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## Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements

## RULE 68: THE SETTLEMENT PROMOTION TOOL THAT HAS NOT PROMOTED SETTLEMENTS

JAY HOROWITZ<sup>†</sup>

### INTRODUCTION

Any attorney experienced in civil litigation necessarily would agree that a rule intended to promote settlement can effectively serve that function only if it authorizes shifting the payment of attorney's fees from the party offering settlement to the party rejecting that offer. Parties to civil litigation often incur extremely sizeable fees. Consequently, a rule that shifts the burden of paying fees from one party to the other can be a powerful—indeed intimidating—tool for promoting settlement. By like measure, parties seeking to induce a settlement with their adversary likely will not even bother to invoke a rule that does *not* shift the burden of paying attorney's fees, reasoning that the shifting of costs alone is not worth the effort.<sup>1</sup> Attorney's fees, as distinguished from other costs incurred by the parties to a civil lawsuit, invariably account for a much larger portion of the total expense of the litigation than do the other costs and, therefore, can serve as a much more formidable hammer in bringing about settlement.<sup>2</sup>

Notwithstanding these facts, Rule 68 of the Federal Rules of Civil Procedure, uniformly recognized as a rule whose sole purpose is to serve the function of settlement promotion, refers on its face only to costs and not to attorney's fees. Rule 68's focus in this regard is counter-intuitive. No real incentive for settlement exists under a settlement promotion rule when the rule provides only that, should a party refuse to settle, it might

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1. 13 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 68.02[4] (3d ed. 1997 & Supp. 2009) (observing that defendants do not invoke Rule 68 because "the costs that they might recover simply do not make it worth their effort").

2. A study conducted by the Federal Judicial Center concluded that costs, not including attorney's fees, "accounted, on average, for less than twenty percent of the total cost of litigation"; a fact referenced in Daniel Glimcher, Note, *Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes*, 27 *CARDOZO L. REV.* 1449, 1478 n.244 (2006). This 20% figure materially exceeds the proportionate amount of expenses and costs, relative to attorney's fees, incurred in the civil litigation in which the author has been involved for more than thirty years.

be required to pay the small amount of money representing the costs typically awarded to the party who prevails in a litigation—such as filing fees, service of process costs, and the like, totaling perhaps a thousand dollars or less.<sup>3</sup>

In order to understand this dysfunctional situation and to examine ways to make Rule 68 more useful, this Article discusses the history of Rule 68 and the role of the United States Supreme Court in dealing with this intended mechanism for settlement promotion. Part I focuses on the Supreme Court's role as the promulgator of the federal rules of civil procedure, having the power and the responsibility—subject to Congress's approval—to adopt, revise and rescind the rules that govern the litigation of all civil cases prosecuted in federal court.

Part II discusses *Delta Air Lines, Inc. v. August*<sup>4</sup> and *Marek v. Chesny*,<sup>5</sup> the Court's two principal decisions interpreting and applying Rule 68. These cases represent the two important occasions upon which the Court has dealt with Rule 68, not in the exercise of the Court's "rule-making" function, but in the exercise of the Court's "rule-interpretation" function. Part II also discusses the train of cases following *Marek* that have variously applied *Marek's* holding that, in certain circumstances, Rule 68 *does* authorize the shifting of attorney's fees, as well as the shifting of costs, to the plaintiff. Most of these cases, however, have significantly limited the application of *Marek* by holding that only the plaintiff's own fees can be shifted (by the plaintiff's being deprived of its right to recover fees), not that the defendant's fees can be shifted.

Part III examines the settlement promotion rules and statutes adopted in several representative states. Many, although not all, of these rules and statutes call for the shifting of attorney's fees and costs to the party who has declined a settlement offer and then later obtains a less-beneficial result.

Finally, Part IV suggests changes that should be made to Rule 68 in light of the rule's intended function. There is an undeniable need for our courts and legislatures to adopt settlement promotion rules and statutes.

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3. The "costs" referenced by Rule 68 customarily are deemed to be the costs typically awarded pursuant to FED. R. CIV. P. 54(d)(1). These costs are itemized in 28 U.S.C. § 1920 (2006), as follows:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

4. 450 U.S. 346 (1981).

5. 473 U.S. 1 (1985).

Rule 68, as it exists and as it has been interpreted, manifestly is not an effective settlement promotion rule. As the title of this Article indicates, Rule 68 simply has failed to promote settlement.<sup>6</sup>

To be effective, any such rule must include provisions that permit the shifting of attorney's fees. At the same time, a revised Rule 68 must include other provisions not contained in the present Rule 68 that can ensure that the rule is both fair and reconcilable with substantive statutes that themselves authorize fee-shifting. In particular, a revised Rule 68 must authorize a plaintiff, as well as a defendant, to bring about a shifting of costs (and fees) by making a settlement offer. And, a revised Rule 68 must furnish the court with the discretion to shift costs and fees when the triggering event has occurred, rather than mandating a shifting in an amount set by reference to an inflexible standard.

### I. RULE 68 AND ITS HISTORY

Three characteristics of Rule 68 stand out from a review of its history and commentary concerning the rule: (1) Rule 68 is, rather mysteriously, viewed as "mysterious"; (2) Rule 68 is the only rule among the many federal rules of civil procedure promulgated by the Supreme Court that concerns the subject matter of settlement; and (3) Rule 68's content has been altered rarely—and even then, altered only slightly—during its more than seventy-year history. Each of these characteristics is discussed below.

#### A. Rule 68—A Mystery?

It cannot be disputed that, certainly on the face of Rule 68, there is nothing "mysterious" about this rule. To the contrary, Rule 68 in its current version is simple and straight-forward<sup>7</sup>:

Rule 68. Offer Of Judgment.

**(a) Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being

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6. See generally Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551 (2009) [hereinafter *A New FRCP Rule 68.1*] (constituting a study of why "Rule 68 offers of judgment are rarely made in the very types of cases in which they, theoretically, would be most effective," i.e., cases based upon fee-shifting statutes); Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (2007) [hereinafter *Rule 68 Offers of Judgment*] ("Rule 68 has played only a minor role in federal civil litigation since its enactment in 1937.").

7. What we refer to here as the "current version" of Rule 68 appears in FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 285–86 (rev. ed. 2009), which includes a version of Rule 68 which is "effective until December 1, 2009, absent contrary Congressional action," and which also includes the version of Rule 68 that is "effective December 1, 2009, absent contrary Congressional action." The minor differences between these two versions of Rule 68 are discussed in Part I.C.

served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

The Rule seems entirely unremarkable: if a defendant offers to have judgment entered against it for a specific amount, and if the plaintiff rejects the offer and subsequently obtains a judgment in an amount less than the defendant's offer, the plaintiff must then pay the costs incurred by the defendant after the offer was made.

Reading Rule 68's language as critically as one might, there is nothing "mysterious" about that language. The principal operative terms are not esoteric: Rule 68 refers to an "offer," a "judgment," an obligation to "pay" and "costs." This is not to say that parties to a litigation may not find many aspects of Rule 68 contestable, including its seemingly plain language.<sup>8</sup> But, disputes about the meaning of the terms of any of the

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8. As is evident from our discussion later in this Note, litigation concerning the meaning of Rule 68's seemingly simple word "pay" is relevant to this Note's focus upon Rule 68's applicability to attorney's fees as distinguished from traditional costs.

Rule 68(d) states simply that the offeree who has obtained a judgment "not more favorable" than the offer made to it by the defendant, "must pay the costs incurred after the offer was made." FED. R. CIV. P. 68(d). No less an analyst than Justice Stevens has suggested that this language merely means that Rule 68, when triggered, cancels the operation of Rule 54(d), and relieves the defendant from paying plaintiff's post-offer costs, but does not require, in addition, that the plaintiff/offeree pay defendant's post-offer costs. *Delta*, 450 U.S. at 360-61.

*Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986), rejected Justice Stevens' suggestion, emphasizing that Rule 68 refers to "costs" without any modifying language or further adornment, i.e., Rule 68 does not refer to "the offeree's own costs," and adding that Rule 68 "stresses that the offeree must pay the costs incurred, thus suggesting an affirmative action." *Id.* at 331. Thus, *Crossman* held that the plaintiff/offeree who "fails to obtain a more favorable judgment, must pay the defendant's post-offer costs," in addition to "paying," in the sense of "bearing," his own costs. *Id.* at 333.

Rule 68's actual language reasonably supports either interpretation. The resolution of the issue, however, can have great practical consequences. As the courts wrestling with the Supreme Court's holding in *Marek* are quite aware, while it may be punitive to require a plaintiff to "pay" its

rules of procedure are commonplace, and it remains a mystery why Rule 68 in particular receives the unflattering sobriquets accorded to it.

Yet legal commentators are more than interested in Rule 68; they are perplexed by it. Rule 68, seemingly plain on its face, regularly has been decried as “complex and ambiguous,”<sup>9</sup> described as a “mystery,” and characterized as “a riddle” and “among the most enigmatic of the Federal Rules of Civil Procedure.”<sup>10</sup>

One might suspect that the source of the “mystery” regarding Rule 68 is a disagreement about the Rule’s purpose. But, with one notable exception, all commentators, the Supreme Court itself and all lower federal courts agree that Rule 68’s function is to bring about the settlement of cases; as the Supreme Court put it: “The plain purpose of Rule 68 is to encourage settlement and avoid litigation.”<sup>11</sup> The one exception is Professor Robert G. Bone who rejects the “conventional view” that “Rule 68 is meant to encourage settlements by forcing plaintiffs to think hard before rejecting an offer” and instead concludes that the rule’s limited and narrow purpose is to protect a defendant from the conduct of an “unreasonable plaintiff” who persists in prosecuting its lawsuit even after the “defendant offered what the plaintiff was entitled to receive from trial.”<sup>12</sup>

But, as intriguing and persuasive as Professor Bone’s hypothesis may be, all other commentators accept the conventional view of Rule 68 as a “settlement promotion” device.<sup>13</sup> Thus, considering that Rule 68’s language is as simple as it is, and Rule 68’s purpose is virtually a subject of stipulation, one is left questioning why all commentators view Rule 68 as such a strange animal. The “mystery” surrounding Rule 68 is itself a mystery—unless those who label Rule 68 as a “mystery” intend to say

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own post-offer attorney’s fees in the sense of “bearing” those fees, it could be disastrous to require a plaintiff to “pay” the defendant’s attorney’s fees in addition to “bearing” his own attorney’s fees.

9. Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 379 (1997).

10. Robert G. Bone, “*To Encourage Settlement*”: *Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1561 (2008) (internal quotation marks omitted) (quoting *Crossman*, 806 F.2d at 331; Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 1 (1985)).

Professor Bone himself describes Rule 68 as a mystery in the sense that Rule 68, although understood as a “settlement promotion device,” includes four features which Professor Bone suggests have impeded its utility as such a device: “The Rule is written in a way that makes it an extremely poor tool for settlement promotion. Four aspects are particularly noteworthy: its small penalty, asymmetric application, requirement of a formal judgment, and timing limitations.” Bone, *supra*, at 1563, 1566. In other words, to Professor Bone, Rule 68’s “mystery” inheres not in what Rule 68 says but, rather in why Rule 68 says what it does say if Rule 68’s function is to promote settlement.

11. *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

12. See Bone, *supra* note 10, at 1562, 1570. It is Professor Bone from whom we have appropriated the term “settlement promotion tool.” This is Professor Bone’s shorthand for contrasting the purpose of Rule 68 as conventionally perceived with what Professor Bone calls the “unreasonable plaintiff model” a phrase which captures his characterization of the circumstances giving rise to Rule 68’s adoption. *Id.* at 1570.

13. See *id.* at 1562. To be sure, nearly all of them examined Rule 68 before Professor Bone and, therefore, without the benefit of his analysis.

only that the mystery inheres in the fact that Rule 68 is worded differently than one might expect that it would be worded given its intended purpose of settlement promotion.<sup>14</sup>

### *B. Rule 68—The Only Rule of Procedure Concerning Settlement*

For more than seventy years the Supreme Court has been responsible for promulgating and revising the Federal Rules of Civil Procedure, subject to contrary action by Congress.<sup>15</sup> The Court has also been responsible for interpreting and applying these rules. Because the great majority of civil cases filed in federal court—and controlled by the rules of procedure—settle, rather than being adjudicated at trial or dismissed on the merits, it is reasonable to expect the Court to have paid concentrated attention to promulgating rules of procedure that specifically concern settlement.<sup>16</sup> But, in fact, the Court has paid little attention to this fundamental element of civil litigation, having adopted only one rule, among all of the federal rules of civil procedure, which specifically addresses settlement. That rule, of course, is Rule 68.

The Supreme Court's passivity in promulgating rules dealing with settlement is at least as much of a mystery as the "mystery" concerning Rule 68 itself. The Court's failure to promulgate rules of procedure dealing with settlement does not however indicate that the Court is uninterested in encouraging parties to settle their disputes. To the contrary, although the Court has promulgated only the beleaguered Rule 68 to specifically address settlement, the Court has explicitly authorized district courts to enter orders encouraging parties to settle their cases. For example, Rule 16 contains three separate provisions that empower a district court to direct parties to attend mediation.<sup>17</sup> By those provisions the

14. This is Professor Bone's apparent perception. See Bone, *supra* note 10.

15. The Supreme Court is vested with the power to prescribe general rules of practice and procedure for cases in the federal courts and to report its recommended rules to Congress by the Federal Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. § 2072 (2006)). The Supreme Court first exercised this power in 1937 when it recommended to Congress the adoption of the first set of the federal rules of civil procedure (although Justice Brandeis stated that he did not approve). See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–81 (1938).

In practice, the federal rules of procedure are regularly reviewed and revisions are proposed by the Judicial Conference of the United States which acts through its Standing Committee on Rules of Practice and Procedure. The Standing Committee, in turn, relies upon the work of the Advisory Committee on the Civil Rules. This process is discussed in GEOFFREY C. HAZARD, JR. ET AL., *PLEADING AND PROCEDURE: STATE AND FEDERAL* 27–29 (8th ed. 1999).

16. A settlement, not a judgment on the merits, is the fate awaiting the overwhelming percentage of civil lawsuits. See Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 *STAN. L. REV.* 1255, 1259 (2005) (reporting that in 2003 only 1.7% of what the author refers to as "civil terminations" in federal civil cases occurred during or after a trial).

17. These three provisions are FED. R. CIV. P. 16(a)(1), (a)(5), (c)(9). They provide as follows:

(a) Pretrial conferences; Objectives. In any action the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) *expediting the disposition of the action;*

....



Supreme Court effectively encourages parties to settle cases through their own efforts, perhaps employing third parties such as arbitrators and mediators to assist.

But the Court has eschewed assigning the federal district courts a more meaningful and direct role in the settlement process, and the Court itself has shied away from promulgating rules of procedure that might encourage settlement. There is no obvious explanation for the Court's reluctance to have the judiciary participate more actively in such an important part of the litigation process.<sup>18</sup>

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(5) *facilitating the settlement* of the case.

.....  
 (c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to

.....  
 (9) *settlement and the use of special procedures to assist in resolving the dispute* when authorized by statute or local rule.

*Id.* (emphasis added).

The Court's interest in encouraging parties to mediate or to resolve their disputes by some method other than participation in a plenary trial is an interest shared by Congress. In the Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471-482 (2006)) [hereinafter CJRA], Congress empowered federal courts to adopt plans intended to bring about "delay reduction." CJRA provides as follows with respect to the "civil justice expense and delay reduction plan" which district courts are directed to adopt:

(a) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider and may include the following principles and guidelines of litigation management and cost and delay reduction:

.....  
 (6) authorization to refer appropriate cases to alternative dispute resolution programs that—

.....  
 (B) the court may make available, including mediation, minitrial, and summary jury trial.

28 U.S.C. § 473.

18. Starting in the late 1970s, the legal profession—to be sure, as a result in part of prodding by the judiciary—has been virtually obsessed by the need to devise ways to bring about settlements and thereby resolve cases short of a full trial on the merits. During that period of time "settlement has become the centerpiece of federal civil adjudication." Bone, *supra* note 10, at 1562. As a result, there is today a thriving and seemingly always expanding cottage industry constituted of for-profit and nonprofit mediation and arbitration companies, which did not exist twenty-five years ago. One dimension of this development is that many practicing attorneys now promote themselves as experienced in arbitration or mediation. An attorney's experience in trying arbitrations or mediations, as contrasted with an attorney's experience in trying cases, is characterized as a specialty, just as tax law or corporate law is characterized as a specialty. Beyond this, many practicing attorneys seek employment, not as the lawyer representing a party to an arbitration or mediation, but as the arbitrator or mediator himself.

Given this extensive activity by attorneys and by others who promote themselves as "facilitators," the judiciary's failure to itself effectively address and bring about the settlement of cases through its adoption and implementation of rules which could harness the coercive power of the court system is baffling. As discussed *supra* note 15, the Supreme Court, fully aware of the importance of settlement, has adopted rules of procedure which authorize district courts to require litigants to participate in activities which may facilitate settlement. But the Supreme Court has failed to adopt rules which themselves facilitate settlement. One would think that refined and tailored rules, accessible to all and administered by the institution whose very charge is to preside over the resolution of lawsuits, would necessarily be as helpful in promoting settlements of lawsuits as are the *ad hoc* results of private mediations.

*C. Rule 68 Has Been Amended Rarely and Only Slightly in Its Seventy Year History*

One of the more intriguing facts about Rule 68 is how little the current rule has changed from the first version of the rule adopted in 1938. Rule 68, in its entirety, provided as follows in 1938:

Offer of Judgment. At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.<sup>19</sup>

The current version of Rule 68 contains sub-parts and words not contained in the original version. But, the essence of Rule 68 has remained strikingly the same.<sup>20</sup>

This lack of change does not reflect a lack of *trying* to change, particularly with respect to the difficult and important subject of whether Rule 68 should be amended to authorize an award of “attorney’s fees” in addition to an award of “costs.” To the contrary, as observed by Justice Brennan in his dissenting opinion in *Marek*, the Judicial Conference and Congress have regularly considered and debated making changes to Rule 68.<sup>21</sup> These efforts to amend Rule 68 have continued to the present.

For example, the minutes of the November 17–18, 2008 meeting of the Civil Rules Advisory Committee contain extensive discussion of Rule 68.<sup>22</sup> That discussion refers to the Committee’s own “efforts to address Rule 68 in the 1980s and 1990s,” notes the sentiment expressed by some Committee members to “abrogate the rule” altogether, and sets

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19. See Advisory Comm. on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 482–84 (1946) (providing redlined version of Rule 68).

20. The Advisory Committee Notes to Rule 68 refer to and explain amendments to Rule 68 made in 1946, 1966, 1987, 2007 and 2009 (the latter changes are discussed in the body of this Note). The Committee’s Notes make it obvious that these amendments uniformly have been changes of little consequence. See FED. R. CIV. P. 68 advisory committee’s notes.

21. See *Marek v. Chesny*, 473 U.S. 1, 15 (1985) (Brennan, J., dissenting) (“Finally, both Congress and the Judicial Conference of the United States have been engaged for years in considering possible amendments to Rule 68 that would bring attorney’s fees within the operation of the Rule.”).

22. See CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: Nov. 17–18 (2008), <http://www.uscourts.gov/rules/Minutes/CV11-2008-min.pdf>.

forth a “list of topics that might be addressed by a modest revision” to the Rule, wryly observing that this list “has a way of expanding.”<sup>23</sup> Following this discussion, the Advisory Committee concludes as follows: “A motion to do nothing now carried unanimously. Rule 68 will be carried forward on the agenda, perhaps for more detailed consideration in the fall of 2009.”<sup>24</sup>

The Advisory Committee thereby did *not* determine that changes to Rule 68 are uncalled for, but rather that the problems confronted by the rule are so numerous that the Committee did not know where to start. Adjourning its examination of this problem for another day (actually, another year) presented itself as the most attractive course of action. And, sadly, when the Advisory Committee convened in October 2009, it devoted no time at all to Rule 68.<sup>25</sup> Again, the Committee resolved (this time apparently by unspoken agreement) to do nothing now.

In fact, at some point after its November 2008 meeting (and before the October 2009 meeting), the Advisory Committee had decided to recommend several changes to Rule 68, as indicated by the fact that during that time the Supreme Court did adopt several changes to Rule 68 which became effective on December 1, 2009, after Congress failed to reject those recommended changes.<sup>26</sup> Given the extensive discussion of Rule 68 through the years, including the extensive discussion at the fall 2008 Advisory Committee meeting, it is remarkable how minor these several amendments are.

First, Rule 68 was amended to extend the *ten* day period of time before trial which fixes the deadline by which an offer must be made, to a *fourteen* day period of time before trial, and to extend the *ten* day period of time following the service of an offer within which an offer must be accepted, to a *fourteen* day period.<sup>27</sup> These changes merely adjusted Rule 68’s existing time periods to accommodate recent changes to Rule 6(a).<sup>28</sup> In other words, these changes to Rule 68 were not driven by a consideration of any substantive issue raised by the application of Rule 68.

The second amendment to Rule 68 effective as of December 1, 2009, did address a matter specifically raised by Rule 68. More particularly, under the former Rule 68 the offering party was required to make

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23. *Id.* at 15.

24. *Id.* at 17 (emphasis added).

25. See CIVIL RULES ADVISORY COMM., JUDICIAL CONFERENCE OF THE U.S., MINUTES: Oct. 8–9 (2009), <http://www.uscourts.gov/rules/Minutes/CV10-2009-min.pdf>.

26. FED. R. CIV. P. 68 (“Text of subdivision (a) effective December 1, 2009, absent contrary Congressional action.”). These changes, explained below, have been incorporated into the current version of Rule 68 as it is quoted in the body of this Note above.

27. *Id.* 68(a).

28. Rule 6(a), the rule for computing time periods, uses time periods shorter than 11 days as a cut-off, namely that in calculating time, parties must “[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days.” *Id.* 6(a)(2).

its offer more than ten days (fourteen days to accommodate the new rule for computing time periods) “before the trial begins.” Rule 68, as amended, requires that the defendant make its offer more than ten days (as amended to fourteen days) “before the date set for trial.” The Advisory Committee explains this change by observing that, as a matter of practice, the date “a trial begins” may differ from the date originally “set for trial”; apparently it was this pedestrian fact which accounts for this amendment. Frankly, it is difficult to see how the putative uncertainty created by the reference to the “beginning of a trial” in the former version of Rule 68, as contrasted with the reference to a date “set for trial” in the new version of the rule, could meaningfully affect either the plaintiff or the defendant.<sup>29</sup> But, in all events, this amendment is not a matter of great moment.<sup>30</sup>

The lack of amendments to Rule 68 is not only notable because of Congress’ and the Supreme Court’s sustained interest in encouraging the settlement of cases, but also because of the controversial nature of the Supreme Court’s two decisions interpreting and applying Rule 68. Neither holding is obvious; both decisions were delivered by a deeply divided Court. These holdings are discussed in Part II. One must question why these decisions did not inspire the Supreme Court or Congress to work at amending Rule 68 so that the rule would be invoked more frequently or used more successfully. Perhaps the explanation is that these decisions were too controversial and that Rule 68 touches upon highly sensitive concerns.<sup>31</sup>

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29. *Id.* 68(a) advisory committee’s notes to 2009 amendment. Requiring a defendant to make his offer within a specific period of time “before the date set for trial,” rather than within a specific period of time “before the trial,” arguably could serve the plaintiff’s interest. In accordance with this new language, and in light of the fact that cases often are “set” for trial more than once, the defendant who is motivated to try to settle his case may wind up making more than one offer of judgment and, as a result, the plaintiff will have more than one opportunity to evaluate the offer.

From the defendant’s perspective, this change seems inconsequential. Under the present version of Rule 68 the defendant who is interested in making an offer knows that there is a deadline by which he must make the offer. But, the new version of Rule 68 also contains a deadline by which the defendant must act. As discussed immediately above, the only difference is that the new version of Rule 68 may make it somewhat more likely that the defendant winds up making more than one offer.

30. Although the particular changes in Rule 68’s timing deadlines affected by the 2009 amendments discussed here are matters of little consequence, the timing deadlines contained in Rule 68 in general are not inconsequential. For example, Rule 68’s requirement that the offeree respond to an offer within a relatively very short period of time—as of December 1, 2009 this is fourteen days and currently this is ten days—makes little sense. *Id.* The exemplary federal civil lawsuit has a lifetime considerably longer than one year. There is no good reason why the plaintiff confronted with an offer of judgment should be required to decide upon a final resolution of his case in such a short period of time. Nor is this short period of time necessary to serve the defendant’s interests; having made its offer the defendant is protected from having to pay post-offer costs whenever the plaintiff may decline the offer (assuming that the plaintiff ultimately obtains a judgment in an amount less than the offered judgment).

31. In fact, in 1983 and again in 1984 the Advisory Committee did make proposals to extensively amend Rule 68. The goal of the 1983 proposal was to “empower the Rule as a settlement promotion tool in order to meet ‘public demand’ for action in the face of an out-of-control litigation system.” See Bone, *supra* note 10, at 1608. But, this proposal “sparked a firestorm of controversy,”

## II. *DELTA AIR LINES, INC. v. AUGUST, MAREK v. CHESNY*, AND THE RULE 68 LITIGATION WHICH HAS FOLLOWED

As indicated above, the Supreme Court has authored two principal decisions which discuss Rule 68 in detail. These decisions were rendered in *Delta Air Lines, Inc. v. August*<sup>32</sup> and *Marek v. Chesny*.<sup>33</sup> These decisions—handed down only four years apart—are of interest in part because they reflect a Court fighting with itself: *Delta* adopts a restrictive interpretation of Rule 68, whereas *Marek* adopts an expansive interpretation. Notwithstanding this disparity, both decisions claim to be applying Rule 68’s “plain meaning.” Are they both right in so claiming? Or is one necessarily wrong? If the latter, which is wrong?

After discussing both decisions below, this Article turns to a discussion of an important issue related to Rule 68’s applicability to attorney’s fees which the Court in *Marek* was not asked to decide and, therefore, did not decide. This issue has led to continuing controversy and constitutes one of the more vexatious issues involving Rule 68: Does Rule 68 ever authorize the shifting of the offeror’s attorney’s fees to the offeree? *Marek* itself held, as discussed below, that Rule 68 only requires in certain circumstances that a plaintiff-offeree pay *his* own attorney’s fees when he otherwise could seek to shift them under a substantive statute providing for fee-shifting. As is also discussed below, most decisions concerning this issue have held that Rule 68 does *not* authorize the shifting of such fees, a holding which necessarily renders Rule 68 considerably less effective as a settlement promotion rule.

### A. *The Supreme Court’s Interpretations of Rule 68*

#### 1. *Delta Air Lines, Inc. v. August*

In *Delta*, the Supreme Court addressed a single, seemingly easy question: “whether the words ‘judgment finally obtained by the offeree,’ as used in [Rule 68] should be construed to encompass a judgment *against* the offeree as well as a judgment *in favor of* the offeree,” a construction which would result in a more expansive application of Rule 68.<sup>34</sup> The Court’s answer to this “narrow question,” an answer favoring a narrow application of Rule 68, was no.

Pursuant to Rule 68, the defendant in *Delta* had made an offer of judgment in a nominal amount to the plaintiff, who refused the offer.<sup>35</sup> At trial, the plaintiff, who brought her claims under the civil rights statutes, lost her case entirely—or, in the terms of Rule 68, the plain-

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and a 1984 proposal, although “designed to placate the opposition” to the 1983 proposal, fared no better. *Id.* at 1609.

32. 450 U.S. 346 (1981).

33. 473 U.S. 1 (1985).

34. *Delta*, 450 U.S. at 348.

35. *Id.*

tiff/offeree did not “obtain” any judgment in her favor.<sup>36</sup> And again referencing the terms of Rule 68, because the “judgment finally obtained” in the case was “not more favorable than the offer”—a development which, under Rule 68’s language, seemingly triggers the application of the rule—the defendant argued that Rule 68 required the district court’s ordering plaintiff to pay defendant’s post-offer costs.<sup>37</sup>

The Supreme Court disagreed, and held that the defendant was not entitled under Rule 68 to an order requiring that the plaintiff pay the defendant’s post-offer costs, even though the defendant had succeeded in prevailing entirely in the case.<sup>38</sup> As articulated by Justice Powell, who concurred in the Court’s decision (basing his concurrence on an issue separate from this central issue), the defendant’s rejected position seems irrefutable: “It is anomalous indeed that, under the Court’s view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.”<sup>39</sup> The Court was not swayed, and, in a decision authored by Justice Stevens, ruled that a denial of the defendant’s application for an award of costs was supported not only by “the language of the Rule and its clear purpose” but also “by the history of Rule 68.”<sup>40</sup>

While Justice Stevens mustered an interesting array of arguments to support the holding in *Delta*, it was Rule 68’s “plain language” that provided the strongest argument in favor of the plaintiff’s position. After all, Rule 68 unambiguously and specifically provides that the plaintiff offeree must pay costs only when “*the judgment that the offeree finally obtains* is not more favorable than the unaccepted offer.”<sup>41</sup> Confining one’s attention to these “plain words,” it is difficult to conclude that an offeree must pay the defendant’s costs even when the offeree had *obtained no judgment at all*.

However, for the reasons stated by Justice Powell, when Rule 68’s settlement-promotion purpose is taken into consideration the Court’s holding in *Delta* seems flatly wrong. After all, how could the Supreme

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36. *Id.* at 349.

37. *Id.* at 347–48 (internal quotation marks omitted) (quoting FED. R. CIV. P. 68).

38. *Id.* at 352.

39. *Id.* at 362 (Powell, J., concurring). Notwithstanding Justice Powell’s opinion that the Court’s holding resulted in this anomaly, Justice Powell concurred in the Court’s ruling that defendant was not entitled to an award of post-offer costs. *Id.* at 366. Justice Powell’s concurrence was based on the narrow ground that the defendant’s offer of judgment which plaintiff had rejected had not “specified some amount of substantive relief, plus costs and attorney’s fees to be awarded by the trial court” but instead, had offered that judgment be taken against it in “*the amount of \$450, which shall include attorney’s fees.*” *Id.* at 365–66 (quoting *Delta*’s putative offer of judgment). The problem for Justice Powell was that the offer as made referred to attorney’s fees as “included” with the substantive amount of the offer itself whereas, according to Justice Powell, the offer should have distinguished between the principal amount of the settlement offer and *then* specified that attorney’s fees were to be added. *Id.*

40. *Id.* at 356 (majority opinion).

41. FED. R. CIV. P. 68(d) (emphasis added).

Court conceivably hold that a defendant offeror who had defeated a plaintiff's claims in their entirety was entitled to be awarded less than a defendant who had only partially defeated a plaintiff's claims?<sup>42</sup> Clearly, settlement promotion would be served by awarding the defendant who was entirely successful at least as much as the award entered in favor of the defendant who was only partially successful. It appears that it was precisely this focus upon Rule 68's "settlement promotion" purpose which led, only four years after *Delta*, to the Court's holding in *Marek*.

## 2. *Marek v. Chesny*

In *Marek*, the defendant, like the defendant in *Delta*, was confronted with a claim under the civil rights statutes, which provide that a prevailing plaintiff can recover both attorney's fees and costs.<sup>43</sup> Pursuant to Rule 68, the defendant tendered an offer of judgment to plaintiff in the amount of \$100,000.<sup>44</sup> The plaintiff rejected the offer, the case proceeded to trial, and the plaintiff obtained a judgment in an amount less than the offered judgment of \$100,000.<sup>45</sup>

The plaintiff, having "prevailed" within the meaning of the relevant civil rights statutes, applied for an award of costs and fees.<sup>46</sup> The defendant objected on grounds that its Rule 68 offer required that the plaintiff, not defendant, pay all post-offer costs; the defendant argued as well that such costs included attorney's fees.<sup>47</sup> In other words, the defendant's position was that Rule 68 barred the plaintiff from recovering attorney's

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42. To be sure, in addition to relying upon Rule 68's language for support, Justice Stevens discussed Rule 68's so-called settlement promotion purpose—asserting that the Court's interpretation of Rule 68, which held that Rule 68 applied only in circumstances in which the plaintiff "obtained" some judgment, was "consistent with [Rule 68's] purpose." *Delta*, 450 U.S. at 352. Justice Stevens' discussion on this point included his observation that, "Rule 68 would provide little, if any, additional incentive [for settlement] if it were applied when the plaintiff loses," since, in such circumstances, the plaintiff likely would be required to pay costs to the defendant in any event pursuant to Rule 54(d)(1). *Id.* In other words, in a case in which a plaintiff loses its case in its entirety to the defendant, the plaintiff already is subject to the imposition of costs. Accordingly, applying Rule 68 to shift costs to the losing plaintiff would be nugatory.

This argument is correct, of course, only if it is assumed that under Rule 68 the plaintiff is required to pay only costs and *not* attorney's fees. If Rule 68 is held to authorize an award of attorney's fees, then the plaintiff facing a loss of his case would have a major incentive to settle in response to the Rule 68 offer because Rule 54(d)(1) explicitly excludes fees. Interestingly, when Justice Stevens wrote his opinion in *Delta* there was little support for the proposition that Rule 68 authorizes an award of attorney's fees. Four years later there was firm support for this proposition when the Court decided *Marek*. As discussed below, *Marek* specifically holds that, once triggered, Rule 68 (when considered together with certain fee-shifting statutes which may underlie the plaintiff's case) requires a plaintiff to pay its own post-offer attorney's fees rather than recovering those fees from the defendant (leaving open the separate issue of whether Rule 68 also requires the plaintiff to pay the defendant's post-offer attorney's fees).

43. *Marek v. Chesny*, 473 U.S. 1, 3–4 (1985).

44. *Id.*

45. *Id.* at 4.

46. *Id.*

47. *Id.*

fees that the plaintiff otherwise would have been entitled to recover under the fee-shifting provisions of the underlying civil rights statutes.<sup>48</sup>

The district court agreed with the defendant,<sup>49</sup> the Seventh Circuit Court of Appeals reversed,<sup>50</sup> and the Supreme Court granted *certiorari* to decide "whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U.S.C. § 1988 when the plaintiff recovers a judgment less than the offer."<sup>51</sup> Observing that the "drafters of Rule 68 did not define the term ['costs']," and ignoring the fact that Rule 68 on its face says nothing about attorney's fees—at least nothing which implies that Rule 68's word "costs" is intended to mean costs *and* fees—the Court held that plaintiff was *not* entitled to recover his post-offer attorney's fees:

[T]he most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.<sup>52</sup>

Based on this reasoning, in particular the fact that the statutes underlying the plaintiff's claims provided that a prevailing plaintiff could recover fees as well as costs (i.e., that fees were "properly awardable"), the Supreme Court held that the plaintiff could not recover *any* of his post-offer costs, including *any* of his post-offer attorney's fees.<sup>53</sup> In the language of Rule 68, the plaintiff-offeree was required to "pay" his own attorney's fees.

Justice Brennan's dissent is powerful.<sup>54</sup> Framing the question in terms of "whether the term 'costs' as it is used in Rule 68 . . . refers simply to those taxable costs defined in 28 U.S.C. § 1920 and traditionally understood as 'costs' . . . or instead includes attorney's fees when an underlying fees-award statute happens to refer to fees 'as part of' the

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48. *Id.*

49. *Id.*

50. *Chesny v. Marek*, 720 F.2d 474, 480 (7th Cir. 1983).

51. *Marek*, 473 U.S. at 3.

52. *Id.* at 9.

53. *Id.* at 9, 11–13.

54. Justice Brennan's dissent radiates power and outrage. Justice Brennan refers to the majority's ruling that a plaintiff could be required under Rule 68 to pay its own post-offer attorney's fees, depending upon the terms of the particular statute underlying the plaintiff's claims, as follows: "It is *simply preposterous* to think that Congress or the drafters of the Rules intended to sanction differing applications of Rule 68 depending on which particular subsection of [one of any number of different federal statutes] the plaintiff happened to invoke." *Id.* at 26–27 (Brennan, J., dissenting) (emphasis added).



awardable costs,”<sup>55</sup> Justice Brennan makes a series of compelling arguments why Rule 68’s “costs” do not include attorney’s fees, no matter what the substantive statute(s) underlying plaintiff’s claims might say. Among these arguments is Justice Brennan’s reliance upon Rule 68’s plain language, in particular the fact that Rule 68, unlike a number of other federal rules of civil procedure, does not contain the words “attorney’s fees.”<sup>56</sup>

Justice Brennan specifically refers to each of these “[e]leven different provisions of the federal rules” which refer to “attorney’s fees.”<sup>57</sup> His discussion is particularly powerful when one reads the entire series of provisions one after the other. Such a review conclusively establishes that, when Congress uses the term “attorney’s fees,” it does so advisedly.<sup>58</sup> Correlatively, when Congress does *not* include the term “attorney’s fees” in a statute or rule, particularly a rule in which Congress would likely have considered using the term if Congress had “attorney’s fees” in mind—to wit, Rule 68—Congress has also acted advisedly.<sup>59</sup> But, the power of Justice Brennan’s dissent was for naught. *Marek* established as law that Rule 68, if triggered by a plaintiff’s recovery of a judgment smaller than the offer of judgment made by a defendant, calls for—indeed requires—a court order requiring that the plaintiff pay its own attorney fees, although only if the underlying statute makes attorney’s fees “properly awardable.”<sup>60</sup>

In sum, *Delta* and *Marek* comprise an interesting set of bookends to the volumes of discussion about Rule 68. *Delta* relies upon Rule 68’s allegedly “plain” language to limit the application of the rule, and to limit it to a narrow category of cases in which a plaintiff obtains a favorable judgment that is less than the amount of the defendant’s settlement offer. *Marek* relies upon Rule 68’s allegedly “plain” language to make the rule more expansive, holding that in certain cases, a court is required to order a plaintiff who has rejected an offer in an amount greater than the amount of judgment ultimately obtained by the plaintiff, to pay its own attorney’s fees as well as its own costs. Ostensibly, Rule 68’s “plain lan-

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55. *Id.* at 13–14, 27.

56. *Id.* at 20 (“When particular provisions of the Federal Rules are *intended* to encompass attorney’s fees, they do so *explicitly*. Eleven different provisions of the Rules authorize a court to award attorney’s fees as ‘expenses’ in particular circumstances, demonstrating that the drafters knew the difference, and intended a difference, between ‘costs,’ ‘expenses,’ and ‘attorney’s fees.’”).

57. *Id.* at 20 & n.11.

58. As explained in note 15, *supra*, both the Supreme Court itself and Congress participate in the writing and the adoption of the Federal Rules of Civil Procedure. Hence, Justice Brennan’s observation that the “drafters knew the difference, and intended a difference, between ‘costs,’ ‘expenses,’ and ‘attorney’s fees,’” is applicable to both the Supreme Court itself and to Congress. *Id.* at 20.

59. The eleven provisions in the Federal Rules of Civil Procedure which specifically refer to attorney’s fees are: Rules 11, 16(f), 26(g), 30(g)(1), 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d), 37(g) and 56(g). *Id.* at 20 n.11.

60. This is the particular phrase in *Marek* which, as discussed later, winds up being endowed with great significance. *Id.* at 9 (majority opinion).

guage" is the talisman in both cases, yet that plain language drives very different results.<sup>61</sup> The intellectually unsatisfying (but probably correct) explanation for this incongruous result is that *Delta* was decided as it was because the more "liberal" pro-plaintiff justices held sway; *Marek*, although decided only four years later, evidenced the ascendancy of a more conservative, pro-defendant bloc.

### *B. The Post-Marek Interpretation of Rule 68 by the Circuit Courts of Appeals*

At the trial court level, the defendant in *Marek* had contended that Rule 68 required that the plaintiff not only "pay" his own post-offer attorney fees, as part of the plaintiff's post-offer costs, but, beyond this, that the plaintiff "pay" the post-offer attorney fees incurred by the defendant.<sup>62</sup> The district court agreed with defendant's position that plaintiff must pay his own post-offer attorney's fees, but rejected defendant's request that plaintiff be ordered, pursuant to Rule 68, to pay defendant's post-offer attorney's fees as well.<sup>63</sup> The defendant did not appeal the latter ruling. Accordingly, during the appellate proceedings in *Marek*, neither the Seventh Circuit Court of Appeals nor the Supreme Court was

61. As discussed above, there can be little dispute that, as Justice Stevens observed in *Delta*, the "plain language" of Rule 68 confines its effect to the second type of case—one in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) (emphasis added). Accordingly, Rule 68's "plain language," taken alone, establishes that a plaintiff who has not "obtained" a judgment cannot be ordered pursuant to Rule 68 to pay its own costs. Justices Brennan, White, Marshall and Blackmun agreed with this "plain language" conclusion.

Justice Rehnquist strongly disagreed. Justice Rehnquist asserted that the majority's reliance upon Rule 68's "plain language" made no sense. "But we may call upon the various canons of statutory construction to pass before us in review as many times as we choose without being reduced to this anomalous conclusion." *Id.* at 370 (Rehnquist, J., dissenting). Justice Rehnquist thereby agreed with Justice Powell's description of the *Delta* holding as "anomalous." *Id.* at 362 (Powell, J., concurring); see also *supra* text accompanying note 36.

Then, four years later, in *Marek*, the "plain language" of Rule 68 was argued by Chief Justice Burger as support for the Court's holding there: "The plain language of Rule 68 and § 1988 subjects such fees to the cost-shifting provisions of Rule 68." *Marek*, 473 U.S. at 11 (emphasis added). Justices White, Powell, Stevens, and Rehnquist agreed. For his part, Justice Brennan, having agreed with the majority's plain language ruling in *Delta*, eschewed the Court's "plain language" approach in *Marek*: "Applying the Court's 'plain language' approach consistently throughout the Rules, however, would produce absurd results . . ." *Id.* at 21 (Brennan, J., dissenting). Justices Marshall and Blackmun agreed.

The most striking reversal of position between *Delta* (1981) and *Marek* (1985) was made by Justice Rehnquist. In *Delta*, Justice Rehnquist, addressing an issue separate from the principal issue in that case concerning the meaning of "obtaining a judgment," unqualifiedly stated that Rule 68's reference to "costs" means only costs and not attorney's fees. *Delta*, 450 U.S. at 377 (Rehnquist, J., dissenting). In *Marek*, Justice Rehnquist unabashedly and without explanation changed his mind: "In *Delta* . . . I expressed in dissent the view that the term 'costs' in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong . . ." *Marek*, 473 U.S. at 13 (Rehnquist, J., concurring).

62. *Chesny v. Marek*, 547 F. Supp. 542, 545 (N.D. Ill. 1982).

63. *Id.* at 547. Even though the district court did not grant defendant all of the relief defendant sought, the district court's more limited order requiring that, pursuant to Rule 68, the plaintiff pay its own post-offer attorney's fees was itself virtually unprecedented, as pointed out by Justice Brennan in his dissent in *Marek*. *Marek*, 473 U.S. at 20–21 & n.12 (Brennan, J., dissenting).

required to decide whether Rule 68 required the plaintiff to pay not only his own post-offer attorney's fees, but also the defendant's post-offer attorney's fees.

Not surprisingly, however, this question, which obviously could have great consequences for parties litigating claims based upon fee-shifting statutes, has arisen in Rule 68 cases arising after *Marek*. Also not surprisingly, there is a split of authority on the question.<sup>64</sup> Most courts have held that while Rule 68, if triggered in a case based on a statute which itself authorizes the shifting of fees, does require that plaintiff pay its own post-offer attorney's fees, Rule 68 does not require that plaintiff also pay the defendant's post-offer attorney's fees—at least not unless the defendant has been held to be entitled to an award of attorney's fees in the case in question (a circumstance probably encountered rarely, if at all).<sup>65</sup>

For example, after observing that *Marek* had not reached this issue, the First Circuit in *Crossman v. Marcoccio* held that *Marek*'s analysis concerning the particular "attorney's fees" issue which *Marek* did reach also supported a holding concerning the attorney's fees issue which *Marek* did not reach which, according to *Crossman*, justifies a holding which results in a more restrictive application of Rule 68 even though *Marek*'s express holding results in a more expansive application of Rule 68.<sup>66</sup> In particular, the *Crossman* court held that a plaintiff cannot be ordered pursuant to Rule 68 to pay a defendant's post-offer attorney's fees unless the defendant himself was entitled to payment of his fees under the statute(s) underlying the case.<sup>67</sup> *Crossman*'s disposition of this issue relies heavily on this language from *Marek*: "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."<sup>68</sup> Thus, *Crossman* states that "although [plaintiff's post-offer attorney's] fees were 'properly awardable' costs under section 1988 [of the civil rights statute], [defen-

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64. Compare *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (concluding that Rule 68 "costs" do include post-offer, non-prevailing party attorney's fees), with *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986) (holding that Rule 68 "costs" do not include post-offer, non-prevailing party attorney's fees), and *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 646–47 (7th Cir. 2001) (agreeing with the First Circuit that Rule 68's "costs" language does not include non-prevailing party attorneys' fees), and *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1030–31 (9th Cir. 2003) (agreeing with the First and Seventh Circuits).

65. There are many federal statutes which underlie federal civil lawsuits and which authorize an award of attorney's fees to the "prevailing party." Those statutes include the civil rights statutes which provide, in 42 U.S.C. § 1988 (2006), that a prevailing party in a lawsuit brought under § 1983, may be awarded attorney's fees "as part of the costs" incurred in the lawsuit. While the civil rights statutes—on their face and without delineation—authorize the awarding of fees to a "prevailing party," judicial construction of those statutes has established a standard for a defendant to be deemed a "prevailing party" which is more rigorous than the standard to be satisfied by the plaintiff claiming to have been the "prevailing" party.

66. *Crossman*, 806 F.2d at 333–34.

67. *Id.* at 334 ("Rule 68 can never require prevailing civil rights plaintiffs to pay defendants' post-offer attorney's fees.")

68. *Marek*, 473 U.S. at 9 (emphasis added).

dant's post-offer] attorney's fees were not. The statute awards costs only to a 'prevailing party' [and defendant did not prevail]."<sup>69</sup>

In other words, *Crossman* holds that, when *Marek* refers to Rule 68 costs as including costs "properly awardable" under the underlying statute(s), *Marek* is holding that a determination of whether attorney's fees constitute Rule 68 costs depends upon the lower courts' analysis of the fee-shifting provisions in the underlying statute(s).<sup>70</sup> Put another way, *Crossman* holds that the unelaborated term "costs" in Rule 68 does not simply mean costs, but actually means this: costs and also attorney's fees, but attorney's fees only in circumstances controlled by a lower court's interpretation and application of the fee-shifting provisions in the statute(s) underlying a particular case. According to *Crossman*, this is what *Marek* meant by the shorthand phrase "properly awardable."<sup>71</sup> And, most courts which have addressed the question of whether Rule 68 does require a plaintiff to pay defendant's post-offer attorney's fees, have blithely followed *Crossman*'s lead.<sup>72</sup>

There is a line of authority, however, albeit a line of authority much shorter than the *Crossman* line, which interprets *Marek* as holding that Rule 68, when triggered, requires the plaintiff to pay not only its own post-offer costs—including its post-offer attorney's fees—and the defendant's post-offer costs as "costs" generally is defined, but *also* to pay defendant's post-offer attorney's fees. In *Jordan v. Time, Inc.*,<sup>73</sup> the Eleventh Circuit Court of Appeals unqualifiedly so ordered:

The language contained in Rule 68 is mandatory; the district court does not have the discretion to rule otherwise. Thus, the district court erred when it used its "equitable discretion" to deny [the defendant's] motion for attorneys' fees and costs. [Plaintiff] must pay the costs incurred by [defendant] after the making of its offer. . . . Costs as used herein includes attorney's fees. Under *Marek v. Chesny*, Rule 68 "costs" include attorney's fees when the underlying statute so prescribes. The Copyright Act so specifies . . . .<sup>74</sup>

69. *Crossman*, 806 F.2d at 334.

70. *Id.*; see also *Marek*, 473 U.S. at 9 (explaining that the court may award attorney's fees as "properly awardable" costs only "where the underlying statute defines 'costs' to include attorney's fees").

71. *Crossman*, 806 F.2d at 333–34.

72. See, e.g., *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1029–31 (9th Cir. 2003); *Le v. Univ. of Pa.*, 321 F.3d 403, 411 (3d Cir. 2003); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 646–47 (7th Cir. 2001); *Poteete v. Capital Eng'g, Inc.*, 185 F.3d 804, 807–08 (7th Cir. 1999); *EEOC v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994); see also *Boisson v. Banian Ltd.*, 221 F.R.D. 378, 380–82 (E.D.N.Y. 2004).

73. 111 F.3d 102 (11th Cir. 1997).

74. *Id.* at 105 (citation omitted); see also *Lucas v. Wild Dunes Real Estate, Inc.*, 197 F.R.D. 172, 177 n.2 (D.S.C. 2000) (explaining *Jordan*'s holding as follows: "This court notes that the Eleventh Circuit did not even consider whether a defendant seeking costs, including attorneys' fees, pursuant to Rule 68 had to be a prevailing party because the Eleventh Circuit implicitly read *Marek*

In the absence of the Supreme Court's own explanation of what has become its much commented-upon phrase, "properly awardable," one is tempted to review the parties' briefs in *Marek* to see whether the litigants' arguments support *Crossman's* holding that *Marek* was a "carefully crafted decision" or alternatively support *Jordan's* holding that *Marek* used the phrase "properly awardable" in a matter-of-fact manner. In fact, the principal briefs filed by the parties in *Marek* did not address this issue at all, let alone raise for the Court's consideration the "carefully crafted" distinction for which *Crossman* praises the majority in *Marek*. As discussed above, the defendant in *Marek* requested that the trial court award it its post-offer attorneys' fees under Rule 68.<sup>75</sup> The district court denied the defendant's request and the defendant did not appeal that ruling.<sup>76</sup> Hence, there was no need for either the plaintiff-respondent in its brief, or defendants-petitioners in their brief, to address that issue.<sup>77</sup> Accordingly, the Court in *Marek* addressed only the question of whether Rule 68, when triggered, requires the plaintiff's payment of its own post-offer attorney's fees. Because the issue of plaintiff's responsibility for defendant's *post-offer fees* was not before it, the Court did not reach that question.<sup>78</sup>

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to mean that the underlying statute *simply must define costs to include attorneys' fees in order for attorneys' fees to be properly awardable under Rule 68.*" (emphasis added)).

75. *Chesny v. Marek*, 547 F. Supp. 542, 545 (N.D. Ill. 1982).

76. *Id.* at 547-48; *see also* *Marek v. Chesny*, 473 U.S. 1, 4 n.1 (1985).

77. *See* Brief of the Respondent at i, *Marek*, 473 U.S. 1 (No. 83-1437), 1984 WL 565431; Brief of the Petitioners at i, *Marek*, 473 U.S. 1 (No. 83-1437), 1984 WL 565430. Comparison of the briefs reveals that the petitioners' brief, quite lengthy and analytic, gave rise to Chief Justice Burger's unusually short and conclusory majority opinion; by contrast, respondents' brief, much shorter than its counterpart, raised only some of the arguments which were extensively developed by Justice Brennan in his powerful and thorough dissenting opinion.

78. There were numerous *amici* briefs filed in support of the respective parties' positions, but the principal amicus brief which directly addressed the issue of whether Rule 68 also requires a plaintiff to pay a defendant's post-offer attorney's fees was that filed by the United States. Brief for the United States as Amicus Curiae Supporting Petitioners at 8 n.3, *Marek*, 473 U.S. 1 (No. 83-1437), 1984 WL 565432. This analytic brief, which furnished Chief Justice Burger with many of the arguments adopted by him (although not discussed by him in detail), addressed this issue in the context of responding to a concern expressed by Justice Rehnquist in *Delta*. The United States' exegesis of this issue is as follows:

Thus, this case does not present any issue concerning the circumstances in which a defendant might seek to collect his post-offer costs from the plaintiff.

In any event, reading "costs" in Rule 68 to include Section 1988 attorneys' fees does not have the result, suggested in Justice Rehnquist's dissenting opinion in *Delta Air Lines, Inc. v. August*, of requiring civil rights plaintiffs who reject Rule 68 offers also to absorb the defendant's attorneys' fees as costs. *Delta Air Lines* held that Rule 68 is entirely inapplicable when judgment is rendered in favor of the defendant. Thus, in any case to which Rule 68 applies, the defendant will by definition have lost the case. Section 1988, on the other hand, provides that fees may be awarded only to the prevailing party. Thus, the condition that entitles the defendant to be considered for the benefits of Rule 68 is the same condition that precludes him from taking advantage of Section 1988.

*Id.* (citation omitted). It is doubtful that Chief Justice Burger, notwithstanding his receptivity to many of the United States' arguments supporting the petitioners' position in general, intended to encapsulate the reasoning stated in the above footnote, when he adopted the phrase "properly awardable." Chief Justice Burger appears to have been principally influenced by the United States' and the petitioners' arguments pointing to the economics of plaintiff's position, which Chief Justice Burger

Thus, the “properly awardable” phrase in Chief Justice Burger’s opinion in *Marek* appears merely to be the Chief Justice’s short-hand reference to underlying statutes which include fee-shifting provisions, not a phrase that reflected the Chief Justice’s advised resolution of a specific issue debated by the litigants. The phrase took on special prominence only when, after *Marek*, the lower federal courts struggled with Rule 68 motions filed by defendants who invoked *Marek* and who asked that the court order a plaintiff to pay *all* post-offer attorney’s fees, including the defendant’s post-offer attorney’s fees. It was then that the phrase “properly awardable” became the allegedly advised phrase which *Crossman* portrays it as being.<sup>79</sup>

### III. THE APPROACH TAKEN BY SEVERAL STATES IN ADDRESSING THE ISSUE OF SETTLEMENT PROMOTION

It is telling that, since 1938, the only federal rule on the subject of settlement has been titled the “offer of judgment” rule.<sup>80</sup> In addressing this identical issue many states title their rule “offer of settlement” or something similar, *not* offer of “judgment.”<sup>81</sup> While this distinction seems merely semantic, and does not appear to alter the way a rule intended to serve the function of settlement promotion might work, the distinction reflects the states’ greater sensitivity to the important role that settlement plays in modern litigation and the states’ awareness of nuances which otherwise may have deterred the invocation of Rule 68. In

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summarized as follows: “[T]he \$139,192 in postoffer legal services resulted in a recovery \$8,000 less than petitioners’ settlement offer.” *Marek*, 473 U.S. at 11. That fact alone may have been the single fact most responsible for the *Marek* holding.

79. Commentators have disagreed with *Crossman*’s analysis of *Marek*’s holding and, in particular, with *Crossman*’s interpretation of the “properly awardable” phrase:

Allowing attorney’s fees to shift under Rule 68 is supported by a clear reading of the rule and the language of *Marek*. . . . In other words, when attorney’s fees are defined as part of costs in the underlying substantive statute, they are properly awardable costs which can be shifted pursuant to the rule.

Glimcher, *supra* note 2, at 1476; and,

Based on the Court’s answer [in *Marek*] to the first question—that attorney’s fees are included in the term “costs” in Rule 68—if the substantive statute defines attorney’s fees “as part of costs,” attorney’s fees should likewise be shifted pursuant to Rule 68.

. . . .

Rather, Rule 68 operates independently, relying only on the substantive statutes to determine what things are included in the Rule’s definition of “costs.” Rule 68 shifts the responsibility to pay “costs,” and the “prevailing party” language in the substantive statutes is irrelevant as Rule 68 does not look to the underlying statutes to determine who “prevailed.”

Christopher W. Carmichael, *Encouraging Settlements Using Federal Rule 68: Why Non-prevailing Defendants Should Be Awarded Attorney’s Fees, Even in Civil Rights Cases*, 48 WAYNE L. REV. 1449, 1455–57 (2003).

80. See FED. R. CIV. P. 68.

81. Colorado, for example, includes in its rule caption the term “offer of settlement.” COLO. REV. STAT. § 13-17-202 (2009). Other states, such as California, refer to their rule as “Offers by a Party to Compromise.” CAL. CIV. PROC. CODE § 998 (West 2009). The 1983 and 1984 proposed amendments to Rule 68 would have changed Rule 68’s caption to “offer of settlement.” *Proposed Court Rules*, 102 F.R.D. 407, 432 (1984); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 337, 361 (1983).

other words, the implementation of Rule 68, as worded, results in the entry of what might be viewed as a portentous “judgment,” rather than merely the effectuation of a neutral “settlement.”<sup>82</sup> In general, the states have been far more responsive in seeking to remedy Rule 68’s observed inadequacies than the United States Supreme Court has been.<sup>83</sup> Indeed a representative sample of the states’ rules of civil procedure reveals a myriad of creative approaches to the settlement promotion rule.<sup>84</sup>

For example, some states have made their settlement rule applicable to offers made by the plaintiff as well as to offers made by the defendant.<sup>85</sup> Many states explicitly include attorney’s fees within the awardable costs, and some of those states authorize the courts to require that one party pay its opposing party’s fees. Finally, some states introduce into the calculus an element of reasonableness, permitting courts to use their discretion in awarding post-offer costs, including attorney’s fees, rather than including Rule 68’s mandatory language providing that the “offeree must pay the costs incurred after the offer was made.”

#### *A. Efforts to Make Rule 68 a Two-Way Settlement Promotion Tool*

Many state versions of Rule 68 allow either party to make an offer of settlement.<sup>86</sup> A rule allowing a two-way offer of settlement incentivizes settlement exchanges by making the award of costs mandatory (assuming, of course, that Rule 68’s historical cast as a mandatory rule is maintained), rather than discretionary under Rule 54(d).<sup>87</sup> Indeed, a quick glance at a representative sampling of state rules shows that every offer of settlement rule adopted since 1970 is a two-way rule.

The Supreme Court has not ignored the possibility of making Rule 68 a two-way rule. On the contrary, amendments to Rule 68 proposed by the Standing Committee in 1983 and in 1984 addressed this specific issue.<sup>88</sup> The 1983 proposed amendment in particular characterized Rule

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82. The notes accompanying the 1983 proposed amendment to Federal Rule 68 explained that Rule 68 “has been recaptioned to refer to ‘settlement’ to indicate it is that process rather than entry of judgment that is being fostered.” *Preliminary Draft*, 98 F.R.D. at 364.

83. See, e.g., Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 52–53, 63–65 (1997).

84. For the purposes of this article, the author examined offer of settlement rules from Alaska, Arizona, California, Colorado, Connecticut, Florida, Nevada, New York, and Washington. Most of these states were chosen because their offer of settlement rule differs considerably from Rule 68, but some states were chosen because their offer of settlement rule is similar or identical to Rule 68.

85. See, e.g., ALASKA STAT. § 09.30.065 (2010); ARIZ. R. CIV. P. 68; CAL. CIV. PROC. CODE § 998; COLO. REV. STAT. § 13-17-202(1)(a); FLA. STAT. ANN. § 768.79(1) (West 2009); N.J. R. CT. 4:58-2; TEX. CIV. PRAC. & REM. CODE ANN. § 42.004 (Vernon 2009); WIS. STAT. ANN. § 807.01 (West 2009).

86. See ARIZ. R. CIV. P. 68; CAL. CIV. PROC. CODE § 998; COLO. REV. STAT. § 13-17-202; NEV. R. CIV. P. 68.

87. Bone, *supra* note 10, at 1599; see also FED. R. CIV. P. 54(d).

88. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 337, 353 (1983).

68's one-way structure as one of the two "principal reasons for the rule's past failure."<sup>89</sup> Nevertheless, Rule 68 remains to this day a "one-way street."<sup>90</sup>

### *B. Efforts to Explicitly Address Attorney's Fees in Rule 68*

As is evident from our discussion above, a common critique of Rule 68 is that it fails to address attorney's fees. Indeed, an attempt to fix this failure may explain the much-maligned *Marek* decision. But again, the States have been much more responsive than the United States Supreme Court in addressing this shortcoming.

Every drafter of a state settlement promotion rule in the representative sample of state rules that was drafted after 1970, has explicitly addressed whether the court may shift attorney's fees in addition to shifting more traditional "costs."<sup>91</sup> From the representative group, only New York and Washington fail to discuss attorney's fees, and the rules from those states are based on Rule 68 as it was originally adopted in 1938.<sup>92</sup> Thus, a review of the states' approach to settlement promotion indicates that the parties responsible for crafting the rules of procedure in the states agree that, if an offer of settlement rule is to actually promote settlement, it must explicitly address the issue of shifting attorney's fees as well as shifting costs.

### *C. Efforts to Inject Discretion into Rule 68*

Some states have dealt with Rule 68's perceived inadequacies by adopting an offer of settlement rule that vests the trial court with discretion to award costs, including attorney's fees. States have approached the issue of discretion in two different ways: (1) some versions of Rule 68 only permit the award of "reasonable" attorney's fees; and (2) other versions of Rule 68 permit the award of attorney's fees when the offeree's rejection of the offer was "unreasonable."

For example, Florida, Arizona, and Nevada authorize an award of attorney's fees under their offer of settlement rules, but only an award of fees which are "reasonable."<sup>93</sup> The Advisory Committee's 1983 proposed amendment to Rule 68 would have incorporated a similar reasonableness requirement.<sup>94</sup> Florida's reasonableness standard does not vest the court with significant discretion in awarding attorney's fees.<sup>95</sup> Florida's courts

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89. *Id.* at 363.

90. *Id.*

91. Alaska, Arizona, California, Florida, Nevada, and Colorado all explicitly address whether attorney's fees are included within shiftable costs. While most states that explicitly address the issue include attorney's fees within the shiftable costs, Colorado explicitly excludes them.

92. N.Y. C.P.L.R. 3221 (McKinney 2010); WASH. CIV. R. 68.

93. ARIZ. R. CIV. P. 68; FLA. STAT. ANN. § 768.79 (West 2009); NEV. R. CIV. P. 68.

94. *Preliminary Draft*, 98 F.R.D. at 363.

95. FLA. STAT. ANN. § 768.79.



*must* award attorney's fees when the underlying statute's prerequisites are met, even if the offeree's rejection of the offer is entirely reasonable.<sup>96</sup>

Like Florida, Arizona uses a reasonableness test albeit one which cabins a court's discretion in awarding attorney's fees. Arizona allows a court to award "reasonable" attorney's fees, but only if the fees have been separately identified in the offer.<sup>97</sup> On the other hand, Nevada's Supreme Court translated the Nevada rule's reference to "reasonable attorney's fees" into a four-part test:

- (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.<sup>98</sup>

Nevada, therefore, directs a trial court asked to award fees to examine the reasonableness of the conduct of both the offeror and the offeree.

The Advisory Committee's proposed 1984 amendment to Rule 68 incorporated a similar version of the reasonableness requirement:

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree. In making this determination the court shall consider all of the relevant circumstances at the time of the rejection, including (1) the then apparent merit or lack of merit in the claim that was the subject of the offer, (2) the closeness of the questions of fact and law at issue, (3) whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer, (4) whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties, (5) the relief that might reasonably have been expected if the claimant should prevail, and (6) the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.<sup>99</sup>

This 1984 proposal contrasts with the Nevada approach in that it contemplates a determination of reasonableness that is more legislative than judicial in character. According to one commentator, a legislative approach conserves judicial resources and is subject to less judicial con-

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96. *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *Schmidt v. Fortner*, 629 So. 2d 1036, 1040 (Fla. Dist. Ct. App. 1993).

97. ARIZ. R. CIV. P. 68.

98. *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983).

99. *Proposed Court Rules*, 102 F.R.D. 407, 433 (1984).

fusion—both seemingly obvious points.<sup>100</sup> Until recently, California used a similar legislative reasonableness test, which also was arguably more effective than its Nevada counterpart.<sup>101</sup> However, the California rule was repealed in 2005.<sup>102</sup>

#### IV. WHAT SHOULD BE DONE?

Despite the Supreme Court's and Congress' expressed interest in encouraging settlement, the Federal Rules of Civil Procedure—in particular Rule 68—have played a relatively small role in addressing this important issue. The question remains why Rule 68 has failed to serve as a meaningful mechanism for settlement and why, in light of that failure, Rule 68 was not long since amended to be more useful.

The answer becomes clearer once one focuses upon the large number of fee-shifting statutes that serve as the basis for federal lawsuits. Proposals for amending Rule 68, particularly if they suggest applying the rule to fees as well as to costs, invariably confront the fact that many federal lawsuits are based on statutes that themselves contain fee-shifting provisions. When Congress has decided that certain policies will be best served by a statute's prescribed allocation of attorney's fees, applying a procedural rule that also allocates attorney's fees may interfere with those legislative goals.

In addition, the application of Rule 68 to deprive a civil rights plaintiff of an award of his attorney's fees, even when that plaintiff has "prevailed" in obtaining a judgment in his favor, arguably violates the Rules Enabling Act of 1934.<sup>103</sup> Application of Rule 68 to require that the civil rights plaintiff, even though it has "prevailed," not only bear his own post-offer attorney's fees, but also pay the defendant's post-offer attorney's fees, would raise an even more troublesome question under the Rules Enabling Act.<sup>104</sup>

Hence, any effort to make Rule 68 work must address the problem raised by applying Rule 68, if it is amended to explicitly authorize the

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100. Anna Aven Sumner, Note, *Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified*, 52 DUKE L.J. 1055, 1072 (2003).

101. *Id.*

102. See CAL. CIV. PROC. CODE § 1021.1 (West 2009).

103. The Federal Rules Enabling Act, *see supra* note 15, specifically provides that the rules of practice, which are prescribed by the Supreme Court in accordance with that Act, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (2006).

104. Of course, requiring a civil rights plaintiff to pay a defendant's attorney's fees does not appear to be a practical problem in light of the interpretation of *Marek* made by most Circuit Courts of Appeals. Those courts, adopting the reasoning of *Crossman*, have held that, even though Rule 68 has been triggered, a plaintiff may not be ordered to "pay" the defendant's post-offer attorney's fees unless the defendant has been the "prevailing party" under the underlying civil rights statutes. This circumstance simply will not occur in light of the fact that Rule 68, by its terms, assumes that the plaintiff and not the defendant has obtained a judgment in its favor, albeit a judgment in an amount less than the amount of the offered judgment and, accordingly, the plaintiff and not the defendant is the prevailing party under the underlying civil rights statutes.

shifting of fees, to cases where the underlying substantive statutes themselves already authorize fee-shifting. Two possible approaches to this problem are: (1) Rule 68 is not applied to any cases in which the parties are litigating issues involving rights established by a fee-shifting statute;<sup>105</sup> and (2) Rule 68 is applied to the entire range of federal civil cases, but the rule is revised to provide that the imposition of Rule 68's "sanction" will not be mandatory but, instead, will be at the discretion of the court.<sup>106</sup> The court's discretion in deciding what post-offer costs or fees, if any, should be imposed on the plaintiff, will be guided by a consideration of all relevant circumstances, including the policies to be served by the underlying statute(s).

The second of these approaches is obviously more attractive. A large number of federal statutes contain fee-shifting provisions. The federal judicial system, and all who work in that system, would best be served by a rule which promotes the settlement of all federal civil cases instead of merely the settlement of certain categories of cases.

But, as indicated above, our recommendation that an amended Rule 68 be applied to all federal cases is based on the assumption that Rule 68, as amended, will provide for a *discretionary* shifting of fees and costs. The mandatory language originally included and still included in Rule 68 may have been suitable in an era of less complicated cases, where Rule 68's settlement-promotion function could be effectuated in an almost ministerial manner. But, particularly when Rule 68 is amended to provide for the imposition of attorney's fees—almost surely not a circumstance envisioned in 1938 (notwithstanding Chief Justice Burger's surmise to the contrary in *Marek*)—the implementation of a mandatory settlement promotion rule providing no discretion for the trial court will fail. There are simply too many variables implicated by the settlement of civil rights cases in particular for a mandatory rule, *requiring* the shifting of fees as well as costs, to bring about a fair result.<sup>107</sup>

Altering Rule 68 to make its imposition of costs (and fees) discretionary rather than mandatory will not undermine Rule 68's settlement-promotion function. To be sure, a mandatory imposition of fees against a plaintiff confronting the possibility of "guessing wrong" is a frightening prospect and no doubt could bring about settlement by intimidation. Such

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105. See Bone, *supra* note 10, at 1619 (observing that "the likely effect of conditional fee shifting on settlement probably varies too much by case type to justify a single uniform rule," and observing also that "the Rules Enabling Act or respect for the goals of congressional fee-shifting statutes might require excepting civil rights cases").

106. Roy D. Simon, Jr., *The Riddle of Rule 68* (pt. 1), 54 GEO. WASH. L. REV. 1, 71-75 (1985).

107. These variables include the factors referenced by the Advisory Committee in its proposed 1984 amendment to Rule 68 discussed above, and facts as fundamental as the plaintiff's financial wherewithal. Any federal settlement promotion rule must be flexible enough to accommodate parties with limited resources, for example, the plaintiff in a civil rights case who is unable to pay costs other than its own and, *a fortiori*, is unable to pay such items as the attorney's fees incurred by the defendant.

a regime is intolerable; encouraging settlement must not be the equivalent of requiring surrender.

A Rule 68 that vests a trial court with discretion to consider all circumstances bearing upon the reasonableness of the conduct of the parties, insofar as the parties' conduct has concerned settlement, will serve to strongly encourage settlement. The party who rejects a Rule 68 settlement offer will know that the reasonableness of its rejection, together with all other relevant circumstances, may be evaluated by the court at the conclusion of the case, necessarily causing that party to pay close attention to settlement offers.

Several other changes to Rule 68, in addition to those discussed above, are necessary to make Rule 68 more useful.<sup>108</sup> First, Rule 68 must authorize the awarding of attorney's fees as well as the awarding of costs; and to this end, Rule 68 should explicitly refer to fees as well as to costs. This should be done even under the current regime since, as discussed, *Marek* does authorize Rule 68's application to attorney's fees (albeit in a limited way) and plaintiffs should be informed of that fact by amending Rule 68's language.

Secondly, Rule 68 should be a two-way rule. The experience of many states in making their settlement promotion rule a "two-way rule" argues in favor of such a change to Rule 68, and so does logic; indeed, one wonders why, in light of the settlement promotion purpose, this change has not long since been made. Third, a more minor change, and one which seemingly is unexceptionable: Rule 68 should itemize the specific costs that can be awarded. Itemization of the specific "costs" will harm no one but, like the Rule's explicit reference to attorney's fees, will inform litigants of the possible consequences of making, or of responding to, a Rule 68 offer. Fourth, to serve a similar purpose, Rule 68 should prescribe the form of the actual document by which the Rule 68 offer is to be conveyed, perhaps eliminating in the future the extensive litigation over a defendant's settlement offer that is not as clear as it might be.<sup>109</sup>

It is impossible to know which of these changes may lead to parties' more frequent use of Rule 68 and, beyond that, which may lead to more settlements. My view is that the use of Rule 68 would increase significantly were the rule available to both plaintiffs and defendants and were the trial court granted discretion in applying the rule. Certainly, *Delta*

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108. A large number of possible changes to Rule 68, including some changes recommended here, all of which possibly could be codified in a new "Rule 68.1," are discussed in Lewis & Eaton, *A New FRCP Rule 68.1*, *supra* note 6.

109. There has been extensive litigation concerning difficulties encountered in interpreting "offers" made by defendants under Rule 68, as catalogued by Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 880-911 (2007).

and *Marek* would have produced opinions less irreconcilable with one another had the Court been construing a rule providing for a trial court's discretionary shifting of costs (and fees) and had Rule 68 been a settlement promotion device available to both parties. Almost certainly Justice Stevens would have been less concerned about a broad application of Rule 68, as sought by the defendant in *Delta*, were Rule 68 a discretionary "two-way" rule. Similarly, Justice Brennan's dissent in *Marek* likely would have been less spirited.

#### CONCLUSION

There is a lot of work to be done to create an effective and fair federal settlement-promotion rule. It seems axiomatic that the judicial system should assume a major portion of the responsibility for that work. After all, the judiciary exists for the purpose of presiding over, monitoring, and bringing about the resolution of lawsuits. Lawsuits are the *raison d'être* of the judicial branch of government. The judiciary itself therefore should play the most prominent role, rather than only an ancillary role, in addressing this central and critical element of every civil lawsuit. Indeed, it is perverse that currently the issue of settlement is handed over to mediators or the like and that the federal courts wind up as passive, albeit interested observers.

It is beyond debate that there should be a Rule 68. It is beyond debate that Rule 68 should be improved. And, it is beyond debate that the Supreme Court should assume the responsibility for that improvement. All litigators will watch with interest.

