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Petra H. Mandigo Hulm
Clerk of the Supreme Court
Via email only phulm@ndcourts.gov

RE: Comments in Opposition to Proposed Amendments to Rule 68 of the North Dakota Rules of Civil Procedure

Dear Ms. Mandigo Hulm:

The American Property Casualty Insurance Association (APCIA) is writing to express concern regarding the proposed amendments to Rule 68 of the North Dakota Rules of Civil Procedure. APCIA is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 65% of the overall U.S. property-casualty insurance market and over 68% of North Dakota's property-casualty insurance market.

APCIA has strong concerns that the proposed amendments to Rule 68 are unreasonably punitive toward defendants and would amount to an unjustified and unnecessary departure from the Federal Rules of Civil Procedure and an overwhelming majority of state practices. The proposed changes would allow a plaintiff to recover double the costs it incurred after a defendant rejects a settlement offer if the plaintiff ultimately obtains a judgment that is more favorable than the unaccepted offer. Such asymmetrical treatment disproportionately affects defendants and in application could violate their due process rights to fair and equal protection under the law. Further, the proposed amendments attempt to solve a problem that does not exist. Courts already incentivize settlement in more reasonable ways without such a lack of parity.

We are also concerned that making double cost recovery available to only a plaintiff creates an incentive to litigate and would increase gamesmanship. It provides for a scenario of plaintiff recovery that is in excess of and unrelated to plaintiff's actual injuries. As such, plaintiffs are discouraged from presenting a reasonable offer of settlement if they know they can recover twice their costs in addition to any judgment award that is greater than the offer; even if that award is \$1 greater. This motivation is in direct opposition to the stated purpose of the proposed revisions to incentivize a "plaintiff to make an offer of settlement". The proposed amendment to Rule 68 would also lead to

more litigation as parties parse out when and how cost shifting is applicable, such as relative to pre-judgment interest awards.

APCIA and its members are specifically concerned that these incentives to litigate will lead to increased litigation costs, which will put upward pressure on insurance costs. This could negatively impact the insurance market in North Dakota and in turn, negatively impact North Dakota consumers.

Further, the proposed revisions mandate that “[n]o party may make an offer of settlement under this rule until 150 days after the action is commenced.” This means that although a defendant may have evaluated a claim during the initial phases of the case, it cannot make an offer under the proposed amendments for 150 days. During this time a defendant would incur costs for depositions, experts, discovery, etc., but would not be able to recover any of those costs since the only costs that can be recovered under the proposed amendments to the Rule are those incurred after an offer of settlement is made. As such, the proposed revisions encourage defendants to conduct most litigation activity after 150 days have passed. Such scenarios unnecessarily extend litigation.

We also note that the Explanatory Note is inconsistent with the proposed revision to Rule 68. The Explanatory Note provides: “Paragraph (a)(1) was amended. . . to specify that *a plaintiff* may not make an offer of settlement until 150 days after commencing the action.” (emphasis added). However, Paragraph (a)(1) of revised Rule 68 applies to *all parties*: “No party may make an offer of settlement under this rule until 150 days after the action is commenced.” To the extent there are any changes to the Rule as proposed, which we strongly discourage, the Explanatory Notes should be consistent in their explanation.

Given rampant abuse of the legal system, it is important to recognize that there is nothing in the proposed amendment to Rule 68 that would require the recovery of double cost be for the benefit of the injured party plaintiff. Instead, it could very well be used for double payment of the plaintiff’s counsel.

For the foregoing reasons, we strongly oppose the proposed amendments to Rule 68 of the North Dakota Rules of Civil Procedure and appreciate the Court’s consideration of our significant concerns.

Please do not hesitate to contact us if you have any questions or need additional information.

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