SHORT TRIALS: AN APPROPRIATE REPLACEMENT FOR COMPULSORY ARBITRATION IN ARIZONA?

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For over four decades, the Arizona Legislature has required parties with small-dollar civil disputes to submit their disputes to compulsory arbitration before trial in Arizona's Superior Court. Overall, compulsory arbitration has been successful in reducing the litigation costs of such cases and in resolving smaller disputes.

In 2015, the Arizona Supreme Court established the Committee on Civil Justice Reform. In one of its four categories of proposed reform, the Committee focused on compulsory arbitration. Rather than revise the existing rules to improve the compulsory-arbitration system, the Committee chose to propose a pilot program in Pima County, to begin in 2017. Under that program, a plaintiff could opt for a short trial, with modified pre-trial and trial rules, in lieu of compulsory arbitration. The Committee hopes that the pilot program will reverse the trend of the vanishing civil jury trial.

This Essay reviews the Committee's work on compulsory arbitration and the proposal's potential pitfalls, summarizes Arizona data regarding jury trials and compulsory arbitration, and suggests proposals to consider in future efforts to improve the compulsory-arbitration program.

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INTRODUCTION

Arizona's Superior Court needs a system to resolve small-value claims efficiently and inexpensively.[1] As required by statute,[2] the Superior Court provides for compulsory arbitration of smaller claims. Since its inception, the compulsory-arbitration program has been modified to address abuses, expand its reach, and discourage appeals. Yet, further reform is still needed to address present inefficiencies.

The creation of the Arizona Supreme Court's Committee on Civil Justice Reform ("CCJR") presented an opportunity for that reform. However, rather than reform the compulsory-arbitration program, the CCJR proposed an alternative to compulsory arbitration—a pilot program for short trials—to be implemented in Pima County. The CCJR designed the pilot program to increase the percentage of civil cases tried in Arizona, which in the preceding decade, had fallen from 0.8% to 0.4%. Unfortunately, the CCJR's proposed pilot program suffers from both

1. In the Matter of the Establishment of the Committee on Compulsory Arbitration in the Superior Court of Arizona, Administrative Order No. 2005-79 (Ariz. 2005), http://www.azcourts.gov/portals/22/admorder/orders05/2005-79.pdf.

2. ARIZ. REV. STAT. ANN. § 12-133 (2016).

constitutional and practical challenges and is unlikely to produce the desired results of reduced time and monies spent on resolving smaller claims.

If these results are to be reached, the existing compulsory-arbitration system should be reformed—not cast aside entirely for a new short-trial system. Such potential reforms discussed below include requiring parties to consider other forms of alternative dispute resolution, engaging only interested arbitrators, altering the timing of expert disclosure and discovery, and modifying the statutory sanctions.

I. THE CCJR'S SHORT-TRIAL PROPOSAL

In December 2015, the Arizona Supreme Court established the 25-member CCJR.[3] The Court charged the CCJR with "develop[ing] recommendations, including rule amendments or pilot projects, to reduce the cost and time required to resolve civil cases in Arizona's superior courts."[4] The Court tasked the CCJR with looking at three specific materials: (1) the report and recommendations of the Conference of Chief Justices' Civil Justice Initiative;[5] (2) the reports and recommendations of the Institute for the Advancement of the American Legal System ("IAALS"), particularly its Rule One Initiative[6] and April 2015 Report on civil justice reform;[7] and (3) the 2015 federal court rules amendments.[8]

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3. Appointment of Members to the Pretrial Servs. Comm., Admin. Order No. 2015-126 (Ariz. 2016) [hereinafter Admin. Order No. 2015-126], https://www.azcourts.gov/Portals/22/admorder/Orders15/2015-125.pdf.

4. ARIZ. SUPREME COURT, COMM. ON CIVIL JUSTICE REFORM, A CALL TO REFORM 1 (2016) [hereinafter A CALL TO REFORM], http://www.azcourts.gov/cscommittees/Committee-on-Civil-Justice-Reform (follow the "Report and Recommendations" hyperlink). The Committee a substantial number of proposed amendments to the Arizona Rules of Civil Procedure, including new provisions providing for the Committee's short-trial proposal. *See id.* app. 1A *passim* [hereinafter CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P.]. For citation purposes, this Essay will refer to the Committee's report and the Committee's proposed amendments to the Arizona Rules of Civil Procedure as though they are separate documents.

5. NAT'L CTR. FOR STATE COURTS, CALL TO ACTION: ACHIEVING CIVIL JUSTICE FOR ALL (2016) [hereinafter CALL TO ACTION], https://www.ncsc.org/~/media/Microsites/Files/Civil-Justice/NCSC-CJI-Report-Web.ashx.

6. For more information on the Rule One Initiative, see *Rule One Initiative*, IIALS, http://iaals.du.edu/rule-one (last visited Feb. 20, 2017).

7. AM. COLL. OF TRIAL LAWYERS & INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., REFORMING OUR CIVIL JUSTICE SYSTEM: A REPORT ON PROGRESS AND PROMISE (2015) [hereinafter REFORMING CIVIL JUSTICE], http://iaals.du.edu/sites/default/files/documents/publications/report_on_progress_and_promise.pdf.

8. Admin. Order No. 2015-126, *supra* note 3, at 1–2.

A. The CCJR's Deliberations

The CCJR first met in February 2016.[9] At that first meeting, one member raised concerns about the vanishing jury trial, lawyers' inexperience at trial, and a desire to put compulsory-arbitration cases directly on a trial track.[10] Members also raised other concerns related to compulsory arbitration including whether frequent litigants, such as insurance carriers, take compulsory arbitration seriously; whether the dollar limit for cases subject to arbitration should be raised;[11] whether sanctions for unsuccessful appeals should be increased;[12] and whether a short list of experienced private attorneys who are willing to serve as arbitrators may be preferable to the existing model of all county residents who have been active members of the State Bar of Arizona for at least four years.[13] Subsequently, the CCJR composed a workgroup of seven individuals to address potential reforms and alternatives to compulsory arbitration.[14]

At its meetings later that spring, the CCJR considered various questions, including whether the current compulsory-arbitration process should be replaced;[15] whether there should be a combination of arbitration and fast-track trials;[16] whether professional hearing officers or retired judges should serve as arbitrators;[17] whether arbitrators should be assigned based on subject-matter experience;[18] whether a plaintiff should be required to waive her right to a jury trial if she elected to proceed with compulsory arbitration;[19] and whether there should be a pilot program to test proposals.[20] In those discussions, the CCJR acknowledged that the current compulsory-arbitration system "did relieve a backup of civil cases on the court's docket, at least in Pima County."[21] Also, the CCJR "determined that Arizona's current system may resolve smaller disputes less expensively, but not necessarily more quickly, than occurs in full-fledged civil litigation."[22]

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9. For the draft minutes of the February 16, 2016, CCJR meeting, see CCJR, MEETING MINUTES: FEBRUARY 16, 2016 (2016) [hereinafter FEBRUARY MINUTES], http://www.azcourts.gov/Portals/74/CJRC/02162016/MeetingPacketRED.pdf.

10. *Id.* at 4.

11. *Id.* at 6–7.

12. *Id.* at 6, 8.

13. *Id.* at 6–7, 9.

14. Memorandum from Don Bivens to [CCJR], (Mar. 9, 2016), http://www.azcourts.gov/Portals/74/CJRC/03152016/3Memo.pdf.

15. CCJR, DRAFT MEETING MINUTES: MARCH 15, 2016, at 7 (2016) [hereinafter MARCH MINUTES], http://www.azcourts.gov/Portals/74/CJRC/04182016/2DraftMinutes.pdf.

16. CCJR, DRAFT MEETING MINUTES: APRIL 18, 2016, at 2 (2016) [hereinafter APRIL MINUTES], http://www.azcourts.gov/Portals/74/CJRC/05172016/2DraftMinutes.pdf.

17. *Id.* at 2–3.

18. CCJR, DRAFT MEETING MINUTES: SEPTEMBER 13, 2016, at 3 (2016) [hereinafter SEPTEMBER MINUTES], http://www.azcourts.gov/Portals/74/CJRC/01062017/2DrafMinutes09132016.pdf.

19. APRIL MINUTES, *supra* note 16.

20. *Id.* at 4.

21. *Id.* at 3; A CALL TO REFORM, *supra* note 4, at 18.

22. A CALL TO REFORM, *supra* note 4, at 18.

Thereafter,[23] the CCJR developed the concept of a pilot program wherein a plaintiff would have the right to opt into either a short trial or compulsory arbitration, and ultimately, approved it unanimously. The CCJR selected Pima County for the pilot program, in part, because of Maricopa County Superior Court's concerns regarding the operation and final impacts of the proposal.[24]

B. The CCJR's October 2016 Proposal

The CCJR approved the proposal for the pilot program, which was published in October 2016 and was to be implemented in 2017.[25] Its features are as follows:

> 1. For cases valued under $50,000, the Superior Court would provide for a short trial as an alternative to compulsory arbitration.[26] Parties would not be able to select a standard trial track for these smaller cases.
>
> 2. The plaintiff would have to elect between a short trial or a compulsory arbitration.[27] A failure to make a choice would result in a short trial.[28]
>
> 3. If a plaintiff were to select compulsory arbitration, current rules would apply[29] with two modifications, one minor and one significant. First, for compulsory-arbitration cases, the "clerk or court administrator should endeavor to select and assign an arbitrator with experience in the subject matter of the action."[30] Second—and crucially—the plaintiff would waive any right to challenge the arbitration proceedings, the award, or any judgment entered on the award.[31] The plaintiff would have no right to a trial de novo; however, the defendant would retain the right.[32]
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> 4. If a plaintiff selected a short trial, there would be a trial of two days or less[33] in Superior Court before a judge or a six-person jury.[34] The plaintiff alone would have the choice of proceeding to a

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23. CCJR, DRAFT MEETING MINUTES: MAY 17, 2016, at 1–2 (2016) [hereinafter MAY MINUTES], http://www.azcourts.gov/Portals/74/CJRC/06142016/2DraftMinutes05172016.pdf; CCJR, DRAFT MEETING MINUTES: JUNE 14, 2016, at 2–3 (2016) [hereinafter JUNE MINUTES], http://www.azcourts.gov/Portals/74/CJRC/07192016/2DraftMinutes.pdf; CCJR, DRAFT MEETING MINUTES: AUGUST 23, 2016, at 8–9 (2016) [hereinafter AUGUST MINUTES], http://www.azcourts.gov/Portals/74/CJRC/09132016/2DraftMinutes08232016.pdf.

24. JUNE MINUTES, *supra* note 23, at 2.

25. AUGUST MINUTES, *supra* note 23, at 9.

26. A CALL TO REFORM, *supra* note 4, at 19.

27. *Id.*

28. CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P., *supra* note 4, r. 72.1.

29. *Id.* r. 72–77.

30. *Id.* r. 73(c).

31. *Id.* r. 72(f).

32. *Id.* r. 77(a).

33. *Id.* r. 75.1(e).

34. *Id.* r. 75.1(e)(2) (providing that five of the six jurors must agree on a verdict).

> short trial, and the defendant would be bound by the plaintiff's choice.[35] The trial would be set between 180 and 270 days of the Complaint's filing.[36] The trial would be subject to time limits, including a cap of three hours per side for presenting a case in chief, including cross-examination and rebuttal.[37] Before the short trial, no party would be allowed to utilize Rule 68 offers of judgment.[38] Expert and treating physician depositions would be limited to one hour per side, for a total of two hours.[39] An expert may only charge the taking party $500 per hour for depositions, and the cost of the deposition should be apportioned based upon the witness' time used by each party.[40] Video depositions could be videotaped with any reliable device.[41] Discovery limits would also be consistent with the CCJR's recommended Tier One limitations, along with allowing only one examination under Rule 35 of the Arizona Rules of Civil Procedure[42]

II. ANALYSIS OF THE CCJR'S CONCERN OF THE VANISHING CIVIL JURY TRIAL AND ITS PROPOSAL FOR SHORT TRIALS

While the CCJR's concern regarding the vanishing civil jury trial has some merit, its proposal for a short-trial program is flawed; it will not provide for the efficient and inexpensive handling of small-value claims.

A. The Vanishing Civil Jury Trial in Arizona

In the United States, the right to a jury trial has always been seen as critical,[43] as the Federal Constitution[44] and Arizona Constitution[45] expressly create this right. Nonetheless, much has been written about the vanishing civil jury trial in the United States.[46] The same trend exists in Arizona, with very few civil cases

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35. *Id.* r. 73.1(a).
36. *Id.* r. 74.1(h).
37. *Id.* r. 75.1(e).
38. *Id.* r. 73.1(f).
39. *Id.* r. 74.1(d).
40. *Id.* r, 74.1(d), (f).
41. *Id.* r. 74.1(e).
42. *Id.* r. 74.1(c).
43. *See* THE FEDERALIST NO. 83, at 563 (Alexander Hamilton) (J. Cooke ed. 1961) (summarizing that all favored preservation of the right to a civil jury trial and that it provides "a security against corruption").
44. U.S. CONST. amend. VII.
45. ARIZ. CONST. art. 2, § 23; *id.* art. 6, § 17; *see also* Fisher v. Edgerton, 336 P.3d 167, 177 (Ariz. 2014) (noting that the Seventh Amendment has never been incorporated into the Due Process Clause of the Fourteenth Amendment). In Arizona state courts, the right to a jury trial applies to all claims that existed at the time of statehood, Smith v. Ariz. Citizens Clean Elections Comm'n, 132 P.3d 1187, 1196 (Ariz. 2006), including rights commonly relegated to compulsory arbitration. *See, e.g.*, Valler v. Lee, 949 P.2d 51, 53 (Ariz. Ct. App. 1997).
46. *See, e.g.*, Rosalind R. Greene & Jan Mills Spaeth, *The Vanishing Jury Trial Phenomenon & Trial Preparation*, ARIZ. ATT'Y, Apr. 2010, at 22; Marc Galanter, *The Vanishing Trial: An Examination of Trial and Related Matters in Federal and State Courts,*

being tried before juries. The CCJR expressed this concern as the major rationale in support of its proposal for short trials.[47]

In Arizona's Superior Court, both the actual number of civil jury trials and the percentage of civil cases tried have steadily declined over the last decade. Figure 1 provides a summary of the actual number of civil jury trials in Arizona's Superior Court, and particularly Maricopa and Pima counties, for Fiscal Years 2005–2015.[48]

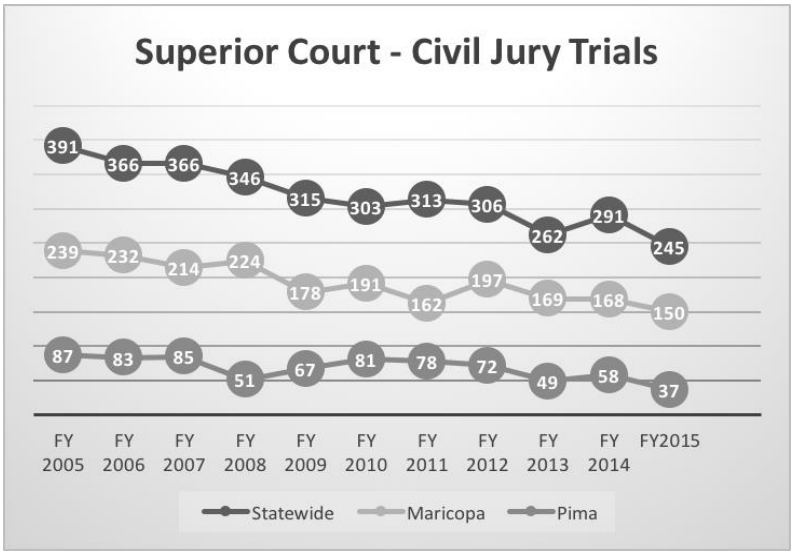

Figure 1: Civil Jury Trials in Arizona Superior Court

Many in the Arizona legal community are troubled[49] that in 2015 there were only 150 civil jury trials in Maricopa County, a county of over 4 million people,[50] and only 37 civil jury trials in Pima County, a county of approximately 1 million people.[51]

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1 J. EMPIRICAL LEGAL STUD. 459, 530 (2004); Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 323 (2012).

47. A CALL TO REFORM, *supra* note 4, at 18–19.

48. *See Statistics*, ARIZ. JUD. BRANCH, http://www.azcourts.gov/statistics/# (last visited Jan. 30, 2017).

49. *See, e.g.*, Greene & Spaeth, *supra* note 46.

50. *See* U.S. Census Bureau, *ACS Demographic and Housing Estimates: Maricopa County, Arizona*, AM. FACT FINDER, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/DP05/0500000US04013 (last visited Jan. 30, 2017) (estimating the 2015 population of Maricopa County, Arizona, to be 4,018,143).

51. U.S. Census Bureau, *ACS Demographic and Housing Estimates: Pima County, Arizona*, AM. FACT FINDER, https://factfinder.census.gov/bkmk/table/1.0/en/ACS/15_5YR/DP05/0500000US04019 (last visited Jan. 30, 2017) (estimating the 2015 population of Pima County, Arizona, to be 998,537). By comparison, looking at data from Pima County from Fiscal Year 1991 to the

Not only is the number of civil jury trials decreasing, but so is the percentage of civil jury trials compared to the total number of cases terminated in the Superior Court.[52] As displayed in Figure 2, that statewide percentage has decreased from 0.8% to 0.4% over the last decade. Five years prior to this data set, in Fiscal Year 2000, the statewide percentage was 1.5%.[53]

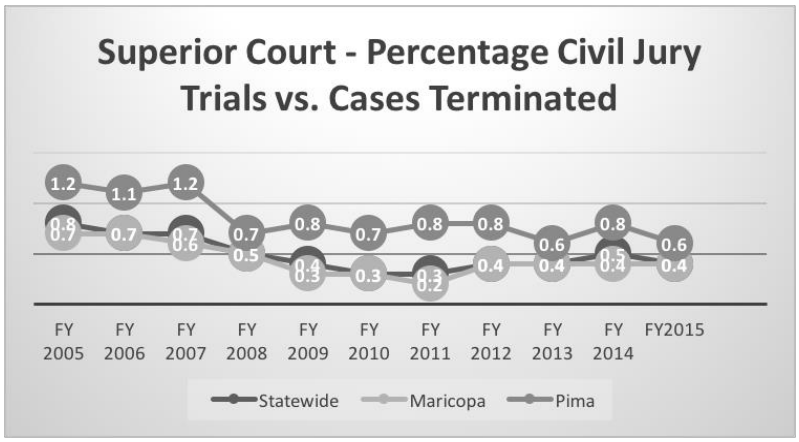

Figure 2: Civil Jury Trials vs. Cases Terminated in Arizona Superior Court

These steady declines are even more troubling when viewed with respect to the number of original case filings in the Superior Court over the same period, depicted in Figure 3. The number of civil cases filed creates a neat bell curve, with the most civil cases filed in Fiscal Year 2010.[54] Even when case filings returned to their previous levels from a decade earlier, the trial rate had decreased by approximately half.

present, the highest number of civil jury trials occurred in Fiscal Year 1998 when there were 175 civil jury trials. Pima County Superior Court Commenced Civil Jury and Court Trials Covering Fiscal Years 1991–2016 (on file with author).

52. *See Statistics*, *supra* note 48.

53. *Id.*

54. *Id.*

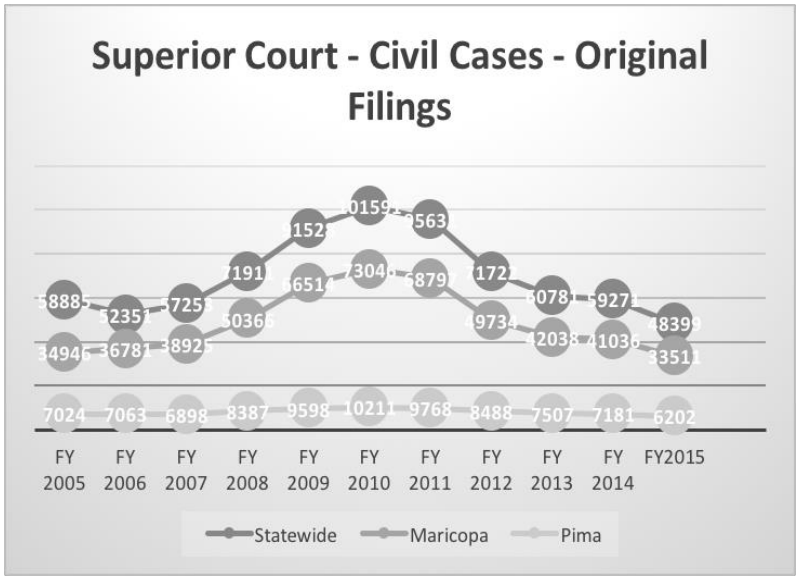

Figure 3: Civil Case Original Filings in Arizona Superior Court

One primary concern is that with fewer jury trials, fewer lawyers know how to try a case, and thus are potentially "more interested in trying to settle it" as a result.[55] It is difficult to test this hypothesis; however, one potential method is to look at the number of bench trials in Arizona and compare that number to the number of civil jury trials. If the number of bench trials has stayed constant in the face of declining civil jury trials, maybe the concern of lawyers' fear of jury trials is appropriate. When looking at the data (depicted in Figure 4), the numbers do not seem to support this hypothesis. At least in the Superior Court[56] during fiscal years 2005–2015, there has been an even greater percentage decline in bench trials statewide and in Maricopa County than the decline in civil jury trials; the relative decline in Pima County is remarkably similar.[57]

55. Greene & Spaeth, *supra* note 46, at 24–26; *accord* A CALL TO REFORM, *supra* note 4, at 18.

56. This phenomenon also manifests itself in federal courts. *See* Stephen D. Susman, Keynote Address at the 35th Annual Conference of the American Society of Trial Consultants: Disappearing Civil Trials 6–7 (May 20, 2016) (transcript available at http://civiljuryproject.law.nyu.edu/scholarship/the-declining-state-of-juries-in-america/) (suggesting that in federal court the decline in bench trials has been faster than jury trials).

57. *See Statistics*, *supra* note 48. By comparison, looking at data from Pima County from Fiscal Year 1991 to the present, the highest number of civil court trials occurred in Fiscal Year 1992 when there were 202 civil court trials. Pima County Superior Court Commenced Civil Jury and Court Trials covering Fiscal Years 1991–2016 (on file with author).

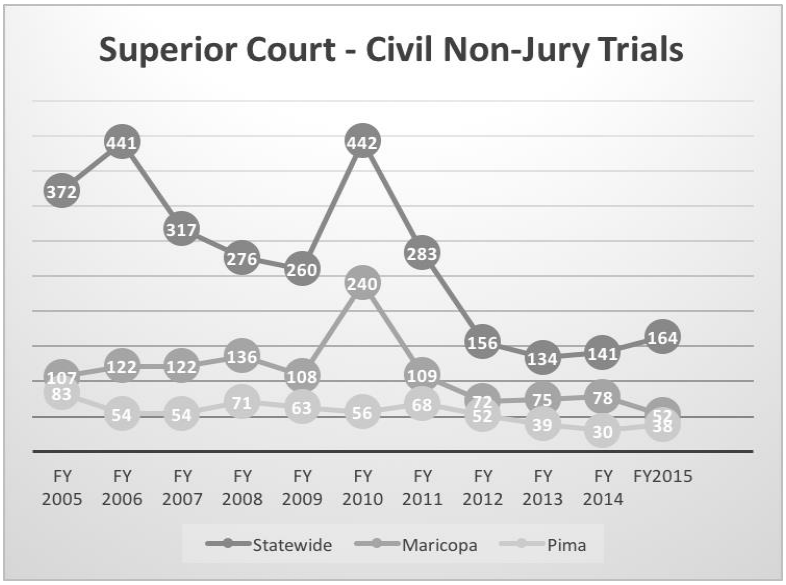

Figure 4: Non-Jury Civil Trials in Arizona Superior Court

There are various explanations for the decline in the number and percentages of civil jury trials,[58] and additional research—beyond the scope of this Essay—is still needed. However, looking at the Arizona data, the main driver of the decline may not be "[a] generation of lawyers and trial judges who are uncomfortable trying cases to juries."[59] Rather, the main driver may be that the expense and time in getting to trial, be it a jury or non-jury, are too high and too long.

B. Support for and Prior Experiences with Short Trials

In fashioning its proposal for a short trial, the CCJR was not plowing on untilled soil. While the recent reports and recommendations did not specifically address court-sponsored mandatory-arbitration programs,[60] there were some prior research and programs upon which the CCJR could draw.

In October 2012, the IAALS published a report supporting short, summary, and expedited civil trials that the American Board of Trial Advocates and the National Center for State Courts supported.[61] The IAALS based its report

58. Explanations include the rise of summary judgments; mediations; the compulsory-arbitration system; private, contractual arbitration; the increased cost of going to trial; litigants' desire for certainty rather than taking the chance of getting a "crazy result" from a jury; and some judicial hostility to trials. *See* Greene & Spaeth, *supra* note 46, at 24–26; Patricia Lee Refo, Opening Statement, *The Vanishing Trial*, LITIG. ONLINE, Winter 2004, at 2–4; Susman, *supra* note 56, at 14.

59. Susman, *supra* note 56, at 14.

60. *See, e.g.*, CALL TO ACTION, *supra* note 4; REFORMING CIVIL JUSTICE, *supra* note 7.

61. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A RETURN TO TRIALS: IMPLEMENTING EFFECTIVE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS 1

on programs whose overall goal "is to provide access to a shorter pretrial and trial procedure, both for jury and bench trials."[62] IAALS's recommendations were "meant to serve as a flexible roadmap for reform, with the details of each program to be determined at the local level."[63] IAALS identified "five constants" as critical for success of any program: (1) the trial itself must be short; (2) the trial date must be certain and fixed; (3) the program must extend to the whole litigation process—not just the trial; (4) the program must encourage issue agreements and evidentiary stipulations; and (5) it recognized that almost all the programs are either partially or wholly voluntary.[64] The voluntary nature of a short-trial program is critical, as

> litigants [should] have the option of choosing this particular track for their case, and they are [and should] not [be] forced to do so . . . voluntary programs . . . preserve the right of the litigants and counsel to decide whether the case is appropriate for an abbreviated process and the program.[65]

IAALS also stressed that the process to adopt the program should be collaborative. It must be developed by the bench and bar, be distributed broadly, be supported by judicial and administrative support, and be followed by additional communication and training.[66] Finally, it stressed the need for best practices in developing and implementing a data-collection plan.[67]

In addition, voluntary short-trial programs have existed in other jurisdictions nationwide,[68] including in Maricopa[69] and Pima[70] counties. In such

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(2012) [hereinafter A RETURN TO TRIALS], http://iaals.du.edu/sites/default/files/documents/publications/a_return_to_trials_implementing_effective_short_summary_and_expedited_civil_action_programs.pdf.

62. *Id.*

63. *Id.* at 2.

64. *Id.* at 3–4.

65. *Id.* at 4; *see also* Robert A. Patterson, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 B.Y.U. L. REV. 951, 973–74 (2014) ("[If the program] is mandatory to some degree, either by allowing a plaintiff to unilaterally bring suit in an [short, summary and expedited] trial court, by requiring participation based on the amount in controversy or . . . by requiring participation in place of some form of mandatory alternative dispute resolution, an implementing jurisdiction should guard against potential constitutional concerns by allowing the parties a restricted ability to remove the case to a [standard trial track].").

66. A RETURN TO TRIALS, *supra* note 61, at 8–9.

67. *Id.* at 20.

68. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., A SUMMARY OF THE SHORT, SUMMARY, AND EXPEDITED CIVIL ACTION PROGRAMS AROUND THE COUNTRY *passim* (updated ed. 2016), http://iaals.du.edu/sites/default/files/documents/publications/summary_chart_of_current_sse_programs.pdf (providing data showing that 24 programs are voluntary or allow opt outs, and only 3 programs are mandatory); Patterson, *supra* note 65, at 962; PAULA L. HANNAFORD-AGOR ET AL., NAT'L CTR. FOR STATE COURTS, SHORT, SUMMARY & EXPEDITED: THE EVOLUTION OF CIVIL JURY TRIALS 43 (2009) [hereinafter EVOLUTION OF JURY TRIALS], https://www.ncsc.org/~/media/Files/PDF/Information%20and%20Resources/Civil%20cover%20sheets/ShortSummaryExpedited-online%20rev.ashx.

69. EVOLUTION OF JURY TRIALS, *supra* note 68, at 23–28 (noting a version of a voluntary short-trial program had been implemented in Maricopa County in 1997 for those

programs, pretrial settlements still prevail in a large majority of these cases, and only a fraction of filed cases are tried.[71] Thus, despite the CCJR's hope, short trials may not be the solution to the vanishing jury trials.

C. Flaws in the CCJR's Short-Trial Proposal

The CCJR's original short-trial proposal failed to account for Arizona's statutory requirement for compulsory arbitration, and, in so doing, contained fatal constitutional flaws. In response, the CCJR has discussed changes to its original proposal; however, if it makes the short trial mandatory, it will have failed to heed IAALS's call to make such programs voluntary. These flaws, as well as additional practical considerations, do not make the proposed short-trial pilot program a better alternative to compulsory arbitration in the efficient and inexpensive resolution of small-value claims.

1. The CCJR's Original Proposal Violates a Plaintiff's Right to a Jury Trial

As proposed in October 2016, the pilot program is constitutionally flawed as it forces a plaintiff to waive a right to a jury trial. The current compulsory-arbitration system preserves both a party's substantive right to participate in a compulsory arbitration as well as the party's constitutional right to jury trial by allowing for a right to appeal[72] and a trial de novo.[73] The CCJR's proposal would discard the current system, and require a plaintiff who wishes to participate in compulsory arbitration to waive the right to a jury trial.

While it could be argued that a plaintiff may voluntarily waive the rights to appeal and a jury trial by opting into compulsory arbitration, the pilot program's proposed rules would still violate a plaintiff's right to a jury trial under Article 6, Section 17 of the Arizona Constitution. Arizona law recognizes two forms of waiver in the civil jury trial context: waivers made voluntarily and knowingly, and waivers made by a failure to comply with procedural rules.[74] It does not, however, countenance a forced or mandatory waiver of a constitutional right to participate in a long-standing program enacted by the Legislature.[75] Moreover, enacting the

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who wanted to appeal an arbitration award or bypass compulsory arbitration all together, but it was used sparingly after the 2004 loss of a major judicial supporter of the program).

70. PIMA CTY. SUPER. CT. R. 4.1; *see also Civil Arbitration and Alternative Dispute Resolution*, ARIZ. SUPERIOR CT. PIMA COUNTY, http://www.sc.pima.gov/?tabid=89 (last visited Feb. 22, 2017) (follow the "Summary Jury trials" hyperlink).

71. Patterson, supra note 65, at 980.

72. Valler v. Hensley, 949 P.2d 51, 53 (Ariz. Ct. App. 1997).

73. *Id.*

74. Harrington v. Pulte Home Corp., 119 P.3d 1044, 1053 (Ariz. Ct. App. 2005).

75. *See* Fisher v. Edgerton, 336 P.3d 167, 178 (Ariz. 2014) ("[T]he right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable." (internal quotation marks omitted) (quoting Richardson v. Sport Shinko, 880 P.2d 169, 188 (Haw. 1994)).

CCJR's proposal would likely run afoul of the unconstitutional conditions doctrine.[76]

2. The CCJR's Original Proposal Violates the Separation of Powers Doctrine

The originally proposed pilot program also violates Arizona's separation of powers doctrine because it denies a plaintiff who chooses compulsory arbitration the substantive right to appeal the arbitration award.[77]

The Arizona Legislature "has all the power not expressly prohibited or granted to another branch of the government."[78] Included in that power is the right to make substantive law, which is "that part of the law which creates, defines, and regulates rights."[79] By contrast, the Arizona Supreme Court has the "[p]ower to make rules relative to all procedural matters in any court,"[80] and "[s]ubstantive rights created by statute cannot be enlarged or diminished by rules promulgated by [the] court."[81] When legislative and judicial rulemaking powers overlap, the Court decides separation-of-powers issues under the two-step analysis set out in *Seisinger v. Siebel.*[82]

First, one must try to harmonize the pilot program with the relevant statutory provision. Regarding the right to appeal, the compulsory arbitration statute provides as follows: "Any party to the arbitration proceeding may appeal from the arbitration award to the court in which the award is entered by filing, within the time limited by rule of court, a demand for trial de novo on law and fact."[83] On the other hand, the CCJR's proposal would grant the plaintiff no such right by means of a mandatory waiver.[84] The proposal and the statute are in direct and irreconcilable conflict.

The textual conflict is clear. The proposed rule requires a plaintiff to waive a right to appeal in every arbitration, while the statute expressly grants that right to "any party," including that same plaintiff. Not only is there a textual conflict, but the rule and the statute also advance opposing purposes. The statute seeks to require parties' participation in arbitration by making it mandatory.[85] The

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76. *See* State v. Quinn, 178 P.3d 1190, 1197 (Ariz. Ct. App. 1990) (quoting Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 593–94 (1926) ("[T]he power of the state . . . is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.")).

77. ARIZ. CONST. art. III.

78. State *ex rel.* Napolitano v. Brown, 982 P.2d 815, 817 (Ariz. 1999) (quoting Adams v. Bolin, P.2d 617, 626 (Ariz. 1952)).

79. Phoenix v. Johnson, 204 P.3d 447, 450 (Ariz. 2009) (quoting State v. Birmingham, 392 P.2d 775, 776 (Ariz. 1964)).

80. ARIZ. CONST. art. VI, § 5(5).

81. Daou v. Harris, 678 P.2d 934, 938 (Ariz. 1984).

82. 203 P.3d 483 (Ariz. 2009).

83. ARIZ. REV. STAT. ANN. §12-133(H) (2016).

84. CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P., *supra* note 4, r. 72(f).

85. Graf v. Whitaker, 966 P.2d 1007, 1010 (Ariz. Ct. App. 1998).

pilot program seeks just the opposite—to discourage arbitration and encourage the fast-track trial.[86]

Furthermore, requiring a plaintiff to waive her right to appeal as a prerequisite to arbitration diminishes this right so far as to efface it entirely. This contravenes clear legislative intent. For a plaintiff, arbitration is no longer possible as contemplated by the legislative scheme, as the plaintiff must relinquish any possibility of a civil trial in order participate in arbitration. This places the plaintiff in a constitutionally ambiguous situation, as discussed above. Thus, a procedural rule that removes this key component for a party cannot align with the clear legislative intent.

Thus, because the rules and the statute "contain directly contradictory instructions,"[87] are intended to advance opposite interests, and effectively leave a plaintiff who completes arbitration with no right to appeal despite a clear, substantive right, there is a conflict.

Upon a finding of irreconcilable conflict, the second step in the *Seisinger* analysis examines whether the right is substantive or procedural.[88] As discussed previously, Arizona courts have defined the right to appeal a compulsory arbitration award as a substantive right.[89] Because the legislature has the power and prerogative to create substantive rights, the judiciary cannot revoke that right through a rule change. Thus, the proposed rule requiring a waiver violates the separation of powers doctrine and cannot stand.

3. The CCJR's Proposal Raises Equal Protection Concerns

The CCJR's proposal also raises equal protection issues as it treats parties differently who both have a dispute subject to compulsory arbitration. To establish an equal protection violation, a party must show that it was treated differently than other people in the same "similarly situated" class.[90] When no suspect class is implicated, the classification need only survive a rational basis review,[91] wherein there is a presumption of constitutionality until rebutted beyond a reasonable doubt.[92] Generalizations must be accepted "even when there is an imperfect fit between means and ends."[93] Here, however, there is no apparent rational basis provided in the CCJR's report for its requirement that a plaintiff waive appeal rights, but the defendant retain those same rights. As such, at the very least, it may be subject to an equal protection challenge.

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86. A CALL TO REFORM, *supra* note 4, at 19.

87. Phoenix v. Johnson, 204 P.3d 447, 449 (Ariz. 2009).

88. Seisinger v. Siebel, 203 P.3d 483, 489 (Ariz. 2009).

89. *Graf*, 966 P.2d at 1009.

90. Aegis of Ariz., L.L.C. v. Marana, 81 P.3d 1016, 1029 (Ariz. Ct. App. 2003); *see also* State v. Nguyen, 912 P.2d 1380, 1382 (Ariz. Ct. App. 1996) ("The equal protection clauses of the state and federal constitutions have the same effect and generally require that all persons subject to state legislation shall be treated alike under similar circumstances.").

91. Baker v. Univ. Physicians Healthcare, 296 P.3d 42, 53 (Ariz. 2013).

92. Fisher v. Edgerton, 336 P.3d 167, 176 (Ariz. Ct. App. 2014).

93. Heller v. Doe, 509 U.S. 312, 321 (1993).

4. The CCJR's Revised Proposal is Still Flawed

It is the Authors' understanding that the CCJR has addressed or is addressing the constitutional issues discussed above. One proposal is to lower the compulsory arbitration threshold in Pima County[94] to either $10,000 or less,[95] to require arbitration consistent with the statute on cases below that amount, and to require a short trial for those above that amount to less than $50,000.

If the short-trial program is made mandatory, the proposed rules for the pilot program are troubling as they provide no avenue for the parties to stipulate to a normal trial track, or for the Court to grant such relief on a motion by one of the parties.[96] Prior proposals for similar programs urged that they be voluntary, or at least partially voluntary.[97] One size does not fit all, and a mandatory pilot program may not fit all small-value cases. For example, would the time limits at trial work in a case where there are multiple defendants and a liability dispute? Would they work in a case where the plaintiff has significant preexisting conditions? Would they work in a case where there are mandatory counterclaims? Generally speaking, a voluntary, short-trial program may make perfect sense for most small-value cases; however, forcing it on parties and their counsel who believe it is not appropriate seems to cause more potential issues than it would solve.

In light of the ongoing conversation, additional discussion is warranted.

a. The Short Trial's Jury Panel Size is Too Small

The CCJR's proposed rule for the short-trial program would require a jury of six, and that five of the six must agree on the verdict. While not inconsistent with Arizona's Constitution,[98] it does violate the statutory provision that requires a jury of eight persons and concurrence of all but two, absent the parties' consent.[99] If the program is to be mandatory, this issue must be addressed.[100]

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94. PIMA CTY. LOCAL R. 4.2(a).

95. By statute, Arizona's Justice Courts are granted "exclusive original jurisdiction of all civil actions when the amount involved, exclusive of interest, costs and awarded attorney fees when authorized by law, is ten thousand dollars or less." ARIZ. REV. STAT. ANN. § 22-201(B) (2013 & Supp. 2016). If the compulsory arbitration limit is reduced to $10,000 or less, there will be very few arbitrations in Superior Court in Pima County.

96. Patterson, *supra* note 65, at 976–77 ("In order to address this issue, a jurisdiction that chooses to adopt an SSE [short, summary and expedited] trial program should also adopt a mechanism by which a party can remove or transfer the case to the traditional trial court. If a jurisdiction has opted to make participation in the SSE trial program mandatory, this feature helps avoid unfairness and injustice by allowing the disadvantaged party or parties to have their case heard before a traditional trial court.").

97. A RETURN TO TRIALS, *supra* note 61, at 4.

98. ARIZ. CONST. art. 2, § 23 ("The right of trial by jury shall remain inviolate . . . . In all other cases [civil cases], the number of jurors, not less than six, and the number required to render a verdict, shall be specified by law.").

99. ARIZ. REV. STAT. ANN. § 21-102(C), (E) (2013).

100. It is the Authors' understanding that the CCJR is also addressing this concern.

b. The CCJR's Revised Proposal Raises Due Process Concerns

If the pilot program proceeds as a program where the plaintiff's election binds the defendant to certain rules, it raises procedural due process issues for defendants. Procedural due process requires that a person receive due process of law before being deprived of liberty or property.[101] In a judicial setting, the Arizona Supreme Court has held that procedural due process is satisfied when a decision is made upon the facts of the case by a judge or jury who hears the evidence.[102] However, there are also pretrial procedural due process rights—namely, the right of the affected party to participate and be heard in the decision-making process.[103] If a defendant is denied the right to raise concerns about the appropriateness of a short-trial program for a particular case, due process challenges will arise.

c. The CCJR's Proposed Elimination of Offers of Judgment is Misguided

The CCJR proposed the removal of Rule 68[104] offers of judgment, at least in part, to prevent a plaintiff's exposure "to thousands of dollars of defense costs if the plaintiff loses the de novo retrial . . . ."[105] Admittedly, Rule 68(g) sanctions, including payment of the offeror's expert witness fees, can be severe,[106] especially in small-value cases.[107] However, "[t]he purpose of the rule is to promote settlement and to avoid protracted litigation."[108] This is true for many plaintiffs' counsel litigating smaller value claims; the ability to make a Rule 68 offer of judgment is one of the most important tools in making the litigation process financially beneficial for the plaintiff, especially if a defendant unreasonably protracts the litigation. The same is true for defendants and their counsel. By removing Rule 68 from these matters, parties will lose an effective tool to avoid protracted litigation.

d. The CCJR's Evidentiary Requirement for Medical Bills Will Increase Litigation Costs

In a short trial as proposed, a plaintiff must establish the foundation that a medical bill "is reasonable and the treatment or service described in the bill was medically necessary."[109] The rule is likely consistent with Arizona caselaw where

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101. Smith v. Pima Cty. Law Enf't Council, 548 P.2d 1151, 1155 (Ariz. 1976).

102. Ohlmaier v. Indus. Comm'n of Ariz., 776 P.2d 791, 795 (Ariz. 1989).

103. Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y Rev. 1, 10 (2006); Patterson, *supra* note 65, at 970, n.101.

104. ARIZ. R. CIV. P. 68.

105. A CALL TO REFORM, *supra* note 4, at 19.

106. Drozda v. McComas, 887 P.2d 612, 613 (Ariz. Ct. App. 1994).

107. Levy v. Alfaro, 160 P.3d 1201, 1202 (Ariz. Ct. App. 2007) (noting that the plaintiff's verdict was for $6,294.02 and that the Rule 68 sanctions in favor of defendant totaled $16,092.70).

108. Arellano v. Primerica Life Ins., 332 P.3d 597, 607 (Ariz. Ct. App. 2014) (citing *Levy*, 160 P.3d at 1203).

109. CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P., *supra* note 4, r. 75.1(b)(1).

the plaintiff has some preexisting condition relevant to the claimed physical injury;[110] however, that may not be the rule in all cases.[111] The proposed rule would codify a narrow interpretation of Arizona law on medical-causation issues in personal-injury cases, and hinder the development of the common law. Also, it conflicts with the cost-saving rules of compulsory arbitration that allow for the admission of properly disclosed healthcare providers' bills and records in personal-injury actions without further proof.[112] Additionally, it runs contrary to IAALS's recommendation that there be "relaxed evidentiary foundational standards."[113] If a plaintiff must now pay a treating physician to testify, or retain an independent medical expert to testify, in small-value cases, and there is no avenue under Rule 68 to recover those costs, it makes little economic sense for a plaintiff to pursue a smaller-valued personal-injury claim to trial. In that respect, the proposed rule for short trials will force more settlements, not foster more trials.

e. The CCJR's Expert Rules Raise Cost and Due Process Concerns

Currently, in compulsory arbitration, either side may submit an expert's sworn witness statement at the arbitration for the fact-finder to assess.[114] Of course, presentation of experts at trial, as well as cross-examination of expert witnesses, is critical.[115] They also come with a cost, and again, parties have no means under the proposed rules governing short trials to shift those costs onto an opposing party who has rejected a reasonable settlement offer and, thus, protracted the litigation.

Additionally, while the CCJR's proposed cap on any expert's fee of $500 per hour[116] is not unreasonable,[117] it ignores reality. Many experts, especially medical experts, now reasonably charge more than that, especially for time spent testifying. The result is that a party must make up the difference for a competent and effective expert, with again, no ability to utilize Rule 68 to recover those costs from an opposing party who has rejected a reasonable settlement offer.

Last, the limitation to one examination of an expert under Rule 35 is also problematic. While one independent medical examiner may be sufficient in the large majority of cases, there is no express provision allowing for additional examinations in those cases where more than one examination may be appropriate—e.g., a case in which a plaintiff claims both a dental injury and an unrelated orthopedic injury. Recalling again that it would be only the plaintiff's choice to opt into the short trial, would it be fair to a defendant who needs more than one examiner to be so limited?

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110. *See, e.g.*, Larsen v. Decker, 995 P.2d 281, 285–86 (Ariz. Ct. App. 2000).

111. Haven v. Taylor, No. 1 CA-CV 13-0337, 2014 WL 3608782, at ¶ 14 (Ariz. Ct. App. 2014) ("Although there may be a case where medical testimony is not required to show the link between an accident and medical treatment, this is not the case.").

112. ARIZ. R. CIV. P. 75(d)(1), (2), (8).

113. A RETURN TO TRIALS, *supra* note 61, at 3.

114. ARIZ. R. CIV. P. 75(d)(7).

115. *See, e.g.*, Green v. Nygaard, 153 P.3d 393, 398 (Ariz. Ct. App. 2006) (citation omitted).

116. CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P., *supra* note 4, r. 74.1(d).

117. *See* Patterson, *supra* note 65, at 976.

f. The CCJR Has Failed to Set Measurable Goals

Moving forward, it is anticipated that the Arizona Supreme Court will adopt the CCJR's pilot program by an Administrative Order. As the CCJR has failed to set any measurable goals for the program, the Arizona Supreme Court should.[118] Some questions include the following: Will it be deemed a success if we have more trials of small-value cases? Will it be deemed a success if those cases resolve more quickly and with less costs? What effect will short trials have on the ability of judges to address other matters when they are being called upon to perform additional civil case management?[119] If it is deemed successful, will Maricopa County and the other counties be more receptive to it?

III. COMPULSORY ARBITRATION IS A PREFERABLE METHOD FOR THE EFFICIENT AND INEXPENSIVE RESOLUTION OF SMALL-VALUE CLAIMS IN THE SUPERIOR COURT

In light of the discussion above, the existing and statutorily mandated compulsory-arbitration program is a preferable method for the inexpensive resolution of smaller claims in the Superior Court and can be made more efficient.

A. A Brief Review of Compulsory Arbitration in Arizona

Arizona first adopted mandatory and nonbinding[120] arbitration in 1971.[121] Its purpose "is to provide for the efficient and inexpensive handling of claims" under the statutory cap.[122] Additionally, "[u]sing an alternative process for disposing of these smaller claims also is intended to reduce the number of cases on court calendars providing for more judicial time for civil cases that remain on the traditional litigation path."[123] Courts have implemented rules of procedure to govern cases assigned to compulsory arbitration,[124] and the Legislature has frequently reaffirmed and expanded[125] the reach of the compulsory-arbitration program by increasing the statutory jurisdiction cap.

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118. A RETURN TO TRIALS, *supra* note 61, at 21.

119. A CALL TO REFORM, *supra* note 4, at 9.

120. ARIZ. REV. STAT. ANN. § 12-133(A), (H), (I) (2016).

121. Act of May 10, 1971, ch. 142, sec. 1, § 12-133, Ariz. Sess. Laws 455.

122. In the Matter of the Establishment of the Committee on Compulsory Arbitration in the Superior Court of Arizona, Administrative Order No. 2005-79 (Ariz. 2005).

123. *Id.*

124. ARIZ. R. CIV. P. 72–77.

125. Act of May 16, 1978, ch. 35, sec. 1, § 12-133, Ariz. Sess. Laws 66; Act of Apr. 6, 1984, ch. 53, sec. 1, § 12-133, Ariz. Sess. Laws 136; Act of May 12, 1986, ch. 360, sec. 1, § 12-133, Ariz. Sess. Laws 1318; Act of May 13, 1991, ch. 110, sec. 1, § 12-133, Ariz. Sess. Laws 369; Act of Apr. 6, 1992, ch. 9, sec. 1, § 12-133, 1 Ariz. Sess. Laws 33; Act of Mar. 23, 2000, ch. 35, sec. 1, § 12-133, 1 Ariz. Sess. Laws 146; Act of Apr. 27, 2007, ch. 142, sec. 1, § 12-133, 1 Ariz. Sess. Laws 502; Act of Mar. 20, 2012, ch. 44, sec. 1, § 12-133, 1 Ariz. Sess. Laws 262.

About a decade ago, changes were made to compulsory arbitration after an extensive study.[126] At that time, attorneys generally viewed compulsory arbitration favorably.[127] The study concluded that "court-connected arbitration does not appear to have a negative effect on the speed or cost of dispute resolution, use of court resources, or satisfaction of participants in most cases. It is less clear, however, whether court-connected arbitration substantially improves the efficiency or effectiveness of dispute resolution."[128] The study resulted in various rule changes that were made pursuant to a rule-change petition.[129]

A more recent IAALS survey of Arizona attorneys noted that "compulsory arbitration has a faster time to disposition and a lower cost than litigation."[130] While IAALS questioned this based upon the earlier study,[131] it did not consider the reforms that went into effect in 2008. IAALS did note some concerns over procedural fairness and that there was seemingly not many limits on discovery before arbitration.[132]

Currently, compulsory arbitration applies to disputes no greater than $65,000[133] with each local Superior Court[134] setting its own jurisdictional limit. Some of the program's primary and intended benefits are as follows:

1. The cost of the arbitrator is low as the statute caps the arbitrator's fee at $140 per day.[135]

2. Compulsory arbitrations allow superior court judges to focus on other matters as once assigned, an arbitrator acts as a "surrogate trial judge"[136] who will "make all legal rulings" with

126. Roselle L. Wissler & Bob Dauber, *A Study of Court-Connected Arbitration in the Superior Courts of Arizona, Executive Summary* (2015); *see also* Roselle L. Wissler & Bob Dauber, *Court-Connected Arbitration in the Superior Court of Arizona: A Study of Its Performance and Proposed Rule Changes*, 1 J. DISP. RESOL. 65 (2007); Roselle L. Wissler & Bob Dauber, *Mandatory Arbitration in Arizona: Structure and Performance*, ARIZ. ATT'Y, Oct. 2005, at 18.

127. Wissler & Dauber, *A Study of Court-Connected Arbitration in the Superior Courts of Arizona, Executive Summary* xii–xiii (2015); *see also* Bob Dauber & Roselle L. Wissler, *Mandatory Arbitration in Arizona: Structure and Performance*, ARIZ. ATT'Y, Oct. 2005, at 18; Order Amending Rules 38.1 and 72 to 77, Arizona Rules of Civil Procedure, Admin. Order No. R-06-0021 (Ariz. 2007).

128. Wissler & Dauber, *supra* note 127, at xx (2015).

129. In the Matter of the Establishment of the Committee on Compulsory Arbitration in the Superior Court of Arizona, Administrative Order No. 2005-79 (Ariz. 2005); Roselle L. Wissler & Bob Dauber, *Compulsory Arbitration Changes Proposed*, ARIZ. ATT'Y, Mar. 2007, at 27 (summarizing the proposed rule changes).

130. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SURVEY OF THE ARIZONA BENCH AND BAR ON THE ARIZONA RULES OF CIVIL PROCEDURE 49 (2010).

131. *Id.* at 49 n.31.

132. *Id.* at 49–51.

133. ARIZ. REV. STAT. ANN. § 12-133(A) (2016); ARIZ. R. CIV. P. 72(a)–(b).

134. ARIZ. R. CIV. P. 72(a); DANIEL J. MCAULIFFE & SHIRLEY J. MCAULIFFE, 2016 ARIZONA CIVIL RULES HANDBOOK 980–81 (2016).

135. ARIZ. REV. STAT. ANN. § 12-133(C), (G) (2016).

136. MCAULIFFE & MCAULIFFE, *supra* note 134, at 996–97.

some exceptions,[137] and be the finder of fact.[138] Thus, the program has intended benefits for the efficient resolution of other cases.[139]

3. Arbitrations are meant to be held quickly. The hearing is generally to be scheduled within 60 to 120 days after an arbitrator's appointment.[140]

4. Evidentiary rules are relaxed. While the Arizona Rules of Evidence apply, certain documents, including bills related to healthcare, a doctor's medical report in a personal injury action, property damage repair bills and estimates, deposition testimony, sworn witness testimony, and an expert's sworn written statement must be admitted "without further proof, if relevant" and disclosed properly.[141]

5. Marginal appeals to a trial de novo are discouraged [142] because of the potential significant exposure[143] to statutory sanctions if the appealing party cannot improve on the arbitration award by at least 23%.[144] The CCJR lamented that effectiveness of these sanctions in resolving cases short of trial,[145] but failed to acknowledge that the Legislature established these effective sanctions.

B. A Review of Compulsory Arbitration Figures

A review of the data reveals that the compulsory arbitration program is generally effective at resolving most small-value cases short of full-blown trial. Figure 5 illustrates the number of compulsory-arbitration appeals in Arizona

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137. ARIZ. R. CIV. P. 74(d).

138. ARIZ. R. CIV. P. 74(a).

139. A CALL TO REFORM, *supra* note 4, at 18.

140. ARIZ. R. CIV. P. 74(c).

141. ARIZ. R. CIV. P. 75(c)–(d).

142. Fisher v. Edgerton, 336 P.3d 167, 173 (Ariz. Ct. App. 2014) (citation and quotation marks omitted).

143. Granville v. Howard, 335 P.3d 551 (Ariz. Ct. Ariz. App. 2014) (reversing arbitration appeal sanctions of over $86,000 in a case where the judgment was otherwise for under $18,000 after trial, and remanding for further proceedings). On remand, the superior court reduced attorney fees from $72,000 to $10,000 (Minute Entry, CV2008-053833, Maricopa County Superior Court, Apr. 23, 2015 (on file with author)); *Fisher*, 336 P.3d at 169–70 (upholding on appeal arbitration appeals sanctions of nearly $16,000 in favor of non-appealing co-defendant and against appealing co-defendant in a case in which judgment in favor of plaintiff was for $17,885.50); Petrovich v. Branciforte, No. 1 CA–CV 16–0036, 2017 WL 117108 (Ariz. Ct. App. 2017) (upholding award of $20,180 in arbitration appeal sanctions in a case where otherwise the total judgment was for $10,700.30; also upholding trial court's decision to calculate the prevailing plaintiff's counsel's hourly rate at $200 per hour, rather than the requested $350 per hour, as "no reasonable client would pay a lawyer $350 per hour to pursue a case of this nature.").

144. ARIZ. REV. STAT. ANN. § 12-133(I) (2016); ARIZ. R. CIV. P. 77(h).

145. CCJR PROPOSED AMENDMENTS TO ARIZ. R. CIV. P., *supra* note 4, at 19.

over the last decade (with some aberrational figures from Maricopa County in Fiscal Years 2011 and 2015).[146]

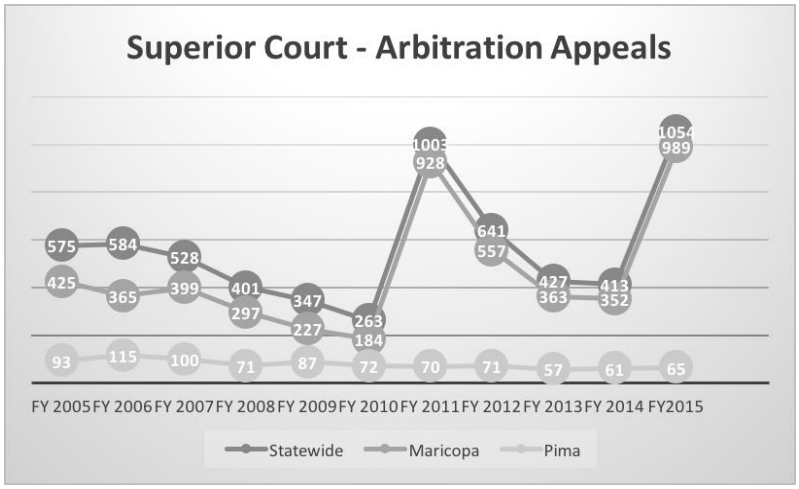

Figure 5: Arbitration Appeals in Arizona Superior Court

In Maricopa County, parties appealed only 27–28% of arbitration awards during Fiscal Year 2013 through Fiscal Year 2015.[147] As for Pima County, parties appealed no more than 29% of arbitration awards annually between Fiscal Year 2009 and Fiscal Year 2016.[148] Thus, the large majority of cases in the compulsory-arbitration track resolved without much, if any, involvement by the Superior Court.

Even after an appeal, there are very few trials. Looking at statewide data from 2011 to 2016,[149] there were 244 reported trials de novo. Generally, defendants took more arbitration appeals to jury verdict (182 defendant-filed appeals compared to 62 plaintiff-filed appeals). [150] Also, defendants were generally more successful in front of a jury than an arbitrator. For example, defendants were

146. *Statistics on All State Court Levels in Arizona*, ARIZ. JUDICIAL BRANCH, http://www.azcourts.gov/statistics/# (last visited Jan. 30, 2017). At least as to Fiscal Year 2015, there is some discrepancy as to the number of arbitration appeals in Maricopa County as that court provided the authors with data showing 319 appeals. Maricopa County Superior Court Arbitration Data covering Fiscal Years 2012–2015 (on file with author). To date, a request for clarification has not been answered.

147. Maricopa County Superior Court Arbitration Data covering Fiscal Years 2012–2015 (on file with author).

148. Pima County Superior Court Arbitration Data covering Fiscal Years 2009–2016 (on file with author).

149. This data was compiled using *The Trial Reporter*, which gathers data from Northern, Central, and Southern Arizona. *See Services*, TRIAL REPORTER, http://www.aznvtr.com/services (last visited Apr. 10, 2017) [hereinafter TRIAL REPORTER] (data on file with author). For more information on *The Trial Reporter*, see *Who We Are*, TRIAL REPORTER, http://www.aznvtr.com/about (last visited Apr. 10, 2017).

150. TRIAL REPORTER, *supra* note 149.

apparently[151] able to avoid Rule 77 sanctions in 80% of their appeals,[152] and they obtained defense verdicts in 31% (57/182) of their appeals where there had been a favorable arbitration award for the plaintiff.[153] By contrast, plaintiffs were much less successful in their appeals, as in 62% (40/62) of their appeals the plaintiff was exposed to possible sanctions.[154] One group of plaintiffs—those who were defensed at *both* arbitration and trial—constituted a plurality, 42% (26/62), of the appeals taken by plaintiffs. Maybe these numbers address the CCJR's concern that plaintiffs will often settle on appeal before trial for something less than the arbitration award.[155] It seems, on the whole, to be a rational economic decision.

Turning to Maricopa County, only 0.13–0.27%[156] of cases subject to compulsory arbitration went to a jury trial between Fiscal Years 2012 and 2015. Table 1 provides the relevant data.[157]

Fiscal Year	Cases Subject to Arbitration	Awards	Appeals	Bench Trials	Jury Trials	Total Trials
2012	14,624	No Data	329	8	24	32
2013	12,174	1,135	319	11	33	44
2014	11,342	1,219	352	14	30	44
2015	9,113	1,152	319	20	12	32

Table 1: Compulsory Arbitration Cases in Maricopa County Superior Court

Turning to Pima County,[158] only 0.15–0.80% of cases subject to compulsory arbitration went to a jury trial between Fiscal Years 2015 and 2016.[159] Again, as Table 2 shows, there were not many trials de novo.

151. Based on the data provided, at times it was impossible to determine exactly whether the final judgment was 23% more favorable than the arbitration award.

152. TRIAL REPORTER, *supra* note 149.

153. *Id.*

154. *Id.*

155. A CALL TO REFORM, *supra* note 4, at 19.

156. Maricopa County Superior Court Arbitration Data covering Fiscal Years 2012–2015, *supra* note 147.

157. *Id.*

158. Pima County Superior Court Arbitration Data covering Fiscal Years 2009–2016, *supra* note 148.

159. This data seems to contradict the CCJR's position that "the Superior Court in Pima County already handles a considerably higher percentage of trials de novo under the existing system of compulsory arbitration, at least as compared to Maricopa County." A CALL TO REFORM, *supra* note 3, at 19–20.

Fiscal Year	Cases Subject to Arbitration	Awards	Appeals	Bench Trials	Jury Trials	Total Trials
2012	1,002	293	71	No Data	No Data	No Data
2013	861	276	57	No Data	No Data	No Data
2014	802	239	61	No Data	No Data	No Data
2015	744	225	65	2	6	8
2016[160]	629	197	55	3	1	4

Table 2: Compulsory Arbitration Cases in Pima County Superior Court

Looking deeper into the Pima County appeals, tort cases constituted a large majority (76-78%). In all cases, defendants filed more appeals (72% in Fiscal Year 2015, and 82% in Fiscal Year 2016). The average arbitration awards were on the lower end: $16,586.60 in Fiscal Year 2015 and $18,838.38 in Fiscal Year 2016; the median appealed awards were $17,808.52 in Fiscal Year 2015, and $21,696.45 in Fiscal Year 2016. Also, none of the trials resulted in actual Rule 77 sanctions.

Thus, overall the compulsory arbitration process appears to be resolving small-value cases short of trial, which appears to the Legislature's intent. Rather than focus on thousands or even tens of thousands of cases that are resolved annually short of an appeal, the CCJR focused on the inefficiency of those cases that do proceed to a de novo trial[161] in order to justify the pilot program. There is no doubt that those inefficiencies need to be addressed while respecting the statutory requirements; however, compulsory arbitration's benefits to the judiciary and the public should not be forgotten. [162]

IV. A CALL FOR ADDITIONAL REFORM OF COMPULSORY ARBITRATION

While compulsory arbitration is largely successful, practitioners who handle compulsory arbitration issues see delay or abuses by both sides in the process.[163] The CCJR chose not to address a majority of those issues and only addressed the encouragement of arbitrators being selected by their practice area.[164]

160. As of the time of publication, four of those appeals are pending.

161. A CALL TO REFORM, *supra* note 4, at 19.

162. *Id.* at 18 (noting that arbitration relieves the backup up civil cases on the docket, and does resolve smaller-value disputes less expensively).

163. *See, e.g.*, *id.*

164. CCJR PROPOSED AMENDMENTS TO THE ARIZ. R. CIV. P., *supra* 4, r. 73(c).

Going forward, the following are some approaches that members of the CCJR and the bar have suggested that could benefit from additional consideration after further study:

> 1. Consider requiring the parties to meet and confer regarding whether an alternative form of alternative dispute resolution would be more appropriate for a case before an arbitrator is assigned. In reviewing the data from Pima County, a significant number of arbitration appeals were settled after a settlement conference. If the parties had engaged in a settlement conference before, or in lieu of, arbitration, significant costs and judicial resources spent on post-appeal motion practice might have been saved.
>
> 2. Study the actual perception of litigants who participate in a compulsory-arbitration hearing similar to the process where judges are evaluated by the Commission on Judicial Performance Review.[165]
>
> 3. Consider limiting Rule 73(c)'s list of eligible arbitrators to volunteer judges pro tempore, hearing officers, and retired judges. The idea would be to get those interested in conducting arbitrations to be the ones hearing the cases, and address one of the CCJR's concerns.[166]
>
> 4. Consider limiting the parties to the same evidence that they presented at the arbitration hearing, thus addressing one of the CCJR's concerns.[167] It would also reduce the abuse by both plaintiffs and defendants in dumping new evidence post-arbitration.
>
> 5. Consider amending section 12-133(I) of the Arizona Revised Statutes, such that in determining sanctions, a comparison would be made between the arbitrator's finding of damages and the trier of facts' finding of damages—i.e., the verdict. Currently, many defense counsel object that, as the current rule compares the award to the judgment wherein both include taxable costs, a plaintiff can essentially moot an appeal by conducting so much discovery post-arbitration that the defense can never do 23% better. This proposal would create a more "apples to apples" comparison[168] than what currently exists, may be more appropriate, and may promote efficiency in appeals.
>
> 6. Consider extending the Rule 74(b) deadlines to conduct arbitration from 60 to 120 days to 60 to 180 days to allow for additional flexibility regarding discovery before the arbitration. This would also restrict the ability of the arbitrator to extend those deadlines further. Parties often need some additional time to conduct

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165. *See, e.g.*, *Judicial Performance Review Process*, ARIZ. JUDICIAL BRANCH, http://www.azcourts.gov/jpr/About-JPR/JPR-Process (last visited Mar. 24, 2017) (discussing surveys taken as part of Arizona's Judicial Performance Review process).

166. A CALL TO REFORM, *supra* note 4, at 18.

167. *Id.* at 18–19.

168. *See, e.g.*, Hales v. Humana of Ariz., 923 P.2d 841, 844 (Ariz. Ct. App. 1996).

discovery and disclose experts,[169] and the current timetable results in motions for extensions and resultant additional delays.

7. Consider limiting expert discovery before arbitration and amending Rule 77(f) to allow for additional time for expert opinion disclosures and discovery after arbitration. The current rule[170] sets up a system where essentially all parties must have their expert and their opinions disclosed at or just after arbitration, and, as a result, encourages appeals as the parties have already incurred significant expert costs.

8. Consider increasing sanctions on appeals de novo or adjusting the percentage that a prevailing party must do better than to avoid appeal sanctions, depending on whether decision-makers want appeals to be favored or disfavored.

With such reforms, or others, Arizona's Superior Court would likely have an improved and workable system to resolve small-value claims efficiently and inexpensively.

CONCLUSION

The CCJR's work on compulsory arbitration should be commended for prompting a policy-based discussion regarding the vanishing civil jury trial and whether smaller cases should be tried to a jury, rather than arbitrated. Unfortunately, the CCJR's original proposal for replacing compulsory arbitrations with short trials is fraught with constitutional and practical shortcomings. It will not help to resolve small-value claims more efficiently and inexpensively. Some of those shortcomings can and should be addressed before the proposal is implemented in Pima County. In addition, even with the CCJR's work, additional study of and reforms of the compulsory arbitration system are necessary.

169. *See, e.g.*, Cosper v. Rea *ex rel.* Cty. of Maricopa, 269 P.3d 1179 (Ariz. 2012).

170. *See id.*