VALID, VOIDABLE, OR VOID? DEFAULT JUDGMENTS AND ATTORNEY NOTIFICATION UNDER RULE 55(a) OF THE ARIZONA RULES OF CIVIL PROCEDURE

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The Arizona Supreme Court depublished a recent Arizona Court of Appeals case, Neeme Systems Solutions, Inc. v. Spectrum Aeronautica, LLC*, on August 31, 2011. The case addressed the ambiguity in the attorney-notice requirement under Rule 55(a) of the Arizona Rules of Civil Procedure, which governs the entry of default prior to a default judgment. This Note explores possible explanations for the depublication and the ramifications of those interpretations. Specifically, the depublication indicates that the Court embraces a narrow construction of the attorney-notice provision of the rule and that a failure to comply with the requirements of Rule 55(a) renders a default judgment merely voidable rather than void.*

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INTRODUCTION

The Arizona Supreme Court left Arizona attorneys and the lower courts scratching their heads on August 31, 2011, after depublishing without comment the Arizona Court of Appeals' decision in *Neeme Systems Solutions, Inc. v. Spectrum Aeronautical, LLC*.[1] The decision in *Neeme*, irrespective of any criticism of its reasoning or conclusions, provided clarity to the ambiguous Rule 55(a)(1)(ii) of the Arizona Rules of Civil Procedure.[2] The premise of Rule 55(a)(1)(ii) is simple enough: It requires that a party's attorney, if actually known, be notified before a court clerk enters default against that party.[3] In practice, however, the application of this rule has been more complex.

The rule specifically requires that a petitioning party send notice to an attorney that represents the defaulting party, regardless of "whether or not that attorney has formally appeared," so long as the petitioning party knows of that attorney's existence.[4] In a simple civil matter between two Arizona residents, this provision may not raise any issue. In more complex litigation, however, additional questions arise. For example, must a party applying for the default of a large corporation send notice to: (1) the corporation's general counsel; (2) an attorney representing the corporation in a tangentially related dispute; (3) any other attorney

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1. Neeme Sys. Solutions v. Spectrum Aeronautical, No. CV-11-0114-PR, 2011 WL 3963588 (Ariz. Aug. 31, 2011); *see also* ARIZ. SUP. CT. R. 111(g); Neeme Sys. Solutions, Inc. v. Spectrum Aeronautical, LLC, 250 P.3d 1206 (Ariz. Ct. App. 2011) (depublished).

2. ARIZ. R. CIV. P. 55(a); *see also Neeme*, 250 P.3d at 1210–12.

3. ARIZ. R. CIV. P. 55(a)(1)(ii).

4. *Id.*

representing the corporation in an unrelated dispute; and (4) every firm when several firms represent the corporation in a single matter?[5]

The *Neeme* court held, with respect to this second question, that "the rule requires notice to an attorney who is known to be representing a party *in the dispute*, regardless of whether that attorney has formally appeared or otherwise shown any particular intention to appear in the litigation in the future."[6] In effect, that court held that notice must be given to any attorney, actually known and involved in the same or similar dispute, that represents the opposing party.[7] Further, the court of appeals held that a failure to do so would make any subsequent default judgment void.[8]

The partial clarity provided by the *Neeme* decision, issued on March 24, 2011, lasted only five months before its depublication by the Arizona Supreme Court, leaving Arizona attorneys and the lower courts to once again grapple with the application of Rule 55.[9] This Note seeks to navigate the ambiguities of Rule 55(a)(1)(ii) in the wake of this depublication.[10] Although the Arizona Supreme Court did not share its reasoning when it depublished the *Neeme* decision, an examination of prior treatment of Rule 55(a) allows for speculation as to the Court's analysis. Two likely, and not inconsistent, explanations emerge: (1) the Court considered the notice requirement articulated in *Neeme* to be too broad; and (2) regardless of that error, failure to comply with Rule 55(a)(1)(ii) renders entry of default judgment voidable, not void.

I. *NEEME* INTERPRETS RULE 55(a)(1)(ii): ATTORNEY NOTIFICATION AND VOID DEFAULT JUDGMENTS

A review of the facts in *Neeme* will provide a sufficient background to understand two practical implications of any interpretation of Rule 55(a)(1)(ii). First, what does attorney notice under the rule entail? Second, if a party fails to give sufficient notice under that interpretation, should an entry of default and subsequent default judgment be held mandatorily void or only voidable at the court's discretion?

The *Neeme* case reached the Arizona Court of Appeals after Neeme Systems Solutions, Inc. ("Neeme") appealed a trial court's decision setting aside a

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5. *See Neeme*, 250 P.3d at 1211–12.

6. *Id.* at 1211. The court of appeals explicitly declined to consider the implications of its interpretation of Rule 55(a)(1)(ii) when applied to in-house counsel, known attorneys representing the client in an unrelated dispute, and cases where multiple law firms are involved. *Id.* at 1211–12.

7. *Id.* at 1210–12.

8. *Id.*

9. Neeme Sys. Solutions v. Spectrum Aeronautical, No. CV-11-0114-PR, 2011 WL 3963588 (Ariz. Aug. 31, 2011).

10. A recent amendment to the Arizona Supreme Court Rules that allows the Court to depublish select portions of a lower court's decision has added to this confusion. Now that the Supreme Court has this power, what are the implications of *Neeme*'s full depublication? *Compare* ARIZ. SUP. CT. R. 111(g) (allowing depublication in part), *with* ARIZ. SUP. CT. R. 111(g) (1998) (providing only for complete depublication).

default judgment against Spectrum Aeronautical ("Spectrum").[11] The dispute concerned a breach of contract for aeronautical hardware and software.[12] After negotiations failed, Spectrum brought suit in the Fourth Judicial District Court in Utah County, Utah, for failure to perform in June 2009.[13] After initially responding to this suit, Neeme filed a second suit in the superior court of Maricopa County, Arizona on July 1, 2009.[14] When Spectrum failed to timely respond to the Arizona suit, Neeme filed an application for entry of default against Spectrum under Rule 55(a).[15] In order to provide notice of the Arizona suit, Neeme sent copies of the application to Spectrum's statutory agent in Delaware, its principal place of business in California, and the company's offices in Utah.[16] At the time, Neeme did not send notice of the application to any attorney.[17]

This implicates the first concern surrounding the rule. Rule 55(a)(1)(ii), which dictates when notice must be sent to a party's attorney, states that:

> When a party claimed to be in default is *known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared*, a copy of the application shall also be sent to the attorney for the party claimed to be in default. *Nothing herein shall be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default*.[18]

Neeme was unaware of any opposing counsel in the Arizona suit, and assumed that Rule 55(a)(1)(ii) did not require notice to be sent to the attorneys representing Spectrum in the Utah dispute—of whom they were aware.[19]

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11. *Neeme*, 250 P.3d at 1208.

12. *Id.*

13. *Id.*; *see also* Appellee's Answering Brief/Cross Appellant's Opening Brief/Petition for Special Action at 4–5, *Neeme*, 250 P.3d 1206 (No. 1 CA-CV 10-0149).

14. *Neeme*, 250 P.3d at 1208.

15. *Id.* For example, Rule 55(a) states: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend . . . the clerk shall enter that party's default" subject to several requirements set forth by the rule. ARIZ. R. CIV. P. 55(a). Rules 55(a), (b), and (c) generally govern the steps that must be taken before a court may issue a default judgment against a party that has failed to respond to a suit. ARIZ. R. CIV. P. 55(a)–(c). A party must first apply for an entry of default against the missing party under Rule 55(a). ARIZ. R. CIV. P. 55(a). After notice to the defaulting party and a ten-day grace period, the entry of default becomes effective and the petitioning party may seek a default judgment under Rule 55(b). ARIZ. R. CIV. P. 55(b). Rule 55(c) articulates the circumstances under which an entry of default or default judgment may be set aside. ARIZ. R. CIV. P. 55(c).

16. *Neeme*, 250 P.3d at 1208. Rule 55(a)(1)(i) provides that notice must be sent to the party "[w]hen the whereabouts of the party claimed to be in default are known by the party requesting the entry of default." ARIZ. R. CIV. P. 55(a)(1)(i). The requirement under this section will be referred to as *party notification*. In contrast, the requirement set forth under Rule 55(a)(1)(ii) will be referred to as *attorney notification*.

17. *Neeme*, 250 P.3d at 1208.

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

19. *Neeme*, 250 P.3d at 1208–09.

Following an application for entry of default, the opposing party has a ten-day grace period in which to respond before the entry becomes effective.[20] Spectrum did not respond during its grace period because "its Chief Executive Officer erroneously believed [the attorney representing Spectrum in the Utah dispute] was handling the Arizona action."[21] After the entry of default, Neeme filed a motion for default judgment, and the trial court awarded Neeme $750,000, plus interest and costs.[22] Fifteen days later, Spectrum finally responded.[23] It claimed that both the entry of default and default judgment were void for failure to notify Spectrum's Utah counsel, and added that even if Rule 55(a) did not require Neeme to send notice to the Utah counsel, the judgment was still voidable and should be set aside because the CEO's confusion was "excusable neglect."[24]

These claims introduce the second concern surrounding interpretations of Rule 55(a)(1)(ii): Does an insufficient attorney notification result in void or voidable default? Specifically, Rule 55(c) states: "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)."[25] Rule 60(c) governs when an actual judgment may be set aside. The relevant sections of Rule 60(c) state that a final judgment may be set aside for "mistake, inadvertence, surprise or excusable neglect" or if "the judgment is void."[26] In effect, Rule 55(c) gives the courts the power to set aside either an entry of default or a final default judgment. Rules 60(c)(1) and (4) highlight a void–voidable distinction often referred to by the courts when attempting to determine when a court has the discretion to set aside a default judgment or when the judgment *must* be set aside.[27]

The trial court set aside the default judgment and the court of appeals affirmed the decision.[28] The court of appeals specifically held that notice must be given to any attorney, actually known and involved in the same or similar dispute, that represents the opposing party.[29] Then, by relying on previous court of appeals cases involving insufficient party notification—including *Ruiz v. Lopez*—the court of appeals rejected Neeme's argument that insufficient attorney notice only resulted in a voidable default judgment subject to Rule 60(c)(1).[30] Rather, the court of appeals held that the default judgment issued in the matter must be set aside as void due to Neeme's failure to notify Spectrum's Utah counsel.[31]

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20. ARIZ. R. CIV. P. 55(a)(2)–(3).
21. *Neeme*, 250 P.3d at 1209.
22. *Id.* at 1208–09.
23. *Id.* at 1209.
24. *Id.* Spectrum pursued the former argument under Rule 55(c) and later under 60(c)(1). *Id.*
25. ARIZ. R. CIV. P. 55(c).
26. ARIZ. R. CIV. P. 60(c)(1), (4).
27. *Id.*; *see infra* Part II.C (discussing the void–voidable distinction).
28. *Neeme*, 250 P.3d at 1213. The trial court agreed with Spectrum that the judgment could still be set aside for "excusable neglect," whether or not the default judgment was void for lack of sufficient notice. *Id.* at 1209.
29. *Id.* at 1211.
30. *Id.* at 1209–12.
31. *Id.* at 1212; *see* ARIZ. R. CIV. P. 60(c)(4).

II. THE EVOLUTION OF RULE 55(a), THE CONCEPT OF "SUFFICIENT NOTICE," AND THE VOID–VOIDABLE DISTINCTION

A. The Evolution of Rule 55(a)

Prior to 1985, obtaining an entry of default from a court clerk in Arizona was a relatively simple task.[32] The original Rule 55(a) did not require a ten-day grace period, nor did it require any form of notification to the defaulting party.[33] But this relaxed form of the rule did not result in a larger number of default judgments than the current rule.[34] Instead, Arizona courts frequently set aside default judgments by relying on the "good cause" provision of Rule 55(c) and the "mistake, inadvertence, surprise or excusable neglect" provision of Rule 60(c)(1).[35] At the time, case law dictated that defaulting parties should have the benefit of the doubt when disputing a default judgment, keeping with the general preference of Arizona courts for resolving cases on the merits rather than by default.[36] With this advantage, a party against whom default had been entered could easily argue that the judgment should be set aside for lack of notice.[37]

In response to the regular practice of setting aside default judgments, Rule 55(a) was amended in 1985 to include the current system of notice, followed by a ten-day grace period.[38] This amendment alleviated concerns over lack of notice and incorporated the case law's deference to defaulting parties. Under the amended rule, all the defaulting party must do to stop an entry of default from becoming effective is answer within the ten-day grace period, without even showing good cause for the earlier failure to respond; in effect, the rule adds an additional ten days to the time to answer a complaint under Rule 12(a).[39] Failing to respond during the grace period, however, leads to a higher burden for defaulting parties when they move to set aside an entry of default or default judgment.[40] Thus, the court of appeals in *General Electric Capital Corp. v. Osterkamp* declared that "[t]he amended rule virtually eliminates any claim of lack of notice as a basis for

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32. Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398, 401–02 (Ariz. Ct. App. 1999).

33. *Id.* at 402. *Osterkamp* dealt with a failure to send party notice during the ten-day grace period due to an attorney's misinterpretation of the rule. The *Osterkamp* court discussed the previous form of Rule 55(a) in order to explain the implications of the new version. The previous version stated: "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these Rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default." *Id.* at 401 (quoting ARIZ. R. CIV. P. 55(a) (1984)).

34. *See id.* at 401–02.

35. *See id.* (quoting ARIZ. R. CIV. P. 55(a), 60(c)(1)).

36. *Id.* (citing Daou v. Harris, 678 P.2d 934 (Ariz. 1984); Webb v. Erickson, 655 P.2d 6 (Ariz. 1982)).

37. *Id.* at 402.

38. *Id.*; ARIZ. R. CIV. P. 55(a).

39. *Osterkamp*, 836 P.2d at 401–02.

40. *Id.* at 402 ("[I]t is only logical that the party will have a greater burden in establishing a basis for setting aside the default than before the rule was amended.").

setting aside a default."[41] Nevertheless, two issues remain: (1) what level of notice is sufficient to satisfy Rule 55(a) and allow for an entry of default to become effective; and (2) when does a court have the discretion to uphold or set aside a default judgment?[42]

B. Sufficient Notice Under Rule 55(a)(1)(i), Its Policy Goal, and Semantic Confusion

The amendment to Rule 55 reflects important policy goals. First, Arizona law prefers judgments rendered on the merits of a case, as opposed to decisions dictated by procedural rules.[43] The amended Rule 55(a) reinforces this policy in two important respects. First, it gives defaulting parties a second chance to respond by providing a ten-day grace period to appear in court after receiving notice of the application for entry of default before that entry becomes effective.[44] This allows a party to avoid the entry of default and join the tribunal so that the case is decided on its merits.[45] Second, even if the defaulting party fails to respond during the grace period, at least the courts are assured that the party received notice of the pending default and purposefully failed to appear to defend the case on its merits.[46]

Arizona Supreme Court Justice Feldman acknowledged another policy goal to consider before setting aside a default judgment: the principle of recognizing and respecting the finality of previously rendered judgments.[47] Parties may not revisit a judgment without first having a significant legal basis from which to criticize the prior decision.[48] In the context of default judgments, a conflict existed between this principle and the law's preference for deciding cases on the merits.[49] "The law favors resolution on the merits . . . . This does not mean, however, that all entries of default or judgments by default will be set aside. There is a principle of finality in proceedings which is to be recognized and given

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41. *Id.* at 402–03; *see also* Ruiz v. Lopez, 236 P.3d 444, 449–50 (Ariz. Ct. App. 2010); Corbet v. Superior Court, 798 P.2d 383 (Ariz. Ct. App. 1990).

42. *See supra* Part I.

43. *Ruiz*, 236 P.3d at 447 (citing Richas v. Superior Court, 652 P.2d 1035, 1037 (Ariz. 1982)); *see also* Almarez v. Superior Court, 704 P.2d 830, 832 (Ariz. Ct. App. 1985) (noting, prior to the 1985 amendment, "the law's preference for resolution of disputes on their merits, so that any doubts should be resolved in favor of the party seeking to set aside the default judgment" (citing Hirsch v. Nat'l Van Lines, Inc., 666 P.2d 49 (Ariz. 1983); Union Oil Co. of Cal. v. Hudson Oil Co., 640 P.2d 847 (Ariz. 1982))).

44. *Osterkamp*, 836 P.2d at 402.

45. *Id.*

46. *See id.* at 402–03 ("The amended rule virtually eliminates any claim of lack of notice as a basis for setting aside a default." (citations omitted)).

47. *Richas*, 652 P.2d at 1037.

48. *Id.* ("[A]lthough the trial court has broad discretion to resolve all doubts in favor of setting aside the entry of default or the judgment by default, 'the discretion thus vested in the court is a legal, and not an arbitrary or personal discretion . . . .'" (quoting Lynch v. Ariz. Enter. Mining Co., 179 P. 956, 957 (Ariz. 1919))).

49. *See id.*; *see also, e.g.*, Addison v. Cienega, Ltd., 705 P.2d 1373, 1374 (Ariz. Ct. App. 1985).

effect."[50] Embodying this principle, Rule 61 requires the courts to conduct a harmless-error analysis before "disturbing a judgment or order" and dictating that courts "must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."[51]

The case law that interprets Rule 55(a)(1) reflects these goals. Before *Neeme*, Arizona courts only had the opportunity to address Rule 55(a)'s provision requiring that notice must be sent to a party when that party's whereabouts are known.[52] Courts face little difficulty when interpreting this provision given that the rule's personal notice requirement functions similarly to other rules that dictate when a party must be served or given notice.[53] Subsection (i) states:

> When the whereabouts of the party claimed to be in default are known by the party requesting the entry of default, a copy of the application for entry of default shall be mailed to the party claimed to be in default.[54]

The courts have interpreted "whereabouts" to include more than an individual's home address, by including, for example, the party's place of employment.[55] In effect, the rule requires that "a party should receive the best notice practicable under the circumstances."[56]

In reaching this conclusion—measuring the quality of notice—the court of appeals cited *Mullane v. Central Hanover Bank & Trust Co.*, the U.S. Supreme Court's articulation of the due process requirements for notice in judicial proceedings.[57] This language has, perhaps, contributed to the semantic ambiguity that exists in the case law when considering insufficient party notice under Rule 55(a).[58] For example, the Arizona Court of Appeals has stated that sending insufficient party notice under Rule 55(a)(i) is "tantamount to sending no notice at all."[59] This statement suggests that failure to send party notice is a jurisdictional defect, when in fact it is only a procedural defect under Rule 55(a).[60] The case

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50. *Richas*, 652 P.2d at 1037 (citing Union Oil Co. of Cal. v. Hudson Oil Co., 640 P.2d 847 (Ariz. 1982); Camacho v. Gardner, 456 P.2d 925, 929 (Ariz. 1969)).

51. ARIZ. R. CIV. P. 61.

52. *See generally* Ruiz v. Lopez, 236 P.3d 444 (Ariz. Ct. App. 2010); Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398 (Ariz. Ct. App. 1999); Corbet v. Superior Court, 798 P.2d 383 (Ariz. Ct. App. 1990).

53. *See, e.g.*, Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (articulating the basic requirements for notice under the Due Process Clause of the U.S. Constitution); *Ruiz*, 236 P.3d at 449–50.

54. ARIZ. R. CIV. P. 55(a)(1)(i).

55. *Ruiz*, 236 P.3d at 448.

56. *Id.* at 449.

57. *Id.*

58. *See id.* (discussing the void–voidable distinction in a manner that can be interpreted as a jurisdictional rather than a procedural issue).

59. *Id.* The *Ruiz* court compounded this ambiguity when it cited *Mullane*'s language as to "notice reasonably calculated," which dealt with notice sent to establish jurisdiction as required by the Due Process Clause of the U.S. Constitution. *See id.* at 448 (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

60. *See* ARIZ. R. CIV. P. 4, 55(a).

where this language originated from actually notes that the plaintiff had properly served the defendant, thereby establishing the court's personal jurisdiction over the defendant.[61] The Arizona Supreme Court has recently clarified that procedural errors during litigation do not create jurisdictional defects when jurisdiction has already been established, regardless of muddled terminology.[62] Therefore, a failure to satisfy the requirements of Rule 55(a)(1) should not be viewed as affecting the court's jurisdiction.

C. The Void–Voidable Distinction for Insufficient Rule 55(a) Notice

In *Ruiz v. Lopez*, the Arizona Court of Appeals identified the distinction between void judgments and voidable judgments.[63] The court noted: "'Void judgments are those rendered by a court which lacked jurisdiction, either of the subject matter or the parties.' . . . 'A voidable judgment is one in which the court has jurisdiction over the subject matter and parties but is otherwise erroneous and subject to reversal.'"[64] Specifically, a decision may be "void" for a lack of subject matter jurisdiction, personal jurisdiction, or a lack of jurisdiction (or authority) "to render the particular judgment or order entered."[65] In contrast, if a court renders a decision after establishing sufficient jurisdiction, then the decision is "voidable," subject to a showing of a substantial injustice under Rule 61.[66]

Due to the semantic ambiguity noted in the previous Subsection, however, interpretations of Rule 55(a)'s party notification provision have confounded this distinction. Arizona appellate case law surrounding Rule 55(a)(1)'s party notification provision has established the following baseline rules: If a court has already issued a default judgment despite a procedural error under Rule 55(a)—that is, if the defaulting party did not receive sufficient party notice or it responded within the ten-day grace period—then the default judgment is mandatorily void if challenged by the "defaulted" party.[67] In contrast, if the petitioning party has properly sought and the court has properly rendered a default judgment, then the Arizona Supreme Court has held that the principle of finality dictates that the court may set aside the judgment only if the court has "some legal justification for the exercise of the power, [and] some substantial evidence to support it."[68] This is essentially what a "voidable" judgment entails: a judgment that will stand unless a valid excuse for the failure to respond is shown under Rule 60(c).[69]

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61. *Ruiz*, 236 P.3d at 446.

62. *See* State v. Maldonado, 223 P.3d 653, 655–57 (Ariz. 2010).

63. *Ruiz*, 236 P.3d at 449 n.3.

64. *Id.* (quoting Cockerham v. Zikratch, 619 P.2d 739, 742–43 (Ariz. 1980); State v. Cramer, 962 P.2d 224, 227 (Ariz. Ct. App. 1998)).

65. Martin v. Martin, 893 P.2d 11, 15 (Ariz. Ct. App. 1994).

66. ARIZ. R. CIV. P. 61.

67. *See* ARIZ. R. CIV. P. 55(a)(3), (c); Corbet v. Superior Court, 798 P.2d 383, 385–86 (Ariz. Ct. App. 1990) ("Because petitioner complied with the rule by filing a timely answer, the entry of default was void, as Rule 55(a)(3) specifically provides.").

68. Richas v. Superior Court, 652 P.2d 1035, 1037 (Ariz. 1982).

69. *See* ARIZ. R. CIV. P. 55(c), 60(c)(1).

To better understand the void–voidable distinction, it is helpful to retreat to the abstract level while analyzing the post-1985 case law implicating Rule 55(a). Generally these cases apply a two-step inquiry that mirrors the requirements of Rule 55(a). When a party questions the validity of an entry of default or default judgment, Arizona courts ask: (1) was the default judgment issued solely due to the defaulting party's neglect, or has the court or the petitioning party also erred; and (2) does that neglect, wherever it may lie, make an entry of default or default judgment voidable at the discretion of the court, or automatically void?[70]

First, if a plaintiff sends sufficient notice to a known, unrepresented defendant under Rule 55(a)(1)(i), and the defendant has responded within the ten-day grace period under Rule 55(a)(3), but the court clerk still allows the entry of default to become effective against the defendant, the court itself has erred.[71] Such was the case in *Corbet v. Superior Court*, where a court clerk mistakenly thought that the ten-day grace period included intervening Saturdays and Sundays.[72] The clerk then neglected to set aside the entry of default, although that party had actually responded within the grace period, and the plaintiff successfully moved for a default judgment.[73] On appeal, the court of appeals recognized that the clerk's entry of default never took effect.[74] Because the court was at fault for failing to recognize the default was ineffective, the court held that both the entry of default default and default judgment were automatically void and beyond the discretion of the trial court.[75] As the court noted: "[T]he entry of default here involved no neglect by [the defendant]. It was a ministerial act which had no effect. There was 'nothing to excuse.'" [76] The *Corbet* court held that when a court has acted outside the bounds of the Rules of Civil Procedure—that is, in the absence of authority—an entry of default is absolutely void.[77] This fundamental rule of American jurisprudence is the basis for Rule 60(c)(4), and its implications are clear: If the grace period has not actually run and expired, then regardless of the reason, default cannot be entered against a defendant under any circumstances.[78]

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70. *See, e.g.*, Ruiz v. Lopez, 236 P.3d 444, 447 (Ariz. Ct. App. 2010); Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398, 401 (Ariz. Ct. App. 1999); *Corbet*, 798 P.2d at 386–87.

71. *Corbet*, 798 P.2d at 386.

72. *Id.*; Rule 6(a), which governs the calculation of time limits under the Rules of Civil Procedure, excludes weekends from a calculation if the time limit is less than 11 days. ARIZ. R. CIV. P. 6(a).

73. *Corbet*, 798 P.2d at 384.

74. *Id.* at 386.

75. *Id.*

76. *Id.* (quoting Pemberton v. Duryea, 43 P. 220 (Ariz. 1896)).

77. *Id.*; *see also* Preston v. Denkins, 382 P.2d 686, 689 (Ariz. 1963) ("If the judgment is void for lack of jurisdiction the court has no such discretion but must vacate the judgment." (citing Gordon v. Gordon, 278 P. 375 (Ariz. 1929))); Martin v. Martin, 893 P.2d 11, 15 (Ariz. Ct. App. 1994). While the *Preston* case involved a jurisdictional defect that led to default judgment being set aside, 382 P.2d at 689, a lack of jurisdiction is akin to a lack of authority under Rule 55(a). If a court has not established or satisfied the basic procedural requirements, then the court does not have the authority to issue a default judgment.

78. *Corbet*, 798 P.2d at 386; *see also* ARIZ. R. CIV. P. 60(c)(4). It is true that Rule 60(c) is stated in permissive terms. For example, the Rule states: "On motion and upon

Second, if the court has acted within the bounds of its authority under the Rule, and a plaintiff has successfully triggered the ten-day grace period under Rule 55(a), all responsibility lies with the defendant to challenge the entry of default.[79] This was the case in *Osterkamp*, where the court found that the plaintiff correctly triggered the ten-day grace period by providing sufficient notice to the defendant, but the defendant failed to respond in a timely fashion because its counsel did not understand the implications of Rule 55(a).[80] Because both the plaintiff and the trial court had met their obligations under Rule 55(a), the entry of default and default judgment against the *Osterkamp* defendant were only voidable at the court's discretion.[81] Stated another way, the plaintiff and trial court had given the defendant an opportunity to respond and join the court in deciding the case on its merits, but because the defendant failed to respond, the defendant would need to persuade the court to exercise its discretion before setting aside the default judgment.[82] Because the judgment was still voidable, the defendant could seek to overturn its default for "mistake, inadvertence, surprise or excusable neglect," just as was the case before the 1985 amendment to Rule 55(a).[83] However, the 1985 amendment to Rule 55(a) effectively shifted the burden of proof to defaulting parties, which is more in line with courts' deference to final judgments.[84] In the end, the defendant in *Osterkamp* could not meet this high burden of showing "excusable neglect," and the court ruled in favor of upholding the default judgment.[85]

Although these rules functioned properly in the two preceding examples, a third application of the baseline rules illustrates their limits. Consider what occurs when the *Corbet* rule is applied to a case involving plaintiff error. If the plaintiff sends insufficient party notice and does not satisfy the provisions of Rule 55(a)(1), Arizona courts apply their baseline rule: If the grace period has not actually run and expired, then regardless of the reason, an entry of default cannot become effective and any subsequent default judgment is mandatorily void.[86] If a plaintiff has failed to send sufficient party notice, then the ten-day grace period never actually ran.[87] This rule suggests, then, that any entry of default or default

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such terms as are just the court *may* relieve a party or a party's legal representative from a final judgment, order or proceeding [if] . . . the judgment is void." *Id.* (emphasis added). However, the *Corbet* court correctly recognized that in the absence of authority, a court's hands are bound, regardless of ambiguous rules of procedure. *See Martin*, 893 P.2d at 15.

79. *See* Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398, 402–03 (Ariz. Ct. App. 1999).

80. *Id.* at 399, 402–03.

81. *Id.* at 403.

82. *See supra* Part II.B.

83. *See supra* Part II.B; *see also* Almarez v. Superior Court, 704 P.2d 830, 831–33 (Ariz. Ct. App. 1985). *Almarez* defined "excusable neglect" as neglect that could be made by "a reasonably prudent person under similar circumstances." *Almarez*, 704 P.2d at 833.

84. *See supra* Part II.A.

85. Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398, 403 (Ariz. Ct. App. 1999).

86. *See* Ruiz v. Lopez, 236 P.3d 444, 449 (Ariz. Ct. App. 2010).

87. *Id.*

judgment against the absent party would be absolutely void. The *Ruiz* court explicitly utilized this reasoning.[88] In that case, the plaintiff mailed notice to the defendant's apartment complex but neglected to add an apartment number.[89] The court concluded that this did not satisfy the notice requirements under Rule 55(a).[90] However, the *Ruiz* court went too far when it relied on the baseline rule and stated that the entry of default and default judgment against the defendant was "void."[91] The *Ruiz* court's language should be read carefully. The decision to set the default judgment aside was based on a procedural error and not a lack of jurisdiction.[92] As noted previously, the *Ruiz* court itself explicitly stated that void judgments "are those rendered by a court which lacked jurisdiction," while a voidable judgment "is one in which the court has jurisdiction over the subject matter and parties."[93] Yet, the court went on to hold the default judgment "void" for a procedural error under Rule 55(a).[95]

To illustrate the fatality of this ambiguity, consider a variation of the *Ruiz* facts in the context of Rule 61 of the Arizona Rules of Civil Procedure.[96] Assume that the petitioning party could show that the defaulting party in *Ruiz* had actually received the notice (imagine the mail carrier was familiar with that defendant and managed to deliver the letter without the apartment number listed in the address). A court facing this set of facts might still uphold the default judgment because the defaulting party had received actual notice and could not show that a substantial injustice had occurred.[97] Therefore, in the context of insufficient notice under Rule 55(a), the void–voidable analysis has its limits—boundaries that the *Ruiz* and *Neeme* courts exceeded.

III. WHY THE SUPREME COURT DEPUBLISHED *NEEME*

Exploration of the void–voidable distinction and its related policy goals illuminates the Arizona Supreme Court's decision to depublish *Neeme*. This section reconstructs the Supreme Court's reasoning, with and without applying the void–voidable framework.

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88. *Id.*; *see also* ARIZ. R. CIV. P. 55(a), (c), 60(c).

89. *Ruiz*, 236 P.3d at 446.

90. *Id.* at 449 ("[M]ailing the notice to Appellee's apartment complex without the apartment number was tantamount to sending no notice at all.").

91. *See id.* at 450.

92. *Id.* at 446, 450.

93. *Id.* at 449 n.3 (quoting Cockerham v. Zikratch, 619 P.2d 739, 742–43 (Ariz. 1980); State v. Cramer, 962 P.2d 224, 227 (Ariz. Ct. App. 1998)).

95. *Id.* at 450.

96. ARIZ. R. CIV. P. 61 ("[N]o error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice.").

97. *Id.* It would be a stretch of imagination to hold that the petitioning party's failure to write a number on an address is a form of substantial injustice when the defaulting party still received actual notice. *See id.*

Before reconstructing the *Neeme* case, a brief review of the Court's depublication rule is appropriate. The recent amendment to Rule 111(g), which governs when and how a court of appeals decision may be depublished, grants the Court the power to depublish select portions of a lower court's decision.[99] During a recent visit to the James E. Rogers College of Law at the University of Arizona, Chief Justice Berch, Vice Chief Justice Hurwitz, and Justice Pelander explained the advantage of this new rule.[100] Previously, if the Court agreed with the final outcome of a lower court's decision, but found a single element of the lower court's analysis inappropriate, the Court could either depublish the entire decision or issue its own.[101] Both options were unsavory. New opinions require a considerable amount of time at the expense of both the parties and the Court, but a full depublication can leave the lower courts guessing as to where they had erred.[102] The current version of Rule 111(g) allows the Court to selectively depublish those portions of a lower court's opinion that it finds erroneous.[103] Despite this new rule, the Court chose to fully depublish the *Neeme* decision.[104] The reasoning behind, and implications of, this decision are unclear. The Court probably agreed with the outcome of *Neeme*—that entry of default and default judgment against Spectrum should be set aside—because it did not reverse the decision. But how did the Court arrive at this decision?

A. Reconstructing the Neeme *Depublication Under the Current Case Law*

Perhaps the Court felt that Neeme satisfied the provisions of Rule 55(a) (i.e., notice is not required for attorneys representing the defaulting party in separate suits), but that the default judgment should still be set aside for excusable neglect. To understand how the Court may have arrived at this conclusion, it is helpful to apply the void–voidable framework outlined in Part II. First, suppose that the Court felt that Neeme did satisfy the attorney-notification provision and was not required to notify the Utah attorney. Under this assumption, there is no procedural deficiency.[105] Therefore, the default judgment against Spectrum would

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99. ARIZ. SUP. CT. R. 111(g). Professor Berch criticized the previous depublication rule in Arizona and offered several changes to the rule. Michael A. Berch, *Analysis of Arizona's Depublication Rule and Practice*, 32 ARIZ. ST. L.J. 175, 175–82 (2000). Specifically, Berch suggested providing the Supreme Court with the power to depublish select portions of a court of appeals' decision, so long as the Supreme Court also explained its decision. *Id.* at 200–01. The recently amended Rule 111(g), however, does not require any such explanation. *See* ARIZ. SUP. CT. R. 111(g).

100. Public Question & Answer Session Before Arizona Supreme Court, at 5:18–7:39 (Sept. 22, 2011) [hereinafter Public Q&A] (video available at http://supremestateaz.granicus.com/MediaPlayer.php?view_id=2&clip_id=751).

101. *Id.*; *see also* ARIZ. SUP. CT. R. 111(g) (1998).

102. Public Q&A, *supra* note 100.

103. *See* ARIZ. SUP. CT. R. 111(g).

104. Neeme Sys. Solutions v. Spectrum Aeronautical, No. CV-11-0114-PR, 2011 WL 3963588 (Ariz. Aug. 31, 2011).

105. *See* ARIZ. R. CIV. P. 55(a)(1); *see also supra* Part II.C. This reconstruction of the *Neeme* depublication would be akin to the facts and analysis in *Osterkamp*. *See* Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398 (Ariz. Ct. App. 1999).

only be voidable for "mistake, inadvertence, surprise or excusable neglect."[106] The default judgment could still be set aside though, because Spectrum probably could show excusable neglect. Their CEO misunderstood the scope of the Utah attorneys' representation and erroneously believed that they were aware of the Arizona suit.[107]

This explanation is plausible for several reasons. First, because the Court now has the power to depublish select portions of a case, a full depublication implies that the Court finds the majority of a lower court's decision faulty, but that the end result is satisfactory under the Court's own analysis. The hypothetical explanation above satisfies this reasoning. It assumes that the court of appeals erred in the most significant parts of its holding that: (1) attorney notification requires notifying attorneys that represent the defaulting party in similar but separate suits, and (2) the judgment was therefore void.[108]

Second, this assumption matches well with the void–voidable framework outlined in Part II. If the plaintiff and court have satisfied the requirements of Rule 55(a), then a previously rendered default judgment is only voidable at the court's discretion.[109] The assumption explains that the plaintiff here (Neeme) *did* satisfy the requirements of the rule when it only sent party notice. Therefore, the entry and judgment against Spectrum should be viewed only as voidable, just as the assumption asserts.

Third, the true cause of Spectrum's failure to respond to the Arizona suit was not a failure on the part of the plaintiff or the court, but rather the CEO's confusion over the scope of the Utah attorney's representation, which is a form of excusable neglect. The trial court in *Neeme* actually found that Spectrum had shown excusable neglect, though the court of appeals did not go so far, because it found the judgment void and considered more analysis unnecessary.[110] Furthermore, because the trial court had already found excusable neglect in this case, there would be no reason for the Supreme Court to remand the case for further inquiry.[111] Hence, a depublication under this interpretation seems appropriate.

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106. ARIZ. R. CIV. P. 60(c)(1); *see also Osterkamp*, 836 P.2d at 401–03.

107. Neeme Sys. Solutions, Inc. v. Spectrum Aeronautical, LLC, 250 P.3d 1206, 1209 (Ariz. Ct. App. 2011) (depublished). The trial court agreed with Spectrum in that the judgment could still be set aside for "excusable neglect," whether or not the default judgment was void for lack of sufficient notice. *Id.* at 1208–09.

108. *Id.* at 1210–12.

109. *See Osterkamp*, 836 P.2d at 403.

110. *Neeme*, 250 P.3d at 1209.

111. An appellate court can affirm a lower court on any grounds supported by the record. Yauch v. S. Pac. Transp. Co., 10 P.3d 1181, 1190 (Ariz. Ct. App. 2009). If the Supreme Court felt that the trial court had not abused its discretion in finding excusable neglect, the Court could affirm that decision despite the erroneous holding that the default judgment was void.

B. Reconstructing the Neeme *Depublication and Correcting the Current Case Law's Semantic Ambiguity*

A second interpretation considers the possibility that the Court felt that notification to the Utah attorney was required, but regardless of whether notice was required, insufficient attorney notification under Rule 55(a)(1)(ii) only leads to a voidable default. This explanation is also consistent with the implications of a full depublication, and would still result in the default judgment in *Neeme* being set aside for excusable neglect. More importantly, though, this explanation seems likely given the procedural—not jurisdictional—nature of a failure to comply with Rule 55.[112] For practitioners sending notice to defaulting parties, this interpretation is no different than the first. There would still be no requirement to notify those attorneys that only represent the defaulting party in a separate suit. However, this interpretation has serious consequences for those lower courts that face revisiting default judgments to determine whether they should be set aside.

If the Arizona Supreme Court agrees that the case law's semantic ambiguity—that a notice failure under Rule 55(a) can result in a "void" default judgment—is erroneous, then the default judgment issued in *Neeme* was only voidable. The uncertainty of this proposition was discussed above.[113] While a default judgment issued by a court that lacks jurisdiction is void on its face, a judgment that contains a procedural defect is merely voidable at the discretion of the reviewing court.[114] Moreover, as stated in Part II.C, the case law's rule is less applicable in the case of insufficient notice under Rule 55(a) due to the fact that the plaintiff's failure may have only resulted in a harmless error.[115] To clarify this point, it is helpful to revisit the hypothetical variation on the *Ruiz* case involving harmless error.[116] Suppose the petitioning party could show that the mail carrier had still managed to deliver the letter to the defaulting party despite the missing apartment number. Under those facts, the default judgment could not be set aside, because the defaulting party would have actual notice and the missing number would only be a harmless error.[117] Similarly, this interpretation of *Neeme* suggests that when a petitioning party sends sufficient party notice, but fails to send notice to an attorney representing the defaulting party in that very suit, the defaulting party would still have *actual notice*. If, under this hypothetical, the trial court rendered a default judgment despite the insufficient attorney notification, a court revisiting that decision would not be able to overturn the earlier decision because the Rule 55(a) violation was harmless error.[118]

In fact, to say that a default judgment is "mandatorily void" after a court reviews whether or not attorney notification was sufficient is a misnomer.[119] As soon as a court revisits a default judgment against a party over whom the court has

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112. *See supra* Part II.C.
113. *See supra* Part II.C.
114. Ruiz v. Lopez, 236 P.3d 444, 449 (Ariz. Ct. App. 2010).
115. *See supra* notes 86–96 and accompanying text.
116. *See supra* notes 86–96 and accompanying text.
117. *See supra* notes 96–97.
118. *See* ARIZ. R. CIV. P. 55(a), 61.
119. *See supra* Part II.C.

personal jurisdiction and allows parties to discuss whether the petitioning party has failed to provide sufficient notice under Rule 55(a), whether for party or attorney notice, that court has essentially started a "voidable" analysis, looking for a substantial legal basis to set aside the judgment.[120] This could be an error by the court clerk (e.g., misinterpretation of the rule), the petitioning party (e.g., failure to give the opposing party actual notice), or the defaulting party (e.g., excusable neglect).[121] Regardless of who erred, the reviewing court is basically looking for a substantial injustice against the defaulting party before overturning a final judgment.[122]

This interpretation has important additional merit. By acknowledging that insufficient attorney notification should not result in a void default judgment, the principle of finality would be reinforced. A court could not set aside a previously rendered default judgment simply for a procedural error under Rule 55(a)(1)(ii). Instead, the court would require a party show a substantial legal basis, such as excusable neglect, before disrupting the finality of the previous decision.[123] This is consistent with the purpose of the 1985 amendment, as stated by *General Electric Capital Corp. v. Osterkamp*:

> The amended rule virtually eliminates any claim of lack of notice as a basis for setting aside a default. The defaulting party who fails to timely answer or otherwise defend after receiving the notice provided in the summons, plus the application for entry of default, will have greater difficulty in showing that such failure was the result of excusable neglect.[124]

Thus the court would require a party like Spectrum to show a significant legal basis for setting aside the default judgment under Rule 60(c).[125] Although it would be a significant departure from the case law that has developed since the 1985 amendment to the rule (perhaps explaining why the Arizona Court of Appeals declined to accept this interpretation), this explanation is consistent with the 1985 amendment's purpose of limiting challenges against final default judgments.

As a final note, we should consider what might occur in practice if a violation of the attorney-notification provision required the courts to automatically set aside default judgments as void. Under such a rule, if a default judgment were issued against a represented defendant in the absence of attorney notification, the defendant could ignore the proceedings and subsequent default judgment for several years and then have the judgment set aside as void.[126] Then, with the

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120. *See supra* Part II.C.

121. Ruiz v. Lopez, 236 P.3d 444, 449–50 (Ariz. Ct. App. 2010); Gen. Electric Capital Corp. v. Osterkamp, 836 P.2d 398, 401–03 (Ariz. Ct. App. 1999); Corbet v. Superior Court, 798 P.2d 383, 385–86 (Ariz. Ct. App. 1990).

122. ARIZ. R. CIV. P. 61; *see also supra* note 96 and accompanying text.

123. *See* ARIZ. R. CIV. P. 60(c); *see also supra* Part II.C.

124. 836 P.2d at 402–03 (citations omitted).

125. ARIZ. R. CIV. P. 60(c)(1).

126. *Ruiz*, 236 P.3d at 449 ("There is no time limit for filing a motion under Rule 60(c)(4), and the court must vacate the void judgment even if the moving party unreasonably delayed brining such motion.").

plaintiff facing the litigation of an ancient claim, the defendant would have unfair settlement leverage over the plaintiff, all because the defendant intentionally kept quiet about the attorney notice error. Furthermore, plaintiffs would be discouraged from seeking out a defendant's representative and engaging in settlement negotiations prior to default. Because Rule 55(a)(1)(ii) imposes no obligation to determine whether a defendant is represented, a rule rendering default judgments void for lack of attorney notice provides a strong incentive to remain ignorant of an opposing party's representation to ensure that any subsequent default judgment would not be set aside automatically for lack of attorney notification.[127]

CONCLUSION

The Arizona Supreme Court's depublication of *Neeme* has two implications for practitioners. First, the attorney notification may not require notice to be sent to those attorneys representing the defaulting party in a separate suit. This much is clear. Whether the Court considered a violation of the attorney-notification provision void or voidable, however, seems more debatable. Stating that a violation of this provision should result in a void default judgment seems consistent with the current state of the law surrounding party notification under Rule 55(a) and is consistent with the implications of a full depublication. However, the void–voidable framework used in party notification cases contains a semantic flaw. While the framework often manages to function in the context of party notification, this void–voidable distinction seems erroneous when dealing with insufficient attorney notification. So long as the issuing court has sufficient jurisdiction, a default judgment issued despite a violation of the attorney-notification provision should only be voidable, not void. This second explanation would represent a startling divergence from the current state of the law, but is more in line with the true definition of "void" and "voidable," is consistent with the policy goals of the 1985 amendment to Rule 55(a), and would avoid the undesirable effects of the automatically-void rule.

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127. *See* ARIZ. R. CIV. P. 55(a)(1)(ii). This rule does not impose any affirmative duty on a petitioning party to discover whether the defaulting party is represented or not, and only requires attorney notification if the petitioning party is aware of that attorney's ties with the defaulting party. *Id.*