and accompanying text.

falling under Rule 60(c)(1) as excusable neglect.[88] Although the court emphasized that no one of these factors alone would be sufficient to constitute extraordinary circumstances, when they were combined with additional factors falling outside the scope of Rule 60(c)(1) through (3)—specifically, the movant's status as garnishee and his lack of notice that the default judgment had been entered against him—extraordinary circumstances were found to exist.[89]

Webb leaves open the question as to whether factors falling solely within the scope of Rule 60(c)(1) through (3) could combine to constitute extraordinary circumstances justifying relief under Rule 60(c)(6). A narrow reading of *Webb* on its facts would suggest that a movant seeking relief under Rule 60(c)(6) may set forth reasons falling under Rule 60(c)(1) through (3), but must still show some additional reason(s) beyond those found in Rule 60(c)(1) through (3) in proving extraordinary circumstances.[90] Such an interpretation would effectively bolster the six-month time limitation applicable to Rule 60(c)(1) through (3) and so promote finality and judicial economy.

A more expansive reading of *Webb*, however, would imply that even factors falling solely within Rule 60(c)(1) through (3) could combine to create extraordinary circumstances justifying relief under Rule 60(c)(6). Under such an expansive reading, the six-month limitation applicable to Rule 60(c)(1) through (3) could conceivably be circumvented by moving under Rule 60(c)(6). The approach Arizona is likely to follow might be discerned from its preferences as to the competing policy goals involved.

Yet, the emphasis placed on a given policy goal will often depend upon the facts of the applicable case.[91] For example, where, as in *Webb*, the movant presents a strong defense to the underlying action and has generally acted in good faith, the courts are likely to promote the resolution of a case on the merits at the expense of finality and judicial economy. Thus, while it remains arguable how expansive *Webb* actually is, *Webb* does enlarge the applicability of Rule 60(c)(6) via the extraordinary circumstances test. This ultimately means an expansion of the trial court's power to relieve a party from a judgment whenever it is appropriate to accomplish justice.

CONCLUSION

In *Webb v. Erickson*, the Arizona Supreme Court applied an analysis originally formulated by the United States Supreme Court in *Klapprott v. United States*, holding that there were sufficient facts existed in the case to raise extraordinary circumstances of hardship or injustice justifying relief under the residual provision of Rule 60(c). Under the analysis adopted by the court in *Webb*, Rule 60(c)(6) and the other grounds listed in Rule 60(c) are not seen as strictly mutually exclusive. Rather, Rule 60(c)(6) is given a

88. 134 Ariz. at 187-88, 655 P.2d at 11-12.
89. *Id.* at 189, 655 P.2d at 13.
90. *See supra* notes 88-89 and accompanying text.
91. *See supra* note 13 and accompanying text.

more flexible meaning which allows the court to grant relief not only when an "other reason" is present, but when under all the circumstances, including those within the scope of other clauses of Rule 60(c), it is appropriate to do so.

Webb leaves open the question of whether factors falling solely within Rule 60(c)(1) through (3) could combine to create extraordinary circumstances sufficient to justify relief under Rule 60(c)(6). It is clear, however, that while the movant must show extraordinary circumstances or an "other reason" sufficient to justify relief under Rule 60(c)(6), this does not complete his task. The movant must also show that he acted promptly in seeking relief from the judgment and that he had a meritorious defense to the judgment sought to be set aside.

The court's decision in *Webb v. Erickson* effectively expands the trial court's power under Rule 60(c)(6) to grant relief from judgment through its application of the extraordinary circumstances analysis. However, it will be up to future cases to provide more guidance as to what reasons combine to create extraordinary circumstances sufficient to invoke the court's equitable power under Rule 60(c)(6).

Brian Neil Spector

III. EMINENT DOMAIN

EMINENT DOMAIN: ADMISSIBILITY OF PLANNED USES FOR CONDEMNATION VALUATION

Before land can be seized by eminent domain, the owner must be paid just compensation.[1] The court must consider two elements in determining just compensation: (1) the value of the property actually taken by condemnation and (2) the reduction in value of the property remaining (the "remainder").[2] The measure of damages for the property actually taken is its fair market value.[3] Severance damages are awarded for the reduction

1. ARIZ. CONST. art. II, § 17, provides in part: "No private property shall be taken or damaged for public or private use without just compensation having first been made."

2. Suffield v. State, 92 Ariz. 152, 156, 375 P.2d 263, 266 (1962), interpreting ARIZ. REV. STAT. ANN. § 12-1122 (1982), which provides in relevant part:

> A. The . . . jury shall ascertain and assess:
>
> 1. The value of the property sought to be condemned. . . .
>
> 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages will accrue to the portion not sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff.
>
> B. As far as practicable, compensation shall be assessed for each source of damage separately.

3. United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979). Fair market value, however, is not the measure of damages when: (1) using fair market value is impracticable because of difficulties in computation; (2) an award of market value would fail to satisfy the fifth amendment requirement that a landowner be indemnified for a taking; or (3) property is taken

in the market value of the remainder.[4] They are measured by the difference in the remainder's fair market value before and after the taking.[5] Thus, determining a parcel's fair market value is crucial in assessing condemnation damages.

Only certain kinds of evidence are admissible as proof of the fair market value of condemned land.[6] The Arizona Court of Appeals in *City of Scottsdale v. Church of the Holy Cross Lutheran*[7] decided whether, in a condemnation proceeding, a landowner may introduce proof of plans for a specific future use of the remainder of his property following a partial taking.[8]

This issue arose when the city of Scottsdale (City) condemned part of a parcel owned by the Church of the Holy Cross Lutheran (Church). City zoning ordinances restricted the condemned parcel, which was not being used, to parking and recreational use.[9] The remainder of the church property was improved with administration and school buildings, a fellowship hall and a parking lot,[10] and the church had plans to build a new sanctuary on the remainder in the future.[11]

At the condemnation hearing, the Church did not dispute that the City's taking was one of "public use and necessity."[12] The Church did,

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from a landowner who has a legal or factual obligation to replace what was taken. *Id.* at 512-13, 515.

Fair market value is "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market with reasonable time allowed in which to find a purchaser, buying with knowledge of all the uses and purposes to which it was adapted and for which it is capable." Mastick v. State, 118 Ariz. 366, 370, 576 P.2d 1366, 1370 (1978). In *Mastick*, the condemnee's witness was correctly permitted to testify as to the fair market value of a parcel since his considerations were factors that a mythical buyer would consider before purchasing the parcel. *Id.* at 370, 576 P.2d at 1370.

4. 4A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 14.01(3) (rev. 3d ed. 1981).

5. Haney v. City of Tucson, 13 Ariz. App. 296, 297, 475 P.2d 955, 956 (1970) (Arizona is committed to the rule that the measure of severance damages is the difference between the market value of the remainder before and after the taking); City of Tucson v. LaForge, 8 Ariz. App. 413, 419, 446 P.2d 692, 698 (1968) (damages to the remainder are assessed as the difference between its value before and after severance); Deer Valley Industrial Park Dev. and Lease Co. v. State, 5 Ariz. App. 150, 154-55, 424 P.2d 192, 196-97 (1967) (courts are required to value the remaining land in its "before" and "after" condition in determining severance damages).

6. *See infra* notes 21-24 and accompanying text.

7. 132 Ariz. 416, 646 P.2d 301 (Ariz. App. 1982).

8. *See id.* at 420, 646 P.2d at 305. The court also considered whether the condemnation had to be valued as a percentage of the condemnee's entire holding or whether the trial court had correctly disregarded the other holdings in its valuation. The condemnee argued that the condemned parcel had no worthwhile use, and hence little fair market value, if severed from his other holdings. The condemnee thought the condemned parcel should be valued as a percentage of his entire holdings to avoid an unnaturally low damages award. The court rejected the condemnee's argument. The court found that the condemned parcel, lying in the bed of a river, could easily be distinguished from the condemnee's other holdings. Hence, the trial court had properly valued the condemned parcel independently of the uncondemned holdings. *Id.* at 421, 646 P.2d at 306.

9. *Id.* at 418, 646 P.2d at 303. The Church's property had use restrictions because it lay in a river's 100 year flood plain. *Id.*

10. *Id.*

11. See infra notes 14-15 and accompanying text.

12. 132 Ariz. at 417, 646 P.2d at 302. The land was condemned for development of a "green belt." *Id.* at 418, 646 P.2d at 303.

Condemnation hearings are provided for in ARIZ. REV. STAT. ANN. § 12-1116 (1982). There are two parts to the hearing. First, the court determines whether the property has been condemned for a necessary use. *Id.* at § 12-1116(c). Second, the court determines the probable dam-

however, contest the damages the City offered to compensate for the taking. Trial was ordered on the damages issue.[13]

Prior to trial, the court granted the City's motion *in limine* excluding evidence of the Church's plan to build a sanctuary on the remainder.[14] More than ten years prior to the taking, the Church had formulated plans to expand the use of its property. The plans called for building a new sanctuary and using the now condemned parcel for parking space. At trial, the Church attempted to introduce evidence that the taking defeated its plans to develop the remainder property. The Church wanted to show that its plans could not be carried out without the parking space. The plans had not been acted on and the Church presented no evidence of when the plans would be realized.[15] The Church's offer at trial to admit proof of its plans was denied. The Church appealed the ruling.[16]

The court of appeals upheld the trial court, holding that a condemnee's plans are not a compensable element of a taking.[17] The court decided, however, that a condemnee's plans may be admitted as evidence of the adaptability of the land for a future use for the purpose of establishing market value.[18] Before evidence of a condemnee's plans can be admitted for this purpose, the condemnee must show a reasonable probability that the proposed use would have come to fruition within the reasonably foreseeable future had the taking not occurred. Because the Church failed to prove that its plans would have come to fruition within the reasonably foreseeable future,[19] the appellate court ruled that the trial court was correct in granting the motion *in limine* excluding evidence of the Church's planned use of the remainder.[20]

Admissibility of Evidence for Valuation Purposes

The court's decision in *Holy Cross Lutheran* is based on settled rules regarding the admissibility of evidence when condemnation damages are in issue. Fair market value is the measure of damages in condemnation cases.[21] Hence, any evidence material to the issue of market value should

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ages. *Id. See* Berger, *Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978) for a discussion of what constitutes a "necessary use."

13. 132 Ariz. at 417-18, 646 P.2d at 302-03. The court's ascertainment of damages is guided by ARIZ. REV. STAT. ANN. § 12-1122, *supra* note 2.

14. 132 Ariz. at 419, 646 P.2d at 304.

15. *Id.* For a case with similar facts, *see* City of Pleasant Hill v. First Baptist Church of Pleasant Hill, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (1969). *First Baptist Church of Pleasant Hill* is distinguishable from *Holy Cross Lutheran*, however, because the Pleasant Hill church proved that it needed to expand its use of the property. *First Baptist Church*, 1 Cal. App. 3d at 405, 82 Cal. Rptr. at 14.

16. 132 Ariz. 419, 646 P.2d at 304. The Church's theory was that its property was more valuable prior to the taking because it could be fully developed. *Id.* Evidence that Church development plans could no longer be carried out proved that the taking forced the land to be underutilized. *See id.* at 420, 626 P.2d at 305.

17. *Id.* at 420, 646 P.2d at 305.

18. *Id.*

19. *Id.* This requirement might have been satisfied had the Church shown that it needed to develop its property. *See supra* note 15 and *infra* note 59.

20. 132 Ariz. 420, 626 P.2d at 305.

21. *See supra* note 3 and accompanying text.

be admitted.[22] The corollary to this is that the court cannot consider evidence of factors not affecting market value.[23] The test for the admissibility of valuation evidence is whether the proof would be considered by a prudent businessman contemplating buying the property.[24]

No consideration will be given to property values peculiar to an owner.[25] The frustration of an owner's particular scheme of development is irrelevant in fixing damages in a condemnation proceeding.[26] In *Holy Cross Lutheran*, therefore, the court correctly held that the mere fact that the Church could not expand its use of the remainder was not a compensable harm.[27]

Though inadmissible to show losses sustained by the owner, future plans can be introduced to show the possible use of the land to establish market value.[28] A condemnation is not valued at its present use if a more valuable use can be made of the land.[29] Rather, the land's value must be calculated in light of all the uses to which it may be applied in the reasonably near future.[30] Evidence of an owner's plans is thus admissible if it

22. Moschetti v. City of Tucson, 9 Ariz. App. 108, 113, 449 P.2d 945, 950 (1969) (the probability of a rezoning had an effect on market value and therefore evidence of this was admissible). *See* J. SACKMAN *supra* note 4, at § 18.11, where the author indicates that any evidence of market value which is competent, material and relevant may be admitted.

23. Olson v. United States, 292 U.S. 246, 256 (1934). In *Olson*, the condemnee was not permitted to show that it was physically possible to use his lands for a reservoir since, in the absence of proof that the use was reasonably probable, the use had no effect on current market value. *Id.* at 256-57.

24. State Road Comm'n v. Wooley, 15 Utah 2d 248, 251, 390 P.2d 860, 863 (1964). *See also* United States v. 25.406 Acres of Land, 172 F.2d 990, 993 (4th Cir. 1946), *cert. denied*, 327 U.S. 818 (1946) (evidence relied upon by people in their business affairs outside the courtroom should not be rejected inside the courtroom); Gleghorn v. City of Wichita Falls, 545 S.W.2d 446, 447 (Tex. 1976) (factors which would reasonably be given weight in negotiations between a buyer and a seller are to be considered by the court in determining fair market value).

25. United States v. Petty Motor Co., 327 U.S. 372, 378 (1946) (relocation costs are inadmissible since such costs reflect the property's value to the owner and not its fair market value); United States v. 992.61 Acres of Land, 201 F. Supp. 578, 580-82 (W.D. Ark. 1962) (the exceptional value to the condemnee of an undivided acreage was irrelevant in fixing fair market value); People v. Alexander, 212 Cal. App. 2d 84, 100, 27 Cal. Rptr. 720, 728 (1963) (market value was not what property would be worth to a particular property owner for some specific use).

26. People v. La Macchia, 41 Cal. 2d 738, 751, 264 P.2d 15, 24 (1953) *La Macchia* was overruled on other grounds in Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957)) (evidence of an owner's plans was incorrectly admitted to the extent that it showed the owner's purposes with regard to his property); Daly City v. Smith, 110 Cal. App. 2d 524, 532-33, 243 P.2d 46, 51 (1952) (condemnee's experts were not entitled to base damages on the condemnee's forced abandonment of specific plans to develop the condemned parcel); City of Los Angeles v. Kerckhoff-Cuzner Mill and Lumber Co., 15 Cal. App. 676, 677, 115 P. 654, 655 (1911) (condemnee was not permitted to enhance his damages by introducing proof of a contemplated scheme to develop the condemned parcel). *But see* State v. City of Terre Haute, 250 Ind. 613, 622, 238 N.E.2d 459, 464 (1968) (development and architectural plans are compensable).

27. *See* 132 Ariz. at 420, 646 P.2d at 305.

28. *See* J. SACKMAN, *supra* note 4, at § 18.11[2] (evidence of future plans is admissible to show the property's market value but is not admissible as an element of damages).

29. Olson v. United States, 292 U.S. 246, 255 (1934) (damages do not depend upon the uses to which the land has been devoted; the most profitable use to which the land will be put in the near future is to be considered as the measure of value to the extent that demand for the use affects market value); Boom Co. v. Patterson, 98 U.S. 403, 408 (1878) (the court cannot place a lower value on land because the owner lacks the ability or the will to make a more valuable use of the land); J. SACKMAN, *supra* note 4, at § 12.314.

30. Boom Co. v. Patterson, 98 U.S. 403, 408 (1878) (the value of the property is not measured by the purposes to which it is currently put but by those to which it may be applied); County of Maricopa v. Paysnoe, 83 Ariz. 236, 239, 319 P.2d 995, 997 (1957) (the market value of damaged

helps to establish the highest and best use to which condemned property may be put in the near future.[31]

For the land to be valued at the higher and better use, the condemnee must make certain foundational showings.[32] Most courts require two showings: first, that the land is adaptable for the proposed use, and second, that a current demand for such use exists.[33] Some authorities also require a third showing: that the condemnee prove a reasonable probability that the land would have been put to the proposed use in the foreseeable future.[34]

The Arizona Supreme Court announced in *State v. Jay Six Cattle Co.*[35] the foundational showings required of a condemnee before presenting proof that land has a higher and better use. In *Jay Six* the state condemned a cattle ranch that lay in an undeveloped region between Tucson and Benson.[36] The condemnee's experts testified that the highest and best use of the ranch land was for commercial and residential development and investment purposes.[37] The state attacked the jury instructions, which per-

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property must be assessed by taking account of all the uses and purposes to which the property is adapted and may be applied); J. SACKMAN, *supra* note 4, at § 12.314 (a valuation must be based on all uses to which the land may reasonably be applied).

31. District of Columbia v. Lot 813, 232 F. Supp. 714, 717 (D.C. 1964) *aff'd sub nom.* Rubinstein v. District of Columbia, 346 F.2d 833 (D.C. Cir. 1965) (testimony as to the existence of financial arrangements, building permits and architectural plans admissible to establish the highest and best use of the condemnation); United States v. 25.406 Acres of Land, 172 F.2d 990, 992 (4th Cir. 1949), *cert. denied*, 337 US. 931 (1949) (evidence of the existence of plans, financial arrangements, construction contracts admissible to establish highest and best use); State v. 7.026 Acres, 446 P.2d 364, 366 (Alaska 1970) (evidence of a planned subdivision admissible to establish that the highest and best use of condemnee's property was for subdivision purposes).

The highest and best use of a parcel is "the most profitable likely use to which a property can be put." State ex rel. Morrison v. Jay Six Cattle Co., 88 Ariz. 97, 110, 353 P.2d 185, 193 (1960). *See also In re* City of New York, 78 A.D.2d 241, 246-248, 434 N.Y.S.2d 771 (1980), *rev'd* 55 N.Y.2d 885, 449 N.Y.S.2d 18, 433 N.E.2d 1266 (1982), *on remand* 89 A.D.2d 894, 453 N.Y.S.2d 602 (1982), *aff'd* 58 N.Y.2d 817, 459 N.Y.S.2d 268, 445 N.E.2d 651 (1983) (trial court did not err when it accepted the valuation of a condemnation based on a definition of highest and best use as "that use which returns the greatest economic return to the land"); J. SACKMAN, *supra* note 4, at § 12.314 (3d rev. ed. 1981) (highest and best use is "the use to which men of prudence and wisdom and having adequate means would devote the property if owned by them").

32. *See infra* notes 33-34 and accompanying text.

33. *See* Olson v. United States, 292 U.S. 246, 255-57 (1934) (before evidence of highest and best use is admissible, the condemnee must show that the land is physically adaptable to such use and that a need or demand exists for the use in the reasonably near future); Shillito v. Metropolitan Edison Co., 434 Pa. 172, 174, 252 A.2d 650, 651 (1969) (the condemnee who proposes consideration of an alternative use must establish physical adaptability of the property to the use and a need for the use in the area); J. SACKMAN, *supra* note 4, at § 18.11[2] (evidence of potential use is admissible provided that there are showings of (1) adaptability of the parcel for the use and (2) such likelihood of demand for the parcel devoted to the use as to affect present market value).

34. *See* J. SACKMAN, *supra* note 4, at § 12.314 (to warrant admission of testimony as to the value for purposes other than that to which the land is being put the landowner must first show: (1) that the property is adaptable to the other use, (2) that it is reasonably probable that it will be put to the other use within the immediate future, or within a reasonable time, and (3) that the market value of the land has been enhanced by the other use for which it is adaptable); Board of Comm'rs of State Inst. v. Tallahassee Bank & Trust Co., 100 So.2d 67, 69 (Fla. App. 1958), *cert. denied*, 101 So.2d 817 (Fla. 1958) (citing the Nichols' rule).

35. 88 Ariz. 97, 353 P.2d 185 (1960).

36. *Id.* at 111, 353 P.2d at 194 (Phelps, J. dissenting). The ranch was 7 to 8 miles west of Benson, which then had a population of 2,500, and 40 miles east of Tucson. *Id.*

37. *Id.* at 101, 353 P.2d at 187. In *Jay Six*, unlike *Holy Cross Lutheran*, the condemnee had no specific plans to develop the property. *See supra* note 15 and accompanying text. The con-

mitted the jury to consider such remote and speculative uses for the ranch land in calculating a fair market value.[38]

The *Jay Six* court held that the jury had been properly instructed on the factors to consider in valuing a condemnation at a higher and better use.[39] The jury was told that before land may be valued at a use other than that to which it is being put, the condemnee must show all of the following: (1) that the property is adaptable to some other use; (2) that the other use is reasonably probable within the reasonably foreseeable future or within a reasonable time; and (3) that the market value of the land has been enhanced thereby.[40] The court found that the expert testimony sufficiently showed the availability, adaptability, reasonable foreseeability and present demand for commercial use of the condemned property to support the jury's award.[41] Thus, *Jay Six* puts Arizona in the minority of jurisdictions requiring all three foundational showings for proof of highest and best use.[42]

Courts in several jurisdictions have found that a close relationship exists between the highest and best use foundational showings and admissibility of a condemnee's plans.[43] A condemnee's plans can be admitted to satisfy the foundational requirements of adaptability, probability and demand, and thus to establish a higher and better use.[44] Most courts hold that a landowner's plans can be introduced to show that the land is adaptable for the proposed use.[45] A few courts have also allowed the condemnee to introduce evidence of a planned use to prove that a proposed highest and best use was reasonably probable within the foreseeable future.[46] The

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demnee in *Jay Six* proved only that a higher and better use of the land was feasible and that the possibility of the use increased the land's fair market value. 88 Ariz. at 102-03, 353 P.2d at 188-89.

38. *See* 88 Ariz. at 109, 353 P.2d at 193 (considering the ranch's location, the *Jay Six* court went far in favoring the condemnee). *See generally* H. KALTENBACH, GUIDE TO THE SUCCESSFUL HANDLING OF CONDEMNATION VALUATION 515 (1972).

39. 88 Ariz. at 110, 353 P.2d at 194.

40. *Id.* Each of the showings must be made. Hence, failure to make any one of the showings disposes of the condemnee's highest and best use argument. *See infra* note 53 and accompanying text.

41. 88 Ariz. at 102, 353 P.2d at 188.

42. *See supra* notes 33-34 and accompanying text.

43. *See infra* notes 44-46 and accompanying text.

44. *See* State v. 7.026 Acres, 466 P.2d 364, 366-67 (Alaska 1970) (the condemnee's plans were admissible to meet the highest and best use showings); State *ex rel.* Symms v. Mountain Home, 94 Idaho 528, 530-31, 493 P.2d 387, 390 (1972) (the foundational highest and best use showings were established by proof of the condemnee's plans); South Carolina State Hwy. Dep't v. Westboro Weaving Co., 137 S.E.2d 776, 779 (S.C. 1964) (evidence that the condemnee's plans were certain would have satisfied one of the showings that must be made before land can be valued at a higher and better use).

45. San Bernardino County Flood Control Dist. v. Sweet, 255 Cal. App. 2d 889, 899, 63 Cal. Rptr. 640, 646 (1967) (evidence of a condemnee's plans is admissible where the feasibility of the proposed use is a relevant consideration in determining market value); Daly City v. Smith, 110 Cal. App. 2d 524, 532-33, 243 P.2d 46, 51 (1952) (the condemnee's plans were admissible to show that the land was adaptable as a motel site); State *ex rel.* Symms v. Mountain Home, 94 Idaho 528, 531, 493 P.2d 387, 390 (1972) (the condemnee's plans were admissible to show that the land could be developed into an eighteen hole golf course).

46. *See* State v. 7.026 Acres, 466 P.2d 364, 366-67 (Alaska 1970) (evidence of a planned subdivision showed that adaptability for subdivision use was reasonably probable); State *ex rel.* Symms v. Mountain Home, 94 Idaho 528, 531, 493 P.2d 387, 390 (1972) (exhibits showing the condemnee considered plans for constructing a golf course were admissible to show the use was reasonably probable); South Carolina State Hwy. Dep't v. Westboro Weaving Co., 137 S.E.2d

Holy Cross Lutheran court agreed with this approach and said that a condemnee's plans may be admitted to show that his land is adaptable for a proposed use. The court failed, however, to integrate this showing into the highest and best use analysis.[47]

Application of the Condemnation Valuation Rules in Holy Cross Lutheran

The issue in *Holy Cross Lutheran* was whether the Church's plans to build a sanctuary on the remainder were admissible under established law to show that the remainder had a higher market value prior to the taking.[48] The court recognized the principle that valuation must be based on the highest and best use. The court, however, refused to frame the issue as one of highest and best use because the parties did not dispute that the highest and best use of the remainder was for Church purposes.[49]

When the court found that the case did not present a highest and best use issue, it implied that the highest and best use analysis was inapplicable to *Holy Cross Lutheran*'s facts.[50] The court, however, offered no alternative analysis to the well established highest and best use rules.[51] Instead, the court decided whether the Church's evidence of its plans was admissible by applying one of the highest and best use rules outlined in *Jay Six.*[52] The court found that the Church failed to lay a proper foundation for evidence of its plans because there was no proof that the planned use of the remainder would come to fruition within the foreseeable future.[53] Since the Church failed to meet one of the foundational showings required by *Jay Six*, it was unnecessary for the *Holy Cross Lutheran* court to reach the question whether evidence of the Church's plans would have satisfied the other foundational showings.[54]

776, 779 (S.C. 1964) (the condemnee should have introduced evidence of this planned use to show that it was reasonably probable).

47. 132 Ariz. at 420, 646 P.2d at 305. *See infra* notes 49-60 and accompanying text.

48. *Id.* at 419, 646 P.2d at 304.

49. *Id.* Both the city and Church appraisers based their valuations on use of the property for Church purposes. *Id.*

50. *See supra* note 47 and accompanying text.

51. *See supra* notes 33-46 and accompanying text.

52. *See* 132 Ariz. at 420, 646 P.2d at 305; *supra* note 40 and accompanying text. The court applied the *Jay Six* rule without citing the case.

53. 132 Ariz. at 420, 646 P.2d at 305. Had the Church in *Holy Cross Lutheran* shown that its plans were imminent, the other foundational requirements for the highest and best use test established in *Jay Six* should then have been applied. *See supra* text accompanying note 40. Since only market value measures of damages are admissible, *see supra* text accompanying note 23, the Church should have been required to show that the value of the remainder was enhanced by the proposed expanded use. *But see* City of Pleasant Hill v. First Baptist Church of Pleasant Hill, 1 Cal. App. 3d 384, 405, 82 Cal. Rptr. 1, 14 (1969) (the Church was required to show that its plans reflected a need for the property, not that the planned use would enhance the property's fair market value). In addition, the Church should have been required to prove the adaptability of the land for the proposed use. *See supra* text accompanying note 40. It is for the purposes of this showing that most courts would allow proof of the Church's plans to be admitted. *See supra* note 45 and accompanying text. Dictum in *Holy Cross Lutheran* recognized the established rule: "[E]vidence of proposed used of the property . . . may be admissible . . . to show adaptability of use of the land for that purpose to establish market value." 132 Ariz. at 420, 646 P.2d at 305.

54. *See* Note, *Eminent Domain: Proving Highest and Best Use of Undeveloped Land in Utah*, 1973 UTAH L. REV. 705, 708. *See also* South Carolina State Hwy. Dept. v. Westboro Weaving Co., 137 S.E.2d 776, 778-79 (1964) (having disposed of the condemnee's claimed higher and better

The court further confused the issue by characterizing it as underutilization of the Church property.[55] The court implied that evidence of the Church's plans could be admitted only to show that the taking lowered the market value of the remainder by forcing it to be under-utilized.[56] The court erred when it suggested that forcing a parcel to be underutilized is not diminution of its highest and best use.[57] The definition of highest and best use is broadly framed to include any changes in a parcel's fair market value.[58] Several courts have seen a highest and best use question when a condemnation lowers a parcel's fair market value by preventing its full utilization.[59] Contrary to the court's finding in *Holy Cross Lutheran*, the highest and best use question was not settled by the Church's testimony that its plans would not change the nature of the parcel's use.[60]

Conclusion

In *Holy Cross Lutheran* the court decided whether a condemnee's plans for future use are admissible in valuing the remainder in a condemnation action. The court held that while a condemnee's future plans do not constitute a compensable element of a taking, such evidence is admissible under certain circumstances to establish a market value for the land by showing that it is adaptable for a more valuable use. Despite finding no issue of highest and best use in the case, the court applied highest and best use rules and held that evidence of a planned use cannot be admitted unless the condemnee has shown that the use is reasonably probable within the reasonably foreseeable future.

The *Holy Cross Lutheran* court reached the correct result by applying highest and best use rules. The Church's plans were not certain enough to show that the parcel was adaptable for the proposed use and hence were inadmissible. The court erred, however, when it denied that the issue was whether the Church's evidence established that the remainder had a higher and better use prior to the taking. The case is confusing because it implies that the highest and best use analysis is inappropriate when the only fact issue is whether a taking forced a parcel to be underutilized. The opinion would have been clearer had the court explicitly applied the highest and

use by showing that the use was not foreseeable, the court did not discuss whether the other foundational tests had been satisfied).

55. 132 Ariz. at 419, 646 P.2d at 304.

56. *See id.* at 420, 646 P.2d at 305.

57. *See infra* notes 58-59 and accompanying text.

58. *See supra* note 30.

59. *See* San Bernadino County Flood Control Dist. v. Sweet, 255 Cal. App. 2d 889, 904; State *ex rel.* State H'wy Comm'n v. Assembly of God, Pentacostal of Albany, 230 Or. 167, 176, 368 P.2d 937, 941 (1962) (landscaping an unimproved strip of land and using it as a lawn was a higher and better use of the land). 63 Cal. Rptr. 640, 649 (1967) (where it was agreed that the highest and best use of the property as a whole was commercial and different parts of the property were adaptable for different commercial uses, the different parts of the property were seen as having different highest and best uses).

60. *See supra* note 29. *See also* State *ex rel.* H'wy Dep't v. Kistler-Collister Co., Inc., 88 N.M. 221, 224, 539 P.2d 611, 614 (1975) (proof of an owner's planned increased utilization of his property is admissible on the theory that it is proper to receive evidence in which consideration is given to the highest and best use of the property).

best use analysis and not implied that there is an alternative analysis that focuses on underutilization.

Kurt Wiese

IV. FAMILY LAW

MEDICAL DEPENDENCY IN ARIZONA: THE "KNOWN MEDICAL DANGER" STANDARD OF *IN RE COCHISE COUNTY JUVENILE ACTION NO. 5666-J*

On March 20, 1981, a six-year old boy was taken by his mother to the emergency room of the Copper Queen Community Hospital in Bisbee, Arizona, where he was pronounced dead on arrival.[1] Because of certain circumstances surrounding the boy's death,[2] the Arizona Department of Economic Security (D.E.S.) was notified. Caseworkers subsequently interviewed the mother. During this interview, the mother explained that because of her religious beliefs, she would not seek medical aid in the future if any of her remaining seven children became ill. As a result, D.E.S. sought to have these children adjudged dependent.[3] The Cochise County Juvenile Court declined to do so and dismissed the case.[4] The Arizona Court of Appeals reversed, finding the children "dependent" as defined in section 8-201(11) of the Arizona Revised Statutes.[5] On review of a petition by the mother, in *In re Cochise County Juvenile Action No. 5666-J* (*Juvenile Action No. 5666-J*), the Arizona Supreme Court vacated the decision of the court of appeals and affirmed the juvenile court.[6]

The issue addressed by the supreme court was new to Arizona: whether the state had sufficient evidence to warrant interference with the mother's right to the custody and control of her children when no known medical danger to the remaining children existed and when the state intervention would contravene her religious beliefs.[7] After weighing the interests of the parent, the state and the child, the court found the evidence

1. *In re* Cochise County Juvenile Action No. 5666-J (hereinafter *Juvenile Action No. 5666-J*), 133 Ariz. 157, 158, 650 P.2d 459, 460 (1982).

2. On his initial assessment of the boy, the emergency room physician noted several abnormalities which indicated that the boy's condition had existed for some time. Both the emergency room physician and the medical examiner who performed an autopsy on the boy stated that "the malady could have lasted weeks." *In re* Cochise County Juvenile Action No. 5666-J, 133 Ariz. 165, 165-66, 650 P.2d 467, 467-68 (Ct. App. 1981).

3. 133 Ariz. at 158, 650 P.2d at 460. Dependency adjudication is governed by statute; the pertinent provisions are found in chapter 2 of the juvenile code, ARIZ. REV. STAT. ANN. §§ 8-201 to 8-246 (1974 & Supp. 1982-83).

4. 133 Ariz. at 158, 650 P.2d at 460.

5. *Id.* at 166, 650 P.2d at 468. *See infra* note 19.

6. *Id.* at 158, 650 P.2d at 460.

7. *Id.*

insufficient to support an adjudication of dependency.[8]

Arizona's Statutory Scheme for Child Protection

Every state's statutes allow a court to remove a child from parental custody when the child is not receiving proper care.[9] The Arizona statutory scheme provides two methods of intervention short of absolute termination of parental rights:[10] temporary custody of a child in limited emergency situations[11] and formal dependency adjudication in the juvenile court.[12]

The Arizona statutes authorize child protective service workers to take immediate protective action in the form of temporary custody of a child in certain situations.[13] When temporary custody is "clearly necessary" to protect a child from abuse[14] or from "serious physical or emotional damage which can only be diagnosed by a medical doctor or psychologist," a protective services worker can exercise temporary custodial powers.[15] The parent, guardian or custodian of a child can obtain court review of the temporary custody, and the court will return the child to his home if custody is not "clearly necessary."[16] If the court finds that custody is "clearly necessary" and home conditions necessitate continued custody of the child, it may declare the child a temporary ward of the court until a dependency

8. *Id.* at 160-62, 164, 650 P.2d at 462-64, 466. The court of appeals had found the children dependent because there was "no parent or guardian willing to exercise" care, because the children were "not provided with the necessities of life," and because the home was "unfit . . . by reason of abuse or neglect." *Id.* at 166, 650 P.2d at 468. *See* ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1982-83). The court of appeals also had found that the threatened refusal to provide future medical care constituted a failure "to maintain reasonable care and treatment" to the endangerment of the child's health or well-being—"abuse" as defined in a superseded version of ARIZ. REV. STAT. ANN. § 8-201(2). 133 Ariz. at 166, 650 P.2d at 468. Under the amended definition of "abuse," which deleted the phrase "failing to maintain reasonable care," the supreme court found no abuse and summarily dispensed with the issue. *Id.* at 160, 650 P.2d at 462. *See infra* notes 69-72 and accompanying text.

9. *See* Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy,* 39 LAW & CONTEMP. PROB. 226, 240 (1975).

10. Because the state did not seek permanent termination of all parental rights in *Juvenile Action No. 5666-J, see* 133 Ariz. at 159, 650 P.2d at 461, a discussion of termination is beyond the scope of this casenote. See ARIZ. REV. STAT. ANN. §§ 8-531 to 8-544 (1974 & Supp. 1982-83) for the statutes regarding termination of parental rights.

11. *See infra* notes 13-18 and accompanying text.

12. *See infra* notes 19-26 and accompanying text.

13. *See* ARIZ. REV. STAT. ANN. §§ 8-223, 8-546.01(C)(4) (Supp. 1982-83). "Peace officers" have concurrent authorization to take protective temporary custody of a child in addition to their authorization to take a child into temporary custody pursuant to the laws of arrest. *See id.* § 8-223(A)-(B).

14. See *infra* text accompanying note 72 for the statutory definition of "abuse."

15. ARIZ. REV. STAT. ANN. § 8-223(B)(2). When a child is taken into custody for the purpose of having an examination by a medical doctor or psychologist, the examination must be made immediately and the child released to his parents within twelve hours if no abuse is found. *Id.* § 8-223(B)(2)(b). No child can remain in temporary custody for more than 48 hours unless a dependency petition is filed. *Id.* §§ 8-223(D)(4), 8-546.01(D).

16. ARIZ. REV. STAT. ANN. § 8-546.06(B)(1) (Supp. 1982-83). The request for a hearing to review the temporary custody must be made in writing within three working days after the parent, guardian or custodian receives notice, pursuant to § 8-223(C), of the taking into temporary custody of the child. *Id.* § 8-546.06(A). The court must hold the hearing within five days of receipt of the written request. *Id.* § 8-546.06(B).

hearing is held.[17] Pending the outcome of the temporary review and dependency hearings, the protective services worker has authority to place the child in temporary foster or shelter care.[18]

To obtain an adjudication of dependency,[19] a D.E.S. child protective services worker[20] generally commences judicial action.[21] Upon receipt of a report regarding a dependent, abused or abandoned child,[22] the protective services worker conducts an investigation. When intervention seems

17. *Id.* § 8-546.06(B)(2) (Supp. 1982-83); ARIZ. R. JUV. P. 15(b). The hearing on the dependency petition itself must be set within twenty-one days of the filing of the dependency petition. *Id.* § 8-223(D)(5)(b).

18. ARIZ. REV. STAT. ANN. § 8-223(E). "Shelter care" is defined as "the temporary care of a child in any public or private facility or home licensed by this state offering a physically nonsecure environment, which is characterized by the absence of physically restricting construction or hardware and provides the child access to the surrounding community." *Id.* § 8-201(19). One of the duties of the protective services worker is to provide 24-hour "temporary foster care." *Id.* § 8-546.01(C)(1). Foster care is defined somewhat differently than shelter care, *see id.* § 8-501(A)(4), (8); however, the two terms apparently are used interchangeably in the statutes. The definition of a "receiving foster home" fits precisely the circumstances addressed in a § 8-223(E) shelter care placement: " 'Receiving foster home' means a licensed foster home suitable for immediate placement of children when taken into custody or pending medical examination and court disposition." *Id.* § 8-501(A)(8).

19. "Dependent child" means a child who is adjudicated to be:

(a) In need of proper and effective parental care and control and has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control.

(b) Destitute or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode, or whose home is unfit for him by reason of abuse, neglect, cruelty or depravity by either of his parents, his guardian, or other person having his custody or care.

(c) Under the age of eight years who is found to have committed an act that would result in adjudication as a delinquent or incorrigible child if committed by an older child.

ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1982-83). Although § 8-201 has been subject to numerous amendments, the definition of "dependent child" has remained intact. *See* ARIZ. REV. STAT. ANN. § 8-201 Historical Note (Supp. 1982-83).

Like most states, Arizona defines "dependency" in vague and broad language. The first two subsections of the Arizona definition of dependency are typical state statutory definitions in that they focus on parental conduct. The third subsection of the Arizona definition addresses the child's behavior. Although this represents a departure from parental conduct-based definitions, it has limited relevance for the current analysis because of its focus on conduct of the child rather than harm to the child.

For a general criticism of the Arizona dependency statutes' broad and vague language and an argument that the statutes be redrafted to focus on harm to the child, see Note, *Dependency Adjudication in Arizona: Problems of Vagueness and Overbreadth*, 24 ARIZ. L. REV. 441 (1982). *See also* Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000 (1975). Wald criticizes definitions like Arizona's because they rarely require any showing of harm to the child but instead define dependency solely in terms of parental conduct or conditions in the home. Wald advocates more specific definitions which refer to the actual types of harm which would justify state intervention. Only by so shifting the focus away from the parent and onto the child, he contends, will positive interventions occur. *Id.* at 1000-01.

20. *See* ARIZ. REV. STAT. ANN. §§ 8-546(A)(5)-(6), 8-546.01 (Supp. 1982-83). *See also* ARIZ. ADMIN. COMP. R. 6-5-5501 (1976), which provides: "The purpose of child protective services is to help prevent or remedy dependency, neglect, exploitation, abuse or abandonment of children by providing social services to stabilize family life and to preserve the family unit."

21. The Arizona Superior Court, acting as a juvenile court, has original jurisdiction over dependent children. *See* ARIZ. REV. STAT. ANN. § 8-201(14) (Supp. 1982-83), which provides: " 'Juvenile court' means the juvenile division of the superior court when exercising its jurisdiction over children in any proceeding relating to delinquency, dependency or incorrigibility." *See also id.* § 8-202(A), which provides: "The juvenile court has exclusive original jurisdiction over all proceedings brought under the authority of this chapter."

22. *See* ARIZ. REV. STAT. ANN. §§ 8-224(B) (1974), 8-546.01(C)(2) (Supp. 1982-83). The

necessary, the protective services worker files a petition with the juvenile court.[23] The court may find dependency in several different circumstances: 1) when a child is "in need of proper and effective parental care and control" and has no parent "willing to exercise or capable of exercising such care and control"; 2) when a child is "destitute or . . . not provided with the necessities of life"; 3) when a child is not provided with a "suitable home"; 4) when a child is abused; and 5) when a child under eight years of age commits an act which would cause an older child to be adjudicated delinquent or incorrigible.[24] Following an adjudication of dependency, the court may order disposition of the case by various means. The court may award the dependent child to the care of his parents subject to D.E.S. supervision, or the court may remove the child from the home and place him with a public or private child-care agency or with relatives of the child or with a private citizen.[25] Once the court adjudges a child dependent, the court retains jurisdiction over the child until the child attains the age of twenty-one.[26]

In *Juvenile Action No. 5666-J*, the protective services workers did not seek temporary custody of the seven children remaining after their brother's death but rather filed a petition for an adjudication of dependency.[27] The Arizona definition of dependency makes no reference to medical care.[28] Thus, to resolve the issue of medical dependency in *Juvenile Action No. 5666-J*, the Arizona Supreme Court construed the general terms of the statute to include the specific provision of medical care.[29]

The court focused on the particular statutory definition of a dependent child as one who "is not provided with the necessities of life."[30] While recognizing that the term "necessity" is not fixed but must remain

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protective services personnel are required to take complaints, oral or written, from "any source." *Id.* § 8-546.01(C)(2).

23. ARIZ. REV. STAT. ANN. § 546.02(B) (Supp. 1982-83); ARIZ. R. JUV. P. 15(a). The protective services worker must first notify the family that it is being investigated. ARIZ. REV. STAT. ANN. § 8-546.02(A). If the family refuses to cooperate with the investigation or to accept proffered services, or if the worker "otherwise believes that the child should be adjudicated dependent," the worker may then petition for an adjudication of dependency. *Id.* § 546.02(B).

24. ARIZ. REV. STAT. ANN. § 8-201(11) (Supp. 1982-83).

25. *Id.* § 8-241(A)(1).

26. *Id.* § 8-202(D). The Arizona Supreme Court has recognized one limit to the court's retained jurisdiction; it applies only to children adjudged dependent prior to their eighteenth birthday. McBeth v. Rose, 111 Ariz. 399, 531 P.2d 156 (1975). The juvenile court may also terminate its jurisdiction by appropriate court order. ARIZ. REV. STAT. ANN. § 8-202(D).

To assure compliance with its orders of disposition, the juvenile court may issue protective orders, *see id.* § 8-235, which are enforceable through the court's contempt powers. *Id.* § 8-248. The contempt power of the juvenile court as a division of the superior court is inherent as well as statutory. *In re* Juvenile Action No. JT-295003, 126 Ariz. 409, 616 P.2d 84 (Ct. App. 1980).

27. 133 Ariz. at 158, 650 P.2d at 460. The caseworkers filed the petition on the basis of a twenty-minute interview with the mother eleven days after the child's death.

28. *See supra* note 19. Only the temporary custody statutes provide explicitly for medical care. *See supra* note 15 and accompanying text.

29. *See infra* notes 30-33 and accompanying text.

30. Juvenile Action No. 5666-J, 133 Ariz. at 160, 650 P.2d at 462; *see supra* note 19 and accompanying text. In so doing, the supreme court summarily dispensed with the court of appeals' finding of abuse. The supreme court noted that the court of appeals' misplaced reliance on a superseded definition of abuse was understandable since the state legislature had amended the definition twice within two days. *Id.* at 159 n.4, 650 P.2d at 461 n.4; *see* 133 Ariz. at 166, 650 P.2d at 468 (court of appeals' opinion).

flexible, the supreme court acknowledged that the state "may impose a minimum threshold of care a parent must provide any child."[31] In the context of medical care, the court determined that this threshold would be met when a "known medical danger" to a child exists.[32] Where such a danger does exist, the court concluded that parental failure to seek medical care would warrant state intervention.[33]

The "Known Medical Danger" Standard for Medical Dependency

In arriving at the "known medical danger" standard for intervention, the Arizona Supreme Court employed an analysis common in child dependency adjudication.[34] Previously reported Arizona appellate cases, though few,[35] reveal two trends which the court's analysis here reflected: 1) a gen-

31. *Id.* at 160, 650 P.2d at 462.

32. *Id.* at 163-64, 650 P.2d at 465-66. The court did not make clear precisely how a medical danger would become "known."

33. *See id.* at 163-64, 650 P.2d at 465-66.

34. See Note, *Dependency Adjudication in Arizona: Problems of Vagueness and Overbreadth*, *supra* note 19, at 448-54, for a discussion of the particular interests and rights traditionally recognized by both the United States Supreme Court and the Arizona Supreme Court in family relations cases.

35. The paucity of reported cases is not unique to Arizona. Most neglect and dependency cases are not appealed. *See* R.H. MNOOKIN, CHILD, FAMILY AND STATE 361 (1978). Only twelve reported cases have dealt with ARIZ. REV. STAT. ANN. § 8-201(11).

Of these, seven actually grappled with the determination of dependency in response to petitions filed by D.E.S.: *In re* Maricopa County Juvenile Action No. JD-561, 131 Ariz. 25, 638 P.2d 692 (1981) (sexual molestation and physical abuse; case remanded because of denial of father's due process rights); *In re* Maricopa County Juvenile Action No. JD-75482, 111 Ariz. 588, 536 P.2d 197 (1975) (Struckmeyer, V.C.J. and Cameron, C.J., concurring in part and dissenting in part) (lack of proper and effective parental care and control; two children awarded to mother's custody subject to D.E.S. supervision; case remanded for disposition of third child); Ariz. State Dep't. of Public Welfare v. Barlow, 80 Ariz. 249, 296 P.2d 298 (1956) (17 minor children improperly found dependent by lower court where state failed to show it was not in the best interests of the children to remain in parents' custody); *In re* Juvenile Action No. 5534-J, 129 Ariz. 23, 628 P.2d 60 (Ct. App. 1981) (children not dependent where mother was undergoing psychiatric treatment but father was not shown to be unwilling to exercise parental care and control); *In re* Pima County Juvenile Action No. J-46735, 25 Ariz. App. 424, 544 P.2d 248 (1976) (children not dependent where D.E.S. petition failed to allege specific facts showing dependency); *In re* Pima County Juvenile Action No. J-35316, 24 Ariz. App. 384, 539 P.2d 188 (1975) (mother unable to exercise parental control; minor children placed with older sister under D.E.S. supervision); *In re* Pima County Juvenile Action No. J-31853, 18 Ariz. App. 219, 501 P.2d 395 (1972) (child temporarily living with mother in a motel and not attending school not dependent).

Three cases arose out of petitions filed by private parties: Caruso v. Superior Court in and for County of Pima, 100 Ariz. 167, 412 P.2d 463 (1966) (Catholic Social Service's dependency petition filed in response to natural father's pursuit of custody of child born out of wedlock, improperly granted); Gubser v. Gubser, 126 Ariz. 307, 614 P.2d 849 (Ct. App.) (father's dependency petition defective in praying for transfer of custody to himself; mother retained custody), *aff'd in part, rev'd in part on other grounds*, 126 Ariz. 303, 614 P.2d 845 (1980); Evans v. Evans, 116 Ariz. 302, 569 P.2d 244 (Ct. App.) (paternal grandparents' petition; award of custody to father vacated and case remanded for presentation by both parents of evidence as to the best interests of the child), *appealed* 117 Ariz. 561, 574 P.2d 49 (1977).

Two cases, although touching on dependency, were actually adoption proceedings: *In re* Adoption of a Baby Boy, 106 Ariz. 195, 472 P.2d 64 (1970) (adoption order affirmed where natural parents failed to meet allegations of dependency based on father's willful desertion and mother's incarceration); *In re* Adoption of B-6355 and H-533, 118 Ariz. 111, 575 P.2d 310 (1978) (sufficient evidence for finding of neglect by natural father where he failed to pay child support or to secure medical advice or other assistance for a hearing-impaired child). Because adoption involves a final severance of all parental rights and thus is more drastic than a declaration of dependency, these cases may have limited value for the purposes of the noted case.

One adoption case, in finding the evidence insufficient to declare a hearing-impaired child

eral reluctance to intervene in family matters[36] and 2) a balancing of the interests of the parent, the child and the state.[37]

Our legal system historically established a strong presumption in favor of parental autonomy and in opposition to coercive state intervention.[38] The English common law recognized as sacred the parent's right to the custody and control of minor children.[39] Nearly sixty years ago, the United States Supreme Court announced that the liberty interest in freedom of choice in family matters is fundamental and should be accorded constitutional protection.[40] This emphasis on parental autonomy has been carried through to the Arizona child welfare statutes and is embodied in the statutorily mandated mission of the child protective services division of D.E.S., which is "to preserve the family unit."[41]

In *Juvenile Action No. 5666-J*, the Arizona Supreme Court followed the line of authority preserving parental autonomy and refused to intervene in a family even where one of the minor children had died. The court expressed its reluctance to accord rights of parenthood to the state. It criticized the court of appeals' emphasis on the distinction between legal custody, which D.E.S. sought, and actual physical custody, reasoning that "[l]egal custody would give the state all the rights of parenthood and virtually make the natural parents' home a foster home."[42] This assessment by the supreme court of the import of legal custody is in accord with Arizona statutory definitions and case law.[43] In the only case in which the Arizona Supreme Court affirmed a finding of dependency, the court made no distinction between legal and physical custody. In fact, the resulting award of

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dependent, mentioned the father's failure to seek medical help for his son but did not elaborate. *In re* Adoption of B-6355 and H-533, 118 Ariz. 127, 133, 575 P.2d 326, 332 (Ct. App. 1977).

36. *See infra* notes 38-44 and accompanying text.

37. *See infra* notes 45-62 and accompanying text.

38. *See* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 648 (1977).

39. Thomas, *Child Abuse and Neglect, Part I: Historical Overview, Legal Matrix, and Social Perspectives,* 50 N.C.L. REV. 293, 299-300 (1972). *See In re* Maricopa County, Juvenile Action No. J-75482, 111 Ariz. 588, 597, 536 P.2d 197, 206 (1975) (Struckmeyer, V.C.J. and Cameron, C.J., concurring in part and dissenting in part).

40. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (state statute requiring public school attendance unreasonably interfered with parents' liberty interest in directing their children's education). The Court has echoed this philosophy in the intervening years. *E.g.*, Santosky v. Kramer, 455 U.S. 745, 753 (1982) (clear and convincing evidence required for involuntary termination of parental rights, based on fundamental liberty interest of natural parents); Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) (liberty interest has its source in human rights, not state law; therefore, foster parents' liberty interest more limited than natural parents'); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (although custody and care of children lie first with parents, the state may regulate family matters where it is in the public interest).

41. ARIZ. REV. STAT. ANN. § 8-546(A)(5) (Supp. 1982-83). *See supra* note 20.

42. 133 Ariz. at 162, 650 P.2d at 464. The statute governing the disposition of dependency cases makes no distinction between legal and physical custody; rather, numerous alternatives, including award of the child to the care of his parents under D.E.S. supervision, are simply listed. ARIZ. REV. STAT. ANN. § 8-241 (Supp. 1982-83). Moreover, the definition of "legal custody" in the termination statutes even includes "[t]he right to have physical possession of the child." ARIZ. REV. STAT. ANN. § 8-531(8)(a) (1974).

43. *See supra* note 42; *In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 536 P.2d 197 (1975) (mother awarded custody subject to D.E.S. supervision; no distinction made between legal and physical custody); *In re* Pima County Juvenile Action No. J-35316, 24 Ariz. App. 385, 539 P.2d 188 (1975) (minor children placed with their sister subject to periodic D.E.S. review; no distinction made between legal and physical custody).

physical custody to the mother subject to D.E.S. supervision was the equivalent of an award of legal custody to D.E.S.[44]

To determine whether parents can retain custody of a child or must relinquish it, courts hearing dependency cases generally balance the interests of the parents, the child and the state.[45] In its consideration of the relative interests of the parties, the court of appeals in *Juvenile Action No. 5666-J* appeared to focus almost exclusively on the rights and interests of the child.[46] The supreme court, however, explicitly balanced the tripartite interests.[47]

The supreme court began by acknowledging the significance accorded the family unit by the United States Supreme Court[48] and the well-settled Arizona rule that the right of parents to the custody and control of their children is " 'both a natural and legal right.' "[49] The court then noted the interest of the state in the health and welfare of children, an interest which, if "great enough," would permit the state to invade the rights of the parents.[50] Finally, the court focused on the rights of children.[51] Not only are children entitled to have their basic needs provided for, but in cases involving the custody of children, the court emphasized that its "paramount interest is always the best interest of the child."[52]

The child's interest, though placing demands on the parents to provide certain necessities, is not always inimical to the interest of the parent in retaining control over the care of the child. Indeed, some authorities have argued strenuously that in most instances it is in the child's best interest to remain in the family unit, where one exists.[53] Even limited interven-

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44. *See In re* Maricopa County Juvenile Action No. J-75482, 111 Ariz. 588, 536 P.2d 197 (1975).

45. *E.g.*, *In re* Maricopa County Juvenile Action No. JD-561, 131 Ariz. 25, 638 P.2d 692 (1981); Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978); *In re* Green, 448 Pa. 338, 292 A.2d 387 (1972), *appealed* 452 Pa. 373, 307 A.2d 279 (1973). See Sokolosky, *The Sick Child and the Reluctant Parent—A Framework for Judicial Intervention*, 20 J. FAM. L. 69 (1981-82) for a critique of this methodology and a proposal for a new methodology based on decision theory.

46. 133 Ariz. at 166-67, 650 P.2d at 468-69.

47. *Id.* at 160-62, 650 P.2d at 462-64.

48. *Id.* at 160, 650 P.2d at 462 (citing Meyers v. Nebraska, 262 U.S. 390 (1925); Skinner v. Oklahoma, 316 U.S. 535 (1942); and Prince v. Massachusetts, 321 U.S. 158 (1944)).

49. 133 Ariz. at 161, 650 P.2d at 462 (quoting Ariz. State Dep't. of Public Welfare v. Barlow, 80 Ariz. 249, 252, 296 P.2d 298, 300 (1956)).

50. 133 Ariz. at 161, 650 P.2d at 462.

51. Although at common law children did not have rights independent of their parents, it is now well established that children have rights under the United States Constitution. *See Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1358-76 (1980). The constitutional guarantees of freedom of expression, equal protection and procedural due process generally apply equally to adults and children. In areas of the law where the state may exercise its *parens patriae* power over children, children may be afforded lesser constitutional rights than an adult would receive in similar circumstances. *Id.* at 1358. Thus, where the child's interests are represented by the state as *parens patriae*, *see infra* note 55, the balance of interests may reflect only the interests of the parents and the state.

52. 133 Ariz. at 161, 650 P.2d at 463. Although "best interests of the child" is a phrase used repeatedly in the child welfare literature and case law, no definition of the factors a court should consider appears in any state statute. Rather, the term takes on various meanings as determined by each judge's own "folk psychology." Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 625, 649-50 (1976).

53. J. GOLDSTEIN, A. FREUD & A.J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 5 (1979).

tion is likely to cause more harm than good in all but the most serious circumstances of deprivation or jeopardy.[54] Thus, in limiting the state's interest as *parens patriae*[55] to situations where the welfare of the child is "seriously jeopardized,"[56] the Arizona Supreme Court put itself in step with the weight of authority as reflected in both scholarly writings and the case law.[57]

The crux of the supreme court's decision and the basis for its departure from the appellate court's reasoning was its analysis of the children's interests, in particular its recognition that the children had "no known need of medical attention" at the time of the D.E.S. action. The supreme court agreed with the court of appeals that the Arizona statutes demand that every child be provided with medical care "should he [or she] become sick or injured."[58] Emphasizing that this "would be a different case were any of these children known to be ill," the supreme court acknowledged that failure to seek medical care for a known illness might represent a lack of parental care.[59]

In this case, however, because the court determined that the children were not deprived of parental care, the balance weighed on the side of the mother's fundamental right to care for her children as she chose.[60] Not

54. Besharov, *Representing Abused and Neglected Children: When Protecting Children Means Seeking the Dismissal of Court Proceedings,* 20 J. FAMILY LAW 217, 231-34 (1981-82); Wald, *supra* note 19, at 996-1000. *See also* INST. OF JUDICIAL ADMIN. & AM. BAR ASSOC., JUVENILE JUSTICE STANDARDS RELATING TO ABUSE AND NEGLECT 52-55 (1981).

55. The doctrine of *parens patriae* originated in the power of the Crown in 18th century England to protect subjects unable to protect themselves, including minor children. The doctrine was adopted in this country along with other common law doctrines and became substantive Arizona law in ARIZ. REV. STAT. ANN. § 1-201 (1974). Note, *A Case of Neglect: Parens Patriae Versus Due Process in Child Neglect Proceedings*, 17 ARIZ. L. REV. 1055, 1058 (1975). For further discussion of the doctrine of *parens patriae* and its development as the legal rationale for state intervention, see Thomas, *supra* note 39.

56. 133 Ariz. at 161, 650 P.2d at 463.

57. *See* Goldstein, *supra* note 38, at 651-61; Wald, *supra* note 19, at 1005-07, 1039-40. Many cases in jurisdictions throughout the country have dealt with parental decision-making in the context of medical care for a child. *E.g.*, People in the Interest of D.L.E., 645 P.2d 271 (Colo. 1982) (refusal of brain-damaged boy and his mother to comply with program for medication to control life-threatening seizures); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (refusal of parents, Jehovah's Witnesses, to consent to blood transfusions for child with blood disease), *cert. denied*, 344 U.S. 824 (1952); Custody of a Minor, 375 Mass. 733, 379 N.E.2d 1053 (1978) (refusal of parents to consent to chemotherapy for child suffering from life-threatening leukemia); *In Re* Sampson, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) (refusal of parents to consent to risky surgical procedures to improve grotesque appearance of teen-ager). Only one case, decided a century ago, allowed state intervention on facts similar to those in this case. Heinemann's Appeal, 96 Pa. 112 (1880) (father, who had refused medical treatment for his wife and three children who died of diptheria, said he would act no differently if the remaining two children became ill).

58. 133 Ariz. at 161, 640 P.2d at 463. The court of appeals had relied on ARIZ. REV. STAT. ANN. §§ 8-201(2) and 8-201(10) (1974) in reaching this conclusion. 133 Ariz. at 166, 650 P.2d at 468.

59. 133 Ariz. at 161, 650 P.2d at 463. The court also suggested that factors other than a known illness might be sufficient for a finding of dependency: "Had there been a genetic predisposition to an illness or the strong suggestion that other children would fall ill, . . . the state may have won the day." *Id.* at 164, 650 P.2d at 466.

60. This right may be particularly fragile where, as here, medical care decisions are the focus of the dependency action. By their nature, medical care decisions present certain problems. Where intervention is based on parentally inflicted physical abuse or emotional damage, the parents' actions clearly are contrary to the child's best interests. In medical care cases, however, the parents' choice of treatment (or non-treatment) may be viewed by the child as an equal alternative

only was the children's welfare not "seriously jeopardized," but on the basis of evidence before the court, the children's welfare was not jeopardized at all at the time dependency was sought.[61] Other courts have dealt with the medical dependency issue on numerous occasions, each time allowing state intervention only where a present need for medical attention existed.[62] Thus, by focusing on the absence of a known medical danger to the children and resolving the issue in favor of the mother's rights as a parent, the supreme court acted consistently with other jurisdictions.

The absence of a known medical danger provided the basis for the court's finding on the issue of the rights of the mother as a follower of certain religious beliefs and practices as well. Only if a "direct collision" occurred between the children's right to good health and the mother's religious beliefs would the court supersede her religious claims to enforce the children's right.[63] No such collision occurred here because no child was actually ill. The court, therefore, declined to intervene, stating that it would not interfere with parental custody rights where such interference would contravene parental religious rights and where no known medical danger existed.[64]

Temporary Custody As an Alternative to Dependency Adjudication

Although the supreme court's finding as to the dependency of the remaining seven children in *Juvenile Action No. 5666-J* reflects a clear and consistent balancing of the parties' interests, a critical question remains. What measures, short of seeking an adjudication of dependency, may the child protective services worker take to determine when a "known medical danger" exists? Indeed, what might the caseworkers in *Juvenile Action No. 5666-J* have done prior to filing a petition requesting the court to adjudge the remaining children dependent?

In the final portion of its opinion, the supreme court alluded to administrative alternatives to dependency: "We emphasize that the state is not without remedy in this matter. D.E.S. has broad supervisory powers."[65] The only power the court discusses, however, is the power of D.E.S. to investigate a family when "there is reason to believe a child may be endangered."[66] The court is unclear as to what, if any, further meas-

to the treatment urged by the state. Thus, the child may be fearful and distrustful of modes of treatment rejected by his parents. Because medical care requires the cooperation of both the minor patient and the parents, the requirement of serious harm in medical neglect cases is particularly well-founded. Wald, *supra* note 19, at 1028-31. *See also In re* Seiferth, 309 N.Y. 80, 127 N.E.2d 820 (1955) (authorization for surgery and dental services denied; non-emergency situation further complicated by the need for post-operative cooperation in speech therapy, which was unlikely due to child's personally held philosophical beliefs).

61. *See* 133 Ariz. at 161, 650 P.2d at 463. The court noted: "During the twenty-minute interview the caseworkers observed several well-dressed and well-fed children . . . dash in and out of the home apparently at play." The court refused to say that the children's mother was not exercising parental care for "her children who appear physically fit." *Id.*

62. *See supra* note 57.

63. 133 Ariz. at 163, 650 P.2d at 465.

64. *Id.*

65. *Id.* at 164, 650 P.2d at 466.

66. *Id.* The court continued:

Because of the special circumstances of this case, D.E.S. may be prompted to investigate

ures D.E.S. may take.

Under the temporary custodial powers of D.E.S.,[67] a child protective services worker may take a child into temporary custody to protect the child from abuse or serious physical or emotional damage.[68] At the time the protective services workers interviewed the mother in *Juvenile Action No. 5666-J*, the statutory definition of abuse was as follows:

> "Abuse" means the infliction of physical or mental injury or the causing of deterioration of a child and shall include *failing to maintain reasonable care* and treatment or exploiting or overworking a child to such an extent that his health, morals or emotional well-being is endangered.[69]

Arguably, this definition would have afforded the protective services workers a statutory basis for seeking temporary custody to have the children examined by a medical doctor on the ground that the parents were "failing to maintain reasonable care."[70] The supreme court itself found "noteworthy" the legislature's deletion of this phrase from the new definition of abuse,[71] which now reads:

> "Abuse" means the infliction of serious injury, impairment of bodily function or disfigurement or the infliction of serious emotional damage . . . and shall include inflicting or allowing sexual abuse . . . , sexual conduct with a minor . . . , sexual assault . . . , molestation of a child . . . , sexual exploitation of a minor . . . , commercial sexual exploitation of a minor . . . or incest.[72]

Even if D.E.S. could have taken temporary custody of the children under the old statutory definition of abuse, no such avenue exists today. In the future, to assert its temporary custodial powers in a non-abuse situation like the one in *Juvenile Action No. 5666-J*, D.E.S. will be required to show that custody is "clearly necessary to protect the child because the

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by something less than would be necessary in a typical situation. An absence from school, a teacher's notification, or a report from a neighbor or other source may permit D.E.S. to inquire further into protecting the welfare of the children. If D.E.S. does compile more information warranting state intrusion into the . . . family, it may again institute dependency proceedings.

Id. *See supra* notes 20, 22-23 and accompanying text.

67. *See supra* notes 13-18 and accompanying text.

68. A child may be taken into temporary custody:

> . . . By a peace officer or a child protective services specialist of the state department of economic security if temporary custody is clearly necessary to protect the child because the child is either:
>
> (a) Suffering or will imminently suffer abuse.
>
> (b) Suffering serious physical or emotional damage which can only be diagnosed by a medical doctor or psychologist.

ARIZ. REV. STAT. ANN. § 8-223(B) (Supp. 1982-83).

69. *Id.* § 8-201(2) (1974) (emphasis added).

70. No Arizona cases have construed this particular phrase of the statutory definition. Courts have, however, recognized that proper parental care may include more than providing food and shelter. *See, e.g.*, Parham v. J.R., 442 U.S. 584, 602 (1979) (parents have a "high duty" to recognize symptoms of illness and to obtain medical advice); *In re* Maricopa County Juvenile Action No. JD-561, 131 Ariz. 25, 28, 638 P.2d 692, 695 (1981) (rights to good physical care and emotional security are implicit in children's right to proper parental care); Caruso v. Superior Court, 2 Ariz. App. 134, 138, 406 P.2d 852, 856 (1965) (proper parental care means more than food and clothing).

71. 133 Ariz. at 160, 650 P.2d at 462.

72. ARIZ. REV. STAT. ANN. § 8-201(2) (Supp. 1982-83).

child *is* . . . *[s]uffering* serious physical or emotional damage which can only be diagnosed by a medical doctor or psychologist."[73] This test for temporary custody in a non-abuse situation clearly limits temporary custody for physical and emotional matters to harms existing at the time custody is sought. The test for abuse, found in the same statute, is more expansive: D.E.S. can gain temporary custody of a child who "is suffering or *will imminently suffer* abuse."[74] The absence of a similar provision for future harm in a non-abuse context is a serious one, for it effectively blocks preventive action.[75] In a case such as *Juvenile Action No. 5666-J*, temporary custody will not be available unless, at the time custody is sought, a child is actually suffering physical damage.

Conclusion

In *Juvenile Action No. 5666-J*, the Arizona Supreme Court exercised the restraint characteristic of child dependency adjudication in resolving an issue of medical dependency new to the Arizona courts. The issue before the court was whether the state had sufficient evidence to interfere with a mother's custody of her children when no medical danger existed and state intervention would contravene her religious beliefs. The court held that, even though a child had died through the mother's refusal to seek medical care, the remaining seven minor children were not dependent. In so holding, the court established a standard for non-intervention based on the absence of a "known medical danger." Although the court would not adjudicate the remaining children dependent in this case, it is possible that the court would have approved a lesser intrusion on the family's privacy. D.E.S. may have been able to gain temporary custody of the children in this case; however, a subsequent statutory change in definition appears to deny this alternative in the future.

In the final analysis, dependency and custody laws may not be able to insure the physical well-being of all children. To supplement the statutory protections, one family law scholar urges state administrative adoption of regular screening programs for all children at birth, during infancy, and as needed in school, in order to safeguard the health of all children.[76] If such

73. *Id.* § 8-223(B)(2)(b) (emphasis added).

74. *Id.* § 8-223(B)(2)(a) (emphasis added).

75. The Joint Commission on Juvenile Justice Standards has proposed a standard for medical intervention which includes prevention as a basis for intervention:

> [Coercive intervention should be authorized when] a child is in need of medical treatment to cure, alleviate, or *prevent* him/her from suffering serious harm which may result in death, disfigurement, or substantial impairment of bodily functions, and his/her parents are unwilling to provide or consent to the medical treatment. (Emphasis added.)

INST. OF JUDICIAL ADMIN. & AM. BAR ASSOC., JUVENILE JUSTICE STANDARDS RELATING TO ABUSE AND NEGLECT 17 (1981). Although the Joint Commission emphasized that intervention should not be premised on a prediction of future harm, it recognized that attempts to intervene need not wait until actual injury has occurred. *Id.* at 55-56.

76. Wald, *supra* note 19, at 1032. Wald notes that devising an adequate system without building in intrusions on family privacy is not a simple matter. He finds it essential that objective health standards form the basis for such a system and that geographic, psychological and economic impediments to the system's use be identified and eliminated. Finally, Wald acknowledges the problem of parental refusal to participate and the resultant need to consider whether and under what circumstances coercive intervention might be necessary. *Id.*

a program were in place in Arizona, the children in *Juvenile Action No. 5666-J* would be assured at least some protection without a substantial intrusion into their family life. If, in the course of examination under such screening programs, a child exhibited symptoms constituting a medical danger, the jurisdiction of the juvenile court could be invoked pursuant to the court's standard in *Juvenile Action No. 5666-J*.

Mary E. Berkheiser

V. PROPERTY LAW

A. PROTECTING THE MORTGAGEE'S RIGHT TO ENFORCE A TIME-IS-OF-THE-ESSENCE PROVISION: AN ANALYSIS OF *FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PHOENIX V. RAM*

The Arizona courts view an acceleration clause in a note or mortgage as neither a forfeiture nor a penalty.[1] Such a clause is merely seen as a contract term which defines when a debt is payable.[2] A default caused by an accident or by a mortgagor's negligence or mistake will not relieve the mortgagor from the effect of an acceleration clause.[3] The mortgagor remains bound by the contract term in the absence of fraud, bad faith, or other conduct on the part of the mortgagee which would make unconscionable the mortgagee's availing himself of the clause.[4] In some cases, the harsh results of enforcing an acceleration clause[5] can be relieved in part if the court views the mortgagee's acceptance of late payments as a waiver of a time-is-of-the-essence clause.[6] The Arizona Court of Appeals, however, in *First Federal Savings & Loan Association of Phoenix v. Ram*,[7]

1. First Federal Savings and Loan Association of Phoenix v. Ram, — Ariz. —, —, 659 P.2d 1323, 1325 (Ct. App. 1982); Ciavarelli v. Zimmerman, 122 Ariz. 143, 144, 593 P.2d 697, 698 (Ct. App. 1979); *see also* OSBORNE, NELSON & WHITMAN, REAL ESTATE FINANCE LAW § 7.7 at 438 (1979).

2. Ciavarelli v. Zimmerman, 122 Ariz. 143, 144, 593 P.2d 697, 698 (Ct. App. 1979); OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 438. *See also* 1A CORBIN, CORBIN ON CONTRACTS § 265 at 537 (1951).

3. *See* authorities cited *supra* note 1.

4. *See* authorities cited *supra* note 1.

5. Acceleration causes the entire debt to become due and payable. *See infra* note 54 and accompanying text. If the mortgagor cannot pay the amount due and thereby redeem the property, he will likely lose his equity in the property through a judicial sale. It seems unlikely that a mortgagor who cannot pay the amount due under the equity of redemption would be able to pay the amount due to exercise his statutory right of redemption.

6. *See* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 438; Ashback v. Wenzel, 141 Colo. 35, 39-40, 346 P.2d 295, 297 (1959). *See, e.g.*, Edwards v. Smith, 322 S.W.2d 770, 776 (Mo. 1959).

7. — Ariz. —, 659 P.2d 1323 (Ct. App. 1982).

determined that a mortgagee need not give notice reinstating a time-is-of-the-essence provision prior to filing a foreclosure action.[8]

In 1976 Walter and Katherine Ram, the appellants and mortgagors, purchased a house and assumed the obligations of a promissory note and a mortgage favoring Catalina Savings and Loan (Catalina).[9] First Federal Savings and Loan of Phoenix (First Federal), as a junior lienholder, held a note and deed of trust which covered the same property.[10] The Rams made erratic and often late payments on the mortgage loan and the deed of trust. Both Catalina and First Federal accepted numerous late installment payments.[11]

The Rams made the December 1979 payment in January 1980 and made the January and February payments in March.[12] Catalina sent letters to the subject property demanding payment and reinstating the time-is-of-the-essence clause.[13] On May 15, 1980, with the March, April and May payments still unpaid, Catalina demanded payment in a letter sent to the subject property.[14] The Rams allegedly did not receive this letter.[15] Later in May, the Rams submitted the March installment, which Catalina returned with a letter indicating foreclosure proceedings would be commenced.[16] Catalina refused the Rams' offer to bring all payments current and to make timely payments thereafter and filed to foreclose on the subject property.[17]

First Federal had become a junior lienholder by being assigned a retail installment contract secured by a deed of trust on the subject prop-

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8. *Id.* at —, 659 P.2d at 1326.

9. *See id.* at —, 659 P.2d at 1324. Appellant's Opening Brief at 4. The mortgage secured note was in the amount of $47,200. The assumption agreement and transfer of impoundments was executed on August 13, 1976, and payments in the amount of $389.00 were due on the 15th of each month. *Id.*

10. — Ariz. at —, 659 P.2d at 1324.

11. *Id.* at —, 659 P.2d at 1324.

12. Appellant's Opening Brief at 5.

13. *See* — Ariz. at —, 659 P.2d at 1324. Appellant's Opening Brief at 5. The letter from Catalina dated February 21, 1980 requested the Rams to inform the loan servicing officer as to when payment could be expected. The second letter, dated March 14, 1980, demanded payment of the amounts due for January, February and March, and reinstated the time-is-of-the-essence provisions of the note and mortgage. *Id.* The Rams operated a seasonal business in Nogales, Arizona, and made infrequent trips to Tucson, where the subject property was located. Mrs. Ram called Catalina Savings to notify it to send all statements concerning the loan account to the Nogales post office box address. Thereafter, the Rams received a letter sent to the Tucson address from Catalina Savings dated March 28, 1980, acknowledging receipt and acceptance of the January and February payments. *Id.* at 4-5. The Rams relied on this letter to support their contention that Catalina failed to notify them of its intent to require strict compliance. *Id.* at 15-16. Catalina points out, however, that the Rams admitted receiving mail at the Tucson address, as their son resided on the property and was there to receive mail. Catalina Savings' Answering Brief at 3-4.

14. Appellant's Opening Brief at 6. This letter was sent to the Tucson address after Catalina Savings had previously complied with the Rams' request that it send all correspondence to the appropriate Nogales address. *Id.*

15. *See* — Ariz. at —, 659 P.2d at 1324. *See also* Appellant's Opening Brief at 6.

16. Appellant's Opening Brief at 6. The Rams submitted the March installment on May 31, 1980. Catalina Savings sent the letter returning the March payment to the Nogales address. *Id.* *See supra* note 14 and accompanying text.

17. *See* — Ariz. at —, 659 P.2d at 1325. Appellant's Opening Brief at 7. The complaint was filed on June 16, 1980 and alleged that the Rams had received demand for payment but had failed to pay on the note and mortgage. *Id.*

erty.[18] The retail installment contract allegedly contained no due date,[19] and First Federal accepted numerous late payments.[20] First Federal did not reinstate the time-is-of-the-essence provision of the retail installment contract.[21]

Catalina filed a foreclosure action against the Rams and against First Federal.[22] First Federal filed a cross-claim against the Rams to foreclose on the retail installment contract and deed of trust.[23] Catalina moved for summary judgment against the Rams based on their default in payment of the note and mortgage. First Federal also moved for summary judgment against the Rams on the grounds that the Rams defaulted on payment of the retail installment contract and deed of trust.[24]

The trial court granted summary judgment in favor of both mortgagees.[25] The Arizona Court of Appeals affirmed the granting of the motion for summary judgment.[26] Specifically, the court found the evidence supported the trial court's conclusion that the Rams' default resulted from their own neglect.[27] The court also concluded that the mortgagee's acceptance of the mortgagor's prior late payments did not preclude foreclosure due to the Rams' subsequent defaults.[28] The import of the decision is that Arizona mortgagees no longer need to give notice to reinstate a time-is-of-the-essence provision prior to enforcement of an acceleration clause in the note secured by a mortgage or deed of trust.[29]

This Casenote will review contract doctrines pertinent to a time-is-of-the-essence provision, including waiver, notice and acceleration. Next, it will analyze the mortgagee's acceptance of late payments in *Ram* and the court's affirmance of summary judgment based on the mortgagor's default in payment of the mortgage and deed of trust. The Casenote then will suggest briefly an alternative analysis the court of appeals might have ap-

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18. — Ariz. at —, 659 P.2d at 1324.

19. Appellant's Opening Brief at 8. Appellee First Federal disputed the Appellant's assertion that no due date was inserted in the contract. First Federal's Answering Brief at 1.

20. — Ariz. at —, 659 P.2d at 1324. First Federal accepted the January, 1980 payment on February 21, 1980, the April payment on May 27, 1980, and the June payment on August 23, 1980. Appellant's Opening Brief at 8.

21. Appellant's Opening Brief at 9. The Rams had notified First Federal to send correspondence to the Nogales address, but they had never received any correspondence reinstating the time-is-of-the-essence provision which was the basis of First Federal's cross-claim. *Id.*

22. Appellant's Opening Brief at 1.

23. *Id.* at 2.

24. *See* — Ariz. at —, 659 P.2d at 1326.

25. *Id.* at —, 659 P.2d at 1324. The judgment in favor of Catalina represented an acceleration of the entire debt under the first mortgage and note, approximately $44,820.00. The trial court also awarded Catalina attorney's fees of $3,762.00, approximately 8.5% of the judgment. Appellant's Opening Brief at 9. The judgment favoring First Federal was for $11,413.00, and attorney's fees of $3,400.00, approximately 30% of the total judgment debt. *Id.* at 10.

26. — Ariz. at —, 659 P.2d at 1326. The court affirmed summary judgment for First Federal, concluding as a matter of law that First Federal's acceptance of late payments did not constitute waiver of its right to accelerate under a time-is-of-the-essence provision. The court also stated that First Federal's cross-claim for foreclosure due to the Rams' default in payment of the First Federal promissory note was valid. *Id.*

27. *Id.* at —, 659 P.2d at 1325. The court also found the evidence supported the trial court's award of the mortgagee's attorneys' fees. *Id.* at —, 659 P.2d at 1326. *See supra* note 25.

28. *Id.* at —, 659 P.2d at 1326.

29. *Id.* at —, 659 P.2d at 1325-26.

plied in consideration of the issue of waiver of the time-is-of-the-essence provision. Finally, the Casenote will consider the consistency and effects of the court's conclusion.

CONTRACT PRINCIPLES

One authority has noted that a frequent source of confusion in analysis of mortgage law is the failure to distinguish between the mortgage and the note it secures.[30] A note is a contract to pay money;[31] a mortgage secures the note.[32] In Arizona, the mortgage is not a conveyance,[33] but it gives a lien on property.[34] Before the lienholder can foreclose on a mortgage, a default on the secured obligation must occur.[35]

Time-is-of-the-essence

A contract provision stating that time is of the essence in the performance of the contract obligations may subject one who breaches such a term to penalties for the breach.[36] At law, time is of the essence in any contract containing fixed dates for performance.[37] Generally, time is not consid-

30. *See* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 2.3 at 22. The discussion in the cited text concerns whether consideration is essential to a mortgage. This writer perceives the same confusion as the culprit leading to inaccurate analysis in other areas of mortgage law.

31. Reid v. Cramer, 24 Wash. App. 742, 744, 603 P.2d 851, 852 (1979); Hartford Federal Savings and Loan Ass'n v. Green, 36 Conn. Supp. 506, 514, 412 A.2d 709, 713 (1979). *See* Price v. Mize, 628 P.2d 705, 706 (Okla. 1981).

32. Arizona Title Ins. and Trust Co. v. Hunter, 6 Ariz. App. 604, 609, 435 P.2d 47, 52, *vacated* 103 Ariz. 384, 442 P.2d 831 (1968); Merryweather v. Pendleton, 90 Ariz. 219, 224, 367 P.2d 251, 254 (1962). *See* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 1.5 at 10. Arizona follows the lien theory, in which the mortgagee holds no title to the property but has security.

33. Fremming Constr. Co. v. Security Savings and Loan Ass'n., 115 Ariz. 514, 515, 566 P.2d 315, 317 (Ct. App. 1977); Cooley v. Veling, 19 Ariz. App. 208, 209, 505 P.2d 1381, 1382 (1973); Arizona Title Ins. & Trust Co. v. Hunter, 6 Ariz. App. 604, 609, 435 P.2d 47, 52, *vacated* 103 Ariz. 384, 442 P.2d 831 (1968).

34. Fremming Constr. Co. v. Security Savings & Loan Ass'n, 115 Ariz. 514, 516, 566 P.2d 315, 317 (Ct. App. 1977); Cooley v. Veling, 19 Ariz. App. 208, 209, 505 P.2d 1381, 1382 (1973); ARIZ. REV. STAT. ANN. § 33-703[A] (1974) provides:

> A mortgage is a lien upon everything that would pass by a grant of the property, but does not entitle the mortgagee to possession of the property unless authorized by the express terms of the mortgage. After execution of the mortgage, the mortgagor may agree to a change of possession without new consideration.

35. *See* Evans v. Dise, 15 Ariz. App. 101, 103, 486 P.2d 213, 215 (1971) (court affirmed summary judgment in foreclosure action where mortgagee made prima facie showing of mortgagor's default on mortgage payments); Browne v. Nowlin, 117 Ariz. 73, 75, 570 P.2d 1246, 1248 (1977) (lender waived right to accelerate payment by accepting sums in default prior to exercise of the acceleration clause).

Where the secured obligation is a note, the question of a default should be governed by contract principles. Once a debtor defaults and no waiver has occurred, then an acceleration clause in the note and mortgage can be invoked. If the debtor fails to pay the amount due, then the creditor may commence a foreclosure action. By the same reasoning, if the mortgagee's actions constitute a waiver of default and the mortgagee has given no notice of reinstatement of a time-is-of-the-essence provision in the note and mortgage as required by contract law, a foreclosure proceeding should not be commenced until notice is given and a reasonable time to cure the default passes. *See generally* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437.

36. *See* Orto v. Jackson, 413 N.E.2d 273, 276 (Ind. App. 1980) (purchasers entitled to damages for the rent they were required to pay due to builder's breach of construction contract provision making time of the essence); Carriger v. Ballenger, 628 P.2d 1106, 1109 (Mont. 1981) (owners entitled to damages and interest for contractor's breach of agreement that time was of the essence).

37. *See* Pinewood Realty Ltd. Partnership v. United States, 617 F.2d 211, 214 (Ct. Cl. 1980)

ered "of the essence" in an equitable proceeding.[38] Even though the contract does not state that time is of the essence, a court may find the conduct of the parties or the nature of the contract sufficient to imply that such was the intent of the parties.[39] Where the contract does not so provide, and where the conduct of the parties shows that they do not consider time to be of the essence, a court will not imply such a term into the contract.[40]

Waiver

Even though time may be declared to be "of the essence" by express stipulation in a contract, the stipulated time limit may be extended by a party's waiver of strict compliance.[41] One authority has defined waiver as a "manifestation of intention to forego the benefit of a condition."[42] Such manifestation operates to excuse the condition.[43] A waiver may be expressed by the party who stands to benefit from strict compliance.[44]

(although time is of the essence in a contract containing fixed dates for performance, failure to terminate the contract within a reasonable time after default creates the inference that time is no longer of the essence); DeVito v. United States, 413 F.2d 1147, 1154 (1969) (time is of the essence in any contract containing fixed dates for performance, but government's acceptance of late performance constituted waiver of the contract schedule). *But see* Easton Theaters, Inc. v. Wells Fargo Land and Mortgage Co., Inc., 265 Pa. Super. 334, 346-47, 401 A.2d 1333, 1340 (1979) (usually time for performance is not regarded as an essential term in the contract, even though the time for performance may be fixed), *appeal dismissed*, 498 Pa. 557, 449 A.2d 1372 (1982).

38. Gay v. Tompkins, 385 So. 2d 973, 980 (Ala., 1980) (in suit seeking sale in lieu of partition, contract made time of the essence where the contract obligated the vendee to pay promptly and contained a "strict performance" clause); Hochard v. Deiter, 219 Kan. 738, 742, 549 P.2d 970, 974 (1976) (specific performance granted to purchasers in land sale contract where vendor failed to secure merchantable title and purchasers continued to demand performance of the contract). *See also* J. MURRAY, MURRAY ON CONTRACTS § 175 at 340 (1974).

39. Hochard v. Deiter, 219 Kan. 738, 742, 549 P.2d 970, 974 (1976) (purchasers entitled to specific performance of contract for sale and purchase of land where purchasers continued to demand performance of the contract; court implied contract contemplated a reasonable time for performance); Stork v. Felper, 85 Wis. 2d 406, 411, 270 N.W.2d 586, 589 (Ct. App. 1978) (in contract for purchase of dwelling which made time of the essence with respect to occupancy but not as to closing, and buyer waived benefit of time-is-of-the-essence provision, court would not apply the provision to closing date simply because the occupancy and closing dates were the same); Siderius, Inc. v. Wallace Co., Inc., 583 S.W.2d 852, 863 (Tex. Civ. App. 1979) (where contract did not stipulate that time was of the essence, court found evidence sufficient to support jury finding that parties intended time to be of the essence where a shipping deadline was extended by the parties once, but party refused a second extension).

40. Richards v. Bycroft, 197 Neb. 478, 481, 249 N.W.2d 743, 745 (1977) (sellers' agreement to extend time for performance in contract of sale shows they did not consider time to be of the essence); Down Grain Co., Inc. v. Pflug, 193 Neb. 483, 487, 227 N.W.2d 610, 612 (1975) (time not of the essence where the contract did not so provide and the parties relaxed manner in carrying out the contract to sell land indicated they did not intend time to be of the essence). *See* MacRitchie v. Plumb, 70 Mich. App. 242, 246, 245 N.W.2d 582, 585 (1976) (time found not to be "of the essence" where time limitation in land sale contract was inserted as a matter of course and not because of the parties' concern that the contract be executed immediately).

41. Puckett v. Hoover, 146 Tex. 1, 5-6, 202 S.W. 2d 209, 212 (1947); Hage v. Westgate Square Commercial, 598 S.W.2d 709, 711 (Tex. Civ. App. 1980); Smith v. Hues, 540 S.W.2d 485, 488 (Tex. Civ. App. 1976); 5 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 741 at 511 (3d ed. 1961): "Thus continued acceptance of late performance without objection may operate as a permission to make similarly late performances in the future, even where the exact time of performance is made of the essence by the contract between the parties." *Id.*

42. J. MURRAY, *supra* note 38, § 189 at 369.

43. *Id.*

44. Puckett v. Hoover, 146 Tex. 1, 5-6, 202 S.W.2d 209, 212 (1947); Johnson v. E.V. Cox Constr. Co., 620 P.2d 917 (Okla. Ct. App. 1980). *See also* Vernon v. McEntire, 232 Ark. 741, 746, 339 S.W.2d 855, 858 (1960), quoted *infra* note 45.

Waiver may also be implied by the actions of the party.[45] Where waiver must be inferred from conduct, the intent to waive the right is essential; therefore, waiver is a question of fact.[46] Although waiver may extend the stipulated time of performance, the promisor can limit the promisee's time to perform by giving notice of intent to reinstate the time-is-of-the-essence provision.[47]

Notice

The purpose of notice is to put a party on guard and to afford him an opportunity to protect his interests.[48] Where notice is involved, actual notice is required unless the contract or a statute provides otherwise.[49] Actual notice means notice given directly and personally to the one to be notified.[50] A court may find sufficient notice where the party to be notified has enough knowledge of pertinent facts and circumstances to enable the reasonably cautious and prudent person to investigate and ascertain ulti-

45. *See* Puckett v. Hoover, 146 Tex. 1, 5-6, 202 S.W.2d 209, 212 (1947) (purchaser's contention that seller delayed consummation of contract for three months and thereby waived requirement that purchase be completed within thirty days created issue for trial court); Spaulding v. McCaige, 47 Or. App. 129, 134, 614 P.2d 594, 597 (1980) (parties to contract impliedly waived applicable time limit by repeated recognition of contract's validity and by consistent work toward completion of transaction); S. WILLISTON, *supra* note 41, § 741 at 513 (quoting Vernon v. McEntire, 232 Ark. 741, 746, 339 S.W.2d 855, 858 (1960)):

> The law will strictly enforce the agreement of the parties as they have made it; but, in order to find out the scope and true effect of such agreement, it will not only look into the written contract which is evidence of their agreement, but it will also look into their acts and conduct in the carrying out of the agreement in order to fully determine their true intent. It is a well-settled principle that equity abhors a forfeiture, and that it will relieve against a forfeiture when the same has either expressly or by conduct been waived.

Id. Acceptance of benefits after breach of a condition excuses the condition. *See* J. MURRAY, *supra* note 38, § 190 at 373.

46. *See* Arizona Title Guarantee and Trust Co. v. Modern Homes, 84 Ariz. 399, 402, 330 P.2d 113, 114 (1958) (no waiver in contract to convey where plaintiff accepted late payments before the expiration of the 30 day grace period provided in ARIZ. REV. STAT. ANN. § 33-741 (Supp. 1982-83)); Southwest Cotton Co. v. The Valley Bank, 26 Ariz. 559, 563, 227 P. 986, 988 (Ct. App. 1924) (in suit to foreclose landlord's lien on cotton, court found plaintiff waived its lien by releasing warehouse receipts to the tenant two months after the lease had been terminated). *See also* Grippo v. Davis, 92 Conn. 693, 104 A. 165 (1918) where the court stated:

> As a general rule, a waiver must be found as a fact since the intentional relinquishment of a known right is the foundation of a waiver, and this intent to be found must be proved. But when the intent, though not expressly found, is yet the necessary inference from the facts found, as in this case, the intent may be inferred as a matter of law.

Id. at 696, 104 A. at 166.

47. Freedman v. Continental Service Corp., 127 Ariz. 540, 543, 622 P.2d 487, 490 (Ct. App. 1980); J. MURRAY, *supra* note 38, § 194 at 384. *See also* S. WILLISTON, *supra* note 41, § 741 at 516-17 (recognizing that a blanket rule requiring notice in all circumstances is too broad a proposition).

48. Burns v. Westamerica Corp., 137 N.J. Super. 442, 446, 349 A.2d 142, 144 (N.J. Dist. Ct. 1975). *See* North Beach Medical Center, Inc. v. City of Fort Lauderdale, 374 So. 2d 1106, 1108 (Fla. App. 1979).

49. Freedman v. Continental Service Corp., 127 Ariz. 540, 543, 622 P.2d 487, 490 (Ct. App. 1980); Wienke v. Lynch, 407 N.E.2d 280, 286 (Ind. App. 1980).

50. Wienke v. Lynch, 407 N.E.2d 280, 286 (Ind. App. 1980). *See* Hamilton v. Edwards, 245 Ga. 810, 811-12, 267 S.E.2d 246, 248 (1980) (notice includes knowledge and that which is communicated by direct information); Leche v. Ponca City Production Credit Assoc., 478 P.2d 347, 350-51 (Okla. 1970) (where the evidence allows the court to infer that information was personally communicated to or received by a party, actual notice exists).

mate facts.[51]

The Arizona courts have recognized, at least in respect to contracts to convey real property, that when one's acts constitute waiver of a time-is-of-the-essence provision in the contract, notice must be given to the purchasers before such a provision can be reinstated.[52] Few Arizona cases have discussed the notice requirement in the context of a mortgage.[53]

Acceleration

An acceleration clause in a note or mortgage providing that the entire debt secured shall become due and payable upon the mortgagor's failure to pay interest or any installment of principal upon maturity is enforceable and is not considered a forfeiture or penalty.[54] The courts view such a clause as merely a contract term which determines when a debt is payable.[55] The general concept of acceleration is universally accepted, and most installment payment mortgages contain acceleration clauses.[56]

A mortgagor's default triggers the mortgagee's option to accelerate. Once triggered, however, the acceleration clause need not be exercised by the mortgagee.[57] Notice of acceleration to the mortgagor is not essential unless the mortgage contains a provision requiring notice.[58] The mortgagee must act affirmatively, demonstrating his intention to accelerate the debt prior to the mortgagor's tender of the amount actually due.[59] Com-

51. Hamilton v. Edwards, 245 Ga. 810, 811-12, 267 S.E.2d 246, 248 (1980) (court found insufficient notice where taxpayer had neither information, observation, knowledge nor means of knowledge prior to receipt of notice of appeal for review of tax assessments); Thomas v. Evans, 200 Kan. 584, 589, 438 P.2d 69, 73 (1968) (plaintiff had no notice that defendant was contracting on behalf of corporation where plaintiff had no actual knowledge or reason to know of defendant's association with the corporation); Leche v. Ponca City Production Credit Assoc., 478 P.2d 347, 350-51 (Okla. 1970) (where the evidence allows the court to infer that information was personally communicated to or received by a party, actual notice exists).

52. Kammert Brothers Enterprises v. Tanque Verde Plaza Company, 102 Ariz. 301, 305, 428 P.2d 678, 682 (1967); Arizona Title Guarantee and Trust Company v. Modern Homes, Inc., 84 Ariz. 399, 403, 330 P.2d 113, 115 (1958); Eyman v. Sowa, 23 Ariz. App. 588, 591, 534 P.2d 1087, 1090 (1975). *But see supra* note 35.

53. *See* Ciavarelli v. Zimmerman, 122 Ariz. 143, 145, 593 P.2d 697, 699 (Ct. App. 1979) (the court admits that some authority protects a mortgagor from default resulting from accident, good faith mistake or unusual circumstances beyond his control, but it fails to either analyze or apply such authority). *See also* Owen v. Mecham, 9 Ariz. App. 529, 531, 454 P.2d 577, 579 (1969) (a letter from plaintiffs' title company to defendants reminding them of the amount due and the date due constituted notice reinstating time-is-of-the-essence).

54. Ciavarelli v. Zimmerman, 122 Ariz. 143, 144, 593 P.2d 697, 698 (Ct. App. 1979); Graf v. Hope Bldg. Corp., 254 N.Y. 1, 6, 171 N.E. 889, 885 (1930); G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 326 at 682 (2d ed. 1970). Acceleration is permitted also for failure to pay taxes, failure to maintain insurance, or for the commission of waste. *See* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.6 at 435.

55. First Federal Savings and Loan of Phoenix v. Ram, — Ariz. —, 659 P.2d 1323, 1325 (Ct. App. 1982); Ciavarelli v. Zimmerman, 122 Ariz. 143, 144, 593 P.2d 697, 698 (Ct. App. 1979); G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES § 326 at 682 (2d ed. 1970).

56. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.6 at 435 n. 75.

57. *Id.* at 436. *See also* Rosenthal, *The Role of Courts of Equity in Preventing Acceleration Predicated Upon a Mortgagor's Inadvertent Default*, 22 SYR. L. REV. 897, 899 n.8 (1971).

58. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.6 at 436.

59. *Id.*; Browne v. Nowlin, 117 Ariz. 73, 75, 570 P.2d 1246, 1248 (1977); Capital City Motors, Inc. v. Thomas W. Garland, Inc., 363 S.W.2d 575 (1962). The *Capital City Motors* court stated: "In other words, the holder of a promissory note which is in default and which contains an acceleration clause may waive or lose his option to treat the entire debt as due, by failure to exercise his

mencement of judicial foreclosure proceedings is sufficient evidence of the mortgagee's election to accelerate.[60] Once a mortgagee elects to accelerate, the mortgagor's recourse is to redeem by paying the amount of the accelerated debt prior to foreclosure[61] or to exercise the statutory right of redemption after foreclosure.[62]

A mortgagee may waive the right to accelerate the debt by accepting the amount in default prior to his election to enforce acceleration.[63] Tender before the election to accelerate destroys the right.[64] Some courts have relieved mortgagors for inadvertent defaults in payment of principal and interest where they have detected a mortgagee's consistent prior acceptance of delinquent payments.[65] Where courts have granted such relief, the mortgagee must then give notice to reinstate his right to accelerate in the future.[66] Other courts have absolutely refused to find waiver where a mortgagee consistently accepted late payments.[67] Failure to accelerate and foreclose on the first default, however, does not constitute waiver of the right to foreclose due to subsequent defaults.[68]

The Arizona Court of Appeals, in *First Federal Savings and Loan Association of Phoenix v. Ram*, followed the lead of those courts which have refused to find that a mortgagee's acceptance of late payments constitutes a

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option before the debtor makes a proper tender of the amount overdue." The court pointed out that an acceleration clause is solely for the benefit of the holder of the note. *Id.* at 578.

60. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.6 at 436. *See also* United States Savings Bank of Newark, New Jersey v. Continental Arms, Inc., 338 A.2d 579, 582-83 (Del. Super. 1975); Pizer v. Herzig, 120 App. Div. 102, 105 N.Y.S. 38 (1907).

61. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437. *See also* ARIZ. REV. STAT. ANN. § 33-726 (1974) which provides:

> If payment is made to the officer directed to sell mortgaged property under a foreclosure judgment, before the foreclosure sale takes place, the officer shall make a certificate of payment and acknowledge it, and the certificate shall be recorded in the office in which the mortgage or deed of trust is recorded and shall have the same effect as satisfaction entered on the margin of the record.

62. ARIZ. REV. STAT. ANN. § 12-1282 (1982) provides in pertinent part:

> A. The judgment debtor or his successors in interest may redeem at any time within thirty days after the date of the sale if the court determined as part of the judgment under which the sale was made that the property was both abandoned and not used primarily for agricultural or grazing purposes.
>
> B. The judgment debtor or his successor in interest may redeem at any time within six months after the date of the sale except when the court has made the determinations as provided in subsection A.

63. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437; Browne v. Nowlin, 117 Ariz. 73, 75, 570 P.2d 1246, 1248 (1977).

64. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437; Browne v. Nowlin, 117 Ariz. 73, 75, 570 P.2d 1246, 1248 (1977). *See also* Bisno v. Sax, 175 Cal. App. 2d 714, 724, 346 P.2d 814, 820 (1960).

65. Ashback v. Wenzel, 141 Colo. 35, 39-40, 346 P.2d 295, 297 (1959); Edwards v. Smith, 322 S.W.2d 770, 776 (Mo. 1959). *See also* OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437; Rosenthal, *supra* note 53, at 907.

66. *See* Rosenthal, *supra* note 57, at 907. *See also supra* notes 48-53 and accompanying text.

67. First Federal Savings and Loan Ass'n of Phoenix v. Ram, — Ariz. —, 659 P.2d 1323, 1326 (Ct. App. 1982). *See, e.g.*, Federal Nat'l Mortgage Ass'n v. Walter, 363 P.2d 293, 296 (Okla. 1961); Campbell v. West, 86 Cal. 197, 202, 24 P. 100, 1001 (1890).

68. OSBORNE, NELSON & WHITMAN, *supra* note 1, § 7.7 at 437; First Federal Savings and Loan Ass'n of Phoenix v. Ram, — Ariz. —, 659 P.2d 1323, 1326 (Ct. App. 1982). *See* Ciavarelli v. Zimmerman, 122 Ariz. 143, 145, 593 P.2d 697, 699 (Ct. App. 1979) (plaintiffs' insistence on being paid according to the terms of the note and deed of trust is not harshly oppressive or inequitable conduct where they had given defendants a second chance by executing a new note and deed of trust after defendants' prior default).

waiver of a time-is-of-the-essence provision.[69] The court's consideration of whether acceptance by a mortgagee of late payments constitutes waiver of the right to timely performance and requires notice reinstating a time-is-of-the-essence clause prior to filing a foreclosure action is discussed in the following section.[70]

ANALYSIS OF *RAM*

Acceptance of Late Payments

The Rams' note and mortgage to Catalina and the deed of trust to First Federal contained time-is-of-the-essence provisions.[71] Default on such a provision would subject the Rams to penalties for the breach.[72] The Rams made numerous late payments, which both Catalina and First Federal accepted.[73] The Arizona Court of Appeals agreed with the trial court's conclusion that the Rams' default due to failure to meet payment deadlines resulted from their own neglect.[74]

The court of appeals rejected the Rams' argument that because they did not receive notice of default, Catalina and First Federal should be estopped from foreclosing because their acts constituted unconscionable conduct.[75] The court also rejected the Rams' assertion that Catalina and First Federal were required to give notice of their intention to reinstate the time-is-of-the-essence provisions because the prior acceptance of late payments constituted waiver.[76] The court found the Rams' reliance on forfeiture law inapposite and distinguished between forfeiture and foreclosure, noting that the purchaser loses all interest in the property in a forfeiture. In making this distinction, the court failed to discuss the possible loss to the purchaser of his equity in a foreclosure action.[77]

The court recognized that Catalina and First Federal had accepted

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69. *See* — Ariz. —, 659 P.2d 1323, 1326 (Ct. App. 1982).

70. *Id.* at —, 659 P.2d at 1324. The second issue which the court identified—whether foreclosure was justified on the basis of an alleged default in payment of property taxes—was rendered moot by the court's holding on the first issue and was not discussed.

71. *Id.* at —, 659 P.2d at 1325.

72. *See supra* note 36 and accompanying text. The penalty here was that the mortgagee had the right to accelerate and demand immediate payment of the entire debt, which subsequently occurred.

73. *Ram*, — Ariz. at —, 659 P.2d at 1324. The court pointed out that the previous payments were late by only a few days, whereas the late payments leading to acceleration were delinquent by several months. *Id.*

74. *Id.* at —, 659 P.2d at 1325.

75. *Id.* at —, 659 P.2d at 1325. The Rams alleged that First Federal never notified them of its intent to require strict performance. Appellants' Opening Brief at 22. The Rams argued that because they had given Catalina and First Federal a Nogales address for all correspondence concerning the Tucson property, and because Catalina sent crucial default notices to the Tucson address but notice of foreclosure to the Nogales address, Catalina's acts constituted unconscionable conduct. *Id.* at 15-17.

76. *Ram*, — Ariz. at —, 659 P.2d at 1325.

77. *Id.* Although the statutes governing foreclosure provide for redemption prior to foreclosure sale, ARIZ. REV. STAT. ANN. § 33-726 (1974) and a right of redemption subsequent to a foreclosure sale, ARIZ. REV. STAT. ANN. § 12-1282 (1963), similar methods apply in the context of a forfeiture. (The Contracts to Convey statutes provide time for a purchaser to cure a default, after which time the purchaser's interest is forfeited, *see* ARIZ. REV. STAT. ANN. § 33-742 (Supp. 1982-83)). If a mortgagor cannot afford to redeem within the time allotted in a foreclosure situation, the general result is a loss of equity. The end result of a foreclosure can be as severe as a

numerous late payments.[78] Although summary judgment requires the court to view facts in the light most favorable to the party opposing the motion,[79] the court avoided a jury determination of the factual allegations by establishing as a rule of law that a mortgagee's acceptance of late payments does not constitute waiver of a time-is-of-the-essence provision, thereby preserving the mortgagee's right to enforce an acceleration clause.[80] Given its decision on the legal issue, the court properly affirmed the trial court's granting of the motion for summary judgment.

Should Notice Reinstating Time-is-of-the-Essence Be Required?

A note, which may be secured by a mortgage, is a contract to pay money.[81] As such, basic principles of contract law apply to its making and interpretation.[82] Thus, a provision in a note secured by a mortgage stipulating that time is of the essence should be analyzed according to contract principles.[83] Under contract law, continued acceptance of late payments may constitute waiver of a time-is-of-the-essence provision.[84] When a time-is-of-the-essence provision has been waived by the acts of the mortgagee, reinstatement of the stipulated clause would require notice to the mortgagor of the intent to strictly adhere to the terms of the contract.[85] Only after notice and a reasonable time in which to cure the default could the mortgagee elect to accelerate the balance due and institute a foreclosure action.[86]

Some jurisdictions follow the above analysis,[87] but the Arizona Court of Appeals found such logic unpersuasive.[88] Instead of considering whether the notice rule was properly applicable, the court issued a conclusory statement that the Rams' reliance on the cited authority was not

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forfeiture; therefore, to require the mortgagee to give valid notice prior to acceleration and foreclosure seems reasonable. *See infra* notes 91-94 and accompanying text.

78. *Ram*, — Ariz. at —, 659 P.2d at 1324.

79. ARIZ. R. CIV. P. 56(c); Nicoletti v. Westcor, 131 Ariz. 140, 639 P.2d 330 (1982); Morelos v. Morelos, 129 Ariz. 354, 355, 631 P.2d 136, 136 (Ct. App. 1981), wherein the court stated:

> If there is the slightest doubt as to whether a factual issue remains in dispute, the granting of summary judgment is erroneous and such doubt must be resolved in favor of a trial on the merits, and, even if there is no factual dispute, where possible inferences to be drawn from the circumstances are conflicting, summary judgment is unwarranted.

80. — Ariz. at —, 659 P.2d at 1326. Although it appears to have adopted a broad rule of law, the court specified that it based its conclusion solely on the facts presented. *Id.* This may provide an opening which, given an appropriate set of facts, could lead a court to limit the impact of the *Ram* case.

81. Reid v. Cramer, 24 Wash. App. 742, 744, 603 P.2d 851, 852 (1979); Hartford Federal Savings and Loan Ass'n. v. Green, 36 Conn. Supp. 506, 514, 412 A.2d 709, 713 (1979). *See* Price v. Mize, 628 P.2d 705, 706 (Okla. 1981).

82. Appliances, Inc. v. Yost, 181 Conn. 207, 210, 435 A.2d 1, 2 (1980); Hartford Federal Savings and Loan Ass'n. v. Green, 36 Conn. Supp. 506, 514, 412 A.2d 709, 713 (1979); First Nat'l Bank and Trust Co. v. Lygrisse, 231 Kan. 595, 600, 647 P.2d 1268, 1272 (1982). *See also supra* notes 30-35 and accompanying text.

83. *See supra* notes 81-82 and accompanying text.

84. *See supra* notes 41-47 and accompanying text, and *infra* note 87 and accompanying text.

85. *See supra* notes 48-53 and accompanying text.

86. *See supra* notes 54-66 and accompanying text.

87. *See, e.g.*, Ashback v. Wenzel, 141 Colo. 35, 346 P.2d 295 (1959); Edwards v. Smith, 322 S.W.2d 770 (Mo. 1959); Musso v. Lodwick, 217 S.W.2d 165 (Tex. Civ. App. 1949).

88. *Ram*, — Ariz. at —, 659 P.2d at 1326. "Even if we found this authority persuasive, we would not find the appellant's reliance to be justified on the facts in the present case." *Id.*

justified given the facts of the case.[89] Indeed, the court's apparent failure to apply the basic contract principles of waiver and notice to reinstate a time-is-of-the-essence provision of a note secured by a mortgage or deed of trust was inconsistent in view of its reliance on contract law to justify the exercise of an acceleration clause.[90]

Because foreclosure is an equitable proceeding,[91] the equity court could require a mortgagee who has continually accepted late payments to give notice to a mortgagor before reinstating a time-is-of-the-essence provision.[92] Where the mortgagor has relied on the mortgagee's acceptance of late payments, a notice requirement would provide an opportunity for the mortgagor to protect his equity by paying the delinquent amount prior to acceleration.[93] Although the foreclosure statutes provide procedural safeguards in the form of equity of redemption and right of redemption,[94] a notice of reinstatement of a time-is-of-the-essence clause prior to acceleration would alert the mortgagor to a possible foreclosure action and inform him of the need to bring current the loan payments. The minimal effort required by the mortgagee to give notice is a light burden compared to the possible loss to the mortgagor of his equity.

Grounds for Relief After Ram

After *Ram* the only grounds for relief from acceleration due to a mortgagor's default are fraud, bad faith or unconscionable conduct on the part of the mortgagee.[95] The Arizona courts have no definitive test by which to establish bad faith or unconscionable conduct, although the *Ram* decision distinguishes one Arizona case which found unconscionable conduct on the part of a mortgagee.[96] In *Arizona Coffee Shops, Inc. v. Phoenix*

89. *Id.* One might question whether the court would find the authority persuasive given a different fact pattern.

90. *Id.* at —, 659 P.2d at 1325. The court stated that an acceleration clause "is merely a contract term determining when a debt is payable." *Id.*

91. Continental Federal Savings and Loan Ass'n. v. Fetter, 564 P.2d 1013 (1977); State Bank of Lehi v. Woolsey, 565 P.2d 413 (1977); United States v. Loosley, 551 P.2d 506 (1976).

92. *See supra* notes 65-66 and accompanying text.

93. *See* Barday v. Steinbaugh, 130 Colo. 10, 272 P.2d 657, 658 (1954) (plaintiff's acceptance of late payments for fifteen months could be relied on by defendants and could justify their belief that plaintiff's right to accelerate would not be exercised without an opportunity to protect themselves by payment of the amount due). *See also* Ashback v. Wenzel, 141 Colo. 35, 346 P.2d 295, 298 (1959) (plaintiff who accepted late payments for twenty-one months cannot accelerate the balance due without notice that he intends to demand prompt payment in the future); Edwards v. Smith, 322 S.W.2d 776, 776 (Mo. 1959) (defendant in wrongful foreclosure action who accepted late payment on a note for more than two years, where on three occasions default involved four or five monthly installments, and defendant accepted payment without invoking acceleration clause, may have waived right to timely payment; court of appeals remanded for trial on issue of waiver).

94. *See supra* notes 61 and 62. The mortgagor must either pay the entire amount owing on the debt before a foreclosure sale to exercise his equity of redemption or pay the amount brought by the sale within six months to exercise the right of redemption. The amount required for redemption under either method would probably be much greater than the amount a mortgagor would be required to pay to make the debt current. By requiring notice to reinstate a time-is-of-the-essence provision, the mortgagor would be alerted to the possible foreclosure action and could take steps to bring the loan payments up to date. Since notice would require minimal effort from the mortgagee, the court of equity should require notice to provide all possible safeguards to the mortgagor.

95. — Ariz. at —, 659 P.2d at 1325.

96. *Id. See infra* notes 97-100, and accompanying text.

Downtown Park, Inc.,[97] the parties were personally well acquainted. The mortgagee knew of the illness of the mortgagor's bookkeeper and of the failure of the bookkeeper to meet an interest payment deadline. The mortgagee said nothing to the mortgagor about the default at a chance meeting and soon thereafter filed a foreclosure action based on the failure to pay.[98] The mortgagor had paid a substantial amount of the debt at the time of the default.[99] The court found the mortgagor's allegations of unconscionable conduct, supported by affidavit, sufficient to create an issue for the trier of fact.[100]

The Rams argued that Catalina acted in bad faith by sending the most important notice to an address which Catalina knew to be incorrect.[101] The Rams further argued that the acts of Catalina and First Federal "lulled" them into a "false sense of security" and that these acts precluded the mortgagees from foreclosing. The court disagreed and stated that *Arizona Coffee Shops* does not stand for the proposition that prior acceptance of late payments followed by foreclosure for a later default constitutes unconscionable conduct.[102] The court's analysis of *Arizona Coffee Shops* may have been more thorough had the Rams raised bad faith as a separate issue.

CONCLUSION

In *First Federal Savings and Loan Association of Phoenix v. Ram*, the Arizona Court of Appeals affirmed the trial court's summary judgment favoring Catalina Savings and Loan and First Federal Savings and Loan Association of Phoenix. The court considered whether acceptance by a mortgagee of late payments constitutes waiver of the right to timely performance and requires notice to reinstate a time-is-of-the-essence clause prior to filing a foreclosure action. The court held that a mortgagee's previous acceptance of late payments did not preclude the mortgagees from foreclosing due to subsequent defaults by the mortgagors. In so holding, the court adopted a rule of law that a mortgagee's acceptance of late payments does not constitute waiver of a time-is-of-the-essence provision. The decision drew a firm line between analysis of forfeiture, on which the Rams relied, and the law of foreclosure. To be relieved from an acceleration due to default, a mortgagor is limited to proof of fraud, bad faith or unconscionable conduct on the part of the mortgagee, none of which the *Ram* court clearly defined.

Although the court affirmed the summary judgment, the decision provides little insight into the court's rationale for adopting in foreclosure law a rule that acceptance of late payments does not constitute waiver of a time-is-of-the-essence provision. The court failed to discuss its reasons for

97. 95 Ariz. 98, 387 P.2d 801 (1963).
98. *Id.* at 99, 387 P.2d at 802.
99. *Id.* The defendant had paid $173,500 of a total debt of $350,000, plus 5% interest, at the time of default.
100. *Id.* at —, 387 P.2d at 803.
101. Appellant's Opening Brief at 17.
102. — Ariz. at —, 659 P.2d at 1325.

not applying the contract doctrines pertaining to a time-is-of-the-essence clause, waiver and notice. Arguably, these doctrines should be applied to give the mortgagor an opportunity to cure a default prior to acceleration. Requiring the mortgagee to give notice would afford an extra measure of protection to a mortgagor whose delinquent payments could lead to a major loss of equity. Such a requirement would impose a minor burden on the mortgagee.

David K. Gray

B. Implied Covenants of Continuous Operation in Commercial Lease Settings

Covenants[1] are of two types—express or implied.[2] Express covenants are created by the words used in an agreement.[3] Implied covenants are inferred from the words used in an agreement to effect the intention of the parties.[4] One kind of covenant sometimes found in commercial leases is the covenant of continuous operation, wherein a lessee promises to operate a business on the leased property continuously for the term of the lease.[5] This type of covenant, like other covenants, can be express or implied.[6]

Lessors of shopping center property sometimes want covenants of continuous operations in their leases to prevent major tenants from discontinuing business operations. These covenants are important to lessors because the closing of a major business in a shopping center can have drastic economic effects on other stores.[7] This economic decline can adversely affect the lessor.[8]

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1. Generally, a covenant can be defined as a promise or agreement to do or not to do a particular act. Bald v. Nuernberger, 267 Ill. 616, 622, 108 N.E. 724, 726 (1915); Beall v. Hardie, 717 Kan. 353, 356, 279 P.2d 276, 278 (1955); Indian Territory Illuminating Oil Co. v. Rosamond, 190 Okla. 46, 50, 120 P.2d 349, 353 (1941).

2. O'Sullivan v. Griffith, 153 Cal. 502, 506, 95 P. 873, 875 (1908); McDonough v. Martin, 88 Ga. 675, 677, 16 S.E. 59, 59 (1891).

3. Lovering v. Lovering, 13 N.H. 513, 515, 519 (1843).

4. Brimmer v. Union Oil Co. of California, 81 F.2d 437, 440 (10th Cir. 1936) *cert. denied*, 298 U.S. 668 (1935); McDonough v. Martin, 88 Ga. 675, 677, 16 S.E. 59, 59 (1891).

5. *See, e.g.*, Walgreen Arizona Drug Co. v. Plaza Center Corp., 132 Ariz. 512, 515-57, 647 P.2d 643, 646-48 (Ariz. App. 1982); Lippman v. Sears, Roebuck & Co., 44 Cal. 2d 136, 280 P.2d 775 (1955).

6. *See Walgreen*, 132 Ariz. at 515, 647 P.2d at 646.

7. *See* Tooley's Truck Stop, Inc. v. Chrisanthopouls, 55 N.J. 231, 238, 260 A.2d 845, 849 (1970) (court concluded that a diner in a truck stop was imperative for the successful operation of the other businesses in the truck stop); Dover Shopping Center, Inc. v. Cushman's Sons, Inc., 63 N.J. Super. 384, 394, 164 A.2d 785, 791 (1960) (court discussed the "harm that would come from withdrawal of one of the members of a semi-cooperative enterprise like a shopping center"). The problem is caused by the reduction in customer traffic when a store closes. "It is common knowledge that the volume of pedestrian traffic at the site of a retail merchandising business is a factor which affects the gross sales potential of a business." Lilac Variety, Inc. v. Dallas Texas Company, 383 S.W.2d 193, 196 (Tex. Civ. App. 1964).

8. The adverse effects include reduced rental income in the case of a percentage-of-sales lease. *See, e.g.*, *Lippman*, 44 Cal. 2d at 140, 280 P.2d at 777.

Lessors are also sometimes adversely affected by dilapidation of vacant premises. Asling v.

Problems sometimes arise when a lessor intends that the lease include a covenant of continuous operation but the covenant is not explicitly stated in the agreement. In this situation, if a lessee has discontinued operations, a lessor might claim the existence of an implied covenant of continuous operation and seek either termination of the lease with damages[9] or specific performance of the lease provision.[10] Until recently, it was unclear what rules applied to implied covenants of continuous operation in Arizona.[11] In May 1982, the Arizona Court of Appeals supplied some guidelines on this issue when it decided *Walgreen Arizona Drug Co. v. Plaza Center Corp.*[12]

Walgreen Arizona Drug Company (Walgreen) was a tenant under a lease with Plaza Center Corporation and Tower Plaza Investment, Limited (Tower Plaza), wherein Walgreen leased one building in a shopping center owned by Tower Plaza.[13] The lease provided that Walgreen was to pay a fixed monthly rental fee. The other tenants in the shopping center paid rent based on a percentage of the sales made by the tenant's business. The Walgreen lease contained no express provision as to continuous operation; however, it did contain a non-assignment provision.[14]

On December 31, 1977 Walgreen closed its retail store, removed its signs and boarded up the windows. Walgreen continued to fulfill all obligations under the written terms of the lease, including the payment of rent. Walgreen also began negotiations with Fed-Mart Corporation and Fed-Mart Stores (Fed-Mart) for a transfer of Walgreen's interest in the lease to Fed-Mart. In February 1978, Tower Plaza took possession of the premises after giving notice to Walgreen that Walgreen had breached an implied covenant of continuous operation. By agreement between Walgreen and Tower Plaza, Walgreen regained possession pending litigation.[15] In September 1978, Walgreen entered into a "sublease" with Fed-Mart. Claiming that the "sublease" violated the non-assignment clause of the lease, Tower Plaza again notified Walgreen that the lease had been breached. Walgreen then brought suit against Tower Plaza, seeking a declaration that Tower Plaza had improperly attempted to terminate Walgreen's lease. Tower Plaza counterclaimed and filed a third-party complaint against Fed-Mart, seeking damages and a declaration that the lease was terminated, based on either a breach of an implied covenant of continuous oper-

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McAllister-Fitzgerald Lumber Co., 120 Kan. 455, 458-60, 244 P. 16, 19 (1926); *Tooley's Truck Stop*, 55 N.J. at 236, 260 A.2d at 848.

9. *See, e.g.*, *Walgreen*, 132 Ariz. at 513, 647 P.2d at 644.

10. *See, e.g.*, *Dover Shopping Center, Inc.*, 63 N.J. Super. at 394, 164 A.2d at 791.

11. Although Arizona courts had discussed implied covenants generally, *see infra* notes 34-35 and accompanying text, no Arizona court had considered the implied covenant of continuous operation.

12. 132 Ariz. 512, 647 P.2d 643 (Ariz. App. 1982).

13. The facts and controversy in *Walgreen* are set forth at 132 Ariz. at 514-15, 647 P.2d at 645-46.

Walgreen and Tower Plaza acquired their interests in the lease from other parties. Walgreen acquired its interest through a sublease with one of its subsidiaries, Globe Discount City of Arizona, Inc. Tower Plaza acquired its interest from A.T. LaPrade when Tower Plaza purchased the shopping center from Mr. LaPrade. *Id.*

14. *Id.*

15. *Id.*

ation or a breach of the non-assignment provision in the lease.[16]

The trial court ruled in favor of Walgreen and Fed-Mart, holding that the agreement between Walgreen and Fed-Mart constituted a sublease and therefore did not result in a breach of the non-assignment clause.[17] The trial court found it unnecessary to decide whether an implied covenant of continuous operation existed, declaring that even if the covenant existed, it was subject to reasonable business interruptions which result from tenant changes.[18]

On appeal, the court of appeals affirmed the lower court.[19] The appellate court held that, under the right set of facts and circumstances, an implied covenant of continuous operation could exist in a commercial lease setting.[20] The court set forth the requirements for an implied covenant of continuous operation and gave some other guidelines for determining whether a covenant will be implied.[21] The court determined, however, that this case did not present the facts and circumstances necessary to create an implied covenant.[22] In addition, the court agreed with the lower court's determination that the "sublease" agreement between Walgreen and Fed-Mart constituted a sublease and not an assignment.[23] This Casenote does not discuss the sublease assignment issue in any detail but concentrates on the implied covenant of continuous operation.

Application of the Lippman *Test*

The *Walgreen* court discussed two basic premises which underlie the application of an implied covenant of continuous operation.[24] The first is that, absent a contrary agreement, a lessee is entitled to use and occupy leased premises for any lawful purpose which does not harm the lessor's reversionary interest in the premises.[25] This rule, though well-established in Arizona case law,[26] did not resolve the issue litigated by the parties in *Walgreen*. The question remained whether a lessee's right to use and occupy property as he pleases includes the right not to use or occupy the property.

Implicit in the court's opinion was the conclusion that the right to use

16. *Id.*

17. *Id.* at 514, 647 P.2d at 645.

18. *Id.* The court concluded that the provisions of the lease made any implied covenant of continuous operation subject to reasonable business interruptions, but it did not mention specifically which provisions it relied on. The court found that the interruption in business operations was associated with the change in tenancy from Walgreen to Fed-Mart and was reasonable in length. *Id.*

19. *Id.* at 518, 647 P.2d at 649.

20. *Id.*

21. *Id.* The court discussed a five-part test for establishing that an implied covenant exists. *Id.*; *see infra* note 41 and accompanying text. It also gave some guidelines as to when percentage-of-sales leases will satisfy these requirements. 132 Ariz. at 515-17, 647 P.2d at 646-48; *see infra* notes 94-100 and accompanying text.

22. 132 Ariz. at 515-17, 647 P.2d at 646-48.

23. *Id.* at 518, 647 P.2d at 649.

24. *Id.* at 515, 647 P.2d at 646. *See infra* notes 25-33 and accompanying text.

25. 132 Ariz. at 515, 647 P.2d at 646. *See also* M. Karam & Sons Mercantile Co. v. Serrano, 51 Ariz. 397, 411, 77 P.2d 447, 453 (1938).

26. *See M. Karam & Sons Mercantile*, 51 Ariz. at 411, 77 P.2d at 453.

and occupy property includes the right not to use or occupy. Thus, a lessee can elect to leave leased property idle.[27] The court stated, however, that the right to leave property idle is subject to the terms of the lease.[28] A covenant of continuous use, therefore, can arise by agreement.[29]

The second basic premise relied on by the *Walgreen* court was that implied covenants generally are not favored.[30] The court pointed out that courts generally are reluctant to imply covenants where the obligations sought to be imposed on the contracting parties are not expressed in their written agreement.[31] Absent illegality, contracting parties are free to bargain as they see fit.[32] When the bargained-for agreement is reduced to writing, a court may not make a new contract for the parties or rewrite the existing contract.[33]

The court pointed out that, despite this reluctance to rewrite contracts, courts will imply covenants in certain situations.[34] Prior to *Walgreen*, no Arizona court had been asked to imply a covenant of continuous operation in a commercial lease setting.[35] The *Walgreen* court therefore broke new ground in holding that covenants of continuous operation can be implied

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27. The court held that unless contrary intent can be derived from the written terms of the lease, either in the form of express provisions or provisions that lead to an implied covenant, there will be no covenant to use the property. *Walgreen*, 132 Ariz. at 515, 647 P.2d at 646.

28. *Id.* The fact that there is an inherent right to leave leased property idle destroys the argument that a duty to use the property exists entirely detached from, and regardless of the nature of, the terms of the lease. This, however, does not foreclose the possibility of an agreement between the parties as to continuous use.

Tower Plaza argued that a covenant of continuous operation existed irrespective of the term of the lease. *Id.* at 516, 647 P.2d at 647. It also argued for a covenant based on the provisions in the lease. *Id.*

29. *Id.*

30. *Id.* at 515, 647 P.2d at 646.

31. *Id.* at 517, 647 P.2d at 648. *See also* Express Cases, 117 U.S. 1, 29 (1885); Spry v. Williams, 82 Iowa 61, 64, 47 N.W. 890, 891 (1891); Farber v. Mutual Life Ins. Co., 250 Mass. 250, 253, 145 N.E. 535, 536 (1924).

For example, in *Walgreen*, the lease did not contain an express provision requiring continuous operation. 132 Ariz. at 514, 647 P.2d at 645. Walgreen alleged that it had not agreed to continuously operate a retail store on the leased property and was under no duty to do so. *See id.* at 513, 647 P.2d at 644. If this allegation is true, implication of a covenant of continuous operation in the lease would impose an obligation on Walgreen to which Walgreen had not agreed.

32. Bierce v. Hutchins, 205 U.S. 340, 347-48 (1907); Farber v. Mutual Life Ins. Co., 250 Mass. 250, 253, 145 N.E. 535, 536 (1924); Northwestern Oil & Gas Co. v. Branine, 71 Okla. 107, 109, 175 P. 533, 534 (1918).

33. New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 91 (1891).

34. *Walgreen*, 132 Ariz. at 515, 647 P.2d at 646. In Smith v. Phlegar, 73 Ariz. 11, 236 P.2d 749 (1951), the Arizona Supreme Court confirmed the existence of implied covenants and stated four requirements that must be met before a covenant will be implied. *Id.* at 18, 236 P.2d at 754 (citing *Covenants, Condition and Restrictions* 14 AM. JUR. § 14). The four requirements are: 1) There can be no expression on the subject in the contract; 2) there must be a clear relationship between the express provisions and the one to be implied; 3) the implied covenant must be legally necessary in view of the express terms and substance of the contract; and 4) there can be no contradiction between the express provisions and the one to be implied. In addition to these four requirements the court emphasized the fact that covenants will not be implied based solely on considerations of fairness. *Id.* The *Smith* court did not find an implied covenant on the facts before it. 73 Ariz. at 18, 236 P.2d at 754.

35. The courts have found implied covenants in other activities. *E.g.*, Savoca Masonry Co., Inc. v. Home & Son Const. Co., Inc., 112 Ariz. 392, 396, 542 P.2d 817, 821 (1975) (implied covenant of good faith dealing); A.R.A. Mfg. Co. v. Pierce, 86 Ariz. 136, 138-39, 341 P.2d 928, 930 (1959) (implied covenant to use best efforts to promote sale).

in commercial lease settings.[36]

The court relied partially on a California Supreme Court case, *Lippman v. Sears Roebuck & Co.*[37] In *Lippman*, the California court held that a lessee had impliedly covenanted to use leased property for the sale of merchandise during the entire term of the lease.[38] The *Walgreen* court set forth the five *Lippman* requirements for implied covenants:[39]

> (1) The implication must arise from the language used . . .;[40]
>
> (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it;
>
> (3) implied covenants can only be justified on the grounds of legal necessity;
>
> (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it;
>
> (5) there can be no implied covenant where the subject is completely covered by the contract.[41]

The *Walgreen* court applied these standards to the facts of the Walgreen and Tower Plaza lease.[42] The first *Lippman* requirement is that an "implication of occupancy"[43] must arise from the language used in the lease.[44] Tower Plaza argued that four clauses in the lease satisfied this requirement.[45]

One clause provided that the lessee was to pay a flat, fixed monthly rental.[46] Tower Plaza argued that this clause, when combined with extrinsic evidence that the base rent was inadequate to compensate the lessor for the use of the property, was sufficient to imply a covenant of continuous operation in its lease.[47] The court held that extrinsic evidence was not ad-

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36. *Walgreen*, 132 Ariz. at 515, 647 P.2d at 646.

37. 44 Cal. 2d 136, 280 P.2d 775 (1955).

38. *Id.* at 145-46, 280 P.2d at 781. The facts in *Lippman* are not exactly the same as those in *Walgreen* because in *Lippman* there was a percentage-of-sales lease with an inadequate minimum rent. *Id.* The *Walgreen* court distinguished cases in which the decision was based on percentage-of-sales provisions. 132 Ariz. at 516, 647 P.2d at 647. *See also infra* note 96 and accompanying text.

39. *Lippman*, 44 Cal. 2d at 142, 280 P.2d at 779.

40. *Walgreen*, 172 Ariz. at 515, 647 P.2d at 646. The ellipses are in the original *Walgreen* opinion.

41. *Id.* (citing *Lippman*, 44 Cal. 2d at 142, 280 P.2d at 779).

With the exception of the requirement of legal necessity, the requirements enumerated in *Lippman* are slightly different from the *Phlegar* requirements. *See supra* note 34. By relying on *Lippman* rather than on *Phlegar*, *Walgreen* appears to have modified the Arizona rules regarding implied covenant, so that Arizona courts may now use the five-part test of *Lippman* in implied covenant cases. *Walgreen*, 132 Ariz. at 515, 647 P.2d at 646.

42. *Walgreen*, 132 Ariz. at 515, 647 P.2d at 646.

43. The court uses this phrase without explaining its meaning or offering guidance as to what is required for an "implication of occupancy." *id.* at 516, 647 P.2d at 647. All that is clear is that there must be some showing that the lease provisions at least hinted that the parties intended a covenant.

44. *See supra* note 41 and accompanying text.

45. *Walgreen*, 132 Ariz. at 516, 647 P.2d at 647.

46. *Id.*

47. *Id.* Tower Plaza argued that the base rental charged to Walgreen did not provide, and was not intended to provide, Tower Plaza with any profit from ownership of the shopping center.

missible to create an implication of occupancy unless the lease provisions themselves gave rise to such an implication.[48] The court found that the monthly fixed rental provision, by itself, did not give rise to an implication of occupancy; therefore, no covenant of continuous operation deriving from an implication of occupancy could result from the monthly rental provision.[49]

Tower Plaza also argued that the first *Lippman* requirement was satisfied by other clauses in the lease. These clauses dealt with the size of the parking lot, the physical relationship of the stores in the shopping center, and the allowance for free access between stores in the shopping center.[50] The court concluded that no implication of occupancy arose from any of these lease provisions since they only showed that the Walgreen business was part of an "integrated" shopping center.[51] Such a showing is insufficient, by itself, to establish an implication of occupancy.[52] Because none of the terms of the lease satisfied the first requirement of the *Lippman* test, the court did not examine the remaining four elements of the test.[53]

In addition to finding no implication of occupancy in the lease terms,

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Tower Plaza's profit was to be derived from rental income from the other businesses in the center. These businesses paid rent based on their monthly sales. Walgreen was to act as a "magnet" to increase customer traffic to the other businesses, thereby increasing the business' sales and Tower Plaza's rental income. Opening Brief for Appellant at 4-5, Walgreen Arizona Drug Co. v. Plaza Center Corp., 132 Ariz. 512, 517-519, 647 P.2d 643, 646-48 (Ct. App. 1982).

48. *Walgreen*, 132 Ariz. at 516, 647 P.2d at 647. The court was clearly impressed with the importance of tying implied covenants directly to language in the lease. It is interesting to note that, when the *Walgreen* court adopted the *Lippman* five-part test, the court quoted the five requirements verbatim from the *Lippman* opinion, with one exception. *Id.* at 514, 647 P.2d at 645. The first full sentence used in *Lippman* read: "the implication must arise from the language used or it must be indispensible to effectuate the intention of the parties." 44 Cal.2d at 142, 280 P.2d at 779. The *Walgreen* court left off the second half of the sentence. 132 Ariz. at 514, 647 P.2d at 645.

This raises an interesting query as to whether the *Walgreen* court meant to adopt only the language which it included in its opinion. The court specifically states that an implication of occupancy must arise from the language of the lease, *id.*, but nowhere discusses the alternative means of satisfying the first step of the *Lippman* test. A situation could arise where the proven intention of the parties is to create a covenant of continuous operation, but there is no language in the lease which could give rise to an implication of occupancy. The court does not make clear whether its holding covers this situation.

Arguably, the court intended that the "indispensible to effectuate the intention of the parties" alternative test of *Lippman* will not be available in Arizona. The alternative test can be satisfied without the existence of a tie between the covenant of continuous operation and the written words of the lease. This seems inconsistent with the *Walgreen* court's emphasis on the importance of such a tie.

On the other hand, perhaps a finding that a covenant is indipensible to effectuate the parties' intent will satisfy the first step of the *Walgreen* test. The second step of the *Walgreen* test, which requires language in the lease which clearly demonstrates that the parties contemplated a covenant, provides a tie to the written lease, *see supra* note 41 and accompanying text. It is uncertain whether this tie would provide a sufficient connection between the lease language and the covenant, such that no further connection would be required from the first step of the test. If step two provides sufficient connection between the lease language and the implied covenant, perhaps step one can be satisfied without finding an implication of occupancy in the lease language. A finding that a covenant is "indispensible to effectuate the intention of the parties" might be enough.

49. *Walgreen*, 132 Ariz. at 516, 647 P.2d at 647. A lease which provides only for rent based on a percentage of the lessee's sales is an example of a situation where the rental term creates an implication of occupancy. *Id. See infra* notes 96-100 and accompanying text.

50. *Walgreen*, 132 Ariz. at 516, 647 P.2d at 647.

51. *Id.*

52. *Id. See also supra* note 41.

53. *Walgreen*, 132 Ariz. at 516, 647 P.2d at 647.

the *Walgreen* court emphasized that covenants will not be implied based purely on considerations of fairness.[54] The mere fact that a contract is unfair, improvident or unwise or would operate unjustly will not result in the implication of a covenant.[55]

Rejection of the New Jersey Approach

The *Walgreen* court implicitly found that the *Lippman* standards for implied covenants in general applied specifically to implied covenants of continuous operation.[56] In so holding, the court refused to follow two recent cases[57] in which the New Jersey Supreme Court did not require such stringent conditions before implying covenants of continuous operation.[58]

In *Ingannamorte v. Kings Super Markets, Inc.*,[59] the lessee operated a supermarket in a small shopping center. The lease provided that the property was to be used only for the operation of a supermarket. The lease also contained a provision restricting the lessor from admitting competing businesses into the shopping center. A dispute arose when the lessee, while continuing to pay the fixed monthly rent, closed the store and removed its exterior signs.[60]

In *Tooley's Truck Stop, Inc. v. Christanthopouls*,[61] the lessee operated a diner in a truck stop. A lease provision provided that the property was to be used only for the operation of a diner. Another provision prohibited the lessor from allowing competing businesses to enter the truck stop. The lessee closed the diner on various occasions for substantial periods of time but continued to pay the fixed monthly rental as called for in the lease.[62]

The New Jersey Supreme Court found in both cases that the lessees had implicitly covenanted to operate their businesses continuously on the leased property.[63] The court based its holdings, at least partially, on the fact that there was an economic interdependence between the operations of the lessor and the lessee.[64] The decisions were also based on the particular "use" clauses in the leases[65] and the circumstances surrounding the disputes.[66]

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54. *Id.* at 515, 647 P.2d at 646 (citing *Smith*, 73 Ariz. at 18, 236 P.2d at 754).

55. *Id.*

56. The court applied the standards to determine the existence of a covenant of continuous operation. 132 Ariz. at 515-17, 647 P.2d at 646-48.

57. Ingannamorte v. Kings Super Markets, Inc., 55 N.J. 223, 260 A.2d 841 (1970); Tooley's Truck Stop, Inc. v. Christanthopouls, 55 N.J. 231, 260 A.2d 845 (1970).

58. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648.

59. 55 N.J. 223, 260 A.2d 841 (1970).

60. *Id.* at 224-25, 260 A.2d at 841-42.

61. 55 N.J. 231, 260 A.2d at 845.

62. *Id.* at 233-34, 260 A.2d at 846-47.

63. *Ingannamorte*, 55 N.J. at 230, 260 A.2d at 844; *Tooley's*, 55 N.J. at 236-38, 260 A.2d at 848.

64. *Ingannamorte,* 55 N.J. at 227-29, 260 A.2d at 843-44; *Tooley's,* 55 N.J. at 236-38, 260 A.2d at 848.

65. *Ingannamorte*, 55 N.J. at 227-29, 260 A.2d at 843-44; *Tooley's*, 55 N.J. at 236-38, 260 A.2d at 848. *See infra* notes 83-89 and accompanying text. A "use" clause or "use and occupancy" clause, in a lease limits a lessee's right to use the leased property. Only certain specified uses are allowed. For example, a "use" clause might prohibit a lessee from using the leased property for any business other than a supermarket. *See, e.g., Ingannamorte*, 55 N.J. at 224, 260 A.2d at 841.

66. In *Tooley's*, for example, the lack of use of the property resulted in deterioration of the

The *Walgreen* court set out four reasons for not following the New Jersey cases.[67] First, the New Jersey cases represented a minority view.[68] Second, the cases overlooked the well-established rule of law that use and occupancy clauses do not prevent lessees from ceasing to use or occupy leased property.[69] Third, the specific use and occupancy clauses in the leases distinguished them from *Walgreen*.[70] Finally, the *Lippman* approach was preferable because it reduced the likelihood that a covenant would be implied where the parties did not intend one.[71]

The *Walgreen* court first stated that the New Jersey cases represented a minority view; no other cases have sustained implied covenants of continuous operation based solely on the fact that the lessee's business was part of an integrated shopping center.[72] While the New Jersey cases clearly represent a minority view,[73] the *Walgreen* court seems to have read into the cases something more than the simple conclusion that they were decided solely on the "integrated shopping center" theory. In each case the New Jersey Supreme Court based its decision not simply on the integration of the businesses in a shopping center setting,[74] but on the particular "use" clause of the lease[75] and the circumstances surrounding the dispute as well.[76]

The *Walgreen* court's second reason for not following the New Jersey cases was that the New Jersey cases overlooked the well-established rule that a covenant of continuous operation will not be implied from a use and occupancy clause.[77] Clauses restricting property to certain uses are typi-

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property. Other factors which the court considered were: the physical location of the business in the retail center, the mode of operation of the business and after execution of the lease, and the existence of an anti-competition clause in the lease. 55 N.J. at 236-38, 260 A.2d at 848.

In *Ingannamorte*, the court considered, among other things, the geographical location of the shopping center and the location of the store within the center, the anti-competition clause, and the fact that the lessor maintained a common parking area for the entire center. 55 N.J. at 230, 260 A.2d at 844.

67. *See infra* notes 68-71.

68. *Walgreen*, 132 Ariz. at 516-17, 647 P.2d at 647-48. *See infra* notes 72-76 and accompanying text.

69. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648. *See infra* notes 77-82 and accompanying text.

70. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648. *See infra* notes 83-89 and accompanying text.

71. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648. *See infra* notes 90-93 and accompanying text.

72. *Walgreen*, 132 Ariz. at 516-17, 647 P.2d at 647-48. "The only cases cited by Tower Plaza (and no others have been found by the court) which squarely hold that an implied covenant of continuous operation arises solely because the business is a part of an 'integrated' shopping center are two cases from the New Jersey Supreme Court, both decided the same day and both authored by the same judge. . . . New Jersey seems to stand alone for this proposition." *Id.*

73. They represent a minority view for two reasons: 1) courts generally will not imply a covenant of continuous operation based on the existence of an integrated shopping center; and 2) courts generally refuse to imply a covenant based on the "use" clause in a lease, *see infra* notes 83-89 and accompanying text.

74. *Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843. *Tooley's*, 55 N.J. at 236-38, 260 A.3d at 848.

75. *Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843. *Tooley's*, 55 N.J. at 236-38, 260 A.2d at 848. *See infra* notes 83-89 and accompanying text.

76. *Ingannamorte*, 55 N.J. at 230, 260 A.2d at 844. *Tooley's*, 55 N.J. at 236-38, 260 A.2d at 848. *See supra* note 66.

77. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648. For examples of cases applying the general

cally interpreted to include a right not to use the property, as well as the right to use the property for the specified uses.[78] This rule appears to be applicable in New Jersey,[79] and the New Jersey Supreme Court noted the rule[80] but decided that it did not apply to the precise facts presented in the cases.[81] The court therefore relied partially on the use clauses in finding a duty on the lessee's part to use the leased property continuously.[82]

The *Walgreen* court's third reason for not following New Jersey's lead was that the "use" clauses in the New Jersey cases were different from the "use" clause in *Walgreen*.[83] The only apparent difference in these clauses, however, was the reference in the New Jersey leases to the nature of the business to be conducted on the premises.[84] The only other major difference between the leases was that the New Jersey leases contained clauses prohibiting the lessor from allowing a competitive business to enter the shopping center.[85] The *Walgreen* lease had no such provision.

The *Walgreen* court stated that these provisions distinguished the New Jersey cases[86] but did not say why the differences were important.[87] Perhaps the answer lies in the fact that the New Jersey court attached significance to the precise words used by the parties in the leases and found that those words created, or helped to create, the implied covenant of continuous operation.[88] The *Walgreen* court implied that the New Jersey

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rule, *see* Stevens v. Mobil Oil Corp., 412 F. Supp. 809, 816 (E.D. Mich. 1976); Congressional Amusement Corp. v. Weltman, 55 A.2d 95, 96 (D.C. Mun. Ct. App. 1947); Kroger Co. v. Chemical Securities Co., 526 S.W.2d 468, 472 (Tenn. 1975); Davis v. Wickline, 205 Va. 166, 169, 135 S.E.2d 812, 814 (1964); Dougan v. H.J. Grell Co., 174 Wis. 17, 23, 182 N.W. 350, 352-53 (1921).

78. *See supra* notes 27-29, *infra* note 77, note 83 and accompanying text.

79. *See Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843; *Tooley's*, 55 N.J. at 236-37, 260 A.2d at 848 (*citing* Hoffman v. Seidman, 101 N.J.L. 106, 109, 127 A. 199, 200 (1925)); Burns & Schaffer Amusement Co. v. Conover, 111 N.J.L. 257, 263, 168 A. 304, 307 (1933); McCormick v. Stephany, 57 N.J. Eq. 257, 263, 41 A. 840, 842 (N.J. Ch. 1898), *modified*, 61 N.J. Eq. 208, 48 A. 25 (N.J. Ch. 1900).

80. *Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843; *Tooley's*, 55 N.J. at 236-37, 260 A.2d at 848.

81. In both *Ingannamorte* and *Tooley* the New Jersey Supreme Court concluded that the rule had never been applied in a case with facts such as those before the court. The court distinguished cases that held that the right to use includes the right not to use, based on the fact that none of those cases had the same use and occupancy clauses as those before the court and that the other cases did not involve economic interdependence between the lessee's and lessor's business operations. *Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843; *Tooley's*, 55 N.J. at 237, 260 A.2d at 848.

82. *Ingannamorte*, 55 N.J. at 227, 260 A.2d at 843; *Tooley's*, 55 N.J. at 237, 260 A.2d at 848. *See supra* note 76 and accompanying text.

83. 132 Ariz. at 517, 647 P.2d at 648. "[B]oth of these cases could be distinguished based on the 'use' provision in each lease. . . ." *Id. See also infra* notes 84-89 and accompanying text.

84. In *Ingannamorte* the lease provided that the leased store was "to be used and occupied only for a supermarket. . . ." 55 N.J. at 225, 260 A.2d at 841. In *Tooley's* the "use" clause stated that the premises were to be "used and occupied only for the operation of a dining car. . . ." 55 N.J. at 234, 260 A.2d at 847. In *Walgreen* the lease provided only that the premises were to be used as a retail store, making no reference to the type of retail business to be operated on the property. 132 Ariz. at 514, 647 P.2d at 645.

85. *See Ingannamorte*, 55 N.J. at 225, 260 A.2d at 842; *Tooley's*, 55 N.J. at 234, 260 A.2d at 847.

86. *See supra* note 83.

87. The court's opinion contains only the conclusory comment that the cases are distinguishable; it offers no explanation. 132 Ariz. at 517, 647 P.2d at 648.

88. *See Ingannamorte*, 55 N.J. at 229, 260 A.2d at 844 ("[t]he lease . . . contained enough on its face to imply an operating mandate. . . ."); *Tooley's*, 55 N.J. at 237, 260 A.2d at 848 ("[t]he very terms of the lease . . . clearly disclosed the economic interdependence of the [businesses in

cases might have come out differently had the lease provisions been similar to those in the *Walgreen* lease. This implication is questionable, however, since the New Jersey cases relied only partially on the "use" clauses.[89]

The fourth reason given by the *Walgreen* court for not following *Tooley's* and *Ingannamorte* was that the *Lippman* test is preferable because it reduces the likelihood that a covenant will be implied where the parties did not intend one.[90] The "integrated shopping center" theory of the New Jersey cases creates an implied covenant in the lease based on the economic interdependence between the lessor and lessee, despite the fact that the parties may not have considered this covenant to be part of their agreement.[91] The first and second parts of the *Lippman* test, on the other hand, prevent the creation of a covenant unless the covenant arises from the language of the lease and appears to have been within the contemplation of the parties.[92] Since the *Lippman* approach prevents parties from being charged with uncontemplated obligations and adds predictability to leasing agreements, the *Walgreen* court favored it over the New Jersey approach.[93]

Implications for Percentage Leases and Lease Drafting

In *Walgreen* the court stated that where the lease terms, in and of themselves, give rise to an implication of occupancy, extrinsic evidence of the inadequacy of base rent would be admissible.[94] This statement will be of major importance to Arizona lessors and lessees because it leaves an opening for implied covenants in a very comon situation—the percentage lease.[95]

The court stated, in dictum, that a percentage lease gives rise to an implication of occupancy.[96] In a lease with no base rental and a percentage-of-sales provision, an implied covenant apparently will exist even without a showing of extrinsic evidence.[97] When a lease contains both a base rental provision and a percentage-of-sales provision, an implication of occupancy will arise from the lease terms, but extrinsic evidence will be

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the truck stop]"). Perhaps the *Walgreen* court, reading the above-quoted language, concluded that the New Jersey cases turned on the fact that the leases specifically mentioned what type of retail business was to be operated on the premises. *See supra* note 84.

89. *See supra* note 75-76 and accompanying text.

90. *See* 132 Ariz. at 517, 647 P.2d at 648.

91. The New Jersey Supreme Court held that a covenant of continuous operation will be implied "[w]here . . . there was economic interdependence between the landlords' operation and that of the lessees and where the landlords' interest in the continued active operation by the lessees exceeded by far the mere payment of rent." *Tooley's*, 55 N.J. at 237, 260 A.2d at 848. For example, the lessor might have an interest in the lessee's continued operation where the lessee's operation acts as a "magnet" to attract customers to other stores in the lessor's shopping center, and those other stores pay rent based on a percentage of their sales. *Id.* at 237-38, 260 A.2d at 848-49; *see Ingannamorte*, 55 N.J. at 228-30, 260 A.2d at 843-44.

92. Lippman v. Sears Roebuck & Co., 44 Cal. 2d 136, 142, 280 P.2d 775, 779 (1955); *see supra* note 41 and accompanying text.

93. *Walgreen*, 132 Ariz. at 517, 647 P.2d at 648.

94. *Id.* at 516, 647 P.2d at 647.

95. *See id.*

96. *Id.*

97. *See id.*

necessary to establish the inadequacy of the base rental before a covenant will be implied.[98] If the base rental provision alone is adequate to compensate the lessor justly for his ownership in the property, it seems likely that the parties did not intend a duty in the lessee to continuously operate a business on the property, and no covenant of continuous operation will be implied.[99] Where the lessor relies on the percentage-of-sales provision to be adequately compensated for his ownership in the property, however, it seems more reasonable to conclude that the parties intended that the lessee continuously operate a business on the property, and a covenant of continuous operation may be implied.[100]

The court provided little guidance as to what is required to satisfy the last four parts of the *Lippman* test. Until Arizona court make clear what it required to satisfy these tests, Arizona lawyers need to be particularly cautious when drafting leases so that no unintended covenants of continuous operation will be implied into their leases. Attorneys for lessors should write covenants of continuous operation into leases where they are desired. Attorneys for lessees should insist upon express provisions which negate implied covenants, where such covenants are not contemplated by the parties.

Conclusion

In *Walgreen Arizona Drug Co. v. Plaza Center Corp.*, the Arizona Court of Appeals determined whether implied covenants of continuous operation could exist in commercial lease settings. The court held that such covenants will be implied in certain circumstances. The court rejected an approach used by the New Jersey Supreme Court which finds implied covenants where there is an economic interdependence between the business operations of the lessee and lessor. Instead, the court applied a five-step test borrowed from *Lippman v. Sears Roebuck & Co.*, a California case, to Arizona implied covenants of continuous operation.

The first step of the *Walgreen* test requires that an implication of occupancy arise from the language in the lease. While full percentage-of-sales leases will satisfy this test, pure fixed monthly rental leases probably will not. Base rental leases with percentage-of-sales provisions will satisfy the test only where the base rental is inadequate to compensate the lessor for use of the premises. The *Walgreen* lease did not contain a percentage-of-sales provision, and no implication of occupancy arose from the terms of the lease. It did not satisfy the first step in the *Lippman* test; therefore, the court found it unnecessary to discuss the other four requirements of the test. Until Arizona courts make clear what is required under the remaining parts of the *Lippman* test, Arizona lawyers must be particularly cau-

98. *Id.*

99. *Id.*

100. *See id.* Adequacy of base rent is only one factor in the determination. *Id.*

tious when drafting leases to avoid the implication of unintended covenants of continuous operation into their leases.

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