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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of	)	No. R-24 0004
	)	
PETITION TO PERMANENTLY	)	
ADOPT RULES FOR THE FAST	)	Comment
TRIAL AND ALTERNATIVE	)	
RESOLUTION PROGRAM	)	
("FASTAR")	)	
_____	)	

Undersigned¹ files this Comment regarding the pending petition to adopt FASTAR on a permanent basis.

Should the Court choose to adopt FASTAR on a permanent basis, the Court may wish to consider the following changes:

1. Adopt the Petitioner's Proposed Revision to Rule 126

Undersigned agrees with the Petitioner that FASTAR Rule 126 should be amended to provide that the rules for a Fast Trial apply to a trial *de novo* after an appeal from the arbitration award.

¹ Undersigned's institutional title and affiliation are included for identification only.

2. Allow Plaintiffs to Appeal an Arbitrator's Award

FASTAR provides that a plaintiff must choose to proceed by a Fast Trial or Alternative Resolution (FASTAR Rule 103(a)), and if a plaintiff chooses to proceed by Alternative Resolution (i.e., arbitration), it waives the right to a trial and to appeal the arbitrators' decision, award, or judgment. FASTAR Rule 103(b)(2). Undersigned proposed that the FASTAR rules be modified to allow either party to appeal to a trial *de novo*.

a. The Superior Court Can Reasonable Handle Any Increased Workload Related to Allowing Plaintiffs the Ability to Appeal an Arbitration Award.

The Superior Court can reasonable handle any increased workload related to allowing both parties to appeal an arbitration award.

The FASTAR program's data demonstrates that, if given a choice, plaintiffs in contract and tort cases—and especially tort-motor-vehicle plaintiffs—strongly prefer the Alternative Resolution Track. As of April 10, 2024, of those plaintiffs filing a Choice Certificate, 58.2% have chosen the Alternative Resolution Track and only 21.6% have chosen the Fast Trial Track. The remainder (20.2%) have been defaulted into the Fast Trial Track by failing to file a timely Choice Certificate. By case category, the data shows the following:

- 51.2% of contract plaintiffs have selected the Alternative Resolution Track, and only 29.6% have chosen the Fast Trial Track.
- 74.4% of tort-motor-vehicle plaintiffs have selected the Alternative Resolution Track, and only 7.6% have chosen the Fast Trial Track. Furthermore, the actual number of tort-motor-vehicle plaintiffs who have selected a Fast Trial has dropped each year from a high of 51 (11.9%) in the first year of the program to only 13 (5.2%) in the last full year of data. In the current reporting period, only 3 (3.9%) of tort-motor-vehicle plaintiffs have selected the Fast Trial Track.²
- 46.2% of tort-non-motor-vehicle plaintiffs have selected the Alternative Resolution Track, and only 18.3% have chosen the Fast Trial Track.
- Only 7.8% of plaintiffs with unclassified civil cases have selected Alternative Resolution Track, and 57.1% have chosen the Fast Trial Track.

The public and the courts have substantial interests in timely resolution of civil proceedings. *See* Comments of the Arizona Commission on Access to Justice in Support of the Petition. FASTAR has been “highly successful when considering the program’s reduced disposition times.” Petition, p. 6. However,

² This data may support additional, future consideration of proposals to amend the Fast Trial Track to make it a more attractive option in tort-motor-vehicle cases.

those interests should be weighed against other interests including the interest in ensuring the judiciary is seen as providing a fair playing field to all parties.

If the Court were to allow a plaintiff the right to seek a trial *de novo*, it would not have an appreciable effect on time processing of FASTAR cases or the civil bench's non-FASTAR cases. There have been on average less than 8 Fast Trials per year, and on average, less than 3 appeals per year. There has been only 1 appeal *de novo* in the 6.44 years of the program. Overall, the FASTAR trial rate is .33% (48 trials/14,352 new case filings).

Looking more closely, available data as of April 10, 2024, shows the Superior Court has held only 47 Fast Trials³ in the program's 6.44 years. There have been 19 appeals or 6.2% of the 307 filed awards during that same time period. As to trials *de novo*, during the entire FASTAR program, the Superior Court has set only 14 arbitration appeals for trial. Of those 14, the Superior Court vacated 13 of those trials, and completed only one *de novo* trial.

For comparison purposes, looking at data from the period immediately before FASTAR, there were more appeals and trials *de novo*, but not an unmanageable amount. In 2015, there were 73 appeals requesting a trial *de novo*, and “[f]or the last full year of the compulsory arbitration system in Pima County, when any party could appeal the arbitration award, the court

³ Available data does not break down the number of bench versus jury trials.

conducted 5 trials *de novo*.” Petition, p. 3. Those numbers are not fundamentally inconsistent with undersigned’s research in 2017 that showed there were only 6 jury trials *de novo* in fiscal year 2015 and only 1 jury trial *de novo* in fiscal year 2016. Sakall & Pack, *Short Trials: An Appropriate Replacement for Compulsory Arbitration in Arizona?*, 59 Ariz. L. Rev. 485, 506 (2017). Looking at statewide data between 2011 and 2016, jury trials *de novo* that resulted from a plaintiff’s appeal were less than 25% of the total number of *de novo* jury trials. *Id.*, at 505. In Pima County, for fiscal year 2015, plaintiffs filed only 28% of the total appeals, and in fiscal year 2016, they filed only 18% of the total appeals. *Id.*, at 507. One explanation for why plaintiffs did not appeal as often by defendants is that defendants generally did better at the *de novo* jury trials. *Id.*, at 505-06.

Upon review of the data, giving both sides the ability to appeal an arbitration award would not negatively affect the Superior Court’s ability to resolve FASTAR (Tier One) or other civil cases in a timely manner. At most, it may—at most—result in a handful of additional appeals *de novo* each year.

If the Court were to allow plaintiffs to appeal, there would be some delay for defendants in those few cases where the plaintiff chooses arbitration and appeals. However, FASTAR Rule 126(f)(5) limits discovery to only 80 days after the appeal. With active judicial management of the appeals, there is no reason why a trial *de novo* could not be concluded in a timely manner.

b. Allowing Plaintiffs to Appeal Would Address the Perceived Imbalance in the Pilot Program.

While a plaintiff solely is given opportunity to select which track the case is to proceed, many in the local legal community have expressed ongoing concerns since 2017 that the playing field is unbalanced—a defendant has a right to seek a trial *de novo* from an adverse arbitration award, but a plaintiff does not. *See* various comments filed in response to the pending Petition. The perception of imbalance is exacerbated by the fact that the Arizona Legislature has allowed *both* sides participating in a compulsory arbitration to seek a trial *de novo*, and that statutory right applies in Arizona’s other fourteen counties. A.R.S. § 12-133(H). Also, even in an arbitration under the Revised Uniform Arbitration Act, A.R.S. §§ 12-3001, et. seq., all parties have limited rights to challenge, modify, or correct an arbitration award. A.R.S. §§ 12-3023, 3024. However, in a FASTAR case, the plaintiff has no explicit rights to challenge, modify, or correct an arbitration award.

Undersigned is not arguing that the FASTAR system is constitutionally deficient. *But see* Buechel Comment, 04/29/2024. The concern raised here is the perception of imbalance. We all make mistakes from time to time. Most of our legal processes allow a party to seek redress in the event of an error. FASTAR, as currently written, gives a plaintiff no such right if it selects to proceed by

Alternative Resolution—which is a majority of selecting plaintiffs in contract and tort cases. As such, it creates a perceived access to justice imbalance.

If the Court chooses to grant both parties a right to appeal, the following rule changes would be needed:

Rule 103. Plaintiff's Choice

(a) [No change]

(b) Manner of Choosing.

(1) [No change]

~~(2) “Waiver.” If the plaintiff chooses Alternative Resolution, then plaintiff's Choice Certificate must include express waiver of the rights:~~

~~(A) to have a trial before a judge or jury, and~~

~~(B) to appeal the Alternative Resolution decision, award, or judgment to the superior court or to an appellate court.~~

(c) [No change].

(d) Effect of a Counterclaim, Cross-claim, or Third-Party Complaint.

(1) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Fast Trial if the plaintiff timely made that choice in the plaintiff's Choice Certificate, or if the plaintiff failed to file a timely Choice Certificate. A defendant, counterclaimant, cross-claimant, or third-party plaintiff has no right under these rules to make the choice or to file a Choice Certificate.

(2) If the case includes a counterclaim, cross-claim, or third-party complaint, the action will proceed by Alternative Resolution if the plaintiff timely made that choice in the plaintiff's Choice Certificate. ~~In that circumstance, and notwithstanding the waiver under Rule 103(b)(2), the plaintiff retains the right to appeal and to have a trial before a judge or jury regarding the decision or award on the counterclaim, crossclaim, or third party complaint.~~

Rule 126. Appeal

(a) Filing a Notice of Appeal.

~~(1) *Plaintiff May Not Appeal.* Except as provided in Rule 103(d), the plaintiff who filed a Certificate under Rule 103(b) and chose Alternative Resolution may not file a notice of appeal of a decision, award, or judgment that was entered in an Alternative Resolution proceeding.~~

~~(2) *Other Parties May Appeal.* Any other party who appears and participates in an Alternative Resolution proceeding may appeal an arbitrator's award by filing a notice of appeal. However, absent good cause, a party waives the right to appeal if the party fails to appear or to participate in good faith at the Alternative Resolution hearing. A notice of appeal must be entitled "Appeal from Alternative Resolution and Motion for Trial Setting." The notice must request that the case be set for trial in the superior court and must state whether a jury trial is demanded and the estimated length of trial.~~

(b) – (h) [No change]

Also, Form 103(b), Choice Certificate, would also need to be amended by removing the sentence following "Alternative Resolution."

3. Alternatively, Provide Plaintiffs With Limited Grounds to Challenge an Arbitrator's Award

If the Court wishes to retain the provisions regarding a plaintiff's waiver of jury trial and appeal rights, the Court should amend the FASTAR rules to provide guidance to the parties and Superior Court as to what challenges, if any, a plaintiff may assert before the Superior Court before the Arbitrator's Award is entered as a judgment. FASTAR Rule 124(d)(1). Undersigned believes that A.R.S. §§ 12-3023 and 3024 provide basic protections against manifest injustice that occurs at an arbitration hearing which should be included in the FASTAR rules. As such, it is requested in the alternative that the Court modify FASTAR Rule 124 as follows:

Rule 124. Arbitrator's Decision, Award, and Judgment

(a) –(c) [no change]

(d) **Judgment.**

(1) *Motion to Enter Judgment.* Any party may file a motion to enter judgment on the award if no appeal is filed by the deadline for filing an appeal under Rule 126.

(2) *Motion to Modify or Vacate an Award.* A plaintiff may file a motion to modify or vacate the award if no appeal is filed by the deadline for filing an appeal under Rule 126.

(i) The court may modify or correct an award only if there was an evident mathematical miscalculation.

(ii) The court may only vacate an award if any of the provisions of A.R.S. § 12-3023(A)(1), (2), or (4) are met, or if the arbitrator failed to comply with the applicable rules so as to prejudice substantially the rights of the plaintiff.

~~(2)~~ (3) *Dismissal of the Action.* If no party files a motion to enter judgment within 90 days of the filing of the notice of decision and if no appeal is pending, the clerk or court administrator must notify the parties in writing that the action will be dismissed without prejudice unless a motion to enter judgment is filed within 30 days after the date of the notice. If no motion is filed within that time, the court must dismiss the action without prejudice and enter an appropriate order regarding any posted security. No further notice to the parties is required before dismissing the action.

(e) – (f) [no change]

A.R.S. § 12-3023(A)(1) allows an arbitration award to be vacated if it was “procured by corruption, fraud or other undue means.” A.R.S. § 12-3023(A)(2) allows an arbitration award to be vacated if there is evident partiality of the arbitrator, an arbitrator’s corruption, or arbitrator’s misconduct that prejudiced a party’s right. Lastly, A.R.S. § 12-3023(A)(4) allows an arbitration award to be vacated if an arbitrator exceeds its powers.

4. Modify Rule 104 Governing Service

The Court should also modify Rule 104 which governs service. Plaintiffs are having difficulty serving defendants in a timely manner, and the rule needs clarification.

Between November 1, 2017 and October 31, 2023, between 18.1% to 25.3% of FASTAR cases were terminated for lack of service. Between November 1, 2017 and April 10, 2024, a total of 21.5% of cases were terminated for lack of service. This data reflects a concern that Rule 104 may be causing an impediment for many plaintiffs.

Balancing the concerns for timely case processing and access to justice concerns, undersigned proposes the Court modify FASTAR Rule 104 to address the following issues: (a) inability to serve within 90 days, (b) requests for extension of time, (c) service by publication, and (d) the savings statute, A.R.S. § 12-504.

a. Inability to Serve Within 90 Days

The Petition correctly addresses a criticism that the deadline to serve is too rigid and unfairly inflexible, and argues that the concern is addressed by the extraordinary circumstances language of FASTAR Rule 102 that allows a case to be removed from FASTAR. Undersigned agrees that the Petitioner's approach is a reasonable solution; however, different judges may disagree about whether a failure to serve within 90 days is an extraordinary

circumstance. As such, undersigned proposes amending Rule 102(d) to make clear it applies to cases wherein a plaintiff is unable to effect timely service despite diligent efforts to serve, and that if a case is excluded, Tier 1 discovery limitations apply.

Whether the Court chooses this proposed approach or that of the Commission on Access to Justice in adopting a “good cause” exception to the deadline, the additional language about Tier 1 discovery limitations should be included in Rule 102(d) to avoid arguments that because the case was removed from FASTAR, Tier 2 discovery limitations apply.

Rule 102. Certificates; Forms

(a) – (c) [No change] FASTAR Certificate.

(d) Exceptions. If extraordinary case characteristics indicate that an otherwise eligible case is not suitable for FASTAR, a party for good cause shown may request the court to exclude the case from the FASTAR program and allow it to proceed under the civil rules applicable to non-FASTAR cases. Extraordinary case characteristics include cases where a plaintiff is unable to serve a defendant within the time provided by Rule 104 despite diligent efforts to serve the defendant. If a case is excluded under this subsection, Tier 1 discovery limits of Civil Rule 26.2(f)(1) apply unless otherwise ordered.

b. Extensions of Time

FASTAR Rule 104(a) provides that a plaintiff must serve the summons and complaint within 60 days. Rule 104(b) provides the Superior Court will issue a notice of impending dismissal indicating that the Court will dismiss the

action in 15 days if the plaintiff does not serve the defendant within those 15 days. Thus, Rule 104(b) actually gives the plaintiff at least 76 days to serve, assuming the Superior Court issues the Notice on day 61 after the complaint was filed. Also, FASTAR Rule 104(c) provides that the Superior Court may extend the time limit to no more than 90 days after the filing date of the complaint.

While anecdotal, in undersigned's nearly two years on the civil bench, FASTAR Rule 104(c) motions are, by far, the most frequent motions presented, and the numerosity of those motions dwarf motions for extensions for the time to serve under Rule 4(i), Ariz. R. Civ. P. Furthermore, FASTAR Rule 104(c), like Rule 4(i), Ariz. R. Civ. P., does *not* require a plaintiff to show good cause to obtain an extension. As a result, a plaintiff need not show it "exercised due diligence in trying to serve the defendant" to obtain relief. *Maher v. Urman*, 211 Ariz. 543, 548 (App. 2005) (citation omitted).

In light of the same and understanding the desire to assure that cases are timely processed, undersigned proposes that the deadline to serve be set at 90 days and that no extensions be permitted. A 90-day time limit would harmonize the FASTAR time limit Civil Rule 4(i). The application of a court's procedural rules should favor a decision on the merits, *see Shea v. Maricopa County*, 255 Ariz. 116, ___, ¶18 (2023), without burdening either parties or courts with requests for extensions of time for service. Moreover, to promote

the objectives of fairness and efficiency noted in Civil Rule 1 and in FASTAR Rule 101(a), there is a significant benefit in having a single, uniform rule for the time for service of process, rather than maintaining two separate, parallel systems for service. *Cf. State v. Bolt*, 142 Ariz. 260, 268-69 (1984) (recognizing value, so long as possible, of maintaining uniformity in rules). This is especially true insofar as FASTAR currently sets the timelines for service before any opposing party appears or has an opportunity to file a Controverting Certificate under FASTAR Rule 102(b), potentially disputing the very eligibility of the case for FASTAR. Having a uniform time for service in all civil cases would eliminate this procedural anomaly of FASTAR, greatly simplifying the rules of procedure and reducing the number of unnecessary dismissals without prejudice due to a lack of service.

Furthermore, undersigned proposes that Rule 104(b) be clarified such that it does not extend the time to serve, but only the time in which a plaintiff can submit proof of timely service.

c. Service by Publication

FASTAR Rule 104 should include a provision addressing service by publication.

In some instances, service by publication is necessary even though many courts have held that it should “be utilized as a last resort” because of concerns

over a defendant's due process rights. *Watts v. Crawford*, 896 P.2d 807, 811, n. 5 (Cal. 1995). See also *Gaeth v. Deacon*, 964 A.2d 621, 628 (ME 2009).

Under the applicable Arizona civil rules, service by publication is not effective until 30 days after first publication. Rules 4.1(l)(2)(D) and 4.2(f)(2)(D), Ariz. R. Civ. P. Those civil rules as applied in a FASTAR case provide difficulty for a plaintiff when, after exercising due diligence to serve a defendant, it determines that service by publication is the best means practicable under the circumstances to give notice to the defendant. Also, as noted by one commentator, the short timeframe of FASTAR sometimes results in a plaintiff serving by publication "sooner than would be necessary in a non FASTAR case." Bacon Comment, filed 04/30/202. As such, undersigned proposes that if a plaintiff secures a court order permitting service by publication within 90 days of the filing date of the complaint, that the plaintiff be allowed 130 days from the filing date of the complaint to file the required, statutory affidavit of publication.

d. The Savings Statute, A.R.S. § 12-504

Because the FASTAR rules limit the time to serve to 90 days, plaintiffs are sometimes unable to serve process, and the case is dismissed. That's not a problem for those who filed long before the applicable statute of limitations; however, it is a problem for those who have filed shortly before the applicable deadline. In a non-FASTAR case the Superior Court has discretion to grant a

plaintiff additional time even absent a showing of good cause. *Maier*, 211 Ariz. at 548. Under FASTAR, it does not. A.R.S. § 12-504(A) (“the savings statute”) provides that the Superior Court may grant relief of the statute of limitations and allow the plaintiff a period of time to refile. Undersigned proposes that Rule 104 contain language addressing relief under A.R.S. § 12-504(A) such that the dismissal order would presumptively allow the plaintiff to refile a timely-filed action within 60 days of the dismissal; however, still reserve the ability of the Superior Court to withhold such relief, if appropriate.

**Rule 104. Modification of Civil Rule 4(i) Regarding Time
for Service; Dismissal of an Unserved or Timely-Served
Defendant**

(a) General Limitation. The time limit of Civil Rule 4(i) does not apply to FASTAR cases. Instead, a plaintiff must serve the summons and complaint on every defendant within ~~60~~ 90 days after the filing date of the complaint.

(b) Service by Publication. If a plaintiff obtains an order permitted service by publication under Civil Rule 4.1(l) or Civil Rule 4.2(f) within 90 days after the filing date of the complaint, the affidavit of publication must be filed within 130 days of the filing date of the complaint.

~~(b)~~ (c) Dismissal of an Unserved Defendant. If the plaintiff does not file proof of timely complete service within ~~60~~ 90 days after filing the complaint or within 130 days if subsection (b) applies, the court will notify the plaintiff that it will dismiss the action without prejudice as to any unserved defendant 15 days after the date of the court's notice, and without further notice, unless the plaintiff files proof of timely service ~~completes service~~ within those 15 days. Unless the Court orders otherwise, a dismissal order must include an order that if the action was commenced within the time limited for the action, the plaintiff may

commence a new action for the same cause within 60 days of the date of dismissal.

~~(c) **Extension.** Within 60 days after filing the complaint, the plaintiff may request, and the court may extend the time for completing service, but the court may not extend the time limit for service more than 90 days after the filing date of the complaint.~~

(d) Dismissal of a Timely-Served Defendant. The court will dismiss without prejudice any timely-served defendant who did not file an answer or other response within 120 days after the filing date of the complaint, unless the plaintiff has filed a Rule 55 application for the entry of default of that defendant before the 120th day. The court will provide the plaintiff at least 20 days' notice before dismissing that defendant in a multi-defendant case, or before dismissing a case that has only one defendant.

5. FASTAR Rule 111: Require Parties to Discuss Potential Agreements, and Modify Rule 111 to Allow for Extraordinary Circumstances

As noted in the Petition, the vast majority of FASTAR cases settle before trial. Petition, p. 5. However, undersigned's anecdotal experience is that most often, parties and counsel are not exploring settlement before a FASTAR Rule 111(a) Status and Trial Setting Conference. The Court should modify Rule 111 to impose an obligation on parties and counsel to discuss potential agreements that could aid in the just, speedy, and inexpensive resolution of the case.

The Court should also modify Rule 111 to allow the Superior Court some flexibility in extraordinary circumstances to set a trial date. In its current form FASTAR Rule 111 requires a trial to be set no later than 270 days after the filing date of the complaint. That timeframe is workable in virtually all circumstances, but there are cases where for reasons beyond the parties' and

Court's control, trial cannot be scheduled within 270 days. Rule 111 should allow some flexibility in extraordinary circumstances.

Rule 111. Conferences; Trial Date

(a) Status and Trial Setting Conference. The judge will set a status and trial setting conference no later than 120 days after the filing date of the complaint.

(b) Obligation to Meet-and-Confer. Before the status and trial setting conference and unless otherwise ordered, the parties must discuss any agreements that could aid in the just, speedy, and inexpensive resolution of the case. The court may impose appropriate sanctions for a failure to comply.

~~**(b)**~~ **(c) Trial Date.** The court will set a trial date that is at least 190 days, but not more than 270 days, after the filing date of the complaint, unless it finds extraordinary circumstances exist. On stipulation and with the judge's consent, the court may set a trial date that is less than 190 days after the filing date of the complaint.

~~**(e)**~~ **(d) Pretrial Conferences.** The judge may set one or more Civil Rule 16 pretrial conferences.

~~**(d)**~~ **(e) Sanctions.** The judge may impose a sanction against a party or a party's counsel who is substantially unprepared to participate in good faith in a conference under this rule.

In the event the Court chooses to adopt FASTAR on a permanent basis, the undersigned respectfully request that the Court adopt the changes above, or reasonable compromises to address the issues addressed.

DATED this 1st day of May, 2024.

Hon. Greg Sakall