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IN THE SUPREME COURT
STATE OF ARIZONA

In the matter of: PETITION TO ABROGATE RULE 68, ARIZONA RULES OF CIVIL PROCEDURE	Supreme Court No. R-19-00015 **COMMENT ON THE PETITION TO ABROGATE RULE 68**

I oppose the abrogation of Rule 68 because (1) the Rule actually opens the court house doors to plaintiffs with legitimate claims with modest damages in proportion to the expert and taxable costs, (2) it forces both sides to reasonably evaluate both damages and liability sooner rather than later, and (3) it can encourage earlier settlement by punishing unreasonable defense tactics in litigation, including excessive discovery and delay.

Most of my current practice is plaintiff's tort claims, although I also pursue and defend breach of contract actions, and in the past I have done insurance defense work. While an imperfect tool, Rule 68 benefits both plaintiffs and defendants and should not be abrogated.

Rule 68(g)(1) provides for the following sanctions:

> (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.

Subsection (A) provides sanctions to both plaintiffs and defendants, while subsection (B) is only of benefit to plaintiffs.

A. Plaintiffs Benefit from Rule 68

(1) Some meritorious claims may not be pursued without the availability of Rule 68 sanctions

One of the issues faced by Plaintiff's personal injury attorneys is getting a settlement or trial result that benefits the client in a cost-effective manner; that is, the cost and time must benefit both the client and the attorney. There is no benefit to a plaintiff in pursuing a case where the settlement or judgment will be largely consumed by liens, fees and costs, leaving little to nothing for that injured plaintiff. Therefore, an important factor in evaluating cases is the litigation costs, which can include significant expert fees. Even in cases with clear liability, the taxable and expert costs can quickly overwhelm the value of the tort case, leaving an injured party with no remedy. The best way to counteract or offset these costs is to serve an offer of judgment with the summons and complaint. For cases on the bubble, the availability of Rule 68 sanctions, and the client's willingness to agree to make an early offer of judgment, can make the difference between accepting and declining the client's case.

(2) Early offers of judgment can lead to early settlement

Making an early offer of judgment also helps clients understand the risks involved in litigation and rewards plaintiffs for making an early, careful evaluation of their damages, and for making an early, legitimate effort to settle the case. A discussion of how Rule 68 works gives the attorneys a framework in which to explain to our clients the costs and time involved in litigation, the value of early settlement based on a reasonable settlement offer, and the reward if that settlement offer is rejected and bested at trial. Early analysis of damages and risks can lead to earlier settlement with an offer of judgment.

(3) A plaintiff's early offer of judgment may cause the insurer to settle early

In most tort cases, the defendant is insured and it is the insurance company that is directing the defense, the willingness to settle and the amount offered in settlement. An

offer of judgment from the plaintiff may pressure the defendant's insurance company to consider paying out the policy limits sooner rather than later. For example, if a personal injury claim is worth roughly $25,000 and the at-fault driver has only $15,000 of insurance, an offer of judgment for the $15,000 policy limits may encourage prompt settlement of the case. If the insurer refuses to settle within the policy limits and the trial results in an excess judgment, the insurer will have to pay the entire judgment or face a claim for bad faith failure to settle. The Rule 68 sanctions – double taxable costs, the expert costs, and prejudgment interest – increase the likelihood that the final judgment will exceed the policy limits, and thereby increase the risk to the insurer in refusing to settle, especially when the plaintiff services the officer of judgment early in the litigation. Rule 68 sanctions may discourage unnecessary depositions and delays, because these tactics increase the amount paid in doubled taxable costs and interest, respectively, if the defendant fails to beat the offer of judgment at trial. The offer of judgment is also effective when the case has been through compulsory arbitration pursuant to Rule 72 et seq., which includes the additional sanction of reasonable attorneys' fees if the insurance company appeals an arbitration award and is sanctioned pursuant to rule 77(h), Ariz.R.Civ.P.

When used early in a case, Rule 68 can benefit a plaintiff and lead to earlier settlement of the case, lessening the burden on the courts.

B. Petitioner's Concerns Do Not Justify Abrogation of Rule 68

The petitioner's concerns can be boiled down to three points: (1) the sanctions may be unfair to reasonable litigants who lose, (2) the threat of sanctions can unreasonably force settlement, and (3) ADR renders Rule 68 unnecessary. These positions are addressed in turn:

(1) <u>Sanctions may be unfair, but the award of taxable costs may be unfair</u>

The award of taxable costs to the prevailing party pursuant to A.R.S. § 12-341 is not subject to a reasonableness evaluation: "The successful party to a civil action shall

recover from his adversary all costs expended or incurred therein unless otherwise provided by law." Therefore, a litigant must always consider the direct costs of litigation, as well as the possible award of taxable costs, in deciding whether to file suit. The added possibility of Rule 68 sanctions merely adds to a factor that must already be weighed when deciding whether to pursue a case. The risk or burden of Rule 68 sanctions for a meritorious claim or defense does not exist in a vacuum and it does not outweigh the value and utility of the sanctions in settling cases.

One way to ameliorate the unfairness of the Rule 68 sanctions would be to add a reasonableness requirement to any offer of judgment. The petitioner rejected adding a reasonableness requirement as "unworkable," because it was be "difficult and time-consuming." However, the courts routinely decide requests for attorneys' fees, which involve a determination of who is the successful party, including consideration of settlement offers prior to and during litigation, and whether the requested fees are reasonable. The determination of the reasonableness of Rule 68 sanctions would be no more difficult than determining attorneys' fees and could take into account similar factors to those identified in *Associated Indemnity Corp. v. Warner,* 143 Ariz. 567, 570 (1985).

Furthermore, the petitioner's claim that a reasonableness requirement "would introduce uncertainty, requiring offerors and offerees to predict the outcome of that subjective evaluation in deciding whether to make or accept an offer of judgment," shows a lack of appreciation for the greatest source of uncertainty in litigation – what the jury will likely decide.

This concern for "uncertainty" caused by a reasonableness requirement also ignores the numerous factors that go into case evaluation and settlement considerations: the likelihood of a favorable jury verdict; the amount of the damages awarded; the delay in reaching final resolution, which could include appeals; the party's tolerance of risk (does the party want to aim for the best possible outcome or avoid the worst possible outcome);

the party's available time and energy needed to pursue or defend the claim; and the implications for the party's business, future planning or personal needs that are affected by the ongoing litigation. In the context of these and other considerations, Rule 68 sanctions that are subject to a reasonableness consideration are not overly complicating.

(2) Threat of sanctions will not unreasonably force settlement

The most significant factors for settlement are (1) for whom the jury will find, and (2) if it is a plaintiff's verdict, the amount of the award. While beating an offer of judgment could be a consideration, it is less important than the considerations of time, energy and expense in going to trial and getting an outright defense verdict, or getting an award that is so small it will not cover the litigation costs, medical liens and attorneys' fees, even if the defendant did not make an offer of judgment. Eliminating Rule 68 sanctions will not alter this reality, but its elimination would prevent plaintiffs from using this tool themselves. Frankly, the threat that unreasonably forces settlement upon a plaintiff is the threat of an appeal of any plaintiff's verdict, even if that appeal may be frivolous.

(3) Other methods for encouraging settlement complement Rule 68 sanctions, they do not replace them

The petitioner does not provide any factual support for its claim, "The almost universal requirement for pretrial alternative dispute resolution has substantially reduced the need for additional mechanisms – such as Rule 68 – to encourage settlement."

Most individual clients seek justice and fair compensation for their injuries, and see those as the purpose of litigation. Settlement is not about justice or fairness. Settlement is a business decision, the weighing of economic costs, risks and the intangibles affecting the party, against the value of settlement now or the possible collection of a judgment sometime in the future. Rule 68 is an additional factor to be weighed by both parties.

Rule 68 is not "replaced" by ADR, it can make ADR more effective, and sometimes, unnecessary. While it is difficult to quantify the effect of the risk of Rule 68 sanctions – no defendant will tell the plaintiff, "I settled for x dollars because of the offer of judgment"

– Rule 68 sanctions are discussed by mediators and judges pro tem with the parties, and given weight by the parties. Rule 68 is not obsolete.

Conclusion

"The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." Anatole France (1844-1924). Litigation is not fair, and parties that can force the other side to incur unbearable expenses, or that can afford the costs and attorneys' fees, have the scales tipped in their favor. Pro se plaintiffs may extort money from small businesses that can't afford the cost of an attorney to defend themselves in superior court; individuals or small businesses may not be able to pursue or defend breach of contract claims because they cannot afford the attorneys' fees or the risk of having attorneys' fees awarded against them. It is not possible to design a workable set of rules that will completely level the playing field for all civil litigants. It makes no sense to abrogate Rule 68 because a few defendants have made $1.00 offers of judgment; eliminating Rule 68 would do more harm than good. Rule 68 should either remain as it is or have a good faith or reasonableness requirement added.

It is notable that as of April 29, 2019, no plaintiff's attorneys have submitted a reply in support of the abrogation of Rule 68, and counsel for both plaintiffs and defendants have argued against the abrogation of the Rule. As an attorney who has represented both sides, I respectfully request the petition to abrogate Rule 68 be denied.

RESPECTFULLY SUBMITTED this 30 day of April, 2019.

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