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IN THE SUPREME COURT
STATE OF ARIZONA

In the Matter of: **PETITION TO AMEND RULE 68(g), ARIZONA RULES OF CIVIL PROCEDURE**	Supreme Court No. **PETITION TO AMEND RULE 68(g), ARIZONA RULES OF CIVIL PROCEDURE**

Pursuant to Rule 28, Rules of the Supreme Court, Timothy Sandefur, individually and on behalf of the Goldwater Institute, respectfully petitions this Court to adopt an amendment to Rule 68 of the Arizona Rules of Civil Procedure, governing the assessment of sanctions against plaintiffs who reject offers of settlement. The current rule unwisely, and in some cases unjustly, penalizes plaintiffs who properly invoke the courts' jurisdiction to promote the public interest. The proposed amendment would remedy this problem by enabling courts to exercise judgment in awarding or denying sanctions as the interests of justice require. A redlined draft of amended Rule 68, as proposed herein, is included in

Appendix A . A clean draft of amended Rule 68, as proposed herein, is included in Appendix B.

I. BACKGROUND AND PURPOSE OF THE PROPOSED AMENDMENT

The current version of Ariz. R. Civ. P. 68 provides that where a defendant tenders an offer of settlement, and a plaintiff rejects that offer, and subsequently "does not obtain a more favorable judgment," the plaintiff "must pay" certain "sanction[s]." Subsection (d) addresses the manner in which a plaintiff may reject a settlement offer. It provides, first, that an unaccepted offer is deemed rejected, and, second, that if a plaintiff fails respond to an offer with specific objections, the plaintiff "waives the right to object to the offer's validity in any proceeding to determine sanctions under this rule."

A. Reason for Change

Although the purpose of Rule 68 is to encourage settlement in cases that involve monetary damages, it can also have the unintended consequence of penalizing good-faith litigation brought in the public interest, and in the process, deter meritorious public-interest lawsuits. An example of this is the recent case of *Stuart v. Lane*, No. 1 CA-CV 15-0746, 2017 WL 3765499 (Ariz. Ct. App. Aug. 31, 2017), *review denied* (Aug. 29, 2018). There, the Court of Appeals concluded that Rule 68 mandated a severe sanctions award against a taxpayer plaintiff who

brought a non-frivolous lawsuit against a government entity to challenge the constitutionality of government action. The result is likely to discourage future public-interest litigation, which is contrary to the public interest.

In *Stuart*, the plaintiff sought only declaratory and injunctive relief, not damages, and the case was explicitly brought as a public-interest matter, to seek judicial review of a city's decision to subsidize a golf course. During the litigation, the city made what it termed a Rule 68 settlement offer, but which proposed only that the plaintiff dismiss the case, with both sides bearing their own costs. The plaintiff did not reply with specific objections to the offer. It was deemed denied, and the court later awarded judgment to the city—and issued sanctions against the taxpayer plaintiff in the amount of $68,000.

That ruling illustrates the harshness and potential unfairness of the rule. Public interest litigation plays an important role in our legal system, as Arizona courts have frequently recognized in cases involving the "private attorney general" doctrine. *See, e.g., State* ex rel. *Corbin v. Tocco*, 173 Ariz. 587, 592 (App. 1992); *Arnold v. Ariz. Dep't of Health Servs.*, 160 Ariz. 593, 609 (1989). That doctrine—which originated in the courts and was afterwards confirmed by the legislature—exists "to encourage private parties to challenge state actions and enactments when necessary to vindicate important public rights." *Kadish v. Ariz. State Land Dep't*,

177 Ariz. 322, 334 (App. 1993). That doctrine involves attorney fees, but the same principles apply to Rule 68 sanctions.

Courts have typically distinguished between plaintiffs and defendants in cases involving attorney fee provisions of civil rights statutes. Most notably, in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978), the U.S. Supreme Court ruled that in light of the "equitable considerations" involved in the private attorney general doctrine, successful plaintiffs should be entitled to attorney fees in civil rights cases, but *un*successful plaintiffs should only be required to pay attorney fees "upon a finding that the plaintiff's action was *frivolous, unreasonable, or without foundation*." *Id*. at 421 (emphasis added). To "assess[] attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation," the Court explained, "and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of [federal civil rights laws]." *Id.* at 422.[1]

Following the same rule, the Court concluded in *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761–62 (1989), that, "in light of the competing equities" in private attorney general cases, courts should award attorney fees

[1] The same distinction between prevailing plaintiffs and prevailing defendants is embodied in the Equal Access to Justice Act, 5 U.S.C. § 504, 28 U.S.C. § 2412.

against unsuccessful plaintiff-intervenors in civil-rights cases "only where the intervenors' action was frivolous, unreasonable, or without foundation."

Arizona courts have adopted the same rule in applying state attorney fee statutes. *See West v. Salt River Agric. Improvement & Power Dist*., 179 Ariz. 619, 626 (App. 1994); *Sees v. KTUC, Inc.*, 148 Ariz. 366, 369 (App. 1985). "[T]he fact that defendant prevailed on the merits should not, in itself, provide the basis for awarding attorney's fees," said the *Sees* court, because state policy is to encourage public-interest litigation to vindicate important state policies. *Id.*[2]

The same principles should apply to Rule 68 sanctions, but because those sanctions are not attorney fees, plaintiffs are not insulated by the rulings in *West* or *Sees*. This means a Rule 68 sanction in a case involving attorney fee statutes—or

[2] *See also Carter v. R.I. Dep't of Corr.*, 25 F. Supp. 2d 24, 25-26 (D. R.I. 1998) ("The purpose of awarding an attorney's fee to a prevailing plaintiff is to encourage individuals to vindicate the policies underlying the civil rights and anti-discrimination laws by pursuing legitimate claims of constitutional deprivations and unlawful discrimination even though the pecuniary damages are modest and/or the claimant lacks the resources to pay counsel. … On the other hand, attorneys' fees are awarded to prevailing defendants in order to deter plaintiffs from bringing groundless lawsuits. … Although the statutes do not distinguish between prevailing plaintiffs and prevailing defendants, a defendant may be awarded attorneys' fees only if the plaintiff's claims are 'frivolous, unreasonable, or without foundation.' … The justification for requiring a higher threshold for defendants is that 'assessing attorneys' fees against plaintiffs simply because they do not finally prevail ... would undercut the efforts of Congress to promote the vigorous enforcement' of such statutes." (quoting *Christiansburg Garment*, 434 U.S. at 422)).

involving other rules that insulate unsuccessful plaintiffs from attorney fee awards[3]—remains a possibility, contrary to the policy embodied in the fee statutes. And *Stuart* makes clear how realistic such a possibility is.

Of course, it is reasonable to seek to deter *groundless* lawsuits, but it is important—as federal and state courts have emphasized—to "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success." *Christianburg Garment*, 434 U.S. at 421–22; *Accord*, *Sees*, 148 Ariz. at 369.

Frivolous, unreasonable, and baseless litigation should be deterred, but plaintiffs should not be deterred from bringing non-frivolous, reasonable, and potentially meritorious public-interest lawsuits, even if they ultimately do not prevail. This is especially true of cases that seek injunctive or declaratory relief against government actions, and where the primary purpose of Rule 68—to encourage settlement of cases involving monetary damages—is absent.

[3] A.R.S. § 12-1135(A), for example, which bars fee or costs awards against unsuccessful plaintiffs in certain property rights cases.

Also, while reducing litigation and encouraging settlement is a worthy goal with regard to private-law disputes, that goal is less obviously desirable in public-interest litigation. In *Stuart*, for example, a taxpayer plaintiff challenged a government subsidy, contending that it violated the state Constitution. The general public has a strong interest in seeing such questions answered by state courts. Even if a plaintiff is unsuccessful, the public benefits by judicial resolution of such questions—which might lead to legislative reform or to the end of disputes over the legality of a government program. But an outright dismissal of a public-interest lawsuit, as the city proposed in its settlement "offer" in *Stuart*, results *at best* in such questions remaining unanswered, and, at worst, in government wrongdoing going unredressed. Settlements of such cases does not necessarily serve the same public interests as the settlement of private disputes that only affect the parties themselves.

Notably, Rule 68 uses the term "sanctions," a term that typically refers to an award intended to punish some form of improper conduct. *See, e.g.*, Black's Law Dictionary 1507 (4th ed. 1968) ("a penalty or punishment provided as a means of enforcing obedience."). Indeed, Rule 68 sanctions have been deemed "both mandatory and punitive." *Stafford v. Burns*, 241 Ariz. 474, 485 ¶ 41 (App. 2017), *review denied* (May 24, 2017). Yet there is nothing *malum in se* in a plaintiff rejecting or even ignoring a settlement offer—particularly one that, as with the

"offer" in *Stuart*, proposes only to end the case while leaving allegedly unlawful government activity unresolved. Worse, Rule 68 does *not* require that an offer be even "'arguably reasonable.'" *Id.* at 484 ¶ 39.

The harsh consequence of the Rule as it now stands is that a defendant who makes an *unreasonable* settlement offer can obtain a *sanction* against a plaintiff who has rejected it, even if the plaintiff *prevails*—and regardless of whether the plaintiff seeks only her own damages, or is seeking injunctive relief as a concerned citizen seeking to vindicate an important public interest.

This outcome will certainly deter plaintiffs from bringing legitimate public-interest cases, out of fear that they may face "sanctions" based on their good-faith refusal to accept a settlement offer from the government.

As noted below, Ariz. R. Civ. P. 68(d) was not written with a case like *Stuart* in mind. It was drafted to govern the ordinary private-law case in which a plaintiff seeks a monetary damages award or to vindicate a private right. But—without taking a position on the merits of *Stuart* itself—it is now clear that a government entity can respond to a public-interest lawsuit by proffering a settlement "offer," even one that in substance proposes nothing other than the dismissal of the lawsuit, and then use the threat of sanctions offensively. At a minimum, this tactic will have a powerful *in terrorem* effect which can deter other citizens from bringing legitimate public-interest cases.

B. Reasons for Rule 68 and How Other Jurisdictions Address the Same Policy Considerations

Rule 68(d) was adopted in 2007 in response to a petition by the Arizona State Bar. *See* Petition to Amend Rule 68, R-06-0010 (July 29, 2006).[4] That petition was concerned with the fact that under the Rule then in effect, "offerees at times wait until the conclusion of the case to attack the validity of the offer," resulting in delay and unnecessarily protracted litigation. *Id.* at 7. The petition in contemplated only private-interest litigation seeking damages, and made no reference to public interest litigation or cases seeking only injunctive relief.

An example of the concerns that Rule 68(d) sought to address is *Boyle v. Ford Motor Co*., 235 Ariz. 529 (App. 2014), in which the plaintiff sued the manufacturer of a pick-up truck that caught fire, damaging the owners' home and other property. The company submitted a settlement offer, to which the plaintiffs did not respond. The court later ruled for the defendant, which sought sanctions under Rule 68. The plaintiffs opposed this on the highly technical ground that the offer did not include an offer to allow judgment to be entered, but only sought to stipulate to dismissal with prejudice in exchange for a fixed sum. *Id*. at 531 ¶ 9. The court found that by failing to respond with this objection at the time the

[4] https://www.azcourts.gov/Rules-Forum/aft/77.

settlement offer was made, the plaintiffs waived their objection under Rule 68(d), and could therefore be sanctioned. *Id.* at 532 ¶ 14.

That situation is wholly unlike a public-interest case seeking injunctive relief against an allegedly illegal act by the government. Rule 68's goal of encouraging the settlement of private disputes and preventing protracted litigation are legitimate ones, and courts should remain free to sanction frivolous, vexatious, or improper behavior or litigation. The rules should, indeed, encourage good-faith settlement discussions in cases involving money damages. But the rule should also take into account the public policy favoring litigation in the public interest by citizens and taxpayers who seek to vindicate important public interests.

No other state imposes a waiver rule similar to Rule 68(d). Those rules are notably less harsh and more carefully tailored to promote the public interest.

California's analogous rule allows a defendant to offer settlement up to 10 days prior to trial, and provides that if a plaintiff who rejects an offer fails to obtain a more favorable judgment, the plaintiff "shall not recover his or her postoffer costs and shall pay the defendant's costs [not double the costs] from the time of the offer." Cal. Civ. Proc. Code § 998(c)(1). It also provides that if a plaintiff rejects a defendant's offer and later obtains a less-favorable judgment, the plaintiff must pay the post-offer costs. It contains no waiver rule like Rule 68.

In Nevada, a party who rejects the other party's offer and fails to obtain a better judgment is barred from recovering either costs or attorney fees, and is also barred from recovering interest for the period following the offer. The rejecting party must also pay the offering party's post-offer costs, and if the offering party's attorney is working on a contingency basis, the amount of fees awarded to the offeror must be deducted from that contingent fee. Nev. R. Civ. P. 68.

The federal version of Rule 68 allows either side to offer a settlement, deems unaccepted offers withdrawn (rather than rejected), and provides that if a party rejects an offer and does not obtain a more favorable judgment later, the party who rejected the offer "must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d).

Michigan's offer-of-settlement mechanism appears to be the most carefully designed to balance the interests addressed here, and a good model to follow. Michigan Rule of Court 2.403 begins by separating cases "in which the relief sought is primarily money damages or division of property" from those "seeking equitable relief." The rules then allow cases to be submitted to a case evaluation panel which acts as a mediator; parties can accept or reject the compromises that panel recommends. Notably, however, the rule allows the court to exempt from this process those cases seeking only equitable relief, if there is "good cause shown

on motion or by stipulation" and if the court agrees that mediation would be "inappropriate." Mich. Ct. R. 2.403(A)(3).

Moreover, if a party rejects the settlement that the mediation panel proposes, and the party later obtains a less favorable judgment, that party must pay the opposing party's actual costs and reasonable attorney fees, Mich. Ct. R. 2.403(O)(1), (O)(6)(b). But the rule also provides that, if the plaintiff obtains equitable relief but no other relief, the court can compare the two and award costs to the defendant if "it is fair to award costs under all of the circumstances." Mich. Ct. R. 2.403(O)(5)(b).

The rule also allows a court "in the interest of justice, [to] refuse to award actual costs." Mich. Ct. R. 2.403(O)(11). This exception refers to cases in which "there is a public interest in having an issue judicially decided rather than merely settled by the parties." *Luidens v. 63rd Dist. Ct.*, 555 N.W.2d 709, 714 (Mich. App. 1996). These include "case[s] involving a legal issue of first impression," or "involving an issue of public interest that should be litigated." *Id.*

The Michigan rule appears carefully tailored to balance the considerations discussed here: the need to encourage settlement of private disputes while not deterring legitimate public-interest litigation. It allows courts proper discretion to decide when a plaintiff who loses after rejecting a settlement offer should not be

required to bear costs and fees. Rule 68 should be revised to strike the same careful balance.

II. THE PROPOSED AMENDMENT

To balance the considerations discussed herein, the proposed amendment is minor. A redlined draft of the proposal is attached at Appendix A, and a clean draft of the Rule including the proposed amendment is attached at Appendix B.

The proposed amendment is as follows:

(g) Sanctions.

(1) *Amount*. A party who rejects an offer, but does not obtain a more favorable judgment, must pay as a sanction:

(A) the offeror's reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred after the offer date; and

(B) prejudgment interest on unliquidated claims accruing from the offer date.

(2) *Taxable Costs and Attorney's Fees*. To determine if a judgment that includes an award of taxable costs or attorney's fees is more favorable than the offer, the court must consider only those taxable costs and attorney's fees that were reasonably incurred as of the offer date.

(3) *Arbitration*. To determine whether to impose a sanction after an arbitration hearing, the court must compare the offer to the final judgment entered either on the award under Rule 76(b)(4) or after appeal under Rule 77.

(4) A court shall not assess a sanction under this Section if the action seeks only declaratory relief, injunctive relief, or nominal damages.

(5) A court may, in the interests of justice, decline to award sanctions against a party who, in good faith, sought to vindicate an important public policy which would benefit a large number of people, if the case was not frivolous, unreasonable, or without foundation.

III. CONCLUSION

For the foregoing reasons, Petitioner hereby requests this Court adopt amendments to Arizona Rule of Civil Procedure 68(g), as proposed herein.

Respectfully submitted January 8, 2018 by:

/s/ Timothy Sandefur
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APPENDIX A

Rule 68. Offer of Judgment

(a) Time for Making; Procedure. Any party may serve on any other party an offer to allow judgment to be entered in the action.

(1) *Trial*. An offer of judgment must be made more than 30 days before trial begins.

(2) *Arbitration*. In actions assigned to arbitration, no offer of judgment may be made during the time period beginning 25 days before the arbitration hearing and ending when a Rule 77(a) notice of appeal is filed.

(b) Contents of Offer.

(1) *Money Judgment*. An offer that includes a money judgment must specifically state the sum of money to be awarded, inclusive of all damages, taxable court costs, interest, and attorney's fees, if any, sought in the action.

(2) *Attorney's Fees*. If specifically stated, attorney's fees may be excluded from an offer. If an offer that excludes attorney's fees is accepted and attorney's fees are allowed by statute, contract, or otherwise, either party may seek an award of attorney's fees.

(3) *Apportionment*. The offer need not be apportioned by claim.

(c) Acceptance of Offer; Entry of Judgment. To accept an offer, the offeree must serve written notice--during the effective time period--that the offer is accepted. After either party files the offer and proof of acceptance, the court must enter judgment in accordance with Rule 58(b).

(d) Rejection of Offer; Waiver of Objections.

(1) *Rejection of Offer*. An unaccepted offer is considered rejected. Evidence of an unaccepted offer is not admissible except in a proceeding to determine sanctions under this rule.

(2) *Objections to Offer*. An offeree who objects to the validity of an offer must--within 10 days after the offer is served--serve on the offeror written notice of the

objections. The failure to serve timely objections waives the right to object to the offer's validity in any proceeding to determine sanctions under this rule.

(e) Multiple Offerors. Multiple parties may make a joint unapportioned offer of judgment to a single offeree.

(f) Multiple Offerees.

(1) *Unapportioned Offers*. Unapportioned offers may not be made to multiple offerees.

(2) *Apportioned Offers*. One or more parties may make an apportioned offer to multiple offerees conditioned on acceptance by all of the offerees. Each offeree may serve a separate written notice of acceptance of the offer. If fewer than all offerees accept, the offeror may enforce any of the acceptances if:

(A) the offer discloses that the offeror may exercise this option; and

(B) the offeror serves written notice of final acceptance no later than 10 days after the offer expires.

The sanctions provided in this rule apply to each offeree who did not accept the apportioned offer.

(g) Sanctions.

(1) *Amount*. A party who rejects an offer, but does not obtain a more favorable judgment, must pay as a sanction:

(A) the offeror's reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred after the offer date; and

(B) prejudgment interest on unliquidated claims accruing from the offer date.

(2) *Taxable Costs and Attorney's Fees*. To determine if a judgment that includes an award of taxable costs or attorney's fees is more favorable than the offer, the court must consider only those taxable costs and attorney's fees that were reasonably incurred as of the offer date.

(3) *Arbitration*. To determine whether to impose a sanction after an arbitration hearing, the court must compare the offer to the final judgment entered either on the award under Rule 76(b)(4) or after appeal under Rule 77.

(4) A court shall not assess a sanction under this Section if the action seeks only declaratory relief, injunctive relief, or nominal damages.

(5) A court may, in the interests of justice, decline to award sanctions against a party who, in good faith, sought to vindicate an important public policy which would benefit a large number of people, if the case was not frivolous, unreasonable, or without foundation.

(h) Effective Period of Offers; Later Offers; Offers on Damages.

(1) *Effective Date*. An offer of judgment must remain effective for 30 days after it is served, except:

(A) an offer made within 60 days after service of the summons and complaint must remain effective for 60 days after the offer is served;

(B) an offer made within 45 days of trial must remain effective for 15 days after it is served; and

(C) in an action subject to arbitration, an unexpired offer will automatically expire at 5:00 p.m. on the fifth day before the arbitration hearing.

If the court enlarges the effective period, the offeror may withdraw the offer at any time after the initial effective period expires and before the offer is accepted.

(2) *Later Offers*. A rejected offer does not preclude a later offer.

(3) *Offers on Damages*. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, any party may make an offer of judgment. It must be served within a reasonable time--but at least 10 days--before the date set for a hearing to determine the extent of liability.

APPENDIX B

Rule 68. Offer of Judgment

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