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RULE 68 AT THE CROSSROADS: THE RELATIONSHIP BETWEEN OFFERS OF JUDGMENT AND STATUTORY ATTORNEY'S FEES

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I. INTRODUCTION

Rule 68 of the Federal Rules of Civil Procedure¹ is the only rule of procedure devoted exclusively to encouraging settlement.² The

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1. Rule 68 provides:

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. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

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

2. "The purpose of Rule 68 is to encourage the settlement of litigation." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). Although most federal court cases end in settlement rather than trial, the word "settlement" did not even appear in the Federal

basic operation of Rule 68 is simple. A defendant (but not a plaintiff)³ may make an offer under Rule 68 to settle a case for a specified dollar amount or other relief.⁴ If the plaintiff accepts the offer, the Rule 68 offer and a notice of acceptance are filed and the clerk enters judgment according to the terms of the offer. If, however, the offer is not accepted, and the judgment obtained by the plaintiff at trial is not more favorable than the offer, the plaintiff "must pay the costs incurred after the making of the offer."⁵

In short, if a plaintiff rejects a Rule 68 settlement offer and fails to beat the offer at trial, the plaintiff is responsible for paying the costs accruing after the offer is made.⁶ This mandatory sanction deprives a prevailing plaintiff of costs to which he would normally be entitled "as of course" under Rule 54(d).⁷

Rules until August 1, 1983, when amended Rule 16 took effect. Rule 16(a)(5) now provides that a court may convene a pretrial conference for the purpose of "facilitating the settlement of the case." This provision does not give courts any new powers, but simply "explicitly recognizes some of the objectives of pretrial conferences and the powers that many courts already have assumed." FED. R. CIV. P. 16 advisory committee note, *reprinted in* 97 F.R.D. 205, 207 (1983). Similarly, Rule 16(c)(7), which authorizes the participants at a pretrial conference to consider settlement or the use of extrajudicial procedures to resolve the dispute, merely acknowledges that "it has become commonplace to discuss settlement at pretrial conferences." *Id.* at 210. Moreover, there is no sanction for failing to settle pursuant to Rule 16(c)(7) because it is "not the purpose of Rule 16(c)(7) to impose settlement negotiations on unwilling litigants." *Id.* Rule 68, in contrast, provides for mandatory sanctions when conditions specified in the rule are met.

3. Since Rule 68 is available to "a party defending against a claim," it is always available to defendants. The rule also may be invoked by a plaintiff against a counterclaim. *See* 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 3001, at 56 n.7 (1973). But a plaintiff defending against a counterclaim may invoke Rule 68 only for purposes of making an offer of judgment with respect to the counterclaim, not for settling his own affirmative claim. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 & n.5 (1981).

For the sake of clarity, this Article will use the term "defendant" to encompass either an original defendant or a plaintiff defending against a counterclaim.

4. The settlement offer may be for "money or property or to the effect specified." FED. R. CIV. P. 68. The offer also must be "with"—it must agree to pay—costs the plaintiff has incurred up to the time of the offer. *Id.*

5. FED. R. CIV. P. 68.

6. Thus, Rule 68 "provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. . . . If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

7. Rule 54(d) provides as follows:

Except when express provision therefor is made either in a statute of the United States or in these rules, *costs shall be allowed as of course to the prevailing party* unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Unfortunately, despite its unique status as a rule encouraging settlement, Rule 68 is seldom used and is widely considered a failure.⁸ There are three major reasons for Rule 68's present ineffectiveness. First, the rule can be invoked only by parties defending against claims. Second, the sanction of costs has generally been considered too small to encourage defendants to make Rule 68 offers or to encourage plaintiffs to accept them.⁹ Third, even when Rule 68 has been used, it has not led to early settlements because defendants generally have a greater incentive to earn interest on their money than to avoid plaintiffs' costs. Thus, many Rule 68 offers are not made until shortly before trial.¹⁰

All of this may be about to change. On December 5, 1984, the United States Supreme Court heard oral argument in *Marek v. Chesny*.¹¹ In *Marek*, the Court is considering whether the term "costs" in Rule 68 includes civil rights attorney's fees,¹² which are defined

FED. R. CIV. P. 54(d)(emphasis added).

Rule 68 does not apply to any case in which the defendant rather than the plaintiff is the "prevailing party." *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351-52 (1981).

8. According to the present Advisory Committee on Civil Rules, Rule 68 "has rarely been invoked and has been considered largely ineffective as a means of achieving its goals." PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE (Preliminary Draft 1984) advisory committee note, reprinted in 102 F.R.D. 425, 433 (1984) [hereinafter cited as *Committee Note*].

9. According to the Advisory Committee on Civil Rules:

The principal reasons for the rule's past failure have been (1) that "costs," except in rare instances in which they are defined to include attorney's fees, *see, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), (1976), are too small a factor to motivate parties to use the rule; and (2) that the rule is a "one-way street," available only to those defending against claims and not to claimants.

Id. at 433-34; *see also* Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 890 (suggesting that non-use of Rule 68 is attributable to modest economic impact or to ignorance of rule's existence).

10. According to the Advisory Committee:

[S]ome parties defending against claims for money are inclined to delay making otherwise acceptable offers until trial so that in the interim they may have the use at favorable interest rates of funds that otherwise would have been available to the offeree under an offer accepted an earlier time.

Committee Note, supra note 8, at 434.

11. *Marek v. Chesny*, cert. granted, 104 S. Ct. 2149 (1984).

12. The two questions presented for review in *Marek v. Chesny* are:

1. Whether the defendants in a civil rights action are required to pay, under Title 42 U.S.C., § 1988, the plaintiff's attorney's fees as costs accrued after a valid offer of judgment under Rule 68 of the Federal Rules of Civil Procedure, when its offer of judgment has been rejected by the plaintiff and when the amount of the offer exceeds the subsequent judgment entered on verdict.

2. Whether fees recovered under a plaintiff's contingency contract should be disregarded by the district court in awarding "a reasonable attorney's fee" under Title 42 U.S.C., § 1988, when the contingency contract was never filed as required under General Rule 39 with the district court nor disclosed until oral

in 42 U.S.C. § 1988 as "part of the costs."¹³ Specifically, the Court will decide whether a civil rights plaintiff who rejects a Rule 68 offer and ultimately obtains a less favorable judgment at trial must be denied attorney's fees for all work performed after the Rule 68 offer was made.¹⁴

Although *Marek v. Chesny* superficially involves only the relationship between Rule 68 and section 1988, the case may have a much broader impact. At least ninety federal statutes in addition to section 1988 allow courts to award prevailing parties reasonable attorney's fees as part of the costs.¹⁵ If the Court decides that Rule 68 in effect incorporates the definition of costs used in the attorney's fees statutes, Rule 68 will become an enormously powerful settlement tool in cases involving fee-shifting statutes. One third or more of all federal litigation will thus be affected by the decision in *Marek v. Chesny*.¹⁶ Indeed, the issue is important enough for the Solicitor General of the United States to have filed an amicus brief urging the Supreme Court to hold that Rule 68 costs include attorney's

argument on appeal.

Petition for Writ of Certiorari at i, *Marek v. Chesny*, cert. granted, 104 S. Ct. 2149 (1984)[hereinafter cited as *Petition for Certiorari*]. This Article will deal only with the first question, which is clearly the major question in the case.

13. 42 U.S.C. § 1988 (1982). Section 1988 provides, in pertinent part, that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* (emphasis added).

14. A defendant who loses a civil rights case ordinarily is obligated to pay the plaintiff's attorney's fees because, under 42 U.S.C. § 1988, a prevailing plaintiff should "recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

15. Brief for the United States as Amicus Curiae Supporting Petitioners, App. at 1a-6a, *Marek v. Chesny*, cert. granted, 104 S. Ct. 2149 (1984)(listing federal attorney's fees statutes)[hereinafter cited as *Amicus Brief*].

16. See ANN. REP. DIRECTOR AD. OFF. U.S. CTS. 122-23 (1983)[hereinafter cited as *ANNUAL REPORT*]. A chart provided in the *Annual Report* gives the following breakdown for civil cases commenced in federal district courts during the 12 month period ending June 30, 1983: State prisoner petitions, 10.9%; federal prisoner petitions, 1.8%; civil rights cases, 8.2%; and antitrust cases, 0.5%—all of which add up to a total of 21.4% of the 241,842 civil cases filed in federal district courts during that period. *Id.* This amounts to approximately 51,750 cases covered by either 42 U.S.C. § 1988 or by the fee provision of the Clayton Act, 15 U.S.C. § 15 (1982).

The *Annual Report* further shows that an additional 19,361 cases (approximately 8.0% of all federal cases filed) were brought during the same 12 month period under federal labor laws (11,033 suits), patent, copyright, and trademark laws (5,413 suits), and securities, commodities, and exchange laws (2,915 suits), many of which were undoubtedly brought under federal statutes allowing an award of attorney's fees to prevailing parties. *ANNUAL REPORT*, *supra*, at 122 (table 18).

Moreover, since § 1988 applies not only to suits alleging constitutional violations but also to suits alleging violations of the "laws" of the United States, *Maine v. Thiboutot*, 448 U.S. 1 (1980), there are thousands of additional suits in which the prevailing party

fees in cases involving any of the ninety-plus fee award statutes.¹⁷

The court of appeals' holding in *Marek* that Rule 68 costs do not include attorney's fees in civil rights cases rested on two grounds. First, the court of appeals concluded that defining Rule 68 costs to include civil rights attorney's fees would have violated the Rules Enabling Act¹⁸ by abridging the plaintiff's substantive right to attorney's fees under section 1988. Second, the court of appeals concluded that construing Rule 68 costs to include civil rights attorney's fees would contradict the policies underlying section 1988.¹⁹

This Article disagrees with the court of appeals holding. Specifically, this Article argues that: (1) under section 1988, a plaintiff who rejects a settlement offer and fails to reach a better result at trial

is eligible for attorney's fees under § 1988 but which are not included as "civil rights cases" in the *Annual Report's* statistical breakdown. For example, the *Annual Report* indicates that social security cases accounted for 8.4% of all civil cases commenced in federal district courts during the 12 months ending June 30, 1983—a percentage even greater than that indicated for civil rights cases (8.2%). ANNUAL REPORT, *supra*, at 122-23. Since *Thiboutot* was an action "based solely on Social Security Act violations," *Mahe v. Gagne*, 448 U.S. 122, 128 (1980), it is clear that many thousands of the social security cases filed in federal court are fully covered by the fee award provisions of § 1988.

Reading all of these statistics together (21.4% + 8.0% + 8.4%), it appears that over one-third (37.8%) of all federal civil cases are covered by federal statutory provisions authorizing an award of attorney's fees to the prevailing party as part of the costs.

17. *Amicus Brief*, *supra* note 15. The importance of the issue is well expressed by the statement of interest of the United States:

The decision of the court below, holding that civil rights plaintiffs may recover post-offer attorneys' fees even if the final judgment they obtain is less favorable than the Rule 68 offer they rejected, significantly impairs the effectiveness of Rule 68 as a tool for encouraging settlements and avoiding protracted litigation. Accordingly, the decision may well result in an unnecessary increase in the workload of the already overburdened federal courts. In addition, as a defendant, the United States may face potential liability for attorneys' fees under a host of fee-shifting statutes (most notably, Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k)) that, like Section 1988, specifically define attorneys' fees "as part of the costs." . . .

Incorporation of Section 1988's definition of "costs" into Rule 68 (which does not itself define "costs") would serve the important purpose of relieving defendants of the burden of plaintiffs' attorneys' fees for continued litigation that produces no additional benefits. But if plaintiffs are assured that they will recover attorneys' fees even if they reject reasonable offers and ultimately obtain less favorable judgments, there will be very little incentive for plaintiffs to accept reasonable settlement offers.

Id. at 1-2.

18. 28 U.S.C. § 2072 (1982). The Rules Enabling Act gives the Supreme Court the power to prescribe general rules to govern United States civil actions. It further provides: "Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *Id.* (emphasis added).

19. *Chesny v. Marek*, 720 F.2d 474, 478-79 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984).

is not entitled to an attorney's fee award for work performed after the date of the offer; thus, defining Rule 68 costs to include civil rights attorney's fees would not violate the Rules Enabling Act;²⁰ and (2) the policies of both Rule 68 and section 1988 would be better served if Rule 68 costs were defined to include civil rights attorney's fees.²¹

II. BACKGROUND

Marek v. Chesny began as a civil rights suit brought under 42 U.S.C. § 1983 by the father (Chesny) of a boy who had been shot and killed by one of the defendant policemen.²² Five months before trial, the defendants made a Rule 68 offer to allow judgment to be taken against them "for a sum, including costs now accrued and attorney's fees, of One-Hundred Thousand (\$100,000) Dollars."²³ Chesny rejected this offer and went to trial. At trial, the jury awarded him \$60,000.²⁴ When Chesny petitioned for attorney's fees under section 1988, the defendants argued that Rule 68 relieved them of any obligation to pay Chesny's post-offer attorney's fees. District Judge Shadur agreed.²⁵ Judge Shadur reasoned that since section 1988

20. See *infra* text accompanying notes 31-74.

21. See *infra* text accompanying notes 75-155.

22. 547 F. Supp. 542, 543 (N.D. Ill. 1982), *aff'd in part, rev'd in part, and remanded*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984).

23. 720 F.2d at 476. The precise terms of the offer were as follows:

Pursuant to Federal Rule of Civil Procedure 68, the defendants, Jeffrey Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, *including costs now accrued and attorney's fees*, of One Hundred Thousand (\$100,000) Dollars.

Petition for Certiorari, *supra* note 12, at 4 (emphasis added). The district court, having misread the offer as being for \$100,000 "plus costs and attorneys' fees then accrued," assumed that the offer exceeded the judgment finally obtained (by \$40,000). 720 F.2d at 476 (quoting 547 F. Supp. at 545) (emphasis added). The court of appeals did not reverse the district court on this point since the parties had agreed that the plaintiff's attorney's fees and costs prior to the date of the Rule 68 offer amounted to \$32,000. *Id.* Even under a correct construction of the offer, therefore, the judgment finally obtained (\$60,000 + \$32,000 = \$92,000) was less favorable than the offer (\$100,000). *Id.*

24. 720 F.2d at 476.

25. The district court also considered whether Rule 68 required Chesny to pay the defendants' post-offer costs. See 547 F. Supp. at 547. Relying in part on dicta in *Delta Air Lines v. August*, 450 U.S. 346, 359 n.24 (1981), the court ruled that, even in instances when Rule 68 denies costs to a prevailing plaintiff, it does not impose liability on the plaintiff for the defendant's costs. 547 F. Supp. at 547-48; see also *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 117 (N.D. Cal. 1979) (denying defendant's motion for costs as to attorney's fees, expert witness fees, and transcript reproduction costs, but granting it as to witness fees).

The rationale for denying the defendant attorney's fees in this situation is simple. Attorney's fees are defined as part of the costs only for a "prevailing party." 42 U.S.C.

defines attorney's fees as costs, and since Rule 68 requires an offeree to pay the costs incurred after the making of the offer, Chesny could not recover his costs, including attorney's fees, incurred after the defendants' offer of judgment.²⁶

On appeal, the United States Court of Appeals for the Seventh Circuit reversed.²⁷ Judge Posner, writing for a unanimous panel, conceded that the district court's "mechanical linking up" of costs in Rule 68 with costs in section 1988 was "in a sense logical."²⁸ Nevertheless, Judge Posner perceived two flaws in the district court's analysis. First, he found that reading costs in Rule 68 to prevent the plaintiff from recovering post-offer attorney's fees would put Rule 68 into conflict with the policy behind section 1988, which

§ 1988. A plaintiff is generally considered to be a prevailing party, at least for purposes of § 1988, whenever he prevails on any significant issue in the litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Thus, the plaintiff is a "prevailing party" whenever he obtains a judgment in his favor, even if it is less favorable than a prior Rule 68 offer. Conversely, the defendant cannot be a prevailing party—and his attorney's fees cannot be defined as 'costs'—unless he obtains a judgment in his favor. If the defendant prevails, however, Rule 68 is not applicable. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

A defendant can win attorney's fees in a civil rights case only by meeting the standards of *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978), which permit such recoveries only when the plaintiff's claim is "frivolous, unreasonable, or groundless," or where the plaintiff continues to litigate it after it clearly becomes so. While the continued litigation of a claim after the plaintiff has received a Rule 68 offer far in excess of the apparent worth of the case might be characterized as "frivolous, unreasonable, or groundless," no court yet has awarded a defendant fees under § 1988 simply because the plaintiff rejected a Rule 68 offer—or any other type of settlement offer—before trial. If, however, a plaintiff's rejection of an offer is found to be in bad faith, the established exceptions to the "American Rule" might allow the defendant to obtain his attorney's fees from the plaintiff independent of Rule 68 or § 1988. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-60 (1975).

26. 547 F. Supp. at 546-47. At least three other district courts have squarely held that a civil rights plaintiff who rejects a Rule 68 offer and then recovers a less favorable judgment cannot recover post-offer attorney's fees. See *Bitsouni v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 898, 900-02, 33 Empl. Prac. Dec. (CCH) ¶ 34,233, at 32,801-03 (D. Conn. 1983); *Lyons v. Cunningham*, 583 F. Supp. 1147, 1156-59 (S.D.N.Y. 1983); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 114-16 (N.D. Cal. 1979).

27. 720 F.2d at 480.

28. *Id.* Judge Posner described the question of "whether an offer that includes attorney's fees is valid under the rule" as one of "first impression at the appellate level." *Id.* at 476. In analyzing this issue, *id.* at 476-78, Judge Posner noted that Justices Powell and Rehnquist, in their respective concurring and dissenting opinions in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 364, 379 n.5 (1981), disagreed about the validity of a Rule 68 offer that included attorney's fees. Like *Chesny*, *Delta* involved an offer including civil rights attorney's fees. 450 U.S. at 348 n.2. The issue debated by Justices Powell and Rehnquist was not considered by the majority in *Delta*, and is not one of the questions presented to the Supreme Court for review in *Chesny*, see *supra* note 12. Nor does the resolution of this issue affect the fundamental arguments and conclusions presented in this Article.

was "to encourage the bringing of meritorious civil rights actions."²⁹ Second, since Judge Posner considered the entitlement to civil rights attorney's fees to be a "substantive" right, he found that reading costs in the fourth sentence of Rule 68 to encompass attorney's fees would abridge that substantive right in violation of the Rules Enabling Act.³⁰

III. STANDARDS UNDER SECTION 1988: LIMITATIONS ON ATTORNEY'S FEE AWARDS TO CIVIL RIGHTS PLAINTIFFS WHO HAVE REJECTED REASONABLE SETTLEMENT OFFERS

Before deciding that the district court's construction of Rule 68 violated the Rules Enabling Act, the court of appeals should have determined the scope of the plaintiff's right to attorney's fees under section 1988. The Seventh Circuit did not make that determination. This Article does make that threshold determination and concludes that section 1988 gives civil rights plaintiffs who have rejected reasonable settlement offers no right to attorney's fees for work performed after the date of the settlement offer.

A. Reasonableness and the "Degree of Success"

Section 1988 confers only a limited right upon a civil rights plaintiff. Congress did not provide in section 1988 that all plaintiffs who bring civil rights actions in good faith are entitled to attorney's fees. Nor did Congress provide that all plaintiffs who press civil rights claims skillfully but lose are entitled to attorney's fees. Indeed, Congress did not even provide that all plaintiffs who *win* civil rights cases are automatically entitled to attorney's fees. Congress provided only that a court may, in its discretion, award a reasonable attorney's fee to the prevailing party as part of the costs in a civil rights case.

29. 720 F.2d at 478.

30. *Id.* at 479. Several courts have agreed with *Chesny* that "costs incurred after the making of the offer" do not include civil rights attorney's fees. *See, e.g.,* Pigeaud v. McLaren, 699 F.2d 401, 403 (7th Cir. 1983) (dicta because court held that plaintiff who accepted Rule 68 offer for \$1.00 was not "prevailing party" under § 1988 and was therefore not entitled to attorney's fees at all); Association for Retarded Citizens v. Olson, 561 F. Supp. 495, 498 (D.N.D. 1982) (dicta) (court held that offer was not more favorable than judgment obtained by offeree), *modified*, 713 F.2d 1384 (8th Cir. 1983); Greenwood v. Stevenson, 88 F.R.D. 225, 229-32 (D.R.I. 1980) (questionable authority because court found contrary analysis in *Waters v. Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979) "well-reasoned and persuasive," but considered *Waters* approach "foreclosed" by First Circuit decision that has since been reversed).

Although prevailing plaintiffs ordinarily have a right to attorney's fees under section 1988,³¹ this right is limited by two critical factors. First, a prevailing civil rights plaintiff cannot recover his attorney's fees when "special circumstances would make an award of fees unjust."³² Second, even when an award of fees is justified, a prevailing plaintiff is entitled only to "reasonable" attorney's fees.³³ The key to the scope of section 1988, therefore, is the determination of what is "reasonable."

As set forth by the Supreme Court in *Hensley v. Eckerhart*, determining a "reasonable" attorney's fee is a two-step process. First, the court should calculate the "lodestar" amount—the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.³⁴ After calculating the lodestar, the court must determine whether any adjustments to the lodestar are necessary to make the fee award reasonable in the circumstances of the particular case.³⁵

In making an upward or downward adjustment from the lodestar, "[t]he result is what matters."³⁶ If the plaintiff has achieved total or nearly total success on his claim, his attorney should be awarded full compensation.³⁷ If, however, the plaintiff has achieved only par-

31. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983).

32. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968). If a plaintiff's civil rights suit is frivolous, unreasonable, or groundless, or if he continues to litigate after it clearly becomes so, the plaintiff may be denied his own attorney's fees and ordered to pay the defendant's attorney's fees. *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 419-22 (1978).

33. 42 U.S.C. § 1988 (1982); see *Blum v. Stenson*, 104 S. Ct. 1541, 1549 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 430 n.3 (1983).

34. 461 U.S. 424, 433-34 (1983). The product of a reasonable number of hours times a reasonable hourly rate is commonly referred to as the "lodestar." The term "lodestar" was first used as a shorthand for attorney's fees in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973).

35. Adjustments to the lodestar figure were recently discussed by the Supreme Court in *Blum v. Stenson*, 104 S. Ct. 1541 (1984). An essential holding of *Blum*, which reversed the award of a 50% "multiplier" (bonus) to civil rights lawyers who had prevailed in a difficult case, was that a bonus above the lodestar amount is warranted only when plaintiff's attorneys achieve "exceptional success." *Id.* at 1548. *Blum* should significantly cut back on bonus awards to prevailing civil rights attorneys, especially since *Blum* removed from consideration factors such as the complexity or novelty of the issues, the level of skill displayed by the attorneys, and the number of plaintiffs represented by the prevailing attorneys. *Id.* at 1549. These factors derived from the seminal case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (factors 2, 8, and 9), which was specifically endorsed by Congress in the legislative history of § 1988.

36. 461 U.S. at 435.

37. *Id.*

tial or limited success, the lodestar figure will be too high. In cases of limited success,

the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, non-frivolous, and raised in good faith. Congress has not authorized an award of fees whenever it was reasonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, *the most critical factor is the degree of success obtained.*³⁸

In most cases, a plaintiff who rejects a pretrial settlement offer and then fails to obtain a judgment at trial more favorable than the amount of the offer has not obtained any "degree of success" after rejecting the offer. If the result is what matters, the plaintiff whose fortunes decline after rejecting a settlement proposal has obtained no post-offer "result" upon which to base an award of attorney's fees for work performed after the offer. Under section 1988, he has a right to reasonable attorney's fees for work done before rejecting the offer, but—even disregarding the operation of Rule 68—he generally has no right to fees for work done after rejecting the offer.

B. District Court Cases Denying Attorney's Fees

Several courts, both before and after *Hensley*, have agreed that prevailing civil rights plaintiffs are not entitled to the full lodestar amount of attorney's fees if they have rejected non-Rule 68 settlement offers and then failed to obtain a more favorable judgment at trial. These cases assist in defining the scope of a plaintiff's right to attorney's fees under section 1988 independent of Rule 68. This Article now briefly examines these cases.

1. *Neal v. Berman*

In *Neal v. Berman*, the plaintiff was an eight-year-old grammar school student who had caused disciplinary problems at school.³⁹ One day the plaintiff's teacher ordered an aide to punish the plaintiff by tying a rope around the plaintiff's waist and holding onto the rope for the duration of the lunch period. This punishment humiliated the plaintiff and caused his classmates to jeer at him.

38. *Id.* at 436 (emphasis added).

39. 576 F. Supp. 1250, 1251 (E.D. Mich. 1983). Since the student himself was a minor, the plaintiff technically was the student's mother, but she sued as his "next friend" and the court treated the student himself as the plaintiff. *Id.* at 1250-51.

When the plaintiff's mother found out what had happened, she brought suit against the teacher and the teacher's aide.⁴⁰

The parties in *Neal v. Berman* were initially referred to a mediation panel for possible resolution of the dispute.⁴¹ The mediation panel concluded that the defendants had violated the plaintiff's civil rights and that he should be awarded \$2,000. The defendants accepted the panel's recommendation but the plaintiff rejected it. Instead, the plaintiff offered to settle for \$10,000. The defendants rejected the \$10,000 offer, but orally indicated a willingness to settle somewhere between \$2,000 and \$10,000. The defendants' offer to settle in that range, however, never was formalized or memorialized on the record. The case went to trial, and the jury awarded the plaintiff \$3,000 in damages.⁴²

After trial, the plaintiff's attorney submitted a petition for costs and attorney's fees. In reviewing this petition, the court observed that if the defendants had made a formal settlement offer for an amount greater than the plaintiff recovered at trial, then the plaintiff, under *Hensley*, would not be entitled to recover fees incurred in trying the case.⁴³

40. *Id.* at 1251. Also named as defendants were the school principal, the Ann Arbor School District, the director of the school district, and the members of the board of trustees of the school district. All of the defendants except the teacher and the teacher's aide were subsequently dismissed from the case upon the defendants' motion for summary judgment. *Id.*

41. *Id.* It is not clear how the case came before the mediation panel. The United States District Court for the Eastern District of Michigan has a local rule making all diversity cases eligible for mediation when only money damages are sought, but the rule says nothing about federal question cases. See E.D. MICH. R. 32, reprinted in 1 FED. LOCAL CT. R. (CALLAGHAN) Mich. 18-20 (1982).

42. 576 F. Supp. at 1251. The two defendants were held jointly liable for \$500 in compensatory damages. The jury also assessed \$750 punitive damages against the teacher's aide, and \$1,750 in punitive damages against the teacher. *Id.*

43. *Id.* at 1252. "Broadly stated," the court said, "*Hensley* teaches that only those resources that were expended in pursuit of relief that was ultimately obtained may be reimbursed under the Attorney's Fee Statute [§ 1988]." *Id.* at 1253.

Because the defendants had not made a firm settlement offer on the record or in writing, the court had no way of ascertaining whether the settlement offer would in fact have exceeded the \$3,000 ultimately recovered by the plaintiff. But the court left no doubt as to how it would have decided the issue. Had an offer more favorable than the judgment been issued, "the Court would have concluded that the plaintiff had not prevailed by going to trial, and would have refused to grant plaintiff his attorney's fees for those hours spent by his attorney in trying the case." *Id.*

The court's use of the term "prevailed" was somewhat careless. There was no question that the plaintiff in *Neal* was a "prevailing party" for purposes of § 1988. A plaintiff prevails for purposes of § 1988 if he wins on any significant issue in the litigation. *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). As *Hensley* makes clear, however, the fact that a plaintiff was the prevailing party "may say little about whether the expenditure of a counsel's time was reasonable in relation to the success obtained." 461 U.S.

The *Neal* court's discussion was intended to encourage defendants in civil rights cases to make reasonable settlement offers—on the record—so that plaintiffs would be “compelled to take a hard look at the expected result of their lawsuit” before proceeding to trial.⁴⁴ Plaintiffs who unreasonably overestimated the likelihood and probable amount of recovery, the court concluded, should not be able to transfer the costs of trial to defendants, “because those costs were not necessarily incurred in securing the desired relief.”⁴⁵

2. *Espinoza v. Hillwood Square Mutual Association*

The *Neal* decision relied in part on *Espinoza v. Hillwood Square Mutual Association*, in which the court denied two civil rights plaintiffs nearly all attorney's fees that accrued after the start of settlement negotiations even though the exact terms of the offers were in dispute.⁴⁶ The defendant, Hillwood, was a cooperative housing association that had adopted a formal policy of refusing membership to aliens.⁴⁷ The plaintiffs were two alien residents of the United States who had been denied membership in Hillwood.⁴⁸ In their complaint the plaintiffs asserted that Hillwood's citizenship policy violated both section 1981 of the civil rights laws⁴⁹ and the federal Fair Housing Act.⁵⁰ In a preliminary ruling that was virtually dispositive of the liability question, the court held that section 1981 prohibited purely private alienage discrimination.⁵¹

Several weeks after the court had ruled in the plaintiffs' favor on the liability issue, the defendant attempted to open settlement

at 436. The *Neal* court apparently meant that, if an offer more favorable than the judgment had been issued, it would have concluded that the plaintiff had not achieved any additional success by going to trial.

44. 576 F. Supp. at 1253.

45. *Id.*

46. 532 F. Supp. 440, 443 (E.D. Va. 1982). *Espinoza* was cited in *Neal* for the proposition that the “failure of plaintiffs to advance a reasonable settlement offer following the resolution of key legal issues precluded recovery of attorney's fees for any time subsequently spent on the case.” 576 F. Supp. at 1253.

47. 532 F. Supp. at 442.

48. *Id.* Plaintiffs Celia and Enrique Espinoza were Peruvian nationals. Plaintiff Vinod Rajpal was a citizen of India. *Id.* at 444 n.2.

49. Section 1981 provides, in pertinent part:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens

42 U.S.C. § 1981 (1982).

50. 42 U.S.C. §§ 3601-3619 (1982).

51. 532 F. Supp. at 442-43 (citing *Espinoza v. Hillwood Square Mut. Ass'n*, 522 F. Supp. 559, 564 (E.D. Va. 1981)(deciding summary judgment motions)).

negotiations. Although the precise terms of Hillwood's settlement offers were in dispute, it was not contested that Hillwood had made an offer, the plaintiffs had rejected it, and the amount recovered at trial—\$1,500—fell short of the amount offered.⁵²

After trial the plaintiffs moved for an award of attorney's fees pursuant to section 1988. The court denied the petition as to virtually all of the work performed after settlement negotiations had begun.⁵³ At the time of those negotiations, the court noted, the court already had rendered its preliminary ruling that Hillwood's citizenship policy violated section 1981. Despite that fact, the plaintiffs made no reasonable settlement offers.⁵⁴ Since the plaintiffs' decision to go to trial had generated several thousand dollars in attorney's fees while securing no additional benefits for the plaintiffs, the court decided that it would be unreasonable to impose these additional expenses on Hillwood.⁵⁵ The court further decided that because the plaintiffs had not offered a reasonable settlement despite having had an opportunity to do so, they "did not fulfill their duty to minimize the costs of enforcing their rights."⁵⁶ Accordingly, the court held

52. 532 F. Supp. at 443. The jury awarded \$500 to each of the three plaintiffs. *Id.*

The apparent confusion over the exact amounts of the settlement offers indicates that, as in *Neal*, no record was kept of the settlement offers.

53. *Id.* at 448-49. In its "one exception to this ruling," the court awarded plaintiffs attorney's fees for the time spent preparing a post-trial motion for injunctive relief to prohibit the defendant from discriminating against aliens in the future. *Id.* at 443, 449. The court considered the motion for injunctive relief "necessary regardless of whether the parties had reached a settlement on damages." *Id.* at 449.

54. *Id.* at 448. The court explained the significance of the prior ruling as follows:

Once a civil rights plaintiff establishes that the defendant's conduct was unlawful, he has tremendous leverage over the defendant. This leverage arises from the fact that the plaintiff is now the prevailing party for the purpose of attorney's fees. If the defendant refuses the plaintiff's demand for damages, the plaintiff can threaten to proceed to trial.

Id. Therefore, the court stated, "plaintiff *must* make a reasonable settlement offer once the court decides the relevant legal issues in his favor." *Id.* (emphasis added).

55. *Id.* In support of its ruling, the court focused on the policy objectives of § 1988: Under the general rule [governing § 1988 fee awards], the plaintiff could impose the cost of going to trial on the defendant, regardless of how low an amount the jury awards. The court, however, will not permit such an imposition of costs, unless the result at trial justifies the plaintiff's refusal to settle. The objective of the attorney's fee mechanism should be to encourage vindication of rights at the minimum cost to the system. *A blind imposition of trial costs, however, would give a prevailing plaintiff's attorney an incentive to maximize his fees by refusing settlement.* Such an incentive would have a deleterious effect on the system of enforcing civil rights. The court, therefore, holds that a civil rights plaintiff has a duty to minimize the costs of vindicating his rights.

Id. (emphasis added).

56. *Id.* at 448-49.

that all time spent after the date of the defendant's initial settlement offer was spent unreasonably and was ineligible for cost-shifting treatment under section 1988.⁵⁷

3. *Skoda v. Fontani*

Another case penalizing civil rights plaintiffs for rejecting reasonable settlement offers is *Skoda v. Fontani*.⁵⁸ In *Skoda*, two civil rights plaintiffs offered to settle for \$3,000 in damages. The defendants offered \$1,500, which was rejected. At trial, the plaintiffs won a nominal judgment of \$1.00 each.⁵⁹ The district court denied the plaintiffs' post-trial request for attorney's fees, reasoning that the token verdict was not sufficient to qualify the plaintiffs as "prevailing parties" under section 1988.⁶⁰

The Seventh Circuit reversed, holding that the plaintiffs were "prevailing parties" despite the small verdict.⁶¹ The case was remanded to the district court to consider whether any "special circumstances" existed which would warrant denying fees. If no special circumstances existed, the court was to determine an appropriate amount of an award.⁶²

On remand, Judge Aspen found that the degree of success obtained by the plaintiffs was "as small as could be, without having lost entirely."⁶³ Moreover, Judge Aspen implied that if the plaintiffs' refusal to settle was not a "special circumstance" warranting a total denial of attorney's fees, it was special enough to justify reducing the award.⁶⁴ Accordingly, the court cut the plaintiffs' fee award by over fifty percent: on a request for more than \$10,000, only \$4,500 was awarded.⁶⁵

4. *Spero v. Abbott Laboratories, Inc.*

A final case partially denying attorney's fees to a non-settling civil

57. *Id.* at 449.

58. 519 F. Supp. 309 (N.D. Ill. 1981).

59. *Id.* at 309.

60. *Id.*

61. *Skoda v. Fontani*, 646 F.2d 1193, 1194 (7th Cir. 1981).

62. *Id.*

63. 519 F. Supp. at 311. Although the case was decided before *Hensley*, the *Skoda* court noted that "the extent of counsel's success is an essential consideration to be taken into account" in determining the amount of attorney's fees. *Id.*

64. *Id.* at 310.

65. *Id.* at 311. The plaintiffs' counsel requested \$10,441.25 for fees and \$1,586.12 for costs. The court awarded the plaintiffs a total of \$6,086.12. *Id.* Since it appears that there was no reduction in costs (\$6,086.12 - 1,586.12 = \$4,500), the decrease in attorney's fees was \$5,941.25 (\$10,441.25 - 4,500 = \$5,941.25) or almost 57%.

rights plaintiff is *Spero v. Abbott Laboratories*,⁶⁶ an employment discrimination suit brought under title VII of the Civil Rights Act of 1964.⁶⁷ Prior to trial, the defendant made two settlement offers. The first, for \$3,000, was made when the plaintiff's accrued attorney's fees totaled \$600. A second offer, for \$5,000, was made when the plaintiff's accrued fees had reached \$2,000. Both offers were rejected. At a bench trial, the plaintiff recovered only \$3,000 in damages.⁶⁸

The plaintiff's court-appointed counsel petitioned for a fee award of \$12,000.⁶⁹ The defendant did not challenge either the accuracy of the attorney's time records or the reasonableness of his customary fee, but the defendant did question the overall reasonableness of the amount sought in view of the pretrial settlement offers. The court, noting that fee awards "should bear some relationship 'to the extent to which the plaintiff prevails in the suit,' " reduced the amount of the plaintiff's award from \$12,000 to \$1,500.⁷⁰

C. A General Rule

On the basis of the cases discussed above, it is possible to set forth a general rule about the relationship between settlement offers and attorney's fees in civil rights cases. The overriding principle was stated in *Hensley v. Eckerhart*: "The result is what matters [T]he extent of a plaintiff's success is a crucial factor in determining the proper amount of an award of attorney's fees under 42 U.S.C. §

66. 396 F. Supp. 321 (N.D. Ill. 1975). The district court's memorandum opinion on the merits apparently was not published. *See id.* at 322.

67. Title VII is codified at 42 U.S.C. §§ 2000e-2000e-17 (1982).

68. 396 F. Supp. at 322.

69. *Id.* at 322-23. The fee petition was filed pursuant to § 706(k) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k)(1982). Section 706(k), which is virtually identical to § 1988, allows a court in its discretion to award the prevailing party "a reasonable attorney's fee as part of the costs." Because the language of § 706(k) is essentially the same as the language of § 1988, cases decided under § 706(k) are frequently cited as precedent for cases decided under § 1988. *See, e.g.,* Nadeau v. Helgemoe, 581 F.2d 275, 278 (1st Cir. 1978); Vanguard Justice Soc'y, Inc. v. Hughes, 471 F. Supp. 670, 754 (D. Md. 1979). In fact, Congress expressly intended that § 1988 would be construed in conformance with judicial precedent under § 706(k) of title VII. *See* S. REP. NO. 1011, 94th Cong., 2d Sess. 4, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912.

70. *Id.* at 323 (quoting *Williams v. General Foods Corp.*, 492 F.2d 399, 409 (7th Cir. 1974)). The court also awarded the plaintiff \$179.73 as expenses. Of particular interest in *Spero* is the fact that the defendant's "very fair offer in settlement was rejected by plaintiff personally in the face of the contrary advice of his lawyer." *Id.* Although the court recognized that a court-appointed attorney "may be caught in between a reasonable offer and a recalcitrant client," the court was "reluctant to assess against [the defendant] the cost of additional services over which it had no control." *Id.*

1988.”⁷¹ Thus, the focus of the analysis must be on the relationship between the settlement negotiations and the ultimate result in the case. If a plaintiff rejects a formal written settlement offer and goes on to win less than the amount of the defendant’s offer, the plaintiff is not ordinarily entitled to any attorney’s fees for work done after the date of the offer.⁷²

Applying this rule to the facts presented in *Marek v. Chesny*, it should be apparent that Rule 68 does not abridge the prevailing plaintiff’s rights under section 1988. A civil rights plaintiff who turns down an offer of judgment and goes on to win less at trial than the amount of the offer has no right to attorney’s fees under section 1988 for work done after the offer was made. Thus, even when Rule 68 cuts off post-offer attorney’s fees to a prevailing plaintiff because the plaintiff’s judgment is less favorable than the rejected offer, Rule 68 cannot be said to infringe any substantive right under section 1988.⁷³ Rather, Rule 68 functions as a purely procedural device

71. 461 U.S. at 435, 440.

72. Of course, there will be some situations in which it will be unfair to deny a plaintiff attorney’s fees for work performed after rejecting a settlement offer. While not all of these situations can be anticipated, a few examples should serve to illustrate the point. First, if a key witness for the plaintiff dies or disappears after the settlement offer, resulting in the plaintiff’s failure to beat the settlement offer at trial, the plaintiff still should be able to recover reasonable fees for work performed after the offer. Second, if an adverse and controlling case is decided after the rejection of the settlement offer, the plaintiff should not be denied post-offer fees, particularly if the adverse ruling was not foreseeable. Third, if the plaintiff receives a series of successively higher settlement offers, he should be denied fees only for work performed after the last offer is made even if the result at trial falls short of the first offer. In other words, obtaining higher settlement offers after the first offer indicates a “degree of success” in prosecuting the lawsuit even though the result finally obtained is less favorable than any of the offers. See *Spero v. Abbott Laboratories, Inc.*, 396 F. Supp. 321, 323 (N.D. Ill. 1975), discussed *supra* notes 66-70 and accompanying text.

In sum, when an unforeseeable event that reduces the value of the plaintiff’s case takes place after the plaintiff has acted reasonably in rejecting an offer of settlement, the policies of Rule 68 would not be furthered by reducing the plaintiff’s attorney’s fees. In *Chesny*, however, the record does not indicate that any unforeseeable event took place between the time the defendants made their Rule 68 offer and the time the jury rendered the verdict. In *Chesny*, the plaintiff prolonged the litigation simply in hopes of recovering more at trial than had been offered in settlement. The general rule should therefore apply. If hopes of recovering more than the amount of the offer were an exception, the general rule would never apply.

73. As the Advisory Committee on Civil Rules noted in the Advisory Committee Note to recently proposed amendments to Rule 68:

Even without the rule the court already has the power in determining the value of the attorney’s services under a fee award statute to take into consideration a party’s refusal to accept a reasonable offer that, if accepted, would have eliminated the necessity for further legal services from the date of the offer.

Committee Note, *supra* note 8, at 436. Unfortunately, the Advisory Committee did not cite any authority for its proposition.

to assist the court in determining the extent of a prevailing plaintiff's right to attorney's fees under section 1988. An offer of judgment establishes the floor that the plaintiff must exceed in order to merit additional attorney's fees.⁷⁴

IV. THE MEANING OF COSTS IN RULE 68

The fact that section 1988 normally mandates the denial of attorney's fees to a civil rights plaintiff whose final judgment is less favorable than a Rule 68 offer refutes any argument that Rule 68 violates the Rules Enabling Act. But the operation of section 1988 alone does not prove that Rule 68 costs should be read to encompass attorney's fees. To determine the proper scope of costs in Rule 68, it is necessary to analyze the text, history and purpose of Rule

74. Because Rule 68 is stated in mandatory terms—the plaintiff “must” pay the costs incurred after the making of the offer—courts would appear to have no room for discretion even when the denial of post-offer fees would be clearly unfair. In practice, however, courts have any number of equitable instruments with which to mitigate the potential harshness of such a rule. One of the more promising tools is the recently amended Rule 11 to the Federal Rules of Civil Procedure. Since August 1, 1983, Rule 11 has provided in pertinent part:

The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

FED. R. CIV. P. 11.

The above-quoted language would seem to reach at least two groups of cases pertinent to the present inquiry. The first group includes cases in which the defendant made a token Rule 68 offer early in the case without evaluating the merits of the plaintiff's claim. The second group consists of cases in which the defendant evaluated the case but made a Rule 68 offer for substantially less than the value of the case.

In the first group of cases, the court could strike the offer under Rule 11 on grounds that the offer was not based on a “reasonable inquiry” and was not “well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” FED. R. CIV. P. 11. Alternatively, the court could rule that the offer was interposed for the “improper purpose” of harassing the plaintiff. *Id.*

With respect to the second group of cases—those in which the defendant evaluated the case but made an offer far below the value of the case—the problem is somewhat trickier. Low initial offers are a standard negotiating strategy. At least in egregious instances, however, courts could hold that unreasonably low Rule 68 offers are made for the “improper purpose” of coercing plaintiffs into unfair settlement. *Id.*

Once a Rule 11 violation is found, courts are empowered by the rule to impose “an appropriate sanction.” *Id.* Sanctions may include an order to pay the opposing party's reasonable expenses incurred because of the filing of the paper, “including a reasonable attorney's fee.” *Id.* Thus, in the two groups of cases under consideration, courts could rule that all of the post-offer attorney's fees were incurred because the Rule 68 offer violated

68.⁷⁵ Likewise, the text, history and purpose of section 1988 must be examined to determine whether they contain any clues as to the proper interpretation of Rule 68 in the fee-shifting context.

The plain language of Rule 68 is not particularly illuminating. Rule 68 does not define costs, and costs are not defined elsewhere in the federal rules. Consequently, the definition of costs in Rule 68 must come either from a substantive statute at issue in the litigation, such as 42 U.S.C. § 1988, or from 42 U.S.C. § 1920,⁷⁶ which provides a general statutory definition of taxable costs for actions in federal district courts.

In most federal cases, costs have been defined according to section 1920.⁷⁷ Section 1920 costs do not include attorney's fees.⁷⁸ As

Rule 11. Since a reasonable offer might have been accepted and further litigation avoided, Rule 11 would authorize the court to assess plaintiff's post-offer attorney's fees to the defendant. Alternatively, the court could achieve the same result by striking the Rule 68 offer, thus denying the defendant the benefits of that rule.

A problem with the Rule 11 approach to awarding post-offer attorney's fees is that it appears to conflict with the Supreme Court's reluctance to read a "reasonableness requirement" into Rule 68. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 355 (1981). *Delta*, however, was decided in March, 1981, more than two years before the current version of Rule 11 took effect. The prior version of Rule 11 did not require a "reasonable inquiry" and did not cover any "improper purpose" other than delay. Thus, while Rule 68 independently contains no reasonableness requirement, it can be argued that Rule 11 now imposes such a requirement on Rule 68 offers just as it does on all other motions, pleadings, and papers filed in federal court. See FED. R. CIV. P. 11 advisory committee note (1983 amendment)(court should inquire under Rule 11 "what was reasonable to believe at the time the pleading, motion, or other paper was submitted").

75. See *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350 (1981)(answer to whether Rule 68 applies in case in which judgment is entered for defendant "is dictated by the plain language, the purpose, and the history of Rule 68").

76. 28 U.S.C. § 1920 provides:

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.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920 (1982).

77. See, e.g., *Copper Liquor, Inc. v. Adolf Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), *modified*, 701 F.2d 542 (5th Cir. 1983); *Advance Business Sys. & Supply Co. v. SCM Corp.*, 287 F. Supp. 143, 162 (D. Md. 1968), *aff'd*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

78. See, e.g., *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980); *Wheeler v. Durham Bd. of Educ.*, 585 F.2d 618, 623 (4th Cir. 1978); *Gordon v. Woods*, 202 F.2d 476, 480 (1st Cir. 1953).

a general rule, therefore, Rule 68 costs do not include attorney's fees. A different situation is presented, however, when an applicable federal statute defines attorney's fees as costs.

A. *Fulps v. City of Springfield*

Apart from *Chesny*, the leading case construing Rule 68 costs in the civil rights context is *Fulps v. City of Springfield*.⁷⁹ *Fulps*, a civil rights case brought under 42 U.S.C. § 1981,⁸⁰ construed the term costs in the first sentence of Rule 68.⁸¹ During the course of the suit, the defendant made an offer of judgment under Rule 68 to pay each of the two plaintiffs \$2,500, plus costs accrued to the date of the offer.⁸² The offer was silent about attorney's fees. The two plaintiffs filed a written acceptance of the offer, whereupon the clerk entered judgment for the dollar amounts "plus costs accrued to date of judgment."⁸³ Eight months after the entry of judgment, the plaintiffs' counsel filed a petition for attorney's fees pursuant to section 1988. The district court denied the entire petition as untimely, and the plaintiffs appealed.⁸⁴

On appeal, the Sixth Circuit first held that a plaintiff who settles a civil rights suit by accepting a Rule 68 offer of judgment is a "prevailing party" within the meaning of section 1988 and therefore is entitled to attorney's fees.⁸⁵ The court then considered whether the defendant's Rule 68 offer to pay costs accrued to the date of the offer obligated the defendant to pay the plaintiffs' reasonable

79. 715 F.2d 1088 (6th Cir. 1983).

80. 42 U.S.C. § 1981 (1982).

81. The discussion until this point has considered the meaning of costs only as it appears in the fourth sentence of Rule 68. The term appears in the rule, however, three times—once in the first sentence ("with costs then accrued"), once in the third sentence ("a proceeding to determine costs"), and again in the fourth sentence ("costs incurred after the making of the offer"). It is axiomatic that costs must be given the same meaning each time the term appears in Rule 68. *See, e.g.,* *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949) (when same word is used in statute more than once, and meaning is clear as used in one place, it should be construed to have same meaning in next place); *United States v. Vargas*, 380 F. Supp. 1162, 1166 (E.D.N.Y. 1974) (meaning of term in one section of statute may be clarified by reference to its use in other sections); *cf. Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (refusing to give dual meaning to term "filed" in subsections (c) and (e) of § 706 of Civil Rights Act of 1964).

Moreover, it seems unreasonable to assume that the drafters of Rule 68 would intend to assign different meanings to a single term appearing several times in the rule. From the standpoint of internal consistency, therefore, the meaning of costs in the first sentence is significant because it casts light upon the meaning of costs in the third and fourth sentences of Rule 68.

82. 715 F.2d at 1090.

83. *Id.*

84. *Id.*

85. *Id.* at 1090-91.

attorney's fees under section 1988, which defines attorney's fees as part of the plaintiffs' costs.⁸⁶ The plaintiffs argued that the offer was for \$5,000, plus section 1920 costs, *plus attorney's fees*.⁸⁷ The defendant, in turn, contended that the \$5,000 settlement figure included the plaintiffs' attorney's fees and that the phrase "plus costs accrued" encompassed only those costs which traditionally may be assessed under section 1920.⁸⁸

The Sixth Circuit sided with the plaintiffs and held that the offer to pay costs included civil rights attorney's fees. The court reasoned:

When Congress drafted 42 U.S.C. § 1988, it described attorney's fees "as a part of the costs." Congress could have simply authorized the recovery of attorney's fees but it chose to go further and characterize the fees as costs. Required, as we are, to construe the language of a statute so as to avoid making any word meaningless or superfluous, *we conclude that Congress expressly characterized fees as costs with the intent that the recovery of fees be governed by the substantive and procedural rules applicable to costs*.⁸⁹

The *Fulps* court relied in part on *Scheriff v. Beck*, which had invalidated an offer of judgment for "\$2,200 together with costs, *not including attorney's fees*, incurred to date."⁹⁰ The *Scheriff* court explained that "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay."⁹¹ Rather, the court found, the rule requires an offer to encompass all accrued costs, which in a civil rights case may include attorney's fees. Thus, the offer was held invalid and the defendant was denied costs accruing after the date of the offer.⁹²

Under *Scheriff*, the requirement of the first sentence of Rule 68 that an offer of judgment be "with costs then accrued" means that an offer expressly excluding attorney's fees in a civil rights case is invalid. Under *Fulps*, an offer that is silent about attorney's fees will be read to obligate the offeror to pay a civil rights plaintiff his reasonable attorney's fees as part of the costs accrued to the date of the offer. In sum, the term costs in the first sentence of Rule 68 encompasses civil rights attorney's fees and requires a defendant whose Rule 68 offer is accepted to pay the plaintiff's reasonable attorney's fees accrued as of the date of the offer.

86. 42 U.S.C. § 1988 (1982).

87. 715 F.2d at 1091.

88. *Id.*

89. *Id.* at 1092-93 (emphasis added)(footnote omitted).

90. *Id.* at 1092 (citing 452 F. Supp. 1254, 1256 (D. Colo. 1978)(emphasis added)).

91. *Scheriff v. Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978).

92. *Id.*

To avoid unfairness and internal disharmony, the term costs in the fourth sentence of Rule 68 should be read consistently with its use in the first sentence of the rule.⁹³ It would be unfair to interpret Rule 68 costs to include attorney's fees only when it is to the plaintiff's advantage to do so—i.e., when a Rule 68 offer is accepted. Moreover, consistency requires that the term be given the same meaning when the plaintiff rejects a Rule 68 offer as when he accepts one. Yet if both the Sixth Circuit's opinion in *Fulps* and the Seventh Circuit's opinion in *Chesny* are correct—as Judge Posner contended⁹⁴—then the term costs would have two separate meanings, one when an offer is accepted and another when an offer is rejected. Like Dr. Jekyll and Mr. Hyde, the term would continually change character depending on whether it appeared in the first or the fourth sentence of Rule 68.

B. White v. New Hampshire Department of Employment Security

The plain language approach to defining Rule 68 costs has a certain elegance. Since Rule 68 speaks in terms of "costs" and since section 1988 defines attorney's fees as part of the "costs," civil rights attorney's fees should fall within the scope of Rule 68 costs. Even Judge Posner acknowledged that this approach to defining Rule 68 costs was "in a sense logical."⁹⁵

But the plain language approach has not, up to now, been persuasive to the United States Supreme Court. In *White v. New Hampshire Department of Employment Security*,⁹⁶ the Court considered whether a request for civil rights attorney's fees under section 1988 was a "motion to alter or amend the judgment" subject to the ten-day time restrictions of Federal Rule of Civil Procedure 59(e).⁹⁷ The Court held that section 1988 fee requests were "uniquely separable from the cause of action to be proved at trial" and were therefore not subject to the time restrictions of Rule 59(e).⁹⁸

93. See *supra* note 81. Indeed, the word costs should be given the same meaning even when it appears in different but related provisions such as Rule 68 and § 1988. See *Firestone v. Howerton*, 671 F.2d 317, 320 n.6 (9th Cir. 1982); *Marino v. INS*, 537 F.2d 686, 691 n.5 (2d Cir. 1976).

94. Judge Posner stated in *Chesny* that he had "no quarrel with the court's conclusion" in *Fulps*. 720 F.2d at 480.

95. *Id.* at 478.

96. 455 U.S. 445 (1982).

97. Rule 59(e) provides that "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." FED. R. CIV. P. 59(e).

98. 455 U.S. at 452.

At the same time, however, the *White* Court refused to hold expressly that section 1988 fees were costs within the meaning of Rules 54(d)⁹⁹ and 58.¹⁰⁰ By way of footnote, the Court stated:

The petitioner has urged us to hold expressly that the § 1988 provision for attorney's fees "as part of . . . costs" establishes that post-judgment fee requests constitute motions for "costs" under Rules 54(d) and 58, which specify no time barrier for motions for "costs." Because this question is unnecessary to our disposition of this case, we do not address it.¹⁰¹

Although this footnote does not establish that section 1988 fees are not costs under the federal rules, the Court's reluctance to hold that section 1988 fees are costs does diminish the force of the plain language approach to Rule 68 costs in civil rights cases. Moreover, in a separate opinion in *White*, Justice Blackmun chided the Court for declining to address the Rule 54(d) and Rule 58 questions, and set forth his belief that these rules do not apply to postjudgment section 1988 fee requests.¹⁰² This pronouncement, too, is not dispositive of the Rule 68 question. Consequently, it is necessary to examine the legislative history of both Rule 68 and section 1988 to determine whether the civil rights definition of attorney's fees as costs was intended to be incorporated into Rule 68 in civil rights cases.

V. THE LEGISLATIVE HISTORY

A. Rule 68

As the Supreme Court discovered in deciding *Delta Air Lines, Inc. v. August*, the legislative history of Rule 68 is sparse.¹⁰³ In particular, the drafters left no record of their intentions as to the meaning of costs. The only helpful evidence of the legislative intent of the drafters of Rule 68 was summarized as follows in the Solicitor General's brief in *Chesny*:

Between 1813 and 1928, Congress itself began the practice of awarding attorney's fees as part of the costs. By the time Rule 68 was promulgated in 1938, Congress had on numerous occasions defined the term "costs" to include attorney's fees. . . . Moreover, it appears

99. For the text of Rule 54(d), see *supra* note 7.

100. Rule 58 states in pertinent part: "Entry of the judgment shall not be delayed for taxing of costs." FED. R. CIV. P. 58.

101. 455 U.S. at 454 n.17.

102. *Id.* at 455-56 (Blackmun, J., concurring).

103. 450 U.S. 346, 356-60 (1981).

that the great majority of statutes enacted prior to 1938 that authorized attorney's fee awards did so as part of the costs. Furthermore, these statutes constituted much of the major legislation of the period: the Clayton (Anti-Trust) Act, the Securities Act of 1933, the Securities Exchange Act of 1934, the Interstate Commerce Act, the Railway Labor Act, and the Copyright Act of 1909.¹⁰⁴

As the Solicitor General noted, Congress must have had knowledge of these provisions when Rule 68 was promulgated, given the prominence of the legislation involved.¹⁰⁵ At the time of the adoption of Rule 68, there were at least a dozen federal statutes allowing an award of attorney's fees to the prevailing party as part of the costs.¹⁰⁶ Nevertheless, the existence of these statutes is at best circumstantial evidence of the congressional intent as to Rule 68. Nothing in the legislative history of the rule even mentions any of these statutes.

The silence about costs in Rule 68 reflects the general uncertainty in the minds of the original drafters of the federal rules about the meaning of costs. A letter from the Secretary of the original Advisory Committee for Rules for Civil Procedure states: "My mind is in a state of confusion about Rule 54(d) relating to costs. We have not in these rules attempted to state what the amount of the costs shall be, or what items shall be taxable"¹⁰⁷ The writer goes on to note that certain federal statutes provide some guidance as to what items constitute taxable costs and to suggest that costs in the rules be construed according to acts of Congress "where they have provision on the subject."¹⁰⁸ This suggests that costs in Rule 68 should be defined by any federal statute applicable to the case, but it does not help in choosing between section 1920 and section 1988 as a source of the definition. In any event, the letter expresses the views of only one man, not of the entire Advisory Committee.

B. Section 1988

The legislative history of section 1988 is similarly unenlightening. As the Solicitor General noted, "the legislative history of Section 1988 is silent with respect to Rule 68."¹⁰⁹ At one point, Congress did express an intention to treat attorney's fees "like other

104. *Amicus Brief*, *supra* note 15, at 12-13 (citations omitted).

105. *Id.* at 13.

106. Brief of the Petitioners, at 15-16, *Marek v. Chesny*, *cert. granted*, 104 S. Ct. 2149 (1984).

107. Letter from William D. Mitchell to Charles E. Clark, Dean of the School of Law, Yale University (Oct. 13, 1937).

108. *Id.*

109. *Amicus Brief*, *supra* note 15, at 15.

items of costs.”¹¹⁰ But this statement goes no further than the statutory directive that attorney’s fees may be awarded “as part of the costs.”¹¹¹

C. *Roadway Express, Inc. v. Piper*

The United States Supreme Court has given some guidance on using legislative history to choose between section 1988 and section 1920 when a definition of costs is needed. In *Roadway Express, Inc. v. Piper*, the Court rejected the plain meaning analysis of costs in the context of 42 U.S.C. § 1927.¹¹² Because the court of appeals in *Chesny* relied heavily on *Roadway Express* in holding that Rule 68 costs do not include attorney’s fees,¹¹³ *Roadway Express* deserves extended analysis.

Roadway Express was a civil rights case. When the plaintiffs failed to comply with a series of orders relating to discovery and filing of briefs, the defendant moved to dismiss the suit and requested an award of attorney’s fees and court costs. The district court granted the motion, dismissing the action with prejudice and assessing attorney’s fees and court costs against plaintiffs’ counsel. The district court’s rationale for assessing attorney’s fees was that 42 U.S.C. § 1927 authorized the court to tax the excess costs against any lawyer who “so multiplies the proceedings . . . as to increase costs unreasonably and vexatiously” and that the civil rights attorney’s fees award statutes defined attorney’s fees as “part of the costs.”¹¹⁴

The Supreme Court disagreed. The Court refused to incorporate into section 1927 the civil rights definition of attorney’s fees as costs.¹¹⁵ Rather, the Court held, section 1927 costs were to be defined by 42 U.S.C. § 1920, which did not include attorney’s fees in its definition of costs.¹¹⁶

110. S. REP. NO. 1011, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913.

111. 42 U.S.C. § 1988 (1982).

112. 447 U.S. 752 (1980).

113. See 720 F.2d at 480. By contrast, both Justice Powell in his *Delta* concurring opinion and the court in *Fulps* rejected the argument that *Roadway Express* required reading Rule 68 costs to exclude attorney’s fees. See 450 U.S. at 364 n.2 (Powell, J., concurring) (“In approving the Federal Rules, Congress appears to have incorporated the definition of costs found in the substantive statute at issue in the litigation.”); *Fulps*, 715 F.2d at 1091-92 (“[W]e are inclined to agree with Justice Powell’s analysis.”). Justice Powell, it should be emphasized, was the author of the majority opinion in *Roadway Express*.

114. 447 U.S. at 755-56.

115. See *id.* at 757-63.

116. *Id.* at 760-61.

There are several important differences between *Roadway Express* and *Chesny*. In *Roadway Express*, the Supreme Court traced the long legislative history of section 1927, going back to the joint enactment of section 1927 and section 1920 in 1853.¹¹⁷ The fact of their joint enactment was taken by the Court to require that the two statutes be read together.¹¹⁸ Rule 68, in contrast, shares no common legislative history with section 1920. There is no historical link between Rule 68 and section 1920 requiring that Rule 68 costs be defined by section 1920 rather than by section 1988.

A second historical reason that the Supreme Court refused to include attorney's fees in section 1927 costs also is inapplicable (or applicable with less force) in the case of Rule 68. Congress enacted the first version of section 1927 in 1813. The "contemporaneous understanding" of the term costs in 1813 plainly did not include attorney's fees, since the Supreme Court already had held that the general practice of the United States was not to allow an award of attorney's fees to the winning party.¹¹⁹ In 1813, there were apparently no federal statutes allowing courts to award attorney's fees to prevailing parties. By the time Rule 68 was adopted, however, more than a dozen prominent federal statutes allowed courts to award attorney's fees to prevailing parties as part of the costs.¹²⁰ Moreover, many of these statutes—for example, the communications laws, the securities laws, and the agricultural laws—had been enacted only a few years before Rule 68 took effect and were among the most important statutes of the time. Against this background, it is plausible to believe that the drafters of Rule 68 wanted costs to be defined to include attorney's fees whenever an applicable federal statute provided for an award of attorney's fees as part of the costs.

In *Roadway Express*, the Supreme Court also was concerned that incorporating the civil rights definition of costs, including attorney's fees, into section 1927 would create a "two-tier system of attorney sanctions."¹²¹ Specifically, the Court feared that attorneys in cases brought under federal fee-shifting statutes would "face stiffer penalties for prolonging litigation than would other attorneys."¹²²

This objection is a serious one in the present context. Incorporating section 1988's definition of attorney's fees as costs into Rule 68 would

117. *Id.* at 759-61.

118. *Id.* at 760.

119. *Id.* at 759 (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

120. See *supra* text accompanying note 106.

121. 447 U.S. at 762.

122. *Id.* at 763.

similarly create a two-tier system under Rule 68. Attorneys litigating under statutes allowing the prevailing party to win attorney's fees as part of the costs would risk the loss of all post-offer statutory fees whenever they rejected a Rule 68 offer. Attorneys litigating under all other statutes would risk only the loss of post-offer costs under section 1920 when rejecting a Rule 68 offer. Because the discrepancy between fees and costs is likely to be substantial in most cases, Rule 68 would impose very different penalties depending on whether or not a fee-shifting statute was applicable.

The difference between the two situations is found in the policy underlying Rule 68. In *Roadway Express*, the Supreme Court found no justification for imposing a two-tier system of attorney sanctions under section 1927, primarily because, unlike the civil rights fee award statutes, section 1927 made no distinction between winners and losers.¹²³ Under Rule 68, however, a two-tier system for assessing fees would help implement the general purpose of the rule, which is to encourage the early settlement of litigation. Without such a dual system, attorneys for plaintiffs in fee-shifting cases may have an incentive to recommend the rejection of reasonable settlement offers since they may hope they can continue to amass fees if the litigation continues. Although this incentive to continue litigation may exist in any case where fees are charged on an hourly basis, fee-shifting cases are a special breed. Because the defendant rather than the plaintiff may have to pay the plaintiff's attorney's fees in a fee-shifting case, there may be little pressure from the plaintiff himself to settle the case. The threat of shifting the fees back again under Rule 68, from the defendant to the plaintiff, would help to counteract this imbalance.

Moreover, defining Rule 68 costs to include attorney's fees would provide substantial benefits for civil rights plaintiffs. Since offers of judgment must include "costs then accrued," defining Rule 68 costs to include attorney's fees would mean that defendants would have to pay all of the plaintiff's accrued attorney's fees as of the time the Rule 68 offer was made. Thus, Rule 68 offers would become more attractive to plaintiffs and the rule's policy of encouraging settlement would be furthered.

The remainder of this Article will explore these policy considerations in greater depth.

123. *Id.*

VI. A HYPOTHETICAL CASE: ENCOURAGING GENEROUS SETTLEMENT OFFERS UNDER RULE 68

Interpreting costs in Rule 68 to include attorney's fees whenever the suit involves section 1988 or some other federal statute providing for an award of fees as part of the costs would have two primary consequences. First, any offer of judgment, in order to satisfy the requirement of Rule 68 that it be "with costs then accrued," would have to include all of the plaintiff's attorney's fees accrued to the date of the offer. Second, any plaintiff who ultimately obtained a judgment less favorable than the Rule 68 offer would have to bear his own attorney's fees incurred after the date of the offer. These two consequences would have a far-reaching economic impact.

This Article now examines these economic implications by considering the way individual lawyers might approach settlement negotiations if costs in Rule 68 were read to include attorney's fees in cases brought under fee-shifting statutes. A hypothetical case is presented, illustrating the strong new incentives to settle that would act upon both parties under the proposed interpretation. The Article first considers the problem from the perspective of the defendant, since the defendant is the only one who can initiate a Rule 68 offer. Then it considers the perspective of the plaintiff. Finally, the Article briefly considers the problem from the perspective of the court. It demonstrates that reading costs in Rule 68 to include civil rights attorney's fees would further the purposes of section 1988, which are "to encourage the bringing of meritorious civil rights actions"¹²⁴ and "to ensure 'effective access to the judicial process' for persons with civil rights grievances."¹²⁵

A. *The Defendant's Perspective*

Consider the predicament of the hypothetical defendant who recently has been served with a civil rights complaint accompanied by interrogatories and document requests. The defendant has answered the complaint, but has not yet responded to the discovery requests.¹²⁶ After speaking to a few witnesses, the defendant's counsel

124. *Chesny*, 720 F.2d at 478.

125. *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)(quoting H.R. REP. NO. 94-1558, 94th Cong., 1st Sess. 1 (1976)).

126. Under Rules 33(a) and 34(b) defendants are not required to answer written discovery requests until 45 days after service of the summons and complaint unless the court orders a shorter or longer time. FED. R. CIV. P. 33(a), 34(b).

has concluded that there is a high probability, approaching a certainty, that a jury would award the plaintiff substantial damages. In other words, there is a very high probability that the plaintiff will be the "prevailing party."

As the prevailing party, the plaintiff will be entitled to reasonable attorney's fees under section 1988 unless "special circumstances" render the award unjust.¹²⁷ Since "special circumstances" are extremely rare,¹²⁸ the defendant's attorney must advise his client that a major expense of the case is likely to be the plaintiff's attorney's fees. Added to this sum, of course, would be the defendant's own attorney's fees, plus the amount of any judgment that may be entered against the defendant.¹²⁹

The defendant's attorney must decide whether to advise his client to make a settlement offer under Rule 68. If such an offer will shield the defendant from any liability for the plaintiff's attorney's fees incurred after the time of the offer, the defendant will have a strong motivation to make a Rule 68 offer. A Rule 68 offer will, in effect, buy the defendant insurance against the plaintiff's attorney's fees for the rest of the case.

1. Determining the Value of the Case

Three basic figures should be considered in determining the amount of an initial Rule 68 offer. First, assuming that the plaintiff will win on the issue of liability, the defendant's attorney should estimate the amount of damages a jury would be likely to award the plaintiff if the case were to go to trial. Second, the defendant's

127. *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968).

128. Courts have placed severe limitations on the "special circumstances" exception. *See, e.g., Espinoza v. Hillwood Sq. Mut. Ass'n*, 532 F. Supp. 440, 444-45 (E.D. Va. 1982) (collecting cases); *Concerned Democrats of Fla. v. Reno*, 493 F. Supp. 660, 663-64 (S.D. Fla.) (collecting Fifth Circuit cases), *rev'd*, 689 F.2d 1211 (5th Cir. 1980).

129. In civil rights cases, of course, the defendant often will be a governmental entity and thus will be defended by government attorneys on salary. *See, e.g., Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157 (2d Cir.), *cert. denied*, 454 U.S. 818 (1981); *see also Lyons v. Cunningham*, 583 F. Supp. 1147 (S.D.N.Y. 1983). Even when defense counsel are on salary, however, the diversion of their time to civil rights cases represents a significant cost to the government.

Moreover, in many civil rights cases a governmental entity is represented by a private firm retained by the government or its insurer on an hourly basis. *Chesny* itself is an example of such a case. In addition, several sections of the civil rights laws, including 42 U.S.C. §§ 1981 and 1985, reach purely private conduct, in which case the defendants must nearly always retain private counsel. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 168-72 (1976) (holding that § 1981 reaches purely private acts of racial discrimination); *Ward v. Connor*, 657 F.2d 45, 48 (4th Cir.) (holding that § 1985(c) reaches private conspiracies to deprive persons of free exercise of religion), *cert. denied*, 455 U.S. 907 (1981).

attorney should estimate the plaintiff's reasonable attorney's fees for the entire case. Third, he should estimate his own client's attorney's fee for the entire case.¹³⁰

For the sake of illustration, assume that the defense attorney, applying this formula, arrives at the following figures.¹³¹ First, the defense attorney estimates that a jury is likely to award a verdict of about \$50,000. Second, the defense attorney estimates that, if the case goes all the way through trial and the plaintiff wins a verdict, the plaintiff's reasonable attorney's fees will exceed \$150,000. Third, the defense attorney estimates that his own fees for taking the case through trial will amount to \$100,000.¹³² Thus, if the case goes to trial and the plaintiff wins, the defendant would have to make a total cash outlay of about \$300,000.¹³³

2. The First Rule 68 Offer

In deciding upon a specific dollar amount to offer in a particular case under a fee-shifting statute, the defense attorney should consider carefully the tactical consequences of making the offer. Specifically he should consider at least three possible scenarios:

130. Naturally there will be some incidental expenses as well, particularly costs under 28 U.S.C. § 1920 and expenses for court reporters, deposition transcripts, travel, transportation, and so forth. However, in arriving at a ballpark figure for an appropriate settlement offer, it may not be necessary to analyze these incidental costs and expenses unless the case is expected to involve dozens of depositions and extensive out-of-town travel.

131. All of the numbers used in this hypothetical are arbitrary and are chosen as convenient figures for purposes of illustration.

132. The calculations for the defendant's attorney's fees are based on the assumption that a single firm or attorney can represent all of the defendants. However, there will be some cases in which the stories or legal defenses of the various defendants conflict, in which case the lead defense lawyers will be disqualified from representing the defendants with conflicts. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (except in narrow circumstances, lawyers shall not continue to represent multiple clients if exercise of independent judgment on behalf of one client is likely to be adversely affected by representation of another client). Where multiple lawyers are required to represent the defendants, the government or its insurer may be required to retain private counsel for the defendants with conflicts. Since some duplicative work is bound to be involved when multiple lawyers represent the defendants, the legal bills are likely to be higher—and thus the savings from an early settlement greater. Moreover, if governmental co-defendants are questioning each other's credibility or blaming each other for the violation of plaintiff's civil rights, the publicity is likely to be highly negative for the government. Accordingly, in cases where the governmental defendants have conflicts among themselves, the interest in early settlement is likely to be greater than in cases without conflicts.

133. Moreover, the defendant's attorney will want to advise his client that these figures do not put any dollar value on the defendant's time spent in interviews and depositions, talking to lawyers on the telephone, or assisting with the investigation and preparation of the case. Nor do they take into account the psychic toll of litigation or the damaging publicity that might result from a highly publicized trial in which the plaintiffs prevail.

(1) If the plaintiff rejects the offer and then wins more at trial, the defendant will be liable for the judgment, the plaintiff's attorney's fees and his own attorney's fees. In other words, if the plaintiff rejects the offer and gets a better result at trial, the offer will have no meaning and will be of no value to the defendant.

(2) If the plaintiff rejects the offer, wins at trial, but recovers less than the amount of the offer, the defendant will have to pay only the judgment, his own attorney's fees, and whatever attorney's fees the plaintiff incurred before the Rule 68 offer was made. In other words, making the offer will save the defendant from having to pay the plaintiff's post-offer attorney's fees.

(3) If the plaintiff accepts the offer, the case will end and the defendant will have to pay only the amount offered in settlement, plus the plaintiff's and his own attorney's fees to the date of the offer.

From the defendant's perspective, the worst of these three scenarios is the first—the plaintiff's rejection of an offer that proves to be less than the jury's verdict. The best scenario is clearly the third—the plaintiff's acceptance of the offer. The defendant, therefore, has an incentive to bring about the third scenario by making a Rule 68 offer that the plaintiff will accept. Obviously, the higher the offer, the more likely it is that the plaintiff will accept. If the offer is rejected, however, a higher offer makes it more likely that the jury will award less than the amount of the offer, which will at least shield the defendant from paying the plaintiff's post-offer attorney's fees.¹³⁴

As a matter of negotiating technique, however, the defendant is likely to make an initial offer well below the apparent value of the case.¹³⁵ There are a number of reasons for making a relatively small initial offer. First, if the plaintiff is like most civil rights plain-

For examples of the considerations that lawyers should raise in advising their clients whether to make settlement offers, see D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* 156-68 (1977); J. JEANS, *TRIAL ADVOCACY* § 18.7 (1975).

134. Because the hypothetical posits that the plaintiff's case clearly has value, it is unnecessary to consider a fourth scenario, one in which the plaintiff rejects the offer but goes on to *lose* at trial. Arguably, this is the "best-case scenario" for the defendant. Even in this case, however, the attorney's fees incurred by the defendant as a result of going to trial may well exceed the difference between a fair settlement and a verdict for the defendant. Thus, in economic terms, a favorable verdict may represent only a pyrrhic victory for the defendant.

Moreover, the mere possibility that a plaintiff with a concededly meritorious claim will ultimately lose at trial is not a consideration that can be given serious weight by the defendant at the settlement stage. Rather, a verdict for the defendant in such a case is more in the nature of a windfall.

135. See, e.g., H. MILLER, *ART OF ADVOCACY—SETTLEMENT* § 5 (1984); White, *Some Standard Negotiating Techniques and Some Thoughts on Non-Verbal Communication*, 5 *LITIGATION* 17, 18, 57 (Fall 1978).

tiffs, he is probably not financially well-off. He may have no savings. He may have accumulated bills. He may be unemployed. A relatively small offer may be very attractive to a indigent plaintiff, even though the actual value of the case is much higher. A second reason for making a relatively low initial offer is that the plaintiff's attorney may have misjudged (or failed to calculate at all) the value of his case. A third reason is that the plaintiff or his attorney may be aware of facts not yet known to the defendant that make the plaintiff's case worth much less than the defendant believes it is worth.

The defendant's object, then, should be to make an opening offer that is low enough to save the defendant some money if it is accepted, and high enough so that the plaintiff will be tempted to accept it. The ideal initial offer under Rule 68, therefore, is one that is at the lower extreme of the probable range of jury verdicts. In practical terms, the offer should be in the range of the lowest verdict that would be returned for the plaintiff by a group of ten different juries hearing the case. If the plaintiff is in desperate need of money, or if the plaintiff or his attorney know about a weakness in the case, or if they have substantially undervalued their case, the offer may be sufficient to induce the plaintiff to accept. If the plaintiff does not accept the initial offer, the defendant can return immediately with a higher offer.¹³⁶

B. The Plaintiff's Perspective

In order to develop our hypothetical case from the plaintiff's perspective, it will be necessary to add a few facts. Assume that the defendant has made an initial Rule 68 offer for \$30,000, including the plaintiff's accrued costs and attorney's fees. The plaintiff's attorney, like the defense attorney, values the case at \$50,000 but believes that the jury might return a verdict for as little as \$30,000. Assume further that the plaintiff has a fee agreement with his lawyer specifying that the attorney will be paid solely out of the amount awarded by the court pursuant to section 1988.¹³⁷ Finally, assume that as of the date of the offer the plaintiff's attorney has performed thirty hours of work compensable under section 1988 at a rate of \$100 per hour.

136. Rule 68 specifically provides: "The fact that an offer is made but not accepted does not preclude a subsequent offer." *Id.*

137. The plaintiff's attorney might be better off if he also executes a contingency fee agreement with his client, since a contingency fee will assure the attorney of a significant fee even if the case settles soon after it is filed. However, courts will scrutinize contingency fee agreements in civil rights cases carefully. As a rule, courts will not allow attorneys in fee-shifting cases to collect both a full contractual contingency fee and the statutory

1. Analyzing the Defendant's First Offer

If the plaintiff accepts an early offer, his attorney will receive only the fees accrued to the date of the offer. Acceptance of the defendant's \$30,000 initial offer, then, would net only \$3,000 for the plaintiff's attorney and \$27,000 for the plaintiff. Under the facts posited, these figures are substantially lower than the plaintiff's attorney expects to recover either for himself or his client if the case goes to trial. The plaintiff's attorney is therefore likely to recommend that the plaintiff reject the offer. He will be especially likely to recommend rejection if he suspects that the defendant's low offer was made merely to test the waters and that a new, higher Rule 68 offer will be made if the initial one is rejected.

The attorney's decision, however, is not an easy one. The plaintiff cannot make a counteroffer under Rule 68 and nothing in Rule 68 obligates the defendant to make a later offer of judgment. If the plaintiff rejects the offer and no new Rule 68 offer is forthcoming, the initial offer may operate to deprive the plaintiff of his right to any further attorney's fees under section 1988. Thus, if the plaintiff's attorney has guessed too high about the value of the case, he risks recovering no more than the amount of his hourly fees accrued as of the date of the offer, no matter how much additional work he must perform. Worse still, if for some unexpected reason the plaintiff does not prevail at trial, the plaintiff and his attorney would receive nothing—no judgment, no fees, and no costs.

Yet the interests of the plaintiff and his attorney would not necessarily be best served by accepting the Rule 68 offer. If the offer were accepted, the plaintiff would recover substantially less than he could probably obtain at trial, and the attorney would receive a much lower fee than he expected to receive under section 1988.

attorney's fee. *See, e.g., Sullivan v. Crown Paper Board Co.*, 719 F.2d 667 (3d Cir. 1983)(limiting civil rights attorney's total fees to higher of contingency amount or court-awarded statutory fee); *Krause v. Rhodes*, 640 F.2d 214, 218-20 (6th Cir. 1981)(attorney fees awarded under § 1988 despite existing contingency agreement, but court reduced award so as not to void settlement agreement); *Zarcone v. Perry*, 581 F.2d 1039, 1044-45 (2d Cir. 1978)(court denied § 1988 fees to prevailing plaintiff, reasoning that contingency agreement provided adequate compensation to attorney and that attorney's fees would not have been significant barrier to prosecuting suit), *cert. denied*, 439 U.S. 1072 (1979); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 90 (total of statutory fee and contingency fee must not be "excessive").

For simplicity, this Article postulates a hypothetical fee agreement limited solely to the fee awarded by the court under a fee-shifting statute. But it must be kept in mind that a plaintiff's attorney usually can protect himself against a low statutory fee award in cases of early settlements by executing a contingency fee agreement based on the amount of the plaintiff's recovery rather than the number of hours worked.

2. The Plaintiff's Dilemma

At this point in the hypothetical, the defendant's low Rule 68 offer appears to have forced the plaintiff into a no-win position. If the plaintiff accepts the offer, he gives up much of the true value of his case. If he rejects the offer, he risks losing his statutory entitlement to attorney's fees accruing after the date of the offer. This predicament befalls the plaintiff even though the defendant concedes that the plaintiff's claims are meritorious and that most juries would award the plaintiff more than the amount of the offer.

These unfair consequences can be traced to four major flaws in Rule 68. First, because only a party "defending against a claim" can make a Rule 68 offer, the rule does not permit counteroffers; the offeree's only choice is to accept or reject the offer on the table. Second, since the rule on its face requires an acceptance or rejection within ten days,¹³⁸ it leaves little time for negotiations to develop and little time for discovery by the plaintiff in order to evaluate the offer. Third, because the rule sets no time limit on when offers can be made, a defendant can make a Rule 68 offer the moment he is served with the complaint. An early Rule 68 offer may force the plaintiff to respond to the offer before the defendant must answer the complaint and before the defendant ordinarily is required to submit to any depositions or respond to any written discovery.¹³⁹ Thus, the plaintiff may be forced to respond to the Rule 68 offer based on relatively few facts and without any testimony under oath from the defendant offeror. Fourth, the rule gives the court no discretion to adjust the sanction of "costs incurred after the making of the offer" if this sanction turns out to be unfair in all of the circumstances. That sanction is mandatory if the offeree's judgment is not more favorable than the rejected offer.

These defects in Rule 68 provide a strong policy basis from which to argue that Rule 68 costs should not be read to include attorney's fees in cases brought under a fee-shifting statute. But the argument has a flaw; it is based on an overly rigid reading of Rule 68 and the rules governing discovery. By taking advantage of the flexibility allowed by the rules, plaintiffs can gain time, information, and leverage over defendants who have made inadequate Rule 68 offers.

138. FED. R. CIV. P. 68.

139. A defendant ordinarily has 20 days after service of the complaint in which to file his answer. FED. R. CIV. P. 12(a). Rule 68, however, gives a plaintiff only 10 days in which to accept or reject an offer of judgment. FED. R. CIV. P. 68. As to discovery, a defendant ordinarily has 30 days after the commencement of the action before the plaintiff can compel him to submit to an oral deposition, FED. R. CIV. P. 30(a), and 30 days after the service of written interrogatories before answers must be given. FED. R. CIV.

3. Combatting a Low Offer

There are three things the hypothetical plaintiff can do to pressure the defendant into making a higher Rule 68 offer. First, the plaintiff can ask the court for an extension of the ten-day period within which he normally would be required to accept or reject a Rule 68 offer. Although some courts have refused to grant extensions of time for responding to Rule 68 offers, the better authority has allowed extensions.¹⁴⁰ An extension, by allowing more time for fact gathering, would enable the plaintiff to evaluate the case and the Rule 68 offer more thoroughly.

P. 33(a); *see also* FED. R. CIV. P. 34(b)(30 days for response to request for production of documents); FED. R. CIV. P. 36(a)(30 days for answer to requests for admission).

140. In *Coleman v. McLaren*, No. 78-C 2117, slip op. at 4-5 (N.D. Ill. June 26, 1981), *aff'd sub nom.* *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983), the court relied on FED. R. CIV. P. 6(b) in approving two previous extensions holding open a Rule 68 offer. When the plaintiff accepted the offer during the second extension period, the defendant argued that the extensions were improper and that the "acceptance" was therefore invalid. The court rejected the defendant's argument, concluding: "Nothing in either Rule 68 or Rule 6(b) even remotely supports [defendant's] contention." *Id.* at 5. This result was plainly correct. Rule 6(b) allows the court to enlarge the time for any act under the rules that is "required or allowed to be done at or within a specified time." Since Rule 6(b) expressly excludes provisions of five specified rules from its operation, but does not exclude Rule 68, there is a strong implication that the drafters of Rule 6(b) intended it to apply to Rule 68.

On the other hand, there may be policy reasons for refusing to extend the 10 day acceptance period. *See Staffend v. Lake Central Air Lines, Inc.*, 47 F.R.D. 218, 220 (N.D. Ohio 1969). In *Staffend*, the court denied the plaintiff's motion to hold a Rule 68 offer open pending decision by the Ohio Supreme Court in a potentially controlling case. The court believed that granting an extension of the acceptance period would discourage defendants from using Rule 68. "No sensible defendant would make an Offer of Judgment under Rule 68," the court stated, "if he knew the offer might be kept open for an indefinite period of time, even though the value of the litigation might change." *Id.*

The best solution is probably a compromise between the opposite positions of *Coleman* and *Staffend*. If a Rule 68 offer is made so early in the case that the plaintiff has not had sufficient time for discovery and may not have an adequate basis on which to evaluate the offer, that should constitute "cause shown" under Rule 6(b) for the court to grant an extension of the 10 day acceptance period. Rule 68 is presumably intended to encourage fair settlements, not just any settlements. Since Rule 68 offers can be made at any time after the defendant is served with a complaint, the 10 day acceptance period can expire even before a defendant is required to answer the complaint—and long before the plaintiff normally is entitled to take depositions or obtain responses to discovery requests. *See* FED. R. CIV. P. 30(a)(leave of court must be obtained if plaintiff seeks to take depositions before 30 days after service of complaint); FED. R. CIV. P. 33(a), 34(b)(defendant not required to respond to interrogatories or document requests until 45 days after service of complaint unless court orders shorter time). There can be no policy reason for forcing a plaintiff to make a decision about accepting or rejecting an offer of judgment before he has had any opportunity to obtain information from the defendant under the rules.

On the other hand, the *Staffend* court is correct that it would be unfair to defendants, and would discourage them from using Rule 68, to permit routine extensions of the 10 day acceptance period. If a court finds cause to extend the 10 day acceptance period,

Second, the plaintiff can ask the court to accelerate the date by which the defendant must respond to any interrogatories, document requests, or other written discovery requests that the plaintiff has served (or intends to serve) on the defendant.¹⁴¹ The acceleration also would help the plaintiff to evaluate the case before the acceptance period expires.

Third, the plaintiff can ask the court for leave to take depositions on an early and accelerated schedule. For example, the plaintiff could seek to take depositions every day, beginning immediately, until the acceptance period expires.¹⁴² If the plaintiff will need to take these depositions eventually, the plaintiff will have good reason to take them before the time for accepting the Rule 68 offer expires.¹⁴³

therefore, it should simultaneously grant the defendant leave to withdraw his offer upon written notice to the plaintiff at any time during the extension period. This procedure would be a change from the usual rule that an offer of judgment may not be revoked before acceptance. See 12 C. WRIGHT & A. MILLER, *supra* note 3, § 3004, at 59-60; Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401 (1957). Since nothing in Rule 68 mandates that an offer must remain open for more than 10 days, however, it would seem permissible for a court to allow the defendant to withdraw an offer at any time after 10 days. An offer withdrawn before the extended acceptance period expired would have no effect.

141. See FED. R. CIV. P. 33(a), 34(b). Rule 33 provides that a party upon whom interrogatories are served shall serve a written response within 30 days after the request is served, except that a defendant need not answer for 45 days after service of the summons and complaint. Rule 34 is to the same effect for document requests. But both rules provide, in identical terms: "The court may allow a shorter or longer time." *Id.*

142. FED. R. CIV. P. 30(a) provides that leave of court must be obtained if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon a defendant. Nothing in the rules prohibits the taking of depositions on Saturdays or Sundays. Under normal circumstances, the court might view weekend depositions (except by agreement of the parties) as a harassment tactic. During the acceptance period for a Rule 68 offer, however, a court should allow the plaintiff to take discovery on an accelerated schedule, including weekends if necessary, in order to evaluate the offer before the acceptance period expires.

143. This is not to suggest that plaintiff's lawyers who receive Rule 68 offers should take depositions or accelerate discovery simply to run up their fees. To do so would violate FED. R. CIV. P. 26(g), which requires every attorney serving a discovery request to certify that the request is "not interposed for any improper purpose" and is "not unreasonable or unduly burdensome or expensive." Since a plaintiff's attorney faces the loss of all of his attorney's fees (except contingency fees) for the remainder of the case if he mistakenly rejects a Rule 68 offer, however, it usually will be proper for him to take whatever discovery is necessary to evaluate the offer before the acceptance period expires.

The discovery necessary to evaluate the offer may include all discovery the plaintiff would take over the duration of the case. Thus, if little or no discovery has been taken up to the time of the Rule 68 offer, the plaintiff may have to take a considerable amount of discovery in a relatively short period. This would not be unusual; accelerated discovery schedules are typical in tender offer cases, preliminary injunction proceedings, and other cases with relatively short deadlines. Since it seems fundamentally unfair to require a plaintiff to accept or reject a Rule 68 offer before he has had ample opportunity for discovery, a court should likewise allow accelerated discovery when a Rule 68 offer is pending.

Accelerating the discovery process would have two benefits for the plaintiff. First, the accelerated schedule would apply pressure on the defendant to make a realistic Rule 68 offer immediately, before attorney's fees multiply. Because the defendant's offer was made early in the hypothetical case, the defendant probably has not yet incurred substantial attorney's fees. But over many days of constant depositions, which the defendant would have no practical choice but to attend,¹⁴⁴ enormous attorney's fees would be generated.¹⁴⁵ In addition, the defendant's attorney would have to spend time preparing interrogatory answers and objections, and sorting through documents in order to respond to the plaintiff's discovery requests.¹⁴⁶

Since the plaintiff simultaneously would be preparing for and attending the depositions, studying the defendant's interrogatory responses, and reviewing the documents turned over by the defendant, the defendant will be at risk of having to pay roughly double attorney's fees if the plaintiff ultimately obtains a judgment more favorable than the defendant's initial Rule 68 offer. The bill for plaintiff's and defendant's combined attorney's fees could easily run into the thousands or even tens of thousands of dollars before the acceptance period expires. To avoid this enormous expense for attorney's fees, the defendant who has made a deliberately low Rule 68 offer—one fairly certain to be exceeded at trial—would be well advised to make a second, higher Rule 68 offer before the expense is incurred.

The second benefit of taking intensive accelerated discovery during the acceptance period is that the plaintiff will have an opportunity to find out whether he has misjudged his case. During discovery, the defendant may reveal some facts highly damaging to the plaintiff's case. If the plaintiff's case is worth much less than the plaintiff's attorney initially thought—if it is worth only \$30,000, for example—then the initial Rule 68 offer may represent the defendant's best and only offer. If it is the defendant's only Rule 68 offer,

144. Nothing in the rules would require the defendant's lawyers to attend depositions scheduled by the plaintiff. But, as a practical matter, it would be unthinkable for a defense counsel not to attend depositions taken by the plaintiff. Cf. A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A)(3) (a lawyer shall not "[n]eglect a legal matter entrusted to him").

145. The defendant's attorney would have to prepare the defendant and defense witnesses for their depositions, and perhaps prepare non-party witnesses as well. He would have to spend additional time preparing to examine or cross-examine any non-party witness called by the plaintiff.

146. No responsible attorney would turn over documents without reviewing them first himself to cull out documents that are privileged, irrelevant, or not responsive to the document requests. Reviewing documents, however, is a time-consuming and complex task. See Saylor, *Organizing Documents by Hand*, 9 LITIGATION No. 2, at 30-32 (Winter 1983).

and if it is for an amount equal to or greater than the plaintiff is likely to win at trial, the plaintiff would be wise to accept it.¹⁴⁷

If the court grants either the plaintiff's motion to extend the acceptance period or the plaintiff's motion for accelerated discovery, or both, the plaintiff will have considerable leverage over the defendant during the acceptance period. If the low offer was merely a bluff, the defendant will face strong incentives to make a better offer and to do so immediately.

If the defendant's second offer is for an amount greater than the plaintiff is likely to receive at trial, the plaintiff's lawyer will want to recommend that his client accept the new offer.

C. *The Second Offer: The Defendant's Perspective*

In considering the amount of a second Rule 68 offer, the defendant's attorney might begin by considering the important differences between civil rights cases and non-fee-shifting cases such as contract suits or personal injury cases. In non-fee-shifting cases, the defendant would almost never want to make an offer for more than the amount the plaintiff would be likely to win at trial. If the defendant would have to pay more in settlement than he expected to pay at trial, there would be no point in settling. Defendants in personal injury cases, however, ordinarily do not face potential liability for the attorney's fees of their adversaries. In a meritorious civil rights case, by contrast, there is a substantial probability that the defendant ultimately will have to pay the plaintiffs attorney's fees. The fees may be even larger than the amount of the judgment, and litigation over fees may amount to a "second major litigation" for which the defendant also would have to pay fees.¹⁴⁸ The threat of being held liable for the fees and expenses of both sides puts considerable pressure on the defendant's attorney to settle the case. The plaintiff's attorney, in contrast, actually may have an incentive not to settle so that he can continue to accrue fees at the defendant's expense.

If the defendant's second offer is slightly higher than the amount the plaintiff can reasonably expect to receive from a jury, the plain-

147. In cases where the plaintiff's attorneys have executed contingency agreements with their clients, see *supra* note 137, the attorneys must keep in mind that they risk losing attorney's fees in two ways if they reject the offer and fail to beat it at trial. First, they would not recover any statutory attorney's fees for time expended after the date of the Rule 68 offer. Second, if the ultimate judgment is lower than the amount of the Rule 68 offer, their contingency fee also would be reduced, since it would be based on a lower recovery.

148. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

tiff and his attorney would be under enormous pressure to accept the offer. If the plaintiff accepts the offer, his attorney will recover his fees at a reasonable hourly rate for all time reasonably spent up to the time of the offer. If the plaintiff rejects the defendant's new offer, though, he will face the possibility of losing all of his attorney's fees for any work performed after the date of the offer. As for the plaintiff personally, he would face a strong incentive to accept the offer, since it would enable him to recover the full value of his claim without the years of delay and uncertainty that a trial and appeal might entail.

To put maximum pressure on the plaintiff, therefore, the defendant should make his second offer quite high. The defendant should think of a Rule 68 offer as an insurance policy. The higher the offer—the higher the “premium” the defendant is willing to pay over what the plaintiff should reasonably expect to receive in judgment—the more insurance the defendant is buying against paying the plaintiff's post-offer fees. When the plaintiff's attorney communicates the defendant's offer to his client, the defendant wants the plaintiff's attorney to tell his client that most juries deciding this case would award less than the amount of the defendant's Rule 68 offer, so that the Rule 68 offer would actually give the plaintiff a better result than he would be likely to win at trial. In short, the defense attorney wants the plaintiff's attorney to recommend in the strongest possible terms that the plaintiff accept the offer.

In formulating the second Rule 68 offer, therefore, the defendant's lawyer should remind the defendant that the optimum result will occur if the offer is accepted, not if it is rejected. If the plaintiff accepts the offer, the defendant will have successfully insured against both the plaintiff's future attorney's fees and his own future attorney's fees. If the plaintiff rejects the offer, however, the defendant will at best be insured only against the plaintiff's future attorney's fees, not his own; the defendant can expect to pay for his own lawyer's services for the rest of the litigation even if the defendant ultimately prevails.¹⁴⁹

Finally, the defendant's attorney should emphasize to his client that if the plaintiff obtains a judgment at trial more favorable than the offer, the defendant will have to pay the plaintiff's attorney's fees for the entire case. The higher the offer, the less likely it is that the jury's award will be more favorable than the offer. Accordingly, the defense attorney should recommend that the defendant raise his Rule 68 offer by allocating to the offer some of the money that he

149. *See supra* note 25.

would probably have to pay as attorney's fees (his own and plaintiff's) if the case were tried. If sufficient funds are reallocated, the Rule 68 offer will be high enough that the plaintiff and the plaintiff's attorney will consider it in their best interests to accept the offer.¹⁵⁰

D. The Second Offer: The Plaintiff's Perspective

We may now assume a few additional facts. Suppose that the defendant and his attorney have made a second Rule 68 offer of \$80,000, including the plaintiff's accrued attorney's fees.¹⁵¹ Having carefully evaluated the case, the defendant genuinely believes that the amount of the new offer is greater than the verdict seven out of ten juries would return. The plaintiff's attorney, after engaging in some discovery, still believes that most juries would return a verdict in the range of \$50,000 and agrees with the defense lawyer that only three juries in ten would return verdicts greater than \$70,000.

Assume further that the plaintiff's accrued costs, including attorney's fees, have now reached \$5,000. After subtracting this sum from the \$80,000 offer, the net amount of the offer for purposes of comparing it to the jury verdict is \$75,000.¹⁵² If the plaintiff accepts the offer, the plaintiff's attorneys would thus receive section 1988 attorney's fees and costs of \$5,000—the amount that accrued to the date of the offer—and their client would receive the remaining \$75,000.

If the plaintiff's attorneys reject the offer, on the other hand, they will not receive any additional fees under section 1988 unless they beat the offer at trial. Moreover, if the jury awards only \$50,000, as the plaintiff's attorneys expect, then their client would receive substantially less than the \$75,000 he would receive by accepting the offer. Finally, the plaintiff and his attorneys will have been forced to withstand the anxiety and delays of trial.

150. The defendant, unused to the economics of settlement under Rule 68, may resist making a high second offer. In particular, the defendant may be concerned that a high settlement will encourage others to bring similar claims against him. The defendant's attorney should advise his client that this possibility can be diminished by requesting the court to order the plaintiff to keep the terms of the offer confidential and by requesting leave to file the judgment, once the offer is accepted, under seal.

151. An offer in this form—for a specified dollar amount including accrued attorney's fees and other costs accrued to the date of the offer—was specifically approved in *Chesny*. See 720 F.2d at 476-77. Justice Powell, however, has previously expressed a belief that an offer that includes fees in a civil rights case does "not comply with the terms of Rule 68." *Delta*, 450 U.S. at 364 (Powell, J., concurring).

152. In other words, for purposes of comparing the offer with the ultimate jury verdict, the court will read the offer as if it were for \$75,000 plus attorney's fees and the costs accrued to the date of the offer. See *Chesny*, 720 F.2d at 476.

Of course, it is possible that the plaintiff will obtain a judgment more favorable than the offer. He may draw a highly favorable jury, or new facts may surface that greatly increase the value of the plaintiff's case. But in terms of probabilities, the plaintiff's lawyers should be comparing an immediate \$5,000 for themselves and an immediate \$75,000 for their client if the offer is accepted, with the same \$5,000 for themselves and only \$50,000 for their client sometime in the future—possibly one, two or three years away—if the offer is rejected and the case goes to trial.¹⁵³

The most critical issue for the plaintiff and his attorneys to consider in deciding whether to accept the Rule 68 offer is risk. Rejecting an adequate Rule 68 offer creates a risk for both the plaintiff and his attorney. For the attorney, rejecting an adequate Rule 68 offer creates the risk that the attorney will receive nothing but pre-offer fees in the rather likely event that a trial produces a judgment less favorable than the offer. For the client, the risk of rejecting an adequate Rule 68 offer is somewhat lower. If he wins a judgment at trial that is less favorable than the amount of the Rule 68 offer, he will still obtain the full amount of the jury verdict. Rejecting a Rule 68 offer does not in any way bar the plaintiff from receiving whatever the jury awards. Thus, the plaintiff's primary risks are (1) that he might win less at trial than he could get by accepting the Rule 68

153. As with any settlement offer, whether or not made under Rule 68, one of the main features of the offer is that the money comes in right away. Getting the money immediately will enable the client to pay off his current bills. Many civil rights plaintiffs, especially employment discrimination plaintiffs (whose attorney's fees would be awarded under the attorney's fees provision of title VII, 42 U.S.C. § 2000e-5(k)(1982), which has language virtually identical to § 1988), have serious financial problems as a result of the violation of their civil rights. These financial problems stem both from the nature of the civil rights violations and from the minority status, and hence typically lower income status, of many civil rights plaintiffs. A victim of employment discrimination, for example, may not only have lost his job due to an act of discrimination, but may also have trouble getting a new job because of a bad reference from the employer who committed the civil rights violation. A victim of police brutality may have incurred high medical expenses as a result of the police violence, and may not have sufficient insurance to cover necessary medical treatment. A victim of an unlawful arrest may have difficulty finding work because of his arrest record, even though potential employers may deny that the arrest was a reason for not hiring the applicant. Thus, for many civil rights plaintiffs, and especially for those who cannot afford necessary medical treatment unless they win a damage award, the prompt payment of damages in settlement is a critical factor in making them whole.

Accepting the offer also would allow the plaintiff to invest the remainder of the settlement amount so that he, rather than the defendant, earns interest on the money beginning early in the case rather than after trial. The interest benefit to the plaintiff can be substantial. *See* ANNUAL REPORT, *supra* note 16, at 282-83 (median length of disposition from filing through trial of civil rights case is 19 months; average length, however, is probably significantly higher).

offer, and (2) that he will give up the time value of money that he could have obtained by accepting the offer. Additionally, the plaintiff may suffer the fundamental penalty imposed by Rule 68—personal liability for the costs incurred after the date of the offer. Post-offer costs may not amount to much, however, and in most cases they can be paid out of the judgment the plaintiff wins at trial.

In sum, from the point of view of both the plaintiff and his lawyer, the risk of rejecting the defendant's second Rule 68 offer will be substantial unless they are confident that the plaintiff's judgment at trial (or a later settlement offer) will be substantially greater than the amount of the offer. If the defendant has made a generous Rule 68 offer genuinely intended to protect the defendant against having to pay any of the plaintiff's additional attorney's fees, that confidence seldom will be justified.

E. The Perspective of the Courts

The interests of judicial administration also will be served by reading Rule 68 costs to include attorney's fees. Because this reading of Rule 68 would increase the number of Rule 68 offers and acceptances, the resources of the courts would be conserved in at least three ways. First, the courts would be relieved of the burdensome duties of pretrial management in cases that settle under Rule 68. This would provide an especially significant savings in complex cases.¹⁵⁴

Second, whenever Rule 68 offers are accepted, courts would not have to preside at trial.

Third, when Rule 68 offers completely settle the litigation, including litigation over attorney's fees, courts would be spared the long and difficult task of determining reasonable attorney's fees under section 1988.

VI. CONCLUSION

If the United States Supreme Court adopts the interpretation of Rule 68 costs proposed in this Article, the economic considerations

154. Some judges are much more active case managers than others. *See, e.g.,* Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135 (1976). At a minimum, however Rule 16, as amended effective August 1, 1983, requires courts to hold a scheduling conference (or by some other means enter a scheduling order) "as soon as practicable but in no event more than 120 days after filing of the complaint." FED. R. CIV. P. 16(b). Rule 16 also encourages judges to hold other pretrial conferences to consider a host of other topics.

illustrated above should obtain in every case brought under one of the ninety-plus federal statutes that currently allow an award of attorney's fees to the prevailing party as part of the costs. The Supreme Court thus has an opportunity in *Marek v. Chesny* to rehabilitate Rule 68 and turn it into a powerful settlement weapon.

If the Supreme Court takes advantage of this opportunity and holds that Rule 68 costs include attorney's fees whenever an applicable fee-shifting statute defines those attorney's fees as costs, Rule 68 will motivate defendants to make early and generous settlement offers in fee-shifting cases. This will have numerous positive effects. It will save defendants attorney's fees,¹⁵⁵ it will get money into the hands of plaintiffs sooner and in greater amounts, and it will save courts from managing and trying numerous complex cases.

Finally, by promoting fair and early settlements in fee-shifting cases, Rule 68 will reduce the risks of civil rights litigation. Attorneys thus will be encouraged to accept civil rights cases as well as other fee-shifting matters. Ultimately, Rule 68 will strongly promote the policies that fee-shifting statutes are intended to serve—encouraging the bringing of meritorious actions and ensuring access to the justice system for all persons with valid grievances.

155. Since many defendants in civil rights cases and other cases allowing an award of attorney's fees are governmental defendants, saving these defendants from paying attorney's fees will also save taxpayers money.