Scharf-Norton Center for Constitutional Litigation
at the GOLDWATER INSTITUTE
Timothy Sandefur (033670)
Aditya Dynar (031583)
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
Litigation@goldwaterinstitute.org

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-19-0015 **COMMENT IN SUPPORT OF THE PETITION**

Under Rule 28, Rules of the Supreme Court, the Goldwater Institute respectfully submits this comment supporting the State Bar of Arizona's petition to Abrogate Rule 68, Arizona Rules of Civil Procedure ("ARCP"). The Court is also considering another petition, No. R-19-0001, to Amend Rule 68(g), Arizona Rules of Civil Procedure. The Court should either grant that Petition or grant the State Bar's Petition.

I. A Survey of Current Offer-of-Judgment Rules Across the United States

If a litigating party rejects a settlement offer and obtains a less favorable judgment, the current Arizona rule *requires* the trial court to award sanctions to be paid

by the offeree litigant for, (1) offeror's expert witness fees, (2) double taxable costs per A.R.S. § 12-332, (3) prejudgment interest, and (4) in some situations, attorney fees. ACRP 68(b), (g). Arizona's offer-of-judgment rule is the harshest rule there is when compared to its counterparts in 50 states, the District of Columbia, and the Federal Rules of Civil Procedure. Arizona is the only state that has a superfecta of sanctions for double costs, expert witness fees, prejudgment interest, and attorney fees (if applicable).

Other jurisdictions have rejected Arizona-style punitive offer-of-judgment rules. *See* Appendix A (list of citations to offer-of-judgment rules in other United States jurisdictions). Prominent among them, the federal rule deems unaccepted offers withdrawn rather than rejected, Fed. R. Civ. P. 68(b), and many states have followed the federal model. Under the federal model, there is no such thing as default sanctions for *rejecting* the offer by failing to accept it. Arizona's rejection-by-default language, therefore, is in marked contrast. ARCP 68(d)(1). In other words, failing to accept the settlement offer is a *rejection* under Arizona's rules but a withdrawal under the federal rules.

Ohio and Illinois offer some helpful lessons. Ohio has an *anti*-offer-of-judgment rule. Ohio. R. Civ. P. 68 reads: "An offer of judgment by any party, if refused by an opposite party, may not be filed with the court by the offering party for purposes of a proceeding to determine costs. This rule shall not be construed as limiting

voluntary offers of settlement made by any party." Thus, Ohio courts permit litigants to voluntarily settle cases out of court and then enter dismissals pursuant to the civil rule on dismissing actions, with or without prejudice, as the case may be.

In Illinois, our research did not unearth any specific offer-of-judgment rule generally applicable to civil actions. It appears that there are a handful of statutes that loosely relate to offers of judgment in narrow classes of actions. *See, e.g.*, 815 Ill. Comp. Stat. 505/10a(h) (car dealership consumer fraud actions); 735 Ill. Comp. Stat. 30/10-5-110 (acquisitions of property for private ownership or control); 735 Ill. Comp. Stat. 5/12-639 (Uniform Foreign-Money Claims Act). In *Allen v. Woodfield Chevrolet, Inc.*, 802 N.E.2d 752 (Ill. 2003), the Court declared the offer-of-judgment rule relating to car-dealership consumer-fraud actions (815 Ill. Comp. Stat. 505/10a(h)) unconstitutional under the Illinois Constitution's Special Law Clause, Ill. Const. 1970, art. IV, § 13.

The experience in Illinois highlights another aspect of the historical development of the offer-of-judgment rule. ***Seventeen*** states, including Illinois, have legislatively enacted offer-of-judgment rules. *See* Appendix A. One-third of the states, thus, consider the rule a matter of substantive policy that must be *legislated*, not promulgated by the judiciary by employing a largely-opaque rulemaking process. In these states, therefore, the state's high court has no authority under its inherent power to establish rules of court to promulgate any offer-of-judgment rule.

II. This Court Should Abrogate Arizona's Punitive Offer-of-Judgment Rule.

There are several compelling reasons for abrogating Arizona's Rule 68 that easily eclipse the one rationale that purportedly supports Rule 68. The Court should, therefore, abrogate Rule 68.

The purpose of Rule 68, Arizona courts have said, is to encourage settlement and avoid protracted litigation. *See, e.g., Twin City Const. of Fargo, N.D. v. Cantor*, 22 Ariz. App. 133, 135 (1974). That is the only rationale ever identified for Rule 68.

In practice, however, this rule seldom encourages reasonable settlement behavior. Arizona's "must pay" language, ARCP 68(g)(1), for example, does not permit courts to perform a reasonableness analysis. The sanction is "both mandatory and punitive." *Stafford v. Burns*, 241 Ariz. 474, 485 ¶ 41 (App. 2017). Other jurisdictions provide judges discretion to waive or reduce the offer-of-judgment awards if justice so requires. *See* Appendix A.

In other words, Arizona imposes sanctions even when the offeree *reasonably rejects* an offer. In Arizona, there is no nexus between the reasonableness of the rejection and the amount of sanctions. A plaintiff who rejects a $10 settlement offer and ultimately wins a $5 award could be sanctioned the same amount as a plaintiff with the same cause of action that turns down a $1 million offer and ultimately wins a $500,000 award. The sanction amount, therefore, is tied solely to the vagaries of how much the *defendant* chooses to spend, not to the reasonableness of the plaintiff's

actions or the merits of the plaintiff's claims. It is bizarre that state law would punish a party—i.e., *sanction* that party—for reasonable behavior.

What's more, this Court's 1992 Amendment to Rule 68 imposed an additional sanction of "double taxable costs, if the judgment finally obtained is *equal to or more favorable than* the offer." *Drozda v. McComas*, 181 Ariz. 82, 84 (App. 1994) (emphasis added). Therefore, the rule creates the risk that a defendant, by the simple expediency of offering a low-ball judgment that the plaintiff will likely ignore, can obtain *double taxable costs* even if the plaintiff wins *more than* the offer amount.

Even more troubling, Rule 68 coerces settlement under the threat of sanctions. Settlement is a tool for resolving conflicts voluntarily in a manner agreeable to both parties. The Rules should not operate as a thumb on the scale favoring defendants or pressure a party to settle a case where that party rightly believes he or she is entitled to ultimate judgment. But—as explained in detail in the Goldwater Institute's petition to amend Rule 68—the Rule has a chilling effect on plaintiffs bringing meritorious suits. The coercive effect of Rule 68 is more pronounced in cases with plaintiffs of limited financial means litigating meritorious lawsuits against deep-pocket defendants. The anti-poor-plaintiff bias of Rule 68 has limited, if any, saving grace.

III. Other Less-Draconian—and Constitutional—Means Exist to Foster Settlements.

Encouraging settlements is a policy goal that is already achieved by Arizona's comprehensive statutory scheme. A few examples: A.R.S. §§ 12-346, 12-348, 12-349, 12-350, 12-3201. These statutes show that when the people's representatives have tackled the question of encouraging settlements, they have enacted laws markedly less onerous than Rule 68.

This point also highlights the solution that 17 states have adopted: leaving policy-making to the other two coordinate branches of government. Seventeen states' high courts have left the matter of encouraging settlement to their respective legislatures.[1] This Court should do the same.

Settlement policy is not a procedural, claim-processing rule. And sanctioning a litigant for not settling is certainly a policy objective that is better left to the legislature to preserve the judiciary's role as an independent branch of government that does not engage in policymaking. Therefore, abrogating Rule 68 would also better respect the Arizona Constitution's Separation-of-Powers Clause. Ariz. Const. art. III.

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[1] Alaska, California, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Louisiana, Maryland, Nebraska, New York, North Carolina, Oklahoma, South Dakota, Virginia, Wisconsin. *See* Appendix A.

Abrogating Rule 68 also respects the zone of rulemaking authority that the Arizona Constitution, in plain words, has given this Court. Ariz. Const. art. VI, § 5 (emphasis added), gives this Court the "[p]ower to make rules relative to all *procedural* matters in any court." It is doubtful if this Court ever had the authority to issue mandatory *substantive* policy statements like the one embedded in Rule 68.

Nor should the Court wait to abrogate Rule 68 until an appropriate *case* comes to the Court on a petition for review. First, such a case is unlikely to be brought to this Court, since the very purpose of the rule is to discourage litigation to the state's highest court. Offeree litigants would not want to accumulate sanctions, costs, fees, and post-offer interest to gamble on the Court granting discretionary review. Second, amending rules through litigation has been and should remain a rare exercise. *See, e.g.*, *Phillips v. O'Neil*, 243 Ariz. 299 (2017). The better approach is to "carefully weigh the full ramifications" of Rule 68 in an open rulemaking process that is not confined to the perspectives and preserved arguments of the (typically) two litigating parties. *Id.* at 78 ¶ 33 (Bolick, J., dissenting).

Conclusion

The Court should abrogate Rule 68, or in the alternative, adopt the amendment proposed in the rule-change petition No. R-19-0001.

Respectfully submitted this 30th day of April 2019,

/s/ Aditya Dynar
Aditya Dynar (031583)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

Appendix A

State	Citation	Type
Alabama	Ala. R. Civ. P. 68	Court rule
Alaska	Alaska Stat. § 09.30.065	Statute
Arizona	Ariz. R. Civ. P. 68	Court rule
Arkansas	Ark. R. Civ. P. 68	Court rule
California	Cal. Civ. Proc. § 998	Statute
Colorado	Colo. Rev. Stat. § 13-17-202 (Colo. R. Civ. P. 68 repealed eff. July 1, 1990)	Statute
Connecticut	Conn. Gen. Stat. § 52-192a	Statute
Delaware	Del. R. Civ. P. 68	Court rule
District of Columbia	D.C. Superior Ct. R. 68	Court rule
Federal Courts	Fed. R. Civ. P. 68	Court rule
Florida	Fla. Stat. § 768.79	Statute
Georgia	Ga. Code § 9-11-68	Statute
Hawaii	Haw. R. Civ. P. 68	Court rule
Idaho	Idaho R. Civ. P. 68	Court rule
Illinois	No specific offer-of-judgment rule found	N/A
Indiana	Ind. St. Tr. P.R. 68	Court rule
Iowa	Iowa Code § 677.7	Statute
Kansas	Kan. Stat. § 60-2002	Statute
Kentucky	Ky. R. Civ. P. 68	Court rule

Louisiana	La. Code Civ. Proc. art. 970	Statute
Maine	Me. R. Civ. P. 68	Court rule
Maryland	Md. Code Ann. Cts. & Jud. Proc. § 3-2A-08A	Statute
Massachusetts	Mass. R. Civ. P. 68	Court rule
Michigan	Mich. Ct. R. 2.405	Court rule
Minnesota	Minn. R. Civ. P. 68.01	Court rule
Mississippi	Miss. R. Civ. P. 68	Court rule
Missouri	Mo. R. Civ. P. 77.04	Court rule
Montana	Mont. R. Civ. P. 68	Court rule
Nebraska	Neb. Rev. Stat. § 25-901	Statute
Nevada	Nev. R. Civ. P. 68	Court rule
New Hampshire	N.H. Ct. R. 39	Court rule
New Jersey	N.J.R. Ct. 4:58	Court rule
New Mexico	N.M.R. Civ. P. 1-068	Court rule
New York	N.Y.C.P.L.R. 3221	Statute
North Carolina	N.C. Gen Stat. § 1A-1, Rule 68	Statute
North Dakota	N.D.R. Civ. P. 68	Court rule
Ohio	Ohio R. Civ. P. 68	Court rule
Oklahoma	Okla. Stat. tit. 12, § 1101.1	Statute
Oregon	Or. R. Civ. P. 54	Court rule
Pennsylvania	Pa. R. Civ. P. 238	Court rule

Rhode Island	R.I.R. Civ. P. 68	Court rule
South Carolina	S.C.R. Civ. P. 68	Court rule
South Dakota	S.D. Codified Laws § 15-6-68	Statute
Tennessee	Tenn. R. Civ. P. 68	Court rule
Texas	Tex. R. Civ. P. 167.4	Court rule
Utah	Utah R. Civ. P. 68	Court rule
Vermont	Vt. R. Civ. P. 68	Court rule
Virginia	Va. Code Ann. § 8.01-421	Statute
Washington	Wa. Superior Ct. Civ. R. 68	Court rule
West Virginia	W. Va. R. Civ. P. 68	Court rule
Wisconsin	Wis. Stat. § 807.01	Statute
Wyoming	Wy. R. Civ. P. 68	Court rule