For Every Weapon, a Counterweapon: The Revival of Rule 68

John P. Woods*
For Every Weapon, a Counterweapon: The Revival of Rule 68

John P. Woods

Abstract

Rule 68 of the Federal Rules of Civil Procedure applies generally where a non-moving party’s settlement offer is rejected, and the court judgment awarded to the moving party, or claimant, is for less than the prior offer. The non-moving party may then be entitled to “costs incurred after the making of the offer.” In Marek v. Chesny, the Court made it clear that “costs” includes attorney’s fees. Congress should consider revising Rule 68 to clarify its application. However, Rule 68 appropriately induces plaintiffs to thoroughly consider a defendant’s offer, under threat that rejection of the offer may include reducing attorney’s fees in any future court judgment.

KEYWORDS: Rule 68, attorney’s fees, Marek v. Chesny, Federal Rules of Civil Procedure

*Member of the New York Bar. Assistant Corporation Counsel, City of New York. B.A. 1968, Fordham University. J.D. 1975, St. John’s University. L.L.M. 1980, New York University School of Law. The opinions expressed in this Article are those of the author and not those of his employer. The author would like to express his gratitude to Linda Nealon, Esq. for her help in the research and writing of this Article.
FOR EVERY WEAPON, A COUNTERWEAPON: THE REVIVAL OF RULE 68

John P. Woods*

I. Introduction

An old military adage says that for every advance made in offensive weaponry or tactics an advance in defensive weaponry or tactics will eventually arise to restore the balance of power—for every weapon there is a counterweapon.¹ When Congress provided, in the Civil Rights Attorney’s Fees Award Act of 1976 (the Fees Act)² as well as in numerous other statutes,³ that prevailing parties might recover

---

¹ Member of the New York Bar. Assistant Corporation Counsel, City of New York. B.A. 1968, Fordham University. J.D. 1975, St. John’s University. L.L.M. 1980, New York University School of Law. The opinions expressed in this Article are those of the author and not those of his employer. The author would like to express his gratitude to Linda Nealon, Esq. for her help in the research and writing of this Article.


In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.] or Title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et. seq.], 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.

a reasonable attorney’s fee as part of “the costs,” it gave to plaintiffs a major advantage. Not only did the prospect of acquiring attorney’s fees make counsel more readily available to them, but it also greatly increased the amount the defendant might have to pay by making recoverable the plaintiff’s attorney’s fees as well as a compensatory damage award. The Supreme Court, in *Marek v. Chesny,* to some extent restored the balance of power between plaintiffs and defendants. The *Marek* case held that an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure (Rule 68), which is not ultimately exceeded by a court judgment, serves to cut off the

---


5. See supra note 2 and accompanying text. Attorney’s fees in civil rights cases can far exceed the plaintiff’s recovery. *See, e.g.*, McCann v. Coughlin, 698 F.2d 112 (2d Cir. 1983) (refusal to reduce $50,000 attorney fee award on ground that plaintiff was awarded only $1 in nominal damages was not in error); Taylor v. Jones, 653 F.2d 1193, 1206 n.12 (8th Cir. 1981) (counsel recovered eighteen times the amount of back pay recovered by plaintiff); Clanton v. Orleans Parish School Bd., 649 F.2d 1084 (5th Cir. 1981) ($24,514.70 recovery for attorney and $8,654.16 for the client); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (Title VII plaintiffs recovered $33,000 in back pay while their lawyers received $160,000 in fees); Spano v. Simendinger, 613 F. Supp. 124 (S.D.N.Y. 1985) (awarding $62,078.21 in attorney’s fees in case with $2,500 recovery).

For a discussion of the policy considerations behind the Fees Act, see infra notes 185-87 and accompanying text.

6. Rivera v. City of Riverside, 763 F.2d 1580 (9th Cir. 1985) (affirming award of $245,456.25 as attorney’s fees on damage award of $33,350), *stayed*, 106 S. Ct. 5, *cert. granted*, 106 S. Ct. 244 (1985). The court held that there need not be a relationship between the amount of damages awarded to the prevailing party and the amount of attorney’s fees awarded. *Id.* at 1583.


8. An offer of judgment is an offer made by a defending party more than 10 days before trial to allow a judgment to be taken against him to the extent specified in the offer. *Fed. R. Civ. P. 68; see infra* note 9 and accompanying text.

9. *Federal Rule of Civil Procedure 68* states:

*Offer of Judgment.*

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. 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
plaintiff's right to recover those attorney's fees which accrue after
the date of the offer.\footnote{10}

The \textit{Marek} decision seems likely to make Rule 68 a major litigation
tool\footnote{11} after more than forty-five years of relative neglect.\footnote{12} A combination
of factors, including the burgeoning size of fee awards in
civil rights cases,\footnote{13} are responsible for the revival of Rule 68. The most critical of these factors was Congress' decision to include fees
"as part of the costs" recoverable under the Fees Act.\footnote{14} This Article
will examine Rule 68 and relevant cases to determine why the Rule
has come into such sudden prominence. Particular attention will be
paid to the implications of Rule 68 and the \textit{Marek} case for fee
awards in civil cases.\footnote{15} Finally, this Article will examine proposed
revisions to Rule 68 and will conclude that retaining the present
version of Rule 68, with some minor technical changes, would best
benefit the public interest because it would encourage speedy and
fair settlement awards.\footnote{16}

\section*{II. The Mechanics of Rule 68}

Rule 68 has been a part of the Federal Rules of Civil Procedure
(FRCP) since their enactment in 1938, and has changed little since
then.\footnote{17} The Rule reflects what was then a new development in federal

\footnote{10} See supra note 7 and accompanying text.

\footnote{11} The clarification of Rule 68 by the Supreme Court in the \textit{Marek} decision
will make Rule 68 a more visible and viable option for litigants. \textit{Marek} v. Chesny,
105 S. Ct. 3012 (1985). See infra notes 218-305 for a discussion of the \textit{Marek}
decision.

\footnote{12} For a discussion of the reasons behind Rule 68's apparent disuse, see infra
notes 107-10 and accompanying text.

\footnote{13} See, e.g., Rivera v. City of Riverside, 679 F.2d 795 (9th Cir. 1982) (fee
award of $243,343.75); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (fee
award of $160,000); Rybicki v. State Bd. of Elections, 584 F. Supp. 849 (N.D.
Ill. 1984) (fee award of $255,795.25).

\footnote{14} Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988 (1982) ("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").

\footnote{15} See infra notes 120-27, 218-305 and accompanying text.

\footnote{16} See infra notes 306-25 and accompanying text.

\footnote{17} Since its enactment in 1938 as part of the original Federal Rules, Rule 68
has been amended on only two occasions, in 1946 and 1966, for minor technical
practice: the denial of costs to parties who continued litigation after refusing a settlement offer and who recovered a court judgment in an amount less than the offer. This concept was borrowed from several state statutes. Similar provisions have since been enacted


18. It should be noted, however, that courts can in their discretion deny costs to the prevailing party. Crutcher v. Joyce, 146 F.2d 518 (10th Cir. 1945) (court sustained decision to deny costs to a litigant who continued to litigate after refusing a settlement and recovered essentially the same amount as settlement offer). The court made its decision by drawing upon its equitable powers. Id. at 519-20. The court so held without reference to Rule 68. Id.

19. American Bar Association, Rules of Civil Procedure for the District Court of the United States with Notes as Prepared under the Direction of the Advisory Committee and Proceedings of the Institute on Federal Rules, Cleveland, Ohio 337 (1938). The 1938 Advisory Committee Notes to the original version of the Rule merely cited three state statutes as illustrations of the operation of the Rule. Id. However, Robert G. Dodge, one of the members of the Advisory Committee indicated at a symposium on the new Rules that the Rule was based on "statutes which are widely prevalent in the states." Id.

Statutes from Minnesota, Montana and New York mandated the imposition of costs on a plaintiff who rejected settlement offers and failed to obtain a judgment more favorable than the offer. Section 9323 of title 2 of the Minnesota statute provided:

At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor.


Section 9770 of title 4 of the Montana Revised Code Annotated provided:

The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer,
in states with procedural codes based upon the FRCP\textsuperscript{20} and in states

with proof of notice of acceptance, and the clerk must thereupon enter
judgment accordingly. If the notice of acceptance be not given, the offer
is to be deemed withdrawn, and cannot be given in evidence upon the
trial; and if the plaintiff fail to obtain a more favorable judgment, he
cannot recover costs, but he must pay the defendant's costs from the
time of the offer.

August, 450 U.S. at 357 n.19.

Section 177 of New York's Civil Practice Law provided:
Before the trial, the defendant may serve upon plaintiff's attorney a
written offer to allow judgment to be taken against him for a sum, or
property, or to the effect, therein specified, with costs. If there be two
or more defendants, and the action can be severed, a like offer may be
made by one or more defendants against whom a separate judgment
may be taken. If the plaintiff, within ten days thereafter, serve upon
the defendant's attorney a written notice that he accepts the offer, he
may file the summons, complaint, and offer, with proof of acceptance,
and thereupon the clerk must enter judgment accordingly. If notice of
acceptance be not thus given, the offer cannot be given in evidence upon
the trial; but, if the plaintiff fail to obtain a more favorable judgment,
he cannot recover costs from the time of the offer, but must pay costs
from that time.

N.Y. Civ. Prac. Law § 177 (Cahill 1937); reprinted in Delta Air Lines, Inc. v.
August, 450 U.S. at 357 n.19.

"All three states had other provisions, similar to Rule 54(d), providing for the
recovery of costs by a prevailing party." Delta Air Lines, Inc. v. August, 450
U.S. at 357-58 (footnote omitted).

"Therefore, the only purpose served by these state offer-of-judgment rules was
to penalize prevailing plaintiffs who had rejected reasonable settlement offers without
good cause." \textit{Id}. at 358 (footnote omitted).

In each of these States, the general statute providing for recovery of
costs by prevailing defendants was, unlike Rule 54(d), mandatory. See
(Mason 1927); N.Y. Civ. Prac. Law §§ 1470-75 (Cahill 1937). Inasmuch
as those statutes did not give trial judges discretion to deny costs to
prevailing defendants, the state antecedents of Rule 68 did not perform
any cost-shifting function in cases in which the defendant prevailed. In
those States—as is true under Rule 68—a sham settlement offer had no
practical consequences: it left the parties in the same position as if no
offer had been made.

\textit{Id}. at 358 n.21.

Other states have or had similar rules.
Colo. 183, 197 P. 898, 898-99 (1921); Wordin v. Bemis, 33 Conn. 216
(1866); Prather v. Pritchard, 26 Ind. 65 (1866); West v. Springfield Fire
& Marine Ins. Co., 105 Kan. 414, 185 P. 12 (1919); Wadsworth v.
Orient Ins. Co., 49 Neb. 590, 68 N.W. 935 (1896); Herring-Hall-Marvin
Safe Co. v. Balliet, 44 Nev. 94, 190 P. 76 (1920); Hammond v. Northern
Pacific R. Co., 23 Or. 157, 31 P. 299 (1892); Sioux Falls Adjustment
Co. v. Penn Soo Oil Co., 53 S.D. 77, 220 N.W. 146 (1928); Newton
v. Allis, 16 Wis. 210 (1862).

\textit{Id}. at 358 n.22.

with their own distinctive codes. The Rule was approved, apparently without debate, and with little discussion by either the Advisory Committee or contemporaneous commentators.

A. Making a Rule 68 Offer

The mechanics of making a Rule 68 offer of judgment are simple but must be followed carefully. An offer of judgment is an offer of money, property or other relief made by the party defending a claim. If accepted, the offer is filed by the court as the judgment in the case. While essentially a defendant's procedural device, Rule 68 is available to any party defending against a claim. The offer


23. The Advisory Committee's sole comment on Rule 68 was merely a reference to the three state statutes upon which the concept behind Rule 68 was based (i.e., Minnesota, Montana and New York). See Fed. R. Civ. P. 68 Advisory Committee note, 28 U.S.C. at 637 (1983); supra note 19.

24. A much cited contemporary article on the new Federal Rules of Civil Procedure merely states by way of commentary:

This provision [Rule 68], in a case involving some doubt, might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers.


26. Id.

27. Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240, 242 (W.D. La. 1949), rev'd in part on other grounds, 181 F.2d 320 (5th Cir. 1950), suggests that an offer can only be made by a defendant, but all the commentators agree that Rule 68 should be available to anyone in the posture of a defendant whether through a cross-claim, a counterclaim or a third party action. See C. Wright & A. Miller, 12 Federal Practice and Procedure, § 3001, at 56 n.7 (1973); see also Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute 337 (Cleveland 1938) (comments of Mr. Robert Dodge, member of original Advisory Committee). For the sake of consistency, this Article will refer to offers as being made by defendants.
must be made more than ten days "before the trial begins." Service
of the offer is made upon plaintiff's counsel in the same manner
as the service of other papers in the suit. Unlike the normal federal
practice in which court papers are filed with the court, an offer
should not be filed until it is required in a proceeding to determine
costs. However, premature filing will not render the offer inef-
fective, but will merely result in the offer being stricken from the
court file.

28. This provision is not as simple as it reads. Rule 68 was amended in 1946,
in response to a decision in Cover v. Chicago Eye Shield Co., 136 F.2d 374 (7th
Cir.), cert. denied, 320 U.S. 749 (1943), to provide that where liability has been
determined in a separate proceeding, the defendant can make an offer of judgment
up to ten days before the damages trial. See Fed. R. Civ. P. 68 Advisory Committee
note, 28 U.S.C. at 637 (1983). There is, however, a question as to what is meant
by the phrase "date the trial begins." In Cruz v. Pacific Am. Ins. Corp., 337
F.2d 746 (9th Cir. 1964), the Ninth Circuit read that phrase to mean ten days
before the trial is set, concluding that "it must mean that to make it an effective
rule." Id. at 748.

However, in Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980), the court
found that for purposes of the ten-day rule the trial began when the "trial judge
calls the proceedings to order and actually commences to hear the case," rather
than when the jury is selected or the trial date is set. Id. at 229.

The Greenwood case better supports the purposes of Rule 68 and better recognizes
the current realities of the judicial system. Trial dates are "set" and come and
go regularly without the actual trial ever commencing. The purpose of Rule 68 is
to encourage settlement. Therefore, offers should be allowed until the last moment
rather than foreclosed because the court has "set" a trial date—possibly years
before the case actually goes to trial. See Barnicle, Offers of Judgment Under
GUIDE 139, 142-43 [hereinafter cited as Barnicle].

29. Federal Rule of Civil Procedure 5(b), in essence, provides for service "upon
the attorney unless service upon the party himself is ordered by the court." Fed.
R. Civ. P. 5(b). The Eleventh Circuit has held that "[t]here is nothing under Rule
68 which permits an offer of judgment, with the attendant sanctions against the
successful plaintiff to be served upon the opposing party, rather than the party's
counsel of record." Pettway v. American Cast Iron Pipe Co., 681 F.2d 1259, 1268
(11th Cir. 1982). The plaintiff in Pettway had also obtained permission from the
district court not only to serve the offer upon the class members themselves, but
to include a sales pitch with the offer. Id. The Eleventh Circuit found this course
of action to be improper. Id.

30. Federal Rule of Civil Procedure 68 states, in part: "a party defending against
a claim may serve upon the adverse party an offer to allow judgment to be taken
against him . . . ." Fed. R. Civ. P. 68; see infra note 31 and accompanying text.

to strike the offer because it was filed with court held to be only a procedural
error which could be remedied); Tansey v. Transcontinental & Western Air, Inc.,
offer of judgment is not a part of the record and having been filed as such . . .
it must be stricken"); Nabors v. Texas Co., 32 F. Supp. 91, 92 (W.D. La. 1940)
(offer filed with the court should be stricken); see 7 J. Moore, MOORE'S FEDERAL
The offer must be for a definite sum, or for other relief which can readily be entered as a judgment and must include "costs then accrued." The defendant must hold open the offer for ten days;

In Boorstein v. City of New York, one district court permitted a plaintiff to bring a motion to strike a Rule 68 offer as being vague, even though that offer had never been (and should not have been) filed with the court. 107 F.R.D. 31 (S.D.N.Y. 1985). Although conceding that there was "little precedent for motions to strike Rule 68 offers because of their substance," id. at 34, the court nonetheless entertained the motion on the authority of Klawes v. Firestone Tire and Rubber Co., 572 F. Supp. 116 (E.D. Wis. 1983). However, the Klawes court had stricken an offer by a plaintiff made under a provision of Wisconsin state law rather than Rule 68, thus providing dubious authority for allowing a motion to strike something not actually part of the court file. Therefore, the Boorstein holding seems to be an unwise invitation to further litigation.

32. Tansey v. Transcontinental & Western Air, Inc., 97 F. Supp. 458, 459 (D.D.C. 1949) ("defendant's offer of judgment does not specify a definite sum to be entered as judgment which plaintiff can either accept or reject and therefore the offer will not prevent consideration by the court of plaintiff's costs hereinafter incurred"); see Barnicle, supra note 28, at 146-47. But see Waters v. Heublein, Inc. 485 F. Supp. 110, 115-16 (N.D. Cal. 1979) (offer of $10,000 "less statutory wage deductions" for backpay in Equal Pay Act case did not render offer indefinite).

33. The language of Rule 68 allows an offer for money or property or "to the effect specified in [the] offer." Fed. R. Civ. P. 68. Rule 68 thus clearly contemplates that non-monetary offers may be made. As discussed infra at text accompanying notes 41-64, if the offer is rejected, difficulties may arise in determining whether the offer has been exceeded by the non-monetary relief ultimately attained. See Barnicle, supra note 28, at 149.

34. In Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978), the court found ineffective a Rule 68 offer which excluded attorney's fees from the "costs incurred." The court found that attorney's fees were part of the costs in that context and that an offeror cannot "choose which accrued costs he is willing to pay." Id. at 1260.

In Marek, the Supreme Court established a simple test for the validity of the form of the offer. Marek v. Chesny, 105 S. Ct. 3012, 3015-16 (1985). The Court stated that the offer need not recite that costs are included, nor specify a set amount for costs, or even refer to costs. Id. It will be effective so long as the offer does not purport to exclude costs. Id.; see infra notes 233-42 and accompanying text.

Despite this clear rule from the Supreme Court, a district court has since found that a Rule 68 offer for $5,000 inclusive of attorney's fees "with costs now accrued" was invalid because its terms were vague as to whether the $5,000 included attorney's fees. Boorstein v. City of New York, 107 F.R.D. 31, 33-35 (S.D.N.Y. 1985). The court, however, found that the invalidity had been cleared up by telephone conversations in which the defendant's counsel had explained the meaning of the terms of the offer. Id. at 35. The curious result in Boorstein is impossible to reconcile with Marek because under either interpretation of the offer it did not seek to exclude costs, and was thus valid.

35. While the Rule does not explicitly state that it is irrevocable for ten days, it does state that if accepted within ten days and filed with the clerk, that the clerk "shall" enter judgment. This has been interpreted as a requirement that the offer be held open for 10 days. See C. WRIGHT AND A. MILLER, FEDERAL PRACTICE
this period may not be extended without the plaintiff's permission.\textsuperscript{36}
If the plaintiff elects to accept the offer, he must give written notice of his acceptance within ten days of service of the offer. Either party may then file the notice with the clerk, who will enter the judgment as set forth in the offer.\textsuperscript{37} If the offer is not accepted within ten days, it is deemed rejected and will not be admissible in any further proceeding, except one which fixes costs.\textsuperscript{38} Having made an offer which has been rejected, the defendant is free to make other offers,\textsuperscript{39} presumably for a greater sum, up to ten days before trial.\textsuperscript{40}

B. Determining Whether The Offer Has Been Exceeded by a Court Judgment

Rule 68 states that "if the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs


Another curious result in Boorstein v. City of New York was that the district court allowed a challenge to an offer to be made after the ten day period had expired. 107 F.R.D. at 34; see supra notes 17, 20 and accompanying text.

\textsuperscript{37} Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 220 (N.D. Ohio 1969) ("[i]f this Court were to extend the period in which the plaintiffs may accept the defendants' offer, the usefulness of Rule 68 would be substantially destroyed").

\textsuperscript{38} This specific provision was added in 1946. See J. Moore, J. Lucas & K. Sinclair, 7 Moore's Federal Practice ¶ 68.01 (2d ed. 1985); see also Federal Rule of Evidence 408 which provides that evidence of an offer to compromise a claim is not admissible "to prove liability for or invalidity of the claim . . . ." FED. R. EVID. 408.

\textsuperscript{39} The rule was amended in 1946 to specifically provide that "[t]he fact that an offer is made but not accepted does not preclude a subsequent offer." FED. R. CIV. P. 68. The Committee note states:

It is implicit, however, that as long as the case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less than the sum offered.


\textsuperscript{40} The Rule states that "[a]t 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 . . . ." FED. R. CIV. P. 68 (emphasis added).
incurred after the making of the offer." Since the Rule allows the offeror to make an offer "for the money or property or to the effect specified," it clearly contemplates that offers will be made for non-monetary relief as well as monetary relief. Thus, there are at least three different types of offers which can be made on the plaintiff's liability claim: (1) an offer of money alone; (2) an offer of non-monetary relief; or (3) a "mixed offer" of both non-monetary and monetary relief.

While in many cases it will be simple to determine whether the offer is greater than the judgment by merely looking at the two, that will not always be the case. For example, where the relief offered is not readily quantified in dollars, obvious difficulties arise in the comparison between the offer and the monetary judgment.

41. FED. R. CIV. P. 68.
42. The Rule states that the offeror may make an offer of judgment against him of "money or property or to the effect specified in his offer." FED. R. CIV. P. 68 (emphasis added).
43. Examples of non-monetary relief include injunctions and demands for specific performance.
44. Difficulties arise even in the situation where both the offer and judgment are in the form of money. For example, since the offer must include the costs then accrued, it is unclear whether the judgment must be increased by the accrued costs amount so as to create a true comparison. A valid argument can be made that the attorney's fee component of the costs awarded is actually recovered by the attorney rather than the client, and thus should not be included in the judgment for comparison purposes. See James v. Home Constr. Co. of Mobile, Inc., 689 F.2d 1357, 1358 (11th Cir. 1982) ("it is the attorney who is entitled to fee awards in a [Truth-in-Lending Act] case, not the client"); Regalado v. Johnson, 79 F.R.D. 447, 452 (D. Ill. 1978) (fact that consent decree, where plaintiffs were prevailing parties, did not mention subject of attorney's fees did not require vacation of decree or grant of motion to strike motion for attorney's fees and costs under Civil Rights Attorney's Fees Awards Act of 1976). However, several courts have found that the fee award is technically made to the plaintiff. See Brown v. General Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983) (under Civil Rights Attorney's Fees Awards Act of 1976, prevailing party, rather than lawyer, is entitled to attorney's fees); Oguachuba v. INS, 706 F.2d 93, 97 (2d Cir. 1983) (interpreting similar language in Equal Access to Justice Act). The trend of the law in those cases where comparisons are made has been to add the fees and costs to the plaintiff's compensatory recovery to arrive at the total figure for comparison purposes. Two courts have suggested in dicta that this approach should be followed. See Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), rev'd on other grounds, 105 S. Ct. 3012 (1985); Baldwin Cooke Co. v. Keith Clarke, Inc., 73 F.R.D. 564 (N.D. Ill. 1976). Another court simply totalled the plaintiff's merits recovery, costs and fees to arrive at a figure for comparison purposes. Quinto v. Legal Times, Inc., 511 F. Supp. 579, 582 (D.D.C. 1981).

This would mean that in evaluating the appropriate figure for comparison with the offer, the court must first go through the complicated process of calculating the amount of the plaintiff's fees accrued before the date of the offer. See infra
1. Non-Monetary Relief

Three recent cases have compared the value of the non-monetary relief ultimately obtained with that which was included in a Rule 68 offer. In Garrity v. Sununu, the Court of Appeals for the First Circuit reviewed the fee award in a successful civil rights class action brought by residents of a New Hampshire state institution for the mentally retarded, challenging conditions at the institution. Defendants made a Rule 68 offer consisting of a proposed court order which would have provided the residents with non-monetary relief in the form of improved services. The plaintiffs, after rejecting the offer, prevailed at trial and obtained a decree for improved services different from that offered by the defendant. Defendants subsequently moved under Rule 68 for an award of fees in their favor. The district court denied the award of fees and further found that the judgment had exceeded the defendant's offer.

The First Circuit, affirming the district court's decision, stated that great deference should be given to the district court's determination as to whether the offer had been exceeded because the district court should best be able to compare the relative merits of an early consent settlement with the actual relief obtained. In addition, the court stated that although the offer contained vague promises, the district court was entitled to construe the ambiguities in the offer against the offeror, so as to prevent the offeree from being pressured into accepting what might turn out to be an un-

notes 131-51 and accompanying text for a discussion of the process by which the court calculates the amount of fees.

45. 752 F.2d 727 (1st Cir. 1984). Applying the clearly erroneous standard, the court found that the district court's determination that the relief obtained in a civil rights class action was not less favorable than the defendants' pretrial offer, and, therefore, that the defendants were not entitled to post-offer costs, including attorney's fees. Id. at 730-33.

46. Id. at 729. Even so, the circuit court notes that the district court was skeptical that the relief offered by the defendants would ensure that residents of the facility could receive services in accordance with federal Standards for Intermediate Care Facilities for the Mentally Retarded under 42 C.F.R. §§ 442.400-442.516 (1979); 752 F.2d at 732.


49. Id. at 731.

50. Id.

51. Id.
favorable offer. Thus, unless a clear error is found in the district court’s assessment of the defendant’s proposal, the circuit court should defer to the district court’s determination.

Similarly, in Association for Retarded Citizens of North Dakota v. Olson, and in Lightfoot v. Walker the defendants made offers for procedures to upgrade care, which were found to be less favorable than the relief finally obtained. Each district court compared the court orders and the judgments obtained. In Olson, the district court noted that the offer failed to meet the patient’s needs in several “critical areas,” including pharmaceutical and punishment reform. Similarly, in Lightfoot, the court found that the offers did not include provisions which the court determined were “absolutely essential.” The courts concluded that plaintiffs obtained more relief under the court judgment, thereby eliminating the need to apply Rule 68.

These three cases illustrate not only the difficulty of drafting a Rule 68 offer in these situations, but that it is possible to make meaningful comparisons between an offer and a court’s decree, even where the offer and the relief granted are non-monetary. A list

52. Id. at 732-33.
53. Id. at 733.
54. 561 F. Supp. 495 (D.N.D. 1982), modified on other grounds, 713 F.2d 1384 (8th Cir. 1983).
55. 619 F. Supp. 1481 (S.D. Ill. 1985). The Lightfoot analysis is somewhat more perfunctory than the other cases. In Lightfoot, the district court ruled on the fee application in a class action which had been bitterly fought for twelve years based on the conditions of medical care in a state prison. Id. at 1484. Defendants opposed an award of attorney’s fees based upon three earlier offers of judgment under Rule 68. Id. at 1485. The court, while recognizing the “inherent difficulty in comparing settlement proposals in cases such as this,” had no difficulty in finding that the offers had been surpassed. Id. The court specifically compared the degree of success obtained and noted that some of the provisions that the court viewed as “absolutely essential” had not been included in any of the offers. Id. at 1485-86. Like the Garrity court, the court in Lightfoot found vague offers of relief contingent upon “trust” to be of less value than the specific court-ordered relief obtained. Id. at 1485.
56. Olson, 561 F. Supp. at 498.
57. In Olson, the court noted that although the offer contained “infinite detail,” it also contained caveats which made its dictates “precatory” rather than “mandatory.” Id. Beyond general criticisms, the court compared specific provisions of the offer and the court order to reach its conclusion. For example, the court noted that the order required immediate correction of overcrowding, whereas the offer of judgment provided for a certain number of community placements by the year 1988. Id.
58. One case, Liberty Mutual Ins. Co. v. EEOC, 691 F.2d 438 (9th Cir. 1982), illustrates a clever way to use Rule 68 to shift costs but does not tell how to compare an offer with the relief obtained. In Liberty Mutual, the plaintiff sought
of criteria, for comparison purposes, might include: (1) the scope of the relief of the offer and of the judgment; (2) the number of people affected by the offer and the judgment respectively; (3) the specific items of relief contained in the offer and the judgment; (4) the immediacy of the relief offered and that obtained; (5) the specificity or vagueness of the offer as compared with the relief ultimately obtained; (6) the mechanics of supervision of the relief in the proposal; (7) the extent to which the terms of the offer are mandatory rather than optional or based upon "good faith;" and (8) the time between the offer and the ultimate judgment.\(^5^9\)

2. Mixed Offers

The most complicated comparison involves what might be called the "mixed offer:" the defendant offers certain specific non-monetary relief as well as a specific sum of monetary relief.\(^6^0\) To assess such an offer, the court should go through the process used for non-monetary awards for each element of the offer, both the monetary and non-monetary, to determine whether the relief offered in each category exceeded that which was obtained. If, after applying such a comparison, the court finds that the plaintiff's recovery on both elements exceeds the offer, it need look no further. If, however,
the court finds that one element exceeds the offer but the other
does not, the court would have to compare the "total package" of
the offer and the judgment to determine whether the judgment
exceeds the offer.

The difficulties in making comparisons regarding non-monetary
and mixed offers have led commentators to suggest that use of Rule
68 be prohibited in cases where injunctive relief is requested. Indeed,
the Advisory Committee, charged with revising Rule 68, has proposed
that the Rule be limited to cases demanding monetary relief. Such
a limitation would be unsatisfactory, however, since the Rule's pur-
pose of encouraging settlement is as applicable to cases requesting
non-monetary relief as it is to cases seeking money damages only.
The better solution would be to develop standards for making the
difficult comparisons, through either case law or statutory revision.

Presently, in situations where it is impossible to compare the offer
and the recovery obtained, fairness would suggest that Rule 68 not
apply in order that plaintiffs be adequately protected.

C. Penalties Under Rule 68

The penalty portion of Rule 68 encourages settlement because it
threatens to take from the victor some of the fruits of his victory if
the victor has previously rejected an offer. The Rule provides
that if the judgment finally obtained by the plaintiff is less than
the offer, the plaintiff must pay the costs accrued by both the

61. See supra notes 45-59 and accompanying text.
62. See 1983 Proposed Revision, supra note 17. One commentator has suggested
that Rule 68 should not apply to employment discrimination cases brought under
(codified at 42 U.S.C. §§ 2000a to 2000e-17); A Fundamental Incompatibility, supra
note 58.
63. See supra notes 45-61 and accompanying text for a discussion of Rule 68's
applicability to both of these situations.
A plaintiff confronted with the complexity of assessing mixed offers and offers
of non-monetary relief can reject such an offer with more confidence than he can
a money offer, simply because there is a better chance that the difficulty of the
comparison will force the court to find that the offer was exceeded. However,
even in these difficult situations, the availability of Rule 68 will often be a positive
factor in litigation because it will force both parties to "concentrate their minds"
as early as possible in the litigation on what will be an acceptable offer.
64. Certain principles to be employed in comparing non-monetary offers can
be extracted from the decisions in Garrity, Olson and Lightfoot. See supra notes
45-63 and accompanying text.
of the penalty provision contained in Rule 68, see infra note 66 and accompanying
text.
plaintiff and the defendant after the date of the offer.\footnote{66} The Rule thus negates the presumption embodied in Rule 54(d)\footnote{67} that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs."\footnote{68} Therefore, a prevailing plaintiff who rejects an offer will not only be precluded from recovering his own costs, but will be required to pay the costs accrued by his adversary after the offer was made.\footnote{69} Depending upon the relative amounts of his recovery and the costs he must pay, the plaintiff may discover that

\begin{quote}
66. Rule 68 states that "[i]f 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." \textit{Fed. R. Civ. P. 68}. This has been construed to mean that the offeree does not recover his own costs accrued after the date of the offer and must pay those accrued by the offeror. \textit{See supra} note 65; \textit{infra} notes 67, 92-96 and accompanying text.

67. Federal Rule of Civil Procedure 54(d) provides a presumption in favor of the prevailing party. \textit{Fed. R. Civ. P. 54(d)}.

68. Federal Rule of Civil Procedure 54(d) states:

\begin{quote}
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.
\end{quote}

\textit{Fed. R. Civ. P. 54(d)}.

The presumption in favor of the prevailing party is subject to the discretion of the court to deny costs. \textit{See 6 J. Moore, J. Taggart & J. Wicker, Moore's \textit{Federal Practice} ¶ 54.70[5] (2d ed. 1985)}. That discretion will be upheld on review in the absence of an "abuse." \textit{Id.}; \textit{see also In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975, 687 F.2d 626, 629 (2d Cir. 1982) (quoting Mid-Hudson Legal Serv., Inc. v. G. & U., Inc., 578 F.2d 34, 38 n.3 (2d Cir. 1978)); Bartell, \textit{Taxation of Costs and Awards of Expenses in Federal Court}, 101 F.R.D. 553, 559-61 (1984) [hereinafter cited as \textit{Costs and Awards}].

For purposes of clarity, the term "taxable costs" will be used throughout this Article to refer to expenses such as those discussed \textit{infra} notes 75-80.

69. Liberty Mutual Ins. Co. \textit{v. EEOC}, 691 F.2d 438, 442 (9th Cir. 1982); Quintel Corp., N.V. \textit{v. Citibank, N.A.}, 606 F. Supp. 898, 915-16 (S.D.N.Y. 1985) (Rule 68 shifts taxable costs but not attorney's fees); Lyons \textit{v. Cunningham}, 583 F. Supp. 1147, 1156 (S.D.N.Y. 1983); Mr. Hanger, Inc. \textit{v. Cut Rate Plastic Hangers}, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974). The \textit{Lyons} case represents a good example of how this works. In \textit{Lyons} the plaintiffs sought to recover $4,500 in deposition and transcript costs. 583 F. Supp. at 1150-51. Not only were they barred from recovering those costs, but they had to pay approximately $450 of the defendant's costs. The total amount which the plaintiff lost was $5,000 out of a recovery of $24,000. \textit{Id.} at 1156. \textit{But see} Waters \textit{v. Heublein, Inc.}, 485 F. Supp. 110, 117 (N.D. Cal. 1979). In \textit{Waters} the defendants failed to meet the requirements of Title VII for attorney's fees and expert witness fees. \textit{Id.} Defendants argued that Rule 68 necessitated the awarding of these fees since it was plaintiff's rejection of their reasonable settlement offer that caused these costs to be incurred. \textit{Id.} The court, however, rejected this argument. \textit{Id.}
Rule 68 has taken away not only some of the fruits of victory but the entire victory.

The term “costs” is frequently used imprecisely; it has a different meaning in different contexts.70 Traditionally, “costs” are the particular expenses which are made recoverable by statute,71 and awarded under Rule 54(d)72 or a similar local rule.73 These costs, commonly referred to as “taxable costs,”74 include items such as witness fees,75

70. For example, the costs a plaintiff accrues in bringing a lawsuit might include time lost from work and inconvenience, but these costs are not recoverable under the Federal Rules.

71. Fed. R. Civ. P. 54(d). Section 1920, entitled: “Taxation of costs,” does not provide a list of items which are recoverable, but does provide:
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 1922 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.


Section 1923 contains a list of docket fees, most of which have become nominal with the passage of time. 28 U.S.C. § 1923 (1982).

72. Fed. R. Civ. P. 54(d); see supra note 68 and accompanying text.

73. See, e.g., Civil Rules of the United States District Courts for the Southern and Eastern Districts of New York Rule 11 [hereinafter cited as N.Y. Local Rules]. Rule 11 provides that nine different items can be taxed as costs: trial transcripts, depositions, witness fees, mileage and subsistence, interpreting costs, exemplification and costs of papers, maps, charts, photographs and summaries, docket fees pursuant to 28 U.S.C. § 1923, master’s, receiver’s and commissioner’s fees and costs for title searches. Id. The Rules then provide the specific circumstances under which these expenses can be recovered. Id.


75. Under Federal Rule of Civil Procedure 45, subpoenas may be served for the production of documents or persons or for depositions or trials. Fed. R. Civ. P. 45. The subpoena must, however, include “the fees for one day’s attendance and the mileage allowed by law.” Id. These fees are set forth in 28 U.S.C. § 1821 (1982) and mandate that each witness be paid $30 per day for each day’s attendance at trial or deposition, see 28 U.S.C. § 1821(b) (1982), as well as the actual expenses of transportation by common carrier, see 28 U.S.C. § 1821(c)(1) (1982), or a mileage allowance, see 28 U.S.C. § 1821(c)(2) (1982), and toll charges and parking fees. See 28 U.S.C. § 1821(c)(3) (1982). The ordinary range of a subpoena is the limits of the district in which the court sits, a radius within 100 miles of the court pursuant to Federal Rule of Civil Procedure 45(e), or any place within the state where the law would permit service. Fed. R. Civ. P. 45(e); see Fed. R. Civ. P.
RULE 68 AND ATTORNEY'S FEES

expenses for the production of trial exhibits,76 deposition transcripts,77 (subpoena may be served within territorial limits provided in Rule 45). The Supreme Court has ruled that the 100 mile rule is not an absolute limit to the ability of the court to order payment of witness expenses, but is a proper consideration. Farmer v. Arabian Am. Oil Co., 379 U.S. 227 (1964). Courts have subsequently exercised their discretion to both grant and deny costs beyond the 100 mile limit. See 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 54.77 (2d ed. 1985). In addition to transportation costs, section 1821(d) also allows a subsistence allowance for witnesses required to stay overnight. 28 U.S.C. § 1821(d) (1982).


However, expert witness fees, which are generally one of the most substantial expenses incurred by a party in litigation, are not recoverable as costs beyond the amount paid to ordinary witnesses. The general rule on this point was established by the Supreme Court more than fifty years ago in Henkel v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 284 U.S. 444, 445 (1932), accord Disaster at Kennedy Airport, 687 F.2d at 631; Cleverock Energy Corp. v. Trepel, 609 F.2d 1358, 1363 (10th Cir. 1979), cert. denied, 446 U.S. 909 (1980).


76. Under the rubric of "fees" for "exemplification and copies of papers necessarily obtained for use in the case," pursuant to 28 U.S.C. § 1920(4), the expense of preparing a large variety of exhibits for trial has been found recoverable. See, e.g., Disaster at Kennedy Airport, 687 F.2d at 631 (costs of producing transcripts of a flight recorder tape); EEOC v. Kenosha Unified School Dist. No. 1, 620 F.2d 1220, 1227-28 (7th Cir. 1980) (considering costs and computer expenses); Harrington v. Texaco, Inc., 339 F.2d 814, 821-22 (5th Cir. 1964), cert. denied, 381 U.S. 915 (1965) (scientific survey of oil wells); Appliance Inv. Co. v. Western Elec. Co., 61 F.2d 752, 756-57 (2d Cir. 1933) (technical drawings); Victor Talking Mach. Co. v. Starr Piano Co., 281 F. 60 (2d Cir.) (special photography of tools in operation), cert. denied, 260 U.S. 726 (1922). Prior approval should, however, be sought from the court. Costs and Awards, supra note 68, at 584-86.

77. Deposition transcript fees are recoverable as costs where "necessarily obtained for use in the case." 28 U.S.C. § 1920(2) (1982). The courts have generally interpreted that phrase to mean that deposition costs can be taxed even if the deposition is not introduced into evidence. See Disaster at Kennedy Airport, 687 F.2d at 631; Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1100 (5th Cir. 1982); Allen v. U.S. Steel Corp., 665 F.2d 689, 697 (5th Cir. 1982); Illinois v. Sangamo Constr. Co., 657 F.2d 855, 867 (7th Cir. 1981); Koppinger v. Cullen-Schiltz & Assocs., 513 F.2d 901, 911 (8th Cir. 1975); Mailer v. RKO Teleradio Pictures, Inc., 332 F.2d 747, 749 (2d Cir. 1964); Costs and Awards, supra note 32, at 567-71. The Local Rules in the Eastern and Southern Districts of New York are more restrictive, allowing recovery of deposition costs only if at least part of a deposition was received into evidence at trial or used by the court in ruling on a summary judgment motion but not where it is used solely for discovery or impeachment purposes. N.Y. Local Rules, supra note 73, Rule 11(c)(2). Once the costs of the...
trial transcripts, translation expenses, and the costs of references to a master.

In addition to taxable costs, Congress has added attorney's fees "as part of the costs" of litigation in a number of statutes—most significantly, the Civil Rights Attorney's Fees Act of 1976.

D. When Rule 68 Comes into Play: Delta Air Lines, Inc. v. August

In Delta Air Lines, Inc. v. August, the plaintiff brought suit under Title VII of the Civil Rights Act, alleging that she had been discharged by her employer because of her race. A few months
into the litigation, the defendant made an offer of judgment for $450, including all accrued attorney's fees and costs as of that date. Plaintiff rejected the offer, went to trial, and lost. The district court ordered each side to bear its own costs. Defendant moved for modification of the judgment, asserting that Rule 68 made cost shifting mandatory. The district court denied the motion on the ground that the offer had not been made in a "good faith" effort to settle because the offer was not "arguably reasonable." The Court of Appeals for the Seventh Circuit affirmed on the same ground, noting that at the time the offer was made, plaintiff's attorney's fees exceeded $450. While conceding that there was "little authority on the point," the Seventh Circuit read a "reasonableness requirement" into Rule 68, whereby an offer must be made in good faith. After examining the potential strength of plaintiff's case, the court found that the Rule 68 offer of "less than $500 before trial [was] not of such significance ... to justify serious consideration by the plaintiff."

The Supreme Court granted certiorari to hear the Delta Air Lines case on the issue of whether a Rule 68 offer must be made in good faith, but affirmed on different grounds. The Court found that the lower courts had failed to confront the threshold question of whether Rule 68 was applicable in situations where an offeree recovers nothing. The Court concluded that the Rule is not applicable in such situations, but rather applies where the plaintiff obtains a judgment that is exceeded by the defendant's offer. Where judgment is for the defendant, or where the plaintiff recovers a judgment in

84. Delta Air Lines, 450 U.S. at 346.
85. Id.
86. Id. at 349.
87. Id. The defendant contended "that under Rule 68 the plaintiff should be required to pay the costs incurred by defendant after the offer of judgment had been refused." Id.
88. August v. Delta Air Lines, Inc., 21 Fair Empl. Prac. Cas. (BNA) 640, 641 (N.D. Ill. 1978). The district court stated that "an offer of only the sum of $450 could only have been effective were the plaintiff's claim totally lacking in merit or were there present additional factors which would mitigate in favor of the defendant." Id. at 641. Since the plaintiff's claim was not totally lacking in merit, the offer of $450 was not "arguably reasonable." Id.
89. August v. Delta Air Lines, Inc., 600 F.2d 699, 701-02 (7th Cir. 1979).
90. Id. at 700 n.3, 701-02.
91. Id. at 701.
93. See id.
94. Id. at 352.
95. See id.
excess of the offer, the Rule is inoperative. In addition, the Court held that when Rule 68 is operative, its cost-shifting provisions are mandatory.96

The Delta Air Lines decision creates an anomaly in that plaintiffs are better off losing altogether than winning minimal recoveries where Rule 68 offers have been made.97 If the plaintiff loses altogether, the court retains its discretion under Rule 54(d) to deny costs to the prevailing defendant.98 Yet, if the plaintiff wins even a dollar in nominal damages, Rule 68 not only precludes his recovery of costs, but also requires that he bear the costs accrued by the defendant after the making of the offer.99 Under these circumstances, a nominal winner could, in reality, become the loser.100

96. Id. at 352-55.
98. FED. R. CIV. P. 54(d).
100. This paradoxical result was criticized by the dissent. Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, in his dissent, stated: "To circumscribe rule 68 in the manner in which the Court does is to virtually cut it adrift from the remaining related portions of the Federal Rules of Civil Procedure, a construction which could be justified only by the strongest considerations of history and policy." Delta Air Lines, Inc. v. August, 450 U.S. 346, 371 (1981) (Rehnquist, J., joined by Burger, C.J., Stewart, J., dissenting).

The dissent further stated:

Contrary to the view of the Court, I think that Rule 68 and Rule 54(d) are entirely consistent with one another when read in a manner faithful to their actual language; indeed, the language of these Rules must be twisted virtually beyond recognition, and that of Rule 68 parsed virtually out of existence, to say that the latter Rule does not apply in a situation such as this simply because the petitioner prevailed.

Id. at 374; see also The Agony of Victory, supra note 83 at 604.

The result in Delta rewards plaintiffs with cases lacking enough merit to prevail, penalizes plaintiffs with cases having just enough merit to prevail (though to a lesser extent than the offer), and destroys virtually all inducement to make offers of judgment . . . . Delta's reasoning is unsupported by the history behind rule 68, the purposes for rule 68, and fundamental principles of statutory interpretation, but the most persuasive reason for declining to accept the reasoning in Delta is the incongruity of the result. Before the reasoning in Delta can be explained without resort to an exercise in semantic calisthenics, the chief question posed by the decision must be answered: Why should defendants be rewarded for losing and penalized for prevailing?

Id. at 633; see also Note, The Application of An Offer of Judgment in a Title VII Suit, 2 PAGE L. REV. 331, 348 (1982) ("As a result of August, the Supreme Court has turned Rule 68 into a potentially unjust Rule") [hereinafter cited as Offer of Judgment in a Title VII Suit]; Note, Delta Air Lines, Inc. v. August: Taking the Teeth Out of Rule 68, 43 U. PITT. L. REV. 765, 768 (1981-82) ("The
While limiting the application of Rule 68, the Supreme Court confused the very issue upon which it had granted certiorari—whether an offer must be made in good faith. The Court, concerned that nominal offers would trigger the Rule, noted that it would be unreasonable to conclude that the drafters of the Federal Rules would “grant the district judge discretion to deny costs to the prevailing party under Rule 54(d),” only to give defendants “the power to take away that discretion by performing a token act” such as the making of a nominal offer.

The Court, however, declined to read a reasonableness requirement into the Rule, finding that a “literal interpretation” of the “plain language of the Rule” makes such a requirement unnecessary. The Court reasoned that by holding Rule 68 inapplicable when plaintiff recovers nothing, sham offers would be useless and defendants would be “encouraged to make only realistic settlement offers.” Despite language to the contrary, the Court nevertheless indicated that a reasonableness requirement would be the fair and evenhanded means of applying Rule 68.

The ambiguous language of Delta Air Lines makes sense only because the Court limits Rule 68 to cases in which the plaintiff has prevailed. The Court notes that Rule 68 would be useless if defendants could regularly offer minimal sums at the beginning of a lawsuit as a strategy to assure recovery of their costs if they were to win. Thus, the Court deems that a reasonableness test is already built into the Rule.

Notwithstanding the limited applicability attributed to Rule 68 by the Delta Air Lines decision, it is a potentially powerful settlement tool. The Rule benefits plaintiffs by encouraging defendants to offer reasonable settlements early in the litigation. Moreover, offers must reflect realistic appraisals of the case in order to be of any use to defendants, as an unreasonably low offer can safely be ignored by the plaintiff.

Delta conclusion that Rule 68 does not apply to losing plaintiffs evidences some fundamental misconceptions about the spirit and purpose of Rule 68” (hereinafter cited as Taking the Teeth Out of Rule 68).

102. Id. at 355-56.
103. Id.
104. See id. at 353.
105. Id. at 353.
106. It can be argued that what a case is really “worth” will vary from time to time as the case progresses and that an offer made at the beginning of the case might have been unreasonable when made but reasonable later and that the plaintiff
It has frequently been stated that Rule 68 is greatly underutilized. Much of the Rule's use, however, takes place behind the scenes and is known only to the parties. One reason for the Rule's apparent...
disuse is that taxable costs are insufficient to make application of the Rule worthwhile. However, a more satisfactory explanation is the Bar’s unfamiliarity with it.

III. Awards of Attorney’s Fees

The “American Rule” has been that a prevailing party may not


109. One commentator, discussing the effect of the comparable rule in New York Practice, N.Y. Civ. Prac. Law § 3221, stated:

If the purpose of the present rule and its predecessor is to encourage plaintiffs to forego a trial where reasonable settlement is possible, the obvious question is: Does the imposition of a portion of the costs qualify as a realistic inducement? For a case that involves more than a trivial amount, the answer to this question must be that it does not.


110. The author of A “New” Tool, supra note 109, could point to only one other law review article that discussed Rule 68, and the article cited only one Iowa provision that was comparable to Rule 68. Id. at 890, n.9. However, since 1980, at least nine articles have devoted substantial consideration to Rule 68. See Barnicle, supra note 28; Branham, Offers of Judgment and Rule 68: A Response to the Chief Justice, J. Mar. L. Rev. 341 (1985) [hereinafter cited as Branham]; Silverstein & Rosenblatt, A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney’s Fees in Civil Rights Litigation, 16 Conn. L. Rev. 949 (1984); Simon, Rule 68 at the Crossroads: Relation Between Offers of Judgment and Statutory Attorney’s Fees, 53 U. Conn. L. Rev. 889 (1984); Note, Offer of Judgment and Statutorily Authorized Attorney’s Fees: A Reconciliation of the Scope and Purpose of Rule 68, 16 Ga. L. Rev. 482 (1982); Note, The Conflict Between Rule 68 and the Civil Rights Attorney’s Fee Statute: Interpreting the Rules Enabling Act, 98 Harv. L. Rev. 818 (1985); Offer of Judgment in a Title VII Suit, supra note 109; Taking the Teeth out of Rule 68, supra note 109.

111. See Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240 (1975). The “American Rule” was first enunciated in Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796), and has been followed ever since. See Day v. Woodworth, 54 U.S. (13 How.) 363 (1851). The Court’s decision in Arcambel has been criticized, see, e.g., Comment, Court Awarded Attorney’s Fees and Equal Access to the Courts, 122 U. Pa. L. Rev. 636, 642-44 (1974), but reiteration of the rule by the Court since the time of Arcambel makes it law now even though it was not a sound rule in 1796. In England, the losing party has long been responsible for the prevailing party’s attorney’s fees. Statute of Gloucester, 6 Edw. I, ch. 1 (1275) (“it is provided that the [victor] Demandant may recover against the Tenant the Costs of his Writ purchased’’); see Goodhart, Costs, 38 Yale L.J. 849, 852 (1929); Payne, Costs in Common Law Actions in the Federal Court, 21 Va. L. Rev. 397 n.2 (1935) [hereinafter cited as Costs in Common Law Actions].
recover attorney's fees as part of damages. Exceptions to the American Rule have been created through the years by both statute and common law. One such exception, frequently employed during the 1970's, involved the private attorney general theory. Under this theory, a private plaintiff is permitted to recover costs if he is vindicating a public interest deemed by Congress to be of the highest

112. Attorney's fees were, however, recoverable as costs early in our history. In 1793, Congress enacted provisions allowing for an award of attorney's fees, in admiralty or maritime proceedings, to the prevailing party as part of costs in federal courts where fees were recoverable in the state where the court was sitting. Act of Mar. 1, 1793, 2d Cong., 2d Sess. Ch. XX, 1 Stat. 332 §§ 1, 4. The Act was renewed in 1796, Act of March 31, 1796, 4th Cong., 1st Sess., 1 Stat. 451, but was then allowed to expire in 1799. Courts, however, continued to allow attorney's fees as part of costs. In 1853, Congress acted to make the award of costs nationally uniform and to eliminate fee awards. Act of Feb. 26, 1853, 32d Cong. 2d Sess., 10 Stat. 161. The Act of 1853 is codified at 28 U.S.C. §§ 1920, 1923(a) (1982). It was treated by the Supreme Court as terminating the right of the plaintiff to recover attorney's fees as part of costs. See Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872); The Baltimore, 75 U.S. (8 Wall.) 377, 388-92 (1869).


115. Under the concept of private attorneys general, the district court could invoke its equitable powers to award fees to counsel of parties who had brought suits to vindicate larger public interests. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 264-67 (1975).
priority.\footnote{116} These courts posited that, even absent specific statutory authority, they were empowered to award fees under their equitable jurisdiction.\footnote{117}

In \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\footnote{118} however, the Supreme Court confronted the question of whether the award of attorney's fees to such "private attorney general" was permissible. After examining the history of the various cost and fee statutes, the Court concluded that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation" by awarding attorney's fees in the absence of Congressional authority.\footnote{119} The Court, however, suggested that Congress might provide such legislation, which advice Congress readily followed by enacting the Civil Rights Attorney's Fees Act of 1976.\footnote{120}


119. Id. at 247.  

120. Hearings were held in both the Senate and the House generating extensive testimony on the subject. \textit{See Awarding of Attorney's Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary,} 94th Cong., 1st Sess. 8 (1975). In 1975, a bill essentially similar to the Fees Act cleared the Senate Judiciary Committee but was not taken up on the Senate floor. \textit{See S. REP. No. 1011, 94th Cong., 1st Sess. 2, reprinted in 1974 U.S. CODE CONG. & AD. NEWS 5908, 5909 [hereinafter cited as Senate Report]. The same bill (S. 2278) was then resubmitted on July 31, 1975 and was subsequently sent to the Senate floor on September 21, 1976. 122 CONG. REC. 31,470 (1976). The bill was debated at considerable length and, after a minor amendment by Senator Allen of Alabama, was passed by the full Senate on September 29, 1976. 122 CONG. REC. 33,315 (1976) (bill passed by a vote of 57 yeas to 15 nays).  

The House then proceeded to take up the Senate Bill on October 1, 1976. 122 CONG. REC. 35,114-30 (1976). Similar legislation had cleared the House Judiciary Committee on September 9, 1976. H.R. REP. No. 1558, 94th Cong., 2d Sess. 1 (1976) [hereinafter cited as House Report]. After a relatively brief debate in the House, the bill was passed, 122 CONG. REC. 35,130 (1976) (bill passed by vote of 306 yeas to 68 nays), and subsequently signed into law on October 26, 1976. 122 CONG. REC. 35,087 (1976). Accompanying the legislation were detailed reports by}
The Fees Act provides that the fee awards under the Act are to follow the same standards as those provided by the Civil Rights Act of 1964\(^1\) and the Voting Rights Act Amendments of 1975,\(^2\) both of which had similar attorney’s fees provisions. Thus, case law interpreting these other fee-shifting statutes provides precedent for fee awards under the Fees Act.\(^3\) Conversely, the Supreme Court has held that the mechanics involved in fixing fees under the Fees Act should also be applied to other types of fee awards.\(^4\)

Litigation over attorney’s fees is rapidly developing into a separate sub-specialty. In order to gain a clear understanding of the relationship between Rule 68 and other statutes granting attorney’s fees “as part of the costs” of litigation, a general discussion of how fee awards are made is necessary. However, a fully detailed explanation of the law which has quickly grown up under the Fees Act is beyond the scope of this Article.

**A. Fee Recovery Under the Fees Act**

Under the Fees Act, a prevailing plaintiff “should ordinarily recover an attorney’s fee unless special circumstances would render such an award unjust.”\(^5\) In contrast, prevailing defendants may
recover under the Fees Act only if the action is unfounded, meritless, frivolously or vexatiously brought, although bad faith need not be

Newman). This standard was specifically adopted in the Senate and House Reports. Senate Report, supra note 120, at 4; House Report, supra note 120, at 6.

As case law has interpreted the Fees Act, this standard has come to mean that prevailing plaintiffs will almost always recover their attorney's fees. Among the circumstances which have been found insufficient to bar an award of attorney's fees are: (1) Defendants acted in good faith and thus should not be penalized, Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 739 (1980); Hutto v. Finney, 437 U.S. 678 (1978); Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968); (2) The government defendant is in bad financial condition, Entertainment Concepts, Inc. v. Maciejewski, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981); (3) Plaintiff was financially able to retain private counsel and pay his own fees, Milwe v. Cavioto, 653 F.2d 80, 83 (2d Cir. 1981); International Oceanic Enter., Inc. v. Mentor, 614 F.2d 502 (5th Cir. 1980); International Soc'y for Krishna Consciousness, Inc. v. Collins, 609 F.2d 151 (5th Cir. 1980); (4) Plaintiffs recovered only nominal damages, Fast v. School Dist. of Ladue, 728 F.2d 1030, 1033-35 (8th Cir. 1984); Lenard v. Argento, 699 F.2d 874, 899 (7th Cir.), cert. denied, 464 U.S. 815 (1983); McCann v. Coughlin, 698 F.2d 112, 128-29 (2d Cir. 1983); Williams v. Thomas, 692 F.2d 1032, 1038 (5th Cir. 1982), cert. denied sub nom. Dallas County v. Williams, 462 U.S. 1133 (1983); Furtado v. Bishop, 635 F.2d 915, 918 (1st Cir. 1980); Coop v. City of South Bend, 635 F.2d 652, 654 (7th Cir. 1980); Burt v. Abel, 585 F.2d 613, 617-18 (4th Cir. 1978); (5) The plaintiff received free representation from a public interest organization, New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 70 n.9 (1980); Dennis v. Chang, 611 F.2d 1302, 1304-07 (9th Cir. 1980); see also Johnson v. University College, 706 F.2d 1205, 1210 (11th Cir.) (suit maintained on contingency fee arrangement), cert. denied, 464 U.S. 994 (1983); Lamphere v. Brown Univ., 610 F.2d 46 (1st Cir. 1979) (same); Holley v. Lavine, 605 F.2d 638, 646 (2d Cir. 1979) (fact that defendant was represented by a federally funded legal services agency was not a bar to collecting a fee), cert. denied sub nom. Russo v. Holly, 446 U.S. 913 (1980); House Report, supra note 120, at 8 n.16 (citing Torres v. Sachs, 69 F.R.D. 343 (S.D.N.Y. 1975) for the proposition that a defendant is not barred from recovering a fee because he is represented by an organization or is himself an organization); (6) The fees would be an unjust burden on taxpayers not involved in the discriminatory act, Aware Woman Clinic, Inc. v. City of Cocoa Beach, 629 F.2d 1146, 1149-50 (5th Cir. 1980); (7) Defendant won its counterclaim, Johnson v. Nordstrom-Larpenteur Agency, Inc., 623 F.2d 1279, 1282 (8th Cir.), cert. denied, 449 U.S. 1042 (1980); (8) Attorney's fees would exceed compensatory damages, Cooperative v. City of South Bend, 635 F.2d 652, 654 (7th Cir. 1980); (9) The non-prevailing parties have to pay substantial fees to their own attorneys, Robinson v. Kimbrough, 652 F.2d 458, 467 (5th Cir. 1981); (10) The United States was a co-plaintiff in a consolidated case, United States v. Terminal Transplant Co., 653 F.2d 1016, 1021 (5th Cir. 1981), cert. denied sub nom. Truck Drivers and Helpers Local Union No. 728 v. Allen, 455 U.S. 989 (1982) or was in fact the chief wrongdoer, Crosby v. Bowling, 683 F.2d 1068, 1074-75 (7th Cir. 1982); (11) Plaintiffs failed to specifically request fees as part of the relief requested in their complaint, Local 391, Int'l Bhd. of Teamsters v. City of Rocky Mount, 672 F.2d 376, 381 (4th Cir. 1982); (12) The plaintiffs or their counsel behaved improperly, Bonnes v. Long, 651 F.2d 214, 218-19 (4th Cir. 1981) (Rehnquist & O'Connor, J.J., dissenting), cert. denied, 455 U.S. 961 (1982). See generally Note, Judicial Discretion and the 1976 Civil Rights Attorney's Fees Awards Act—What Special Circumstances Render an Award Unjust, 51 Fordham L. Rev. 320 (1982).
shown specifically. The Supreme Court has defined “meritless” to mean that the action is “groundless or without foundation.”

1. Prevailing Party

To recover attorney’s fees under the Fees Act one must first prevail in the action. In the seminal case of *Hensley v. Eckerhart*, the Supreme Court adopted a liberal rule for determining whether a party meets this threshold test. The party must “succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” The same standard was expressed

---

126. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978) (citing Carrion v. Yeshiva Univ., 535 F.2d 722, 727 (2d Cir. 1976)). The Court noted that there are at least two equitable considerations favoring an attorney’s fee award to a prevailing Title VII plaintiff that are wholly absent in the case of a Title VII defendant: first, the plaintiff is Congress’ chosen instrument to vindicate a policy that Congress has considered to be of the highest priority; second, when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. 434 U.S. at 418-19; see Senate Report, supra note 120, at 5; 122 Cong. Rec. 35,124 (1976) (statement of Cong. Drinan). There is authority for such an award in all federal litigation where a party has acted “in bad faith, vexatiously, wantonly, or for oppressive reasons.” Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253 (2d Cir. 1985); 6 J. Moore, W. Taggart & J. Wicker, Moore’s Federal Practice ¶ 54.77[2], at 1709 (2d ed. 1985); see, e.g., Vaughan v. Atkinson, 369 U.S. 527 (1962); Perichak v. International Union of Elec. Radio and Mach. Workers, Local 601, 715 F.2d 78, 80 (3rd Cir. 1983); Nemeroff v. Abelson, 704 F.2d 652, 654 (2d Cir. 1983); Prate v. Freedman, 583 F.2d 42, 46 (2d Cir. 1978); Browning Debenture Holders’ Comm. v. DASA Corp., 560 F.2d 1078, 1088-89 (2d Cir. 1977). There is also statutory authority for an award of fees against counsel where counsel “so multiplies the proceedings in any case unreasonably and vexatiously . . . .” 28 U.S.C. § 1927 (1982); see United States v. Potamkin Cadillac Corp., 697 F.2d 491 (2d Cir.), cert. denied, 462 U.S. 1144 (1983); Bankers Trust Co. v. Publicker Indus., Inc., 641 F.2d 1361 (2d Cir. 1981); North Am. Foreign Trading Corp. v. Zale Corp., 83 F.R.D. 293, 297 (S.D.N.Y. 1979); Harrell v. Joffrion, 73 F.R.D. 267, 268 (W.D. La. 1976), aff’d, 545 F.2d 167 (5th Cir. 1976) (mem.).

A recent amendment of Federal Rule of Civil Procedure 11 has also required counsel to sign all his pleadings and declare that such signature constitutes a “certificate” by the attorney that “he has read the pleading, motion, or other paper; [and] 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 . . . .” Fed. R. Civ. P. 11. The Second Circuit recently remanded a meritless antitrust/civil rights suit for the imposition of the sanction of the defendant’s attorneys fees upon the plaintiff’s counsel and/or its client. Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 254 (2d Cir. 1985).


129. Id. at 433 (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).
in the Senate Report: a party need “not prevail on all issues,” so long as he “has prevailed on an important matter in the course of the litigation.”

2. Fixing Attorney's Fees: The Lodestar Approach

Once it has been established that a party has prevailed, the court must fix the amount of the attorney's fee which the party is entitled to recover. Two tests have been developed to make this determination. The oldest test is the twelve factor test set forth in Johnson v. Georgia Highway Express, Inc. The newer, more common method follows the “Lodestar” approach whereby attorney's fees are determined by multiplying the number of hours billed by the hourly rate normally charged for similar work “by attorneys of like skill in the area.” This approach also gives the trial court discretion to adjust the fee upward or downward if appropriate.

The Lodestar formula, while appearing simple, is not easy to administer. The first step is to determine the extent to which the

130. Senate Report, supra, note 120, at 5. A party need not recover on the central issue of the litigation but must obtain some of the relief sought. See Pollock v. Baxter Manor Nursing Home, 716 F.2d 545 (8th Cir. 1983) (per curiam), rev'd 706 F.2d 236 (8th Cir. 1983) (per curiam).

131. 488 F.2d 714 (5th Cir. 1974). The twelve Johnson factors are: (1) time and labor expended by attorneys; (2) novelty and difficulty of the case; (3) attorney's skill; (4) the effect that this case had on counsel's ability to take on other work; (5) the attorney's customary fee; (6) nature of the fee; (7) unusual time limitation imposed on the litigants; (8) amount of money involved in the claim and the outcome of the claim; (9) experience, ability and reputation of counsel; (10) “undesirability” of being associated with the cause; (11) nature and length of litigant's and counsel's professional relationship; and (12) awards made in similar cases. Id. at 717-19.

Johnson is specifically cited in the Senate Report, supra note 120, at 6 and the House Report, supra note 120, at 8. The Johnson factors are consistent with those recommended by the American Bar Association Model Code of Professional Responsibility, DR 2-106 (1982).

132. See City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2d Cir. 1977) (Grinnell II). See also Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 112 (3rd Cir. 1976) (en banc) (applying “Lodestar” approach with adjustments). The twelve Johnson factors and the “Lodestar” approach should essentially lead to the same result. The twelve Johnson factors will be reflected in the hours spent on the case or in the attorney's hourly rate. The novelty and difficulty of the case, and any unusual time limitations will be reflected in the number of hours expended. The attorney's skill, his customary fee, his experience, ability and reputation will likely be reflected in the hourly rate awarded. See Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 & n.15 (5th Cir. 1980) (antitrust case where court held that “Lodestar” calculation should be adjusted to reflect Johnson factors), aff'd in relevant part after remand, 684 F.2d 1087 (5th Cir. 1982).
prevailing party has succeeded. In *Hensley v. Eckerhart*, the Supreme Court stated that in order to determine the extent of a plaintiff's success, a court must determine the issues upon which the plaintiff prevailed. Where the plaintiff's success is partial, a reduction in attorney's fees may be made by the district court, either by separating out the hours spent on non-prevailing issues or by making across-the-board reductions.

The reasoning of the *Hensley* holding, that the extent of a plaintiff's success is crucial in determining the appropriate amount of attorney's fees, should apply to cases involving multiple plaintiffs or defendants. Attorney's fees incurred for work done on behalf of non-prevailing plaintiffs should not be recoverable unless that work is intrinsically related to work done for prevailing parties. Moreover, fees incurred for work carried out against prevailing defendants

134. Id.
135. Id. at 436-37. The Court noted that in some circumstances, a single lawsuit may contain distinctly different claims based on different facts. For the purposes of determining the attorney's fee award, time expended on unsuccessful claims must be treated as if it had been spent on a different lawsuit. Id. at 434-35. See *Sisco v. J.S. Alberici Constr. Co.*, Inc. 733 F.2d 55, 58-59 (8th Cir. 1984); *United Slate Tile and Composition Roofers v. G & M Roofing and Sheet Metal Co.*, 732 F.2d 495, 504-05 (6th Cir. 1984); *Willie M. v. Hunt*, 732 F.2d 383, 385-87 (4th Cir. 1984); *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984); *Fast v. School Dist. of Ladue*, 728 F.2d 1030, 1035 (8th Cir. 1984) (en banc); *Wojtkowski v. Cade*, 725 F.2d 127, 130 (1st Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263 (7th Cir. 1983); *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983); *Webb v. County Bd. of Educ. of Dyer County*, 715 F.2d 254, 259-60 (6th Cir. 1983), aff'd, 105 S. Ct. 1923 (1985); *Rutherford v. Pitchess*, 713 F.2d 1416, 1421-22 (9th Cir. 1983); *Ramos v. Lamm*, 713 F.2d 546, 556-57 (10th Cir. 1983); *Lyons v. Cunningham*, 583 F. Supp. 1147, 1152-53 (S.D.N.Y. 1983); *Dunten v. Kibler*, 518 F. Supp. 1146, 1149 (N.D. Ga. 1981); *Illinois Welfare Rights Org. v. Miller*, 723 F.2d 564, 567 (7th Cir. 1983) (time spent on related but unsuccessful claims should not automatically be excluded from fee calculation); *Clanton v. Orleans Parish School Bd.*, 649 F.2d 1084, 1102-03 (5th Cir. 1981) (portion of time spent on unsuccessful claims contributed to the development of claims that were successful. Where there is a common core of facts, the court should view the suit in terms of the "overall relief" obtained. *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1982); *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978); *Abraham v. Pekarsi*, 728 F.2d 167, 175 (3rd Cir.) (time spent on preparation of depositions prepared for the unsuccessful claim but used to prove an element of the successful claim is recoverable), cert. denied, 104 S. Ct. 3513 (1984); *White v. City of Richmond*, 713 F.2d 458, 461-62 (9th Cir. 1983) (since appellee's success was complete, it was unnecessary to reduce plaintiff's award).

136. See *Perkins v. Cross*, 728 F.2d 1099, 1100 (8th Cir. 1984); see also *Redding v. Fairman*, 717 F.2d 1105, 1119 (7th Cir. 1983) (award of attorney's fees for prisoner appearing *pro se* was inappropriate).
should not be recoverable unless it meets the same requirement.

In addition to eliminating hours expended upon work on non-prevailing issues or parties, the lower court should scrutinize the fee application for unnecessary work. Counsel is expected to exercise "billing judgment" in assessing the proper amount of time to be spent on a case. However, if the work is necessary for the success of the lawsuit, then even work only indirectly connected with the lawsuit may be recompensed.

A party seeking an award of attorney's fees has the burden of establishing and documenting the time expended and the hourly rate at which he seeks reimbursement. This burden must be met by producing billing time records which are maintained in a manner that will enable "a reviewing court to identify distinct claims."


Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is no less important here. Hours that are not properly billed to one's client also are not properly billed to one's adversary pursuant to statutory authority."


140. See, e.g., New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980) (actions in state administrative proceeding outside title VII action are compensable); Chrapliwy v. Uniroyal, Inc., 670 F.2d 760 (7th Cir. 1982) (counsel's actions to debar defendant led to settlement of the action and was, therefore, compensable), cert. denied, 461 U.S. 956 (1983).


142. Id. at 437.
While the attorney's records need not be exceedingly detailed, they should identify the general subject matter on which time was spent.\footnote{143} Once the court has calculated the number of compensable hours, it must fix the hourly compensation rate. The claimant has the burden of proving that the requested rates are comparable to those paid for similar services of lawyers in the community who have similar skill, experience and reputation.\footnote{144}

3. Adjustments of Attorney's Fees

After calculating the number of compensable hours at the prevailing market rate, the court should decide whether the figure should be adjusted either upward for exceptional work or downward for unsatisfactory work.\footnote{145} In \textit{Blum v. Stenson},\footnote{146} the Supreme Court argued against making such adjustments except in rare instances. The Court noted that in most cases adjustments are unnecessary because the quality of representation is reflected in the hourly rate.\footnote{147} The Court rejected the theory that the novelty or complexity of the issues call for upward adjustment of the fee, since such factors should be reflected in the number of billable hours and counsel's hourly rate.\footnote{148} In addition, the Court held that the number of people affected by the ruling should not be a consideration for upward adjustment, because counsel should be diligent regardless of the number of clients he is representing.\footnote{149} Thus the quality of repre-

\footnote{143} Id. at 437 n.12 (citing Nadeau v. Helgemoe, 581 F.2d 275, 279 (1st Cir. 1978). Some courts will allow reconstructed records. Pawlak v. Greenawalt, 713 F.2d 972, 978 (3d Cir. 1983), \textit{cert. denied}, 464 U.S. 1042 (1984); Johnson v. University College, 706 F.2d 1205, 1207 (11th Cir.) \textit{cert. denied}, 464 U.S. 994 (1983); Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1473 (9th Cir. 1983). However the trend is toward requiring contemporaneous time records. The Second Circuit has stated that any fee requests for work done after June 15, 1983 which are not supported by contemporaneous time records will be denied. New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136, 1147-48 (2d Cir. 1983); \textit{see also} Wojtkowski v. Cade, 725 F.2d 127, 130 (1st Cir. 1984), Ramos v. Lamm, 713 F.2d 546, 553 (10th Cir. 1983). Failure to produce such records can result in either reduction of a percentage of the total claimed hours, or denial of reimbursement for undocumented hours. In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court approved an across-the-board reduction of thirty percent due to an attorney's inexperience and failure to keep contemporaneous time records. \textit{Id.} at 438 n.13.}


\footnote{145} Graves v. Barnes, 700 F.2d 220, 223 (5th Cir. 1983); Anderson v. Morris, 658 F.2d 246, 249 (4th Cir. 1981).


\footnote{147} \textit{Id.} at 899.

\footnote{148} \textit{Id.} at 898-99.

\footnote{149} \textit{Id.} at 900 n.16.
sentation justifies an upward adjustment only in the rare instances in which the quality of the work is not reflected in the hourly rates and where there has been exceptional success. Conversely, where the quality of representation or the results are poor, the fee award may be reduced.

IV. Rule 68 and Attorney’s Fees

The escalating number of cases being litigated over large fee awards in civil rights actions has caused Rule 68’s cost-shifting mechanism to become an attractive tool for defense counsel seeking to cut off the plaintiff’s right to receive attorney’s fees accruing after an offer. In July of 1985, the Supreme Court held, in Marek v. Chesny, that an unaccepted offer under Rule 68 cuts off the plaintiff’s post-offer attorney’s fees where such fees are recoverable “as part of the costs.” In its determination, the Court examined whether statutory attorney’s fees are recoverable as part of the costs for purposes of the Federal Rules of Civil Procedure (FRCP), and whether the policy considerations underlying the award of such fees would override the policy embodied in Rule 68 of encouraging settlements.

A. Do “Costs” Include Attorney’s Fees Under Rule 68?

In the seven years prior to the Marek decision, the Supreme Court, on a number of occasions, addressed the question of whether at-

150. Id. at 899.
153. Id. at 170. It noted that the policy considerations underlying the award of such fees would override the policy embodied in Rule 68 of encouraging settlements.
154. Id. at 3017-18. These were the two major issues which had been litigated in the Seventh Circuit. In addition, the circuit court criticized the district court’s reading of Rule 68 to include attorney’s fees, 720 F.2d 231, 235 (7th Cir. 1985), such an interpretation would prevent a plaintiff from recovering attorney’s fees to which he is entitled under substantive law. Under the Rules Enabling Act, Congress delegated authority to the Supreme Court to make rules governing the “practice and procedure” of the federal courts, provided that such rules do not “abridge, enlarge or modify any substantive right . . . .” 28 U.S.C. § 2072 (1982). The Seventh Circuit held that the right to recover attorney’s fees under the Fees Act was both “substantive” and “procedural,” and thus a reading of Rule 68 to cut
to be treated as costs in other contexts, such as Rule 68. In *Hutto v. Finney*, defendants, who were state employees, asserted an eleventh amendment immunity claim regarding the attorney's fees award imposed against them under the Fees Act. The eleventh amendment, by its terms, precludes extending the "judicial power" of the United States "to any suit in law or equity" commenced against one of the states. Under the rule of *Ex Parte Young*, actions for equitable relief, however, can be brought against state officials acting in their state capacity. The Supreme Court in *Hutto* granted the plaintiff's request. The Court found that when Congress enacted the Fees Act, it had made attorney's fees a "part of the costs." The Court noted that *Fairmont Creamery Co. v. Minnesota* had been correctly understood as implying that there was no eleventh amendment immunity to the imposition of costs.

Although *Hutto* appeared to resolve the question of whether attorney's fees are part of the costs, the issue reappeared in connection with the timing of fee requests, which led to a split among the circuit courts. Four circuit courts had held that since fees are

---

156. U.S. CONST. amend. XI. The Eleventh Amendment states:
   The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

160. *Id.* at 167.
162. *Id.* at 695. The Court relied in part on the Senate Report of the Fees Act which states: "[I]t is intended that the attorneys' fees, like other items of costs, will be collected either directly from the official, in his official capacity, from funds of his agency or under his control, or from the State or local government (whether or not the agency or government is a named party)." *Id.* at 694 (citing S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 5 (1976) (footnotes omitted)).
RULE 68 AND ATTORNEY'S FEES

statutorily included in costs a fee application is a motion for costs under Rules 54(d) and 58 of the Federal Rules of Civil Procedure which do not limit the time in which those motions are available.

The Courts of Appeals for the First and Tenth Circuits, however, held that fees cannot be costs, despite what Congress provided, because fees are more difficult to calculate than other costs. Fee requests, therefore, would have to be made pursuant to FRCP 59(e) within ten days after entry of judgment. In *White v. New Hampshire Department of Employment Security*, the Supreme Court resolved the dispute on the timing of fee requests but not the question of whether attorney's fees are costs. The Court declined to hold expressly that provision for attorney's fees as costs under the Fees Act means that postjudgment fee requests constitute motions for "costs" under Rules 54(d) and 58, but merely held that motions for attorney's fees should not be made under Rule 59(e) with its ten day limitation. The Court thereby cast doubt upon an issue that seemed to be clear-cut following the *Hutto* decision, but did so without rebutting the proposition that fees are costs. Courts have subsequently followed that interpretation.

In *Roadway Express, Inc. v. Piper*, the Supreme Court faced the question of whether attorney's fees in civil rights cases are to

---

1231, 1234 (7th Cir. 1980); Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980).
166. See supra note 68 and accompanying text.
167. Rule 58 sets forth the mechanism for entry on the judgment. See FED. R. CIV. P. 58.
170. *White*, 629 F.2d at 702; see *Glass*, 657 F.2d at 256-57.
171. The Court of Appeals for the Eighth Circuit followed yet another approach, holding that fee requests are governed by local rather than federal rules. Obin v. District No. 9, Int'l Ass'n. of Machinists and Aerospace Workers, 651 F.2d 574, 582-84 (8th Cir. 1981).
173. Id. at 454-55, n.17.
174. See Spray-Rite Service Corporation v. Monsanto Co., 684 F.2d 1226, 1247-48 (7th Cir. 1982); Brown v. City of Palmetto, Georgia, 681 F.2d 1325 (llth Cir. 1982); cf. Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982) (fees are not part of "costs" as that term is used in local rules); Metcalf v. Borba, 681 F.2d 1183 (9th Cir. 1982) ("fees" are not "costs" for the purposes of Rules 54(d) and 58).
In another context, the Second Circuit held that a release executed by the prevailing party as to costs was also a release of attorney's fees. Brown v. General Motors Corp., 722 F.2d 1009 (2d Cir. 1983).
175. 447 U.S. 752 (1980).
be treated as costs for purposes of section 1927 of Title 28. After plaintiffs' counsel repeatedly failed to comply with court orders on discovery and other matters, the district court dismissed the action and awarded costs and attorney's fees to the defendant under section 1927 of Title 28, which makes counsel liable for excessive "costs" caused by vexatious behavior. Although section 1927 did not, at that time, specifically define "costs" to include fees, Title VII allowed fees "as part of costs."

The Court, upon an examination of section 1927's legislative history, found that the costs referred to in section 1927 are the costs deemed taxable under section 1920. The Court also noted that section 1927 and the fee provisions of Title VII have different purposes. The fee provisions of Title VII are "acutely sensitive" to the merits of an action and to the policy behind the statute and they treat plaintiffs and defendants differently, whereas section 1927 "does not distinguish between winners and losers, or between plaintiffs and defendants" but is concerned only "with limiting the abuse of court processes." Litigants urging that Rule 68 not be found to cut off attorney's fees have frequently cited this case as authority for the proposition that civil rights attorney's fees are not "costs."

However, upon close inspection of Roadway Express, it is clear that the Supreme Court was construing "costs" as used in section 1927 and not as used in the civil rights statutes.

This technical issue of whether attorney's fees in civil rights cases were to be treated as costs for purposes of the Federal Rules, was also litigated in connection with Rule 68 in a number of cases prior
RULE 68 AND ATTORNEY’S FEES

1986]

to Marek. One line of cases concluded that attorney’s fees are costs, while a second line of cases, culminating in Chesny v. Marek, concluded that attorney’s fees in civil rights cases are not costs.

B. Awards of Attorney’s Fees and Public Policy Considerations

The second issue raised by the use of Rule 68 was whether cutting off plaintiff’s attorney’s fees under Rule 68 to encourage settlement conflicts with the public policy of encouraging the vindication of

---

183. In Fulps v. City of Springfield, 715 F.2d at 1092-93, the Sixth Circuit concluded that Congress expressly included attorney’s fees as part of the costs under the Fees Act:

> 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.


184. 720 F.2d 474 (7th Cir. 1983), rev’d, 105 S. Ct. 3012 (1985). In Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983), the plaintiff accepted an offer of one dollar “plus all costs and expenses,” which stated that it should not be “construed as an admission of liability.” _Id._ at 402. The Seventh Circuit held that, in view of the rejection of liability, the plaintiff was not a prevailing party and thus could not recover fees. _Id._ It then determined that costs in the context of a Rule 68 offer do not include attorney’s fees because such fees were not specifically mentioned by the Rule’s draftsmen. Unless fees are expressly included as part of costs, they are generally considered to have been excluded. _Id._ at 403. Moreover, the definition of costs in Rule 54(d) does not include attorney’s fees. _Id._ Illustrative of the semantic quagmire that this kind of discussion can lead to is the fact that the holding in _Pigeaud_ (and, for that matter, in _Chesny v. Marek_) is inconsistent with the Seventh Circuit’s own earlier determinations in Spray-Rite Serv. Corp. v. Monsanto Co., 684 F.2d 1226, 1247-48 (7th Cir. 1982), and Bond v. Stanton, 630 F.2d 1231, 1234 (7th Cir. 1980), in which the Seventh Circuit held that attorney’s fees are costs for the purpose of the timing of fee applications.

185. Writing in the context of Rule 68, Justice Powell stated:

> On the other hand, parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings. Rule 68 makes available to defendants a mechanism to encourage plaintiffs to settle burdensome lawsuits. The Rule particularly facilitates the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.

civil rights by providing for the payment of attorney's fees. The argument against the cutting off of attorney's fees, made most forcefully by the Seventh Circuit in *Marek*, was that reading Rule 68 to bar recovery of fees for post-offer work would defeat the Fees Act by forcing the plaintiff's attorneys to either personally collect the post-offer fee from the plaintiff, or to provide post-offer work free of charge. Such a situation might encourage attorneys to accept inadequate offers of judgment more frequently out of the fear of losing their fees, and thereby diminish the value of the Fees Act.

Prior to *Marek*, several district court cases denied fees for post-

---

186. It is indisputable that there is a congressional policy which favors fee awards as a means of encouraging the vindication of civil rights. Specifically, the *Senate Report*, supra note 120, at 2, described fee awards as an "essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies" which are contained in such laws. The *Senate Report* further states that "[i]f our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases." *Id.* at 6. Thus, the legislative history indicates that the awarding of attorney's fees was seen as a means to an end, that end being the protection of basic civil rights. However, it is also clear that Congress did not intend the Fees Act to become a "lawyers relief bill" encouraging attorneys to litigate frivolous cases to obtain fees. See 122 CONG. REC. 33,314 (1976) (remarks of Sen. Kennedy); 122 CONG. REC. 35,127 (1976) (remarks of Rep. Jordan) ("not a bill that we could term a food-stamp bill for lawyers").

During the House hearings on the bill that was ultimately to become the Fees Act, Representative Seiberling of Ohio noted that the bill was certainly not calculated to promote the interests of lawyers who make the wrong judgment or who make an ineffective presentation or who are on the wrong side of a lawsuit. *Award of Attorneys' Fees: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess.* 8 (1975); see, e.g., 122 CONG. REC. 31,474, 31,830 (1976) (statements of Sen. Allen); 122 CONG. REC. 31,832 (1976) (remarks of Sen. Abourezk); 122 CONG. REC. 31,834 (1976) (remarks of Sen. Helms).

187. In *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), *rev'd on other grounds*, 105 S. Ct. 3012 (1985), the Seventh Circuit rejected the approach of reading Rule 68 "costs" to include attorney's fees under the Fees Act:

This approach, though in a sense logical, puts Rule 68 into conflict with the policy behind section 1988. Section 1988 was intended to encourage the bringing of meritorious civil rights actions, such as the present action, which resulted in a judgment for the plaintiff of $60,000 for the death of his decedent at the hands of the three police officers who are the defendants . . . . The effectiveness of section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer.

*Id.* at 478.

188. *Id.*

189. *Id.* at 478-79.
offer work. In *Waters v. Heublein, Inc.*, the court for the Northern District of California concluded that the purposes behind the Fees Act are not violated when fees are cut off for post-offer work. Anticipating the reasoning of *Hensley*, that attorneys should not be compensated for unsuccessful work, the *Waters* court concluded that "[a]warding fees covering their pre-offer work to attorneys who settle cases through acceptance of an offer of judgment advances the purposes underlying the fees provision." Thus, the application of Rule 68 to bar recovery of post-offer fees did "not unduly interfere" with the operation of the Fees Act since the post-offer work did not provide a more favorable result to the plaintiff.

The result in *Waters* does indeed comport with the purposes of the civil rights laws, which were designed to benefit the client rather than the attorney. When the plaintiff receives a Rule 68 offer exceeding the amount of the actual judgment, he has, by definition, been offered full relief since the best measure of the relief he is entitled to is the relief that he actually obtains.

While it has been suggested that allowing Rule 68 to cut off fees would force civil rights plaintiffs to accept improperly low settlements, the use of Rule 68 is just as likely to produce an offer greater than the "real" value of the case, particularly in cases of low damage awards. In calculating a Rule 68 offer, a defendant must consider not only the minimum amount a jury is likely to award, but also the cost of attorney's fees a plaintiff might recover in a statutory fees case if the litigation is continued, as well as the defendant's own attorney's fees and any inconvenience. A Rule 68 offer is likely to incorporate these "nuisance value" considerations, particularly if it is made early. Thus, in many cases, Rule 68 will encourage the defendant to offer a windfall in excess of what the plaintiff's claim is really worth, but less than the cost to the defendant of litigating it.

192. 461 U.S. at 430.
194. Id.
195. See supra notes 113, 120.
197. An example of this kind of offer can be found in Abrams v. Interco Inc., 719 F.2d 23, 25, 26 n.1 (2d Cir. 1983) where the defendant offered triple the
Furthermore, Rule 68 provides a strong incentive for the defendant to offer relief for the plaintiff earlier in the case. In this way, Rule 68 better serves the civil rights laws because it discourages plaintiffs from persisting with litigation which will ultimately bring them smaller recoveries and their attorneys larger fees.

C. The Propriety of Prejudgment Fee Negotiations

The third issue which arose both in the context of Rule 68 and in general fee awards litigation relates to the ethical propriety of simultaneously negotiating the fees and the merits of the case. Some courts have been concerned about the possibility that defendant’s counsel might offer his adversary a “sweetheart deal” in which the attorney agrees to minimal relief for his client on the merits claim in exchange for a generous settlement for his own fees. The courts have also indicated that simultaneous negotiation of the disbursement of the fund from which the plaintiff would get his recovery and the percentage of the fund which plaintiff’s attorney would get for his fee creates a conflict of interest between attorney and client.198

In Prandini v. National Tea Co.,199 the Court of Appeals for the Third Circuit resolved this conflict by mandating that discussion regarding the amount of the fee take place only after settlement on the merits.200 The Court of Appeals for the Ninth Circuit adopted

---

199. 557 F.2d 1015.
200. Id. at 1021.
a similar rule in *Mendoza v. United States*, a although it refused to absolutely prohibit settlements which did not follow the prescribed method, stating that whether the existence of a "potential conflict" required a trial court to reject a settlement would depend upon examination of the circumstances under a "special scrutiny" standard. Thus the *Mendoza* court, skeptical of pre-settlement fee negotiation, was nevertheless unwilling to go as far as the absolute prohibition in *Prandini*.

The Supreme Court substantially undercut the *Prandini* approach in 1982 when it stated, in *White v. New Hampshire Department of Employment Security*, that:

In considering whether to enter a negotiated settlement, a defendant may have good reason to demand to know his total liability from both damages and fees. Although such situations may raise difficult ethical issues for a plaintiff's attorney, we are reluctant to hold that no resolution is ever available to ethical counsel.

This pronouncement, although dictum, contemplates that the parties should settle fees between themselves, if possible.

The *Prandini* decision has been criticized by commentators as being impractical and inhibitive of settlements. The Third Circuit itself

---


202. *Id.* at 1353. The Ninth Circuit further noted that while it would "rarely be an abuse of discretion" for the court to reject such a settlement proposal, rejection is not "automatically required." *Id.*

203. *Id.*

204. 455 U.S. 445 (1982).

205. 455 U.S. at 453-54 n.15.

acknowledged that *Prandini* may be "more honored at the breach." Since the Supreme Court's *White* decision in 1982, the trend has clearly been away from an absolute prohibition on the fee settlement negotiation.

A more difficult problem arises in the case of the so-called "conditional offer" in which the defendant's attorney asks his adversary to waive his fees altogether as a condition of the settlement award. This question was bitterly contested and is now before the Supreme Court for resolution in *Jeff D. v. Evans*.

The Bar of the City of New York delivered a divided ethics opinion, holding that where a defendant offers to settle a case with a plaintiff who is represented by an attorney from a public interest group, and the offer is conditioned upon a waiver of attorney's fees, such an offer is unethical. This opinion was rejected, however, by other Bar Associations who declined to establish such

lack of vitality of the *Prandini* rule, noting that "some of the judges interviewed suggested that White v. New Hampshire . . . may have modified or overruled *Prandini*" [hereinafter cited as *Waiver of Attorney's Fees*].


208. In addition to *White* and *Moore* several other circuits have implicitly or explicitly permitted fee negotiation. See Lazar v. Pierce, 757 F.2d 435, 437-39 (1st Cir. 1985) (plaintiff appeals district court denial of motion to reopen issue of attorney's fees); Chesny v. Marek, 720 F.2d at 477-78, rev'd on other grounds, 105 S. Ct. 3012 (1985); Brown v. General Motors Corp., 722 F.2d 1009, 1012 (2d Cir. 1983) (in action for attorney's fees under 42 U.S.C. § 1988, court found plaintiff could waive his attorney's claim to fees); Gram v. Bank of Louisiana, 691 F.2d 728 (5th Cir. 1982) (settlement of Truth in Lending Act action); Chicano Police Officer's Ass'n v. Stover, 624 F.2d 127 (10th Cir. 1980) (after settlement, plaintiffs make motion for award of attorney's fees pursuant to 42 U.S.C. §§ 1988, 2000e-5(k)).


210. Comm. on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. 80-94, 36 Record of N.Y.C.B.A. 507 (1981) [hereinafter cited as Committee on Professional Ethics]. After the comments by the Supreme Court in *White v. New Hampshire Department of Employment Security*, the committee still reached the same conclusion but recognized that a defendant needed to have some idea of his ultimate exposure by allowing defense counsel to request from plaintiff's counsel data on the number of hours they expected to work and their hourly rate. Both the original Ethics Opinion and its successor contained vigorous dissents. Committee on Professional and Judicial Ethics of the New York City Bar Ass'n, Op. 82-80, N.Y.L.J. December 9, 1983, at 4, col. 1. The District of Columbia Bar Legal Ethics Committee, Op. 147, reprinted in 113 THE DAILY WASHINGTON LAW REPORTER, February 27, 1985, at 389, reached the same conclusion as to conditional offers but was unwilling to find that "offers of a single sum" were unethical.

211. Committee on Professional Ethics, *supra* note 210, at 511.
a prohibition on conditional offers, and has been criticized by at least one basically sympathetic commentator.

Ethical concerns over prejudgment negotiations and conditional offers were also raised in connection with Rule 68 when plaintiffs made lump sum offers which included attorney's fees. It was argued that when the offer is made in a lump sum, a conflict may arise between the plaintiff and the plaintiff's counsel over how much of the lump sum each party is to receive. However, the lump sum has the advantage of eliminating the possibility of the "sweetheart settlement," whereby a fee arrangement between the defendant and the plaintiff's attorney does not fairly address the plaintiff's best interests when a lump sum is offered, the defendant's counsel will


214. In a suit where fees can be recovered, a defendant can structure his offer in only two ways—the offer can be for either a sum of money "with costs" or for a sum "plus costs" accrued as of the date of the offer. Where attorney's fees are part of the costs, the offer constitutes an offer to pay a sum of money plus whatever taxable costs and fees have accrued to the date of the offer. This creates no ethical problem because the funds for the client and his counsel are separable.

Justice Powell, in his concurring opinion in Delta Air Lines, Inc. v. August, took the position that in order to be effective, a Rule 68 offer had to break the offer into specific sums or, at least, a specific sum of money plus costs for the plaintiff and fees for his counsel. Justice Powell concluded that a Rule 68 offer in a case where attorney's fees were available as part of the costs must set forth specific sums for merits and costs. 450 U.S. at 362-65 (Powell, J., concurring). However, Justice Powell did not cite any direct authority for this contention and several courts have specifically declined to follow him on this point. See Pigeaud v. McLaren, 699 F.2d at 403; Lyons v. Cunningham, 583 F. Supp. at 1158.

Rule 68 offers may also be made for a sum of money "inclusive" of fees and costs. This type of offer consists of a flat sum which, if accepted, would satisfy all of plaintiff's claims against the defendant. This is the format of the offers in Delta Air Lines, Inc. v. August, 450 U.S. at 348-49 n.2; Marek v. Chesny, 105 S. Ct. at 3015; Lyons v. Cunningham, 583 F. Supp. at 1151.

215. Plaintiffs argued in Chesny v. Marek, 720 F.2d at 477-78, and Lyons v. Cunningham, 583 F. Supp. at 1158, that offers inclusive of attorney's fees were unethical and ineffective.

216. "Sweetheart contract" is a term used in the labor field; it is defined as a "derogatory term used to describe a contract between a union and an employer in which concessions are granted to one or to the other for the purpose of keeping a rival union out." Black's Law Dictionary 1298 (5th ed. 1979). The term is also used in the context of cases in which the defendant pays the plaintiff's lawyers, and particularly agrees to pay counsel for the class a fee up to a certain maximum set by the court. Prandini v. National Tea Co., 557 F.2d 1015, 1021 (3d Cir.)
not offer a specified amount to be paid to the plaintiff’s counsel. Those courts which specifically ruled on the ethical propriety of lump sum Rule 68 offers concluded that such offers were proper.217

V. Marek v. Chesny: Costs Under Rule 68 Include Attorney’s Fees

Marek v. Chesny218 involved three police officers who shot and killed Chesny’s son during a call to investigate a domestic disturbance. Chesny brought suit in federal court under section 1983219 and under state tort theories.220 Several months prior to trial, the petitioners made a Rule 68 offer of settlement “for a sum, including costs now accrued and attorney’s fees of one hundred thousand ($100,000) dollars.”221

---

217. Chesny v. Marek, 720 F.2d at 477-78. Although Chesny was reversed on other grounds, this portion of the opinion remains good law. Marek v. Chesny, 105 S. Ct. 3012 (1985). The Chesny court noted that an arrangement under Rule 68 whereby the lawyer is to receive a fixed share of any damages awarded, plus the attorney’s fees awarded by the court, would present the same issues as any other case in which the plaintiff and lawyer do not specify a figure beforehand. And, as is done in all other unspecified fee cases, if the plaintiff felt the lawyers were taking too much, the plaintiff could ask the court to arbitrate the dispute. Id. at 478; see Prandini v. National Tea Co., 557 F.2d 1015, 1020-21 (3d Cir. 1977) (in assessing request of class counsel for court approval of statutorily authorized attorney’s fees, court had duty to see that arrangement was, and appeared, fair).

In Lyons v. Cunningham, the district court concluded that lump sum offers were permissible, but found ethical problems where the offer set out a specific sum for fees. 583 F. Supp. at 1158. This portion of the Lyons opinion was arguably undermined by the Supreme Court in Marek v. Chesny when it ruled that a defendant could make an effective offer which set out a specific amount for costs including attorney’s fees. See infra notes 233-40 and accompanying text for a more complete discussion of this principle.


219. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


220. Marek, 105 S. Ct. at 3014.

221. The full language of the offer was “[p]ursuant to Federal Rule of Civil Procedure 68, the defendants Jeffery Marek, Thomas Wadycki and Lawrence Rhode, hereby offer to allow judgment to be taken against them by the plaintiff for a
Chesny did not accept the offer and at trial recovered a verdict of $60,000. After trial, he requested a total of $171,692.47 in costs, including attorney's fees. Defendants contended that their Rule 68 offer, which had not been exceeded by the court's judgment, precluded an award of attorney's fees for time expended after the offer. The district court agreed with the defendants and awarded fees to the plaintiff only for the time expended up to the date of the offer—a total of $32,000.

Chesny appealed, and the Seventh Circuit, in an opinion by Circuit Judge Posner, reversed. The Seventh Circuit concluded that the Rule was "little known" and little used, and that to interpret it to bar a prevailing plaintiff from recovery of his full fee under the Fees Act "cuts against the grain" of the Fees Act. The Seventh Circuit declined to follow the District Court's "rather mechanical linking up of Rule 68 and section 1988." In a phrase that would echo throughout each side of this dispute, Judge Posner commented that this would force plaintiffs' attorneys in civil rights cases to "think very hard" before rejecting even an inadequate offer because it could cost both their clients and themselves a great deal.

On June 25, 1985, the Supreme Court, in a decision written by Chief Justice Burger, reversed the Seventh Circuit and held that Rule 68 cuts off attorney's fees not only under the Fees Act, but presumptively under numerous other federal statutes as well. A lengthy dissent by Justice Brennan, in which Justices Marshall and Blackmun concurred, criticized not only the Court's reasoning but also the implications of the majority opinion.

The majority opinion states that the Court had been requested to consider only two issues: (1) whether the "offer was valid under Rule 68;" and (2) "whether the term 'costs' in Rule 68 includes attorney's fees awardable under the [Fees Act]." However, the
opinion resolves, either directly or indirectly, many issues which had been raised in the earlier Rule 68 cases and gives Rule 68 a far broader reach than it had before.

A. Lump Sum Offer is Valid Under Rule 68

First, the Supreme Court found, as had the court of appeals,233 that the lump sum offer was valid.234 The Court thus rejected the position suggested by the respondents and by Justice Powell in Delta Air Lines235 that an effective offer had to be broken into separate sums: the amount being offered for the substantive claim and the amount for the costs included in the offer.236 The Supreme Court emphasized that "the critical feature" of that portion of the Rule is that the offer be one which "allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued."237 Where costs are included in the offer or where a specific amount is offered for costs,238 and the plaintiff

---

233. Chesny v. Marek, 720 F.2d at 476-77. Plaintiffs argued that the offer was invalid because it did not provide for separate sums in the offer for the liability award and for the fees and costs award. Circuit Judge Posner, writing for the Seventh Circuit, rejected that theory and found the offer in Marek to be a valid one, noting that if such an offer were invalid, many defendants would be unwilling to make a binding settlement offer, thereby leaving them open to an undetermined fee award. Id.

234. 105 S. Ct. at 3016.


236. Marek v. Chesny, 105 S. Ct. at 3016. The Court was undoubtedly right in reaching this conclusion. Justice Powell's reading of Rule 68 was rejected by every lower court which considered it. See Chesny v. Marek, 720 F.2d at 477; Pigeaud v. McLaren, 699 F.2d at 403; Lyons v. Cunningham, 583 F. Supp. at 1158-59. However, it did receive some support in the law reviews. See Branham, supra note 110, at 353. Justice Powell himself in his concurring opinion, while still contending that it was "the better practic .or the offer of judgment expressly to identify the components," joined the majority opinion and gracefully bowed to the necessity for "a clear interpretation of Rule 68" because of the great public interest in the settlement of cases. Marek v. Chesny, 105 S. Ct. at 3019 (Powell, J., concurring).

237. Marek, 105 S. Ct. at 3015 (emphasis in original).

238. While approving of such a "bifurcated" offer, the Marek Court did not address the issue of how such an offer, if rejected, would be compared to the ultimate verdict received by the plaintiff. For example, if a defendant making an offer guessed correctly about the amount of the liability on the merits but wrongly as to the amount of the costs, including fees, would the judgment exceed the offer? Conversely, if the defendant offered $40,000 on the merits and $10,000 for costs including fees and the plaintiff recovered $42,000 on the merits but only $5,000 in costs and fees for a total recovery of $47,000 would the judgment exceed the offer? There are of course several different ways such a bifurcated offer could end up being played out but there is no case law as to how the comparison between
accepts the offer, the judgment will, of course, include the costs. However, even if the offer does not specifically include costs or if an amount is not specifically set aside for costs, the court entering judgment will include an additional amount to cover the costs accrued to the date of the offer.\textsuperscript{239}

The Court announced the rule that:

\begin{quote}
[I]t is immaterial whether the offer recites that costs are included, whether it specifies the amount the defendant is allowing for costs, or for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment \textit{not} include costs, a timely offer will be valid.\textsuperscript{240}
\end{quote}

Thus, only if the plaintiff specifically \textit{excludes} costs from his offer will an offer be invalid. The rationale expressed for this conclusion was purely practical. The Supreme Court recognized, as had the Seventh Circuit,\textsuperscript{241} that defendants who cannot make lump sum offers will be reluctant to make settlement offers which expose them to whatever liability for fees the court might ultimately fix.\textsuperscript{242} It is reasonable to assume that the Court went into such detail to give guidance to counsel as to how to make a valid offer.

\section*{B. Costs Under Rule 68 Include Attorney's Fees}

The second question before the Court was whether the term "costs" in Rule 68 includes attorney's fees awardable as part of the costs under the Fees Act.\textsuperscript{243} The Court looked to the history of the Federal Rules to determine what the drafters of the Rules intended the word "costs" to mean.\textsuperscript{244} Specifically, the Court looked not to

\textsuperscript{239} Marek, 105 S. Ct. at 3015-16.
\textsuperscript{240} Id. at 3016.
\textsuperscript{241} In Chesny v. Marek, 720 F.2d at 476-77, Judge Posner, writing for the Seventh Circuit, cited Justice Rehnquist in his dissenting opinion in Delta Air Lines, Inc. v. August, 450 U.S. 346, 379 n.5 (1981) for the proposition that "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff."
\textsuperscript{242} Marek v. Chesny, 105 S. Ct. at 3016.
\textsuperscript{243} Id.
\textsuperscript{244} Id. at 3017. When the Federal Rules of Civil Procedure were adopted in
the sparse history of Rule 68 but to Rule 54, which sets forth the normal federal practice as to costs. The Court noted that by 1938, the year of the enactment of the Federal Rules, a significant number of federal statutes had been enacted which created exceptions to the American Rule. For example, the Clayton Act provided that attorney's fees be part of the costs recoverable, as did the Securities Acts of 1933, and the Communications Act of 1934 and the Railway Labor Act. The Court stated that the drafters of the Federal Rules were "fully aware of these exceptions to the American

---

1938, federal statutes had been authorizing and defining awards of costs to prevailing parties for over eighty-five years. Id. at 3016. The Court stated that "[u]nlike in England, such 'costs' generally had not included attorney's fees; under the 'American Rule,' each party had been required to bear its own attorney's fees." Id.

245. Id. at 3017.
246. 15 U.S.C. § 15 (1934). Section 15 provides in part: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee." Id.

247. 15 U.S.C. § 77k(e) (1934). Section 77k(e) provides in part:
The suit authorized under subsection (a) of this section may be to recover such damages as shall represent the difference between the amount paid for the security . . . and (i) the value thereof as of the time such suit was brought . . . [T]he court may, in its discretion, require an undertaking for the payment of the costs of such suit, including reasonable attorney's fees.

Id.

248. 15 U.S.C. § 78i(e) (1934). Section 78i(e) provides in part:
Any person who willfully participates in any act or transaction in violation of subsections (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue . . . . In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

Id.

249. 47 U.S.C. § 407 (1934) provides in part:
If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States . . . a petition setting forth briefly the causes for which he claims damages . . . . If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

250. 45 U.S.C. § 153(p) (1926) provides in part:
If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States . . . a petition . . . . If the petitioner shall finally prevail he shall be allowed a reasonable attorneys' fee, to be taxed and collected as a part of the costs of the suit.
Rule," since the Advisory Committee's Note on Rule 54(d) cited twenty-five statutes involving costs, of which "no fewer than 11 allowed for attorney's fees as part of costs." Then, turning an omission into a policy statement, Chief Justice Burger wrote that in view of "the importance of costs to the Rule," the fact that the drafters of Rule 68 had not defined costs for purposes of that Rule, makes it "very unlikely that this omission was mere oversight" and that "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority."

The Court stated further "absent Congressional expressions to the contrary, where the underlying statute defines costs to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." The Court thus found that Rule 68 cuts off fee awards not only in civil rights cases but, presumptively, in numerous other federal statutes as well.

Had the Court chosen to look to the legislative history of the Fees Act, it would have found further justification for its conclusion that Rule 68 cuts off the Fees Act. Although the legislative history of the Fees Act is void of any reference to Rule 68, there is strong, if oblique evidence that Congress chose to make fees part of costs without regard for the Eleventh Amendment immunity applicable to the states. That, in fact, was the rationale of

252. Id.
253. Id.
254. Id.
255. The legislative history of the Fees Act provides some guidance for a definition of "costs." Although there is no reference to Rule 68 in the extensive legislative record contained in subcommittee hearings, debates on the House and Senate floors, and in House and Senate reports, these sources indicate that Congress intended "costs" to include attorney's fees, at least where the defendant is a state body or official. Hutto, 437 U.S. at 694. Congressional concern arose over the question of whether states and state employees can assert eleventh amendment defenses against claims for fee awards. Id. The amendment explicitly precludes extending the "judicial power" of the United States "to any suit in law or equity" commenced against one of the states. U.S. Const. amend. XI. In Ex parte Young, 209 U.S. 123 (1908), the Supreme Court held that the eleventh amendment did not bar injunctions against state officials acting in their official capacity. That left open the question of whether the Eleventh Amendment prevented federal courts from awarding attorney's fees, which are essentially money judgments, from state treasuries. See generally Comment, Attorneys Fees and the Eleventh Amendment 88 Harv. L. Rev. 1875 (1975).

While Congress was evaluating the Fees Act prior to its enactment, the Supreme Court decided in Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), that similar provisions for attorney's fees in the 1964 Civil Rights Act were enforceable against state
Fulps and of the district court cases which concluded that the term "costs," as used in Rule 68, included attorney's fees. However, had the Court chosen to rely upon the legislative history of the Fees Act, its decision would have been limited to the interpretation of the civil rights statutes. Litigation would have been necessary to determine whether any of the dozens of other federal fee statutes, under which fees are awarded as part of the costs, contain similar legislative histories and, thus, whether the Rule would affect these statutes. As with the Court's explanation of how to make a proper offer, it is again easy to see the pragmatic reasons the Court reached out for a broader result.

C. Policy Considerations

The Court's disposition of the "policy" disputes, which had so burdened the lower courts, involves an element of pragmatism as well. Although the application of Rule 68 could serve as a "disincentive" to counsel to continue to litigate after the offer, the Court found that such a "disincentive" was not contrary to the legislative intent behind the Fees Act. The Court relied on the defendants. Id. at 456-57. Congress relied on the Fitzpatrick holding to rebut the argument that allowing fees against the state would violate the eleventh amendment. 122 Cong. Rec. 33315 (1976) (remarks of Sen. Abourezk); 122 Cong. Rec. 35123 (1976) (remarks of Cong. Drinan). In addition, the Senate Report specifically cited in a footnote to the Supreme Court's 1927 decision in Fairmont Creamery Co. v. Minnesota, 275 U.S. 70 (1927), holding that the eleventh amendment did not prevent the assessment of costs against states when it stated that, "it is intended that the attorneys' fees, like other items of costs, will be collected ... from the official, in his official capacity ...." S. Rep. No. 1011, 94th Cong., 2d Sess. 5 (1976) (footnotes omitted).

In Hutto v. Finney, 437 U.S. at 694-98, the court stated:

The Act imposes attorney's fees "as part of the costs." Costs have traditionally been awarded without regard for the States' Eleventh Amendment immunity. The practice of awarding costs against the States goes back to 1849 in this Court .... The Court has never viewed the Eleventh Amendment as barring such awards, even in suits between States and individual litigants.

Id. at 695.

256. Fulps v. City of Springfield, 715 F.2d 1088, 1091-95 (6th Cir. 1983) ("The Supreme Court has held that the eleventh amendment is not a bar to the awarding of attorney's fees, like other items of costs against State governments in civil rights actions.") (footnote omitted) (citation omitted). Id. at 1093.

257. See supra note 256 and accompanying text.

258. Marek at 3017-18. The Court stated:

Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence, however, that Congress, in considering [the Fees Act], had any thought that civil rights claims were to be on a
principle expressed in *Hensley v. Eckerhart*\(^{259}\) that the "degree of success obtained" is the "most critical factor" in fixing a fee award.\(^{260}\) The Court further noted, in *Marek*, that a plaintiff would obtain no benefit from work done after the offer.\(^{261}\) The Court then pointedly observed that the $139,692 in post-offer work done by plaintiff's counsel in *Marek* had in fact resulted in a total recovery to plaintiff and counsel of $8,000 less than the Rule 68 offer.\(^{262}\)

The Court also discussed some of the philosophical implications of Rule 68 and concluded that the Rule is "neutral, favoring neither plaintiffs nor defendants."\(^{263}\) The Court noted that while some plaintiffs would not recover fees for work done after the offer, others would receive settlement sums which might not have been offered otherwise or which might have been less but for the availability of Rule 68.\(^{264}\) In addition, the Supreme Court, unlike the Seventh Circuit, had no difficulty requiring plaintiffs to "think very hard" before rejecting a reasonable Rule 68 offer. Rather, the Court stated that this is precisely what Rule 68 contemplates.\(^{265}\)

Thus, the Court in effect decided, by omission, the issue of the ethical propriety of making a lump sum offer, inclusive of fees and costs. In fact, the Court stated that a valid Rule 68 offer could be made either by a lump sum offer including fees or by an offer specifically setting forth an amount for fees.\(^{266}\) By approving both forms of offers, the Court implicitly approved the ethics of each type of offer.

---

different footing from other civil claims insofar as settlement is concerned.
Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court.

*Id.*


260. *Id.* at 436.

261. *Marek v. Chesny*, 105 S. Ct. at 3018. In *Marek*, the Court stated: "In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the post-offer services of his attorney." *Id.*

262. *Id.*

263. *Id.*

264. *Id.* The Court further noted that "even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation." *Id.*

265. *Id.*

266. *Id.* at 3016.

The problem of the "conditional offer," now before the Supreme Court in *Jeff D.*, in which the plaintiff's counsel is asked to waive fees in exchange for relief on the merits, is unlikely to arise under Rule 68 because of the Rule's particular technical requirement that a valid offer include "costs." Defendants could, of
While the *Marek* opinion, in one sense merely holds that defendants can make Rule 68 offers either consisting of lump sums inclusive of fees and costs or providing specific sums for costs and liability, its reasoning inherently rejects the position taken in *Prandini*\(^\text{267}\) that prejudgment negotiation is improper. Certainly, if the defendant can make either a settlement offer of either a lump sum inclusive of fees or of a specific sum for fees, plaintiffs’ counsel should be able to make a counter-offer. This is surely preferable to the two parties stumbling blindly into a settlement through a series of offers.

Upon examination of the majority opinion, it is apparent that the *Marek* Court’s major concern was its pragmatic interest in effectuating settlements. This is reflected in the Court’s delineation of what constitutes an effective offer. It is also reflected in the Court’s pragmatic decision to make Rule 68 presumptively applicable to all cases involving fees which are awarded “as part of the costs” and in the Court’s *sub-silentio* rejection of an absolute prohibition on prejudgment fee negotiation.

**D. The *Marek* Dissent**

If a pragmatic concern for effectuating settlement was the motivating factor for the majority, the dissent’s\(^\text{268}\) primary concern was

course, attempt to bypass this requirement by including a nominal sum for costs in the offer. However, the practicalities of Rule 68 could come into play to render such an offer of dubious value. First, a court might term an offer of a purely nominal sum which bears no relation to a reasonable fee as one which “implicitly” seeks to exclude costs and is therefore invalid. Furthermore, if fees must be included in the judgment obtained by the offeree for comparison with the offer, a prevailing party would recover, as part of his judgment, fees for at least those hours expended prior to the offer. The plaintiff’s judgment would then contain both non-monetary relief and a monetary sum for costs and fees. If a plaintiff were to make a Rule 68 offer which included only a nominal sum for fees, the costs and fees portion of the judgment would considerably exceed the amount of that portion of the offer. This alone might be grounds for a finding that the judgment exceeds the offer. The offer would therefore prove ineffective in practice although valid in form.

These considerations should cause defendants, in cases where the plaintiffs seek only non-monetary relief but would be entitled to a fee award if successful, to be sure either to include in the offer a sum which reasonably approximates the amount of plaintiff’s fees and costs accrued as of the date of the offer, or to make an open-ended offer of relief “plus costs and fees.” Neither type of offer will present to plaintiff’s counsel the ethical dilemma of asking him to waive his fees altogether, but will comply with Rule 68.


268. Justice Brennan wrote the dissenting opinion, in which he was joined by Justices Marshall and Blackmun. *Marek*, 105 S. Ct. at 3019.

One of the more remarkable aspects of the majority opinion in *Marek* is how
the possibility that variations in the cost provisions of the over one hundred attorney's fees statutes could result in the inconsistent application of Rule 68. Other objections were that the majority's holding was "inconsistent with the history and structure" of Federal Rules, that it would "undermine" the purposes behind the Fees Act, that it would violate the limitations on the Court's rule-making power contained in the Rules Enabling Act and that it was contradicted by recent attempts by Congress to change Rule 68.

Close it came to becoming the minority opinion. Three of the six justices joining in the majority opinion reversed positions they had taken in prior concurring or dissenting opinions.

Justice Powell had concurred only in result in *Delta Air Lines* because he felt that a valid Rule 68 offer could be made only if the offer provided for separate sums for liability and costs. 450 U.S. at 365-67 (Powell, J., concurring). Powell joined in the majority opinion in *Marek* but stated that he still thought it the "better practice" to "identify the components" expressly in the offer of judgment. 105 S. Ct. at 3019.

In Justice Rehnquist's dissent in *Delta Air Lines* in which Chief Justice Burger joined, he argued that costs in Rule 68 did not include attorney's fees. 450 U.S. at 377-79 (Rehnquist, J., dissenting). In his concurrence in *Marek*, Justice Rehnquist explained this change of position by stating that "[f]urther examination of the question . . . convinced [him] that this view was wrong." 105 S. Ct. at 3019.

The Justices in the minority were not totally consistent either. Justice Blackmun joined in the dissent in *Marek*, 105 S. Ct. at 3021-22, which relied in part upon a section of the opinion in *Roadway Express*, 447 U.S. at 768-69, from which he had dissented.

269. 105 S. Ct. at 3019.
270. *Id.* at 3020; see *supra* note 154 and accompanying text.
271. Justice Brennan stated:

[Both Congress and the Judicial Conference of the United States have been engaged for years in considering possible amendments to Rule 68 that would bring attorney's fees within the operation of the Rule. That process strongly suggests that Rule 68 has not previously been viewed as governing fee awards, and it illustrates the wisdom of deferring to other avenues of amending Rule 68 rather than ourselves engaging in "standardless judicial lawmaking.]"

*Id.* (citation omitted). However, bills have recently been proposed in Congress which would drastically cut back on fee recoveries. In 1984, the Reagan Administration proposed a "Legal Fees Equity Act," which was introduced in both the Senate, S. 2802, 98th Cong., 2d Sess., 130 CONG. REC. S8466 (daily ed. June 27, 1984), and the House, H.R. 5757, 98th Cong., 2d Sess., 130 CONG. REC. H5109 (daily ed. May 31, 1984). These bills have the support of the National Association of Attorney's General whose report, *Civil Rights Attorney's Fees Awards Act of 1976*, was introduced into the Congressional Record. *National Association of Attorneys General, Civil Rights Attorney's Fees Awards Act of 1976*, 98th Cong., 2d Sess., 130 CONG. REC. S8844-53 (daily ed. June 29, 1984). This 1984 legislation would, among other things, restrict eligibility for fees to those who had obtained "significant relief," prohibit multiples or bonuses, permit a 25% reduction in the fee where there was an award of damages, and limit the hourly rates for
1. Criticism of the "Plain Meaning" Analysis

A large portion of the lengthy dissent was devoted to disputing the majority's "plain meaning" conclusion which equated "costs" for purposes of Rule 68 with "costs" for purposes of the Fees Act. While conceding that such an interpretation was, as Judge Posner stated, "in a sense logical," Justice Brennan wrote that the Court's conclusion in Marek contradicted the conclusion it had reached on a similar issue in Roadway Express, Inc. v. Piper. The Court held in Roadway Express that a party could not recover attorney's fees against an attorney who vexatiously extended the litigation, even where the underlying statute provided for an award of fees as part of the costs. The Court feared the creation of a "two-tier system of attorney sanctions" wherein attorneys who behaved improperly in cases where fees could have been awarded as costs could have fees assessed against them, but attorneys who behaved in this fashion in cases where "costs" were limited to their traditional meaning could suffer a considerably less severe sanction. The dissent in Marek argued that the inconsistent result which the Court had rejected in Roadway Express would take place under the Court's reading of Rule 68 in Marek since the various fee statutes had slightly different language, and, therefore, would render different results.

272. 105 S. Ct. at 3020-27.
273. Id. at 3020.
274. Id. at 3021.
275. 447 U.S. at 759-61. In Marek, Justice Brennan stated:
[While the starting point in interpreting statutes and rules is always the plain words themselves, "[t]he particular inquiry is not what is the abstract force of the words or what they may comprehend, but in what sense were they intended to be understood or what understanding they convey when used in the particular act."]
105 S. Ct. at 3020-21 (footnote omitted).
276. Marek v. Chesny, 105 S. Ct. at 3021 (citing Roadway Express, Inc. v. Piper, 447 U.S. at 762-63). The Court, in Roadway Express, stated "[t]here is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct. A court's processes may be as abused in a commercial case as in a civil rights action." 447 U.S. at 763.
277. Marek v. Chesny, 105 S.Ct. at 3021-22. "The parties' arguments in this case and in Roadway are virtually interchangeable, and our analysis is not much advanced simply by the conclusory statement that the cases are different." Id. at 3022. However, the majority found so little difficulty with Roadway Express that it disposed of the case in a footnote stating:
Respondents suggest that Roadway Express, Inc. v. Piper, requires a different result. Roadway Express, however, is not relevant to our decision
2. Costs Under Rule 68

In addition, the dissent challenged the majority's conclusion that costs under Rule 68 included attorney's fees for purposes of the Fees Act. Justice Brennan reiterated the argument raised by the First Circuit in White v. New Hampshire Department of Employment Security, that since Rule 54(d) provides for costs to be automatically taxed by the clerk upon one day's notice, and since attorney's fees can be fixed only by the court and not by the clerk, attorney's fees are therefore not costs. Thus, the dissenters in Marek concluded that Rule 68 cannot include attorney's fees. This argument, however, was rejected by the Court, at least implicitly, through its reversal of White.

The dissent noted that where the Federal Rules "intended to encompass attorneys fees" they did so "explicitly," pointing to eleven different provisions of the Federal Rules where sanctions specifically included fees. However, the sections to which Justice today. In Roadway, attorney's fees were sought as part of costs under 28 U.S.C. § 1927, which allows the imposition of costs as a penalty on attorneys for vexatiously multiplying litigation. We held in Roadway Express that § 1927 came with its own statutory definition of costs, and that this definition did not include attorney's fees. The critical distinction here is that Rule 68 does not come with a definition of costs; rather, it incorporates the definition of costs that otherwise applies to the case.

Id. at 3017 n.2. (citation omitted).

278. White v. New Hampshire Dep't of Employment Sec., 629 F.2d 697, 699 (1st Cir. 1980) (attorney's fees, as opposed to costs, must be resolved either before entry of final judgment, or after entry of final judgment within such time limits as apply to appropriate motion to alter or amend judgment under Rule 59(e)), rev'd on other grounds, 455 U.S. 445 (1982).

279. Marek v. Chesny, 105 S. Ct. at 3022. The First Circuit in White also stated that while fees, "like routine costs, are ... somewhat ancillary to the main dispute, they are fully capable of engendering a major controverted claim ... . The considerations making it feasible to treat routine costs as an exception to final judgment rules—the ease of their computation and the fact that they almost never give rise to dispute or appeal—plainly do not apply to Section 1988 attorney's fees." White, 629 F.2d at 703.

282. FED. R. CIV. P. 11 (signing of pleadings, motions, or other papers in violation of the Rule), 16(f) (noncompliance with rules respecting pretrial conferences), 26(g) (certification of discovery requests, responses, or objections made in violation of Rule), 30(g)(1) (failure of party giving notice of a deposition to attend), 30(g)(2) (failure of party giving notice of a deposition to serve subpoena on witness), 37(a)(4) (conduct necessitating motion to compel discovery), 37(b) (failure to obey discovery orders), 37(c) (expenses on failure to admit), 37(d) (failure of party to attend at own deposition, serve answers to interrogatories, or respond
Brennan refers are part of an entirely different scheme and typically do not provide for awards of "costs," but sanctions in the form of "reasonable expenses," including attorney's fees, incurred by the parties' misconduct. The drafters of those Rules clearly intended to provide flexibility for the Court's fixing of sanctions so as to include attorney's fees and other types of "expenses" not covered under the ordinary meaning of "costs."

The dissent next argues that the majority's reading of Rule 68's usage of the word "costs" is not only unsupported by past understanding of that phrase, but, if read in accordance with a "plain language" approach to include attorney's fees recoverable under the Fees Act, would logically suggest that the prevailing plaintiff in a civil rights case who fails to get a court judgment exceeding an offer, not only will be precluded from collecting his own fees, but will be required to shoulder the post-offer fees of the defendant—a conclusion squarely at odds with the legislative intent of the Fees Act and the prevailing case law.

There is, however, a solution to this problem which would allow Rule 68 to cut off fees without forcing the plaintiff to pay the defendant's post-offer attorney's fees. A Rule 68 offer that is not exceeded by a court judgment has the effect of mandatorily shifting

---

283. For example, Rule 11 directs the court to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." FED. R. CIV. P. 11.

284. The dissent argues that there is relatively little precedent for such a reading because neither the courts nor the attorneys have consistently read it that way. Rule 68 has been in effect for nearly half a century, and since there has not been a practice among the defense bar of seeking to shift or reduce fees by use of Rule 68, the trial lawyers have interpreted Rule 68 as referring only to ordinary cost items recoverable under 28 U.S.C. § 1920. Marek, 105 S. Ct. at 3022. However, a number of cases not cited by Justice Brennan reached the opposite conclusion. See Bitsouni v. Sheraton-Hartford Corp., 33 Fair Empl. Prac. Cas. (BNA) 898, 902 (Conn. 1983); Lyons v. Cunningham, 583 F. Supp. 1147, 1159 (S.D.N.Y. 1983); cf. Neal v. Berman, 576 F. Supp. 1250, 1252 (E.D. Mich. 1983) (suggesting in dicta that had defendants made a written offer, court might have denied fees for post-offer work); Spero v. Abbot Laboratories, Inc., 396 F. Supp. 321, 323 (N.D. Ill. 1975) (court reduced fee award when recovery was less than the defendant's settlement offer).


286. Id. at 3024. Under the Fees Act, a prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant. See supra note 2; see also S. REP. No. 1011, 94th Cong., 2d Sess. 1, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5.
the defendant's costs to the plaintiff. Fees, however, are a portion of the costs award which, by statute and case law, are awardable at the discretion of the court. Thus, before a court could award fees to a defendant following a Rule 68 offer which does not exceed a court judgment, the court would be required to find that the plaintiff's action was "unfounded, meritless, frivolous or vexatiously brought." Since Rule 68 comes into play only when there is a plaintiff's verdict for less than the amount of the offer, the fee component of the defendant's costs could be shifted to the plaintiff only under the unlikely circumstance where the action was "unreasonable, frivolous, meritless or brought for a vexatious purpose." However, it is rare that a plaintiff is awarded a judgment on an unreasonable, frivolous or vexatious claim.

3. Inconsistent Application

The dissent's final argument about "costs" under Rule 68 is, perhaps, its strongest. Attached to the opinion is an appendix listing

287. FED. R. CIV. P. 68.
288. Section 1988 provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982) (emphasis added).
290. Delta Air Lines, Inc. v. August, 450 U.S. 346, 351-52 (1981). In Delta, the Court held that Rule 68 does not apply where judgment is entered against the plaintiff offeree and in favor of the defendant offeror. Id.
291. The Court in Bitsouni v. Sheraton-Hartford Corp., 33 Fair Empl. Prac. Cas. (BNA) at 898, discussed at length the policy considerations involved in shifting to a prevailing plaintiff the defendant's attorney's fees accrued after an unbeaten offer and rejected that conclusion although finding that Rule 68 did preclude the plaintiff from recovering his post-offer fees from the defendant. In Association for Retarded Citizens of North Dakota v. Olson, 561 F. Supp. at 495, and Garrity v. Sununu, 752 F.2d at 730-33, the losing defendants were denied fees they requested under Rule 68. In each case, the court's ruling was dicta because it was determined that the offers did not exceed the judgment obtained. However, in Quintel Corp., N.V. v. Citibank, N.A., 606 F. Supp. at 898, the court declined to shift fees as well as costs.

Commentators have tended not to agree with these policy arguments. Compare A Fundamental Incompatibility, supra note 58, at 976-77 (reading discretion into the rule invites uncertainty and waste of litigant's time and money); A "New Tool," supra note 109, at 900 (intent and specific language of Rule 68 require that fees not be awarded to plaintiff); A Reconciliation, supra note 110, at 504-06 (policy arguments are inconsistent with purposes of Rule 68); with Branham, supra note 110, at 357-60 (stating that declining to shift the defendant's attorney's fees to the plaintiff, while "perhaps understandable on policy grounds, is a disconcerting example of judicial improvisation"); Impact of Proposed Rule 68, supra note 17, at 724 (civil rights actions should be exempt from proposed Rule 68).
over one hundred attorney's fees statutes in which Congress had provided for the award of fees in some way. The Federal Rules, it was stated, should be interpreted to provide for "uniform and consistent application in all proceedings" in federal court.\textsuperscript{293} The variations in language in these statutes might result in Rule 68 not cutting off fees in statutes where Congress has provided for "costs and reasonable attorney's fee," but cutting off fees in statutes where fees are awarded "as part of the costs." This, Justice Brennan argued, will result in a "senseless patchwork" of fee shifting which will result in plaintiffs being barred from recovering fees under some statutes but not others, even though the same plaintiff might bring his action under both statutes.\textsuperscript{294}

While this argument has considerable merit, it represents an argument for legislative change rather than for reading those statutes where Congress made fees recoverable "as part of the costs" as meaning something other than what they say. Faced with the option of disregarding the language of dozens of statutes in order to obtain consistency, the majority cannot be faulted for choosing to follow the statutory language. It also seems unrealistic to expect strict uniformity in perhaps a hundred statutes drafted over a period of more than half a century.

4. \textit{The Purpose of Civil Rights Statutes}

In addition to the attack on the majority's reading of the technical issue as to whether the term "costs" includes attorney's fees, the dissent took exception to the Court's policy pronouncement that reading Rule 68 to cut off fees was not contrary to the purpose behind the civil rights statutes.\textsuperscript{295} Congress, Justice Brennan wrote, intended for attorney's fee entitlements under the Fees Act to be determined by a "reasonableness standard," with the district court having discretion to determine whether to award a fee and, if awarded, the size of the fee. The mandatory nature of Rule 68's application, however, results in the Rule becoming insensitive to the

\textsuperscript{293} Id. at 3024.

\textsuperscript{294} Id. This distinction may, however, be more theoretical than real. If a plaintiff were to prevail on both statutes, he would probably end up recovering most of his post-offer fees, since it is likely that much of the work done on the statute that was affected by Rule 68 would have been necessary as well for the plaintiff's success on the statute that was not affected by Rule 68.

\textsuperscript{295} Id. at 3027.
merits of an action and to the policies behind it,\textsuperscript{296} and thereby contravening the purpose of attorney's fee entitlements.\textsuperscript{297}

The dissent also disagreed with the majority's conclusion that Rule 68 is "neutral, favoring neither plaintiffs nor defendants."\textsuperscript{298} It feared that the Court's application of the Rule would encourage defendants to make "low-ball" offers immediately after the suit is filed and before the plaintiff has had the opportunity to conduct adequate discovery.\textsuperscript{299} These fears are misplaced. As the majority opinion noted, the plaintiff knows, or should be able to reasonably assess, the amount of his damages caused by the challenged conduct and he can reasonably ascertain the costs that have accrued to that point.\textsuperscript{300} Only in rare instances, if ever, will a plaintiff need extensive discovery to determine whether the offer reasonably reflects his damages and, in those circumstances, the plaintiff can avail himself of those provisions of the Federal Rules which allow for accelerated discovery.

E. The Impact of \textit{Marek}

In comparing the dissenting opinion with the majority opinion, it seems clear that the majority has the better argument. While the support the Court found in Rule 54(d) for its interpretation of Rule 68 is far from overwhelming, the dissent was unable to produce any convincing history of either the Rules or the Fees Act which would suggest a contrary result. The fact remains that in the Fees Act, as well as in other statutes, Congress included fees "as part of the costs," although it did not always express its reasons for doing so. The chosen language of Congress should not be dismissed without overwhelming contrary policy considerations. The policy argument raised by both the majority and the dissent can certainly cut both ways.

In assessing the importance of \textit{Marek} to federal litigation, it is

\textsuperscript{296} Id.

\textsuperscript{297} Id. at 3027-28.

\textsuperscript{298} Id. at 3028-29.

\textsuperscript{299} Id. at 3029.

\textsuperscript{300} Id. at 3016. Justice Brennan also seemed to suggest that a reasonableness test be applied to Rule 68 whereby the district court might conduct an appropriate inquiry to determine whether a plaintiff had unreasonably rejected the offer. If the district court found that the offer had been unreasonably rejected, it might order that all or some of the plaintiff's post-offer fees not be reimbursed. Id. at 3027. However, Justice Brennan acknowledged that this was not the present law. Id.
difficult to overestimate the importance of the Court's ruling that Rule 68 could cut off fees not only under the Fees Act, but also under the dozens of federal statutes awarding fees which use identical or similar language. One commentator has estimated that at least one-third of all federal litigation involves statutes with similar language providing for fee awards.\textsuperscript{301}

After Marek, any defense counsel involved in federal civil litigation presumably covered by Rule 68 would be foolish \textit{not} to make a Rule 68 offer. A defendant who has an interest in settling has nothing to lose by making such an offer. If the offer is accepted, the case is disposed of on satisfactory terms. If it is initially rejected, the Rule's penalty provision provides some leverage to the defendant in further settlement negotiations.\textsuperscript{302} If the offer is ultimately exceeded at trial or the plaintiff loses altogether, the defendant is not damaged by having made the offer. Finally, if the plaintiff wins a recovery which is less than the offer, Rule 68 would diminish the plaintiff's recovery.\textsuperscript{303}

The likelihood of the dire consequences for the civil rights laws predicted in amicus briefs\textsuperscript{304} to the Court and in the public prints\textsuperscript{305}
is exaggerated. A competent attorney, in considering whether to commence a civil rights suit, is unlikely to be deterred by the somewhat improbable chance that his adversary might make an offer which would be unacceptable to counsel and his client early enough in the litigation to deny counsel a reasonable, if reduced, fee but nevertheless would be greater than the ultimate recovery. If anything, such an attorney might be encouraged to file suit in the expectation that the significant benefits to the defendant from making an offer will lead to an early Rule 68 offer.

VI. Proposed Revisions of Rule 68

Rule 68 had no sooner returned to life than the Advisory Committee on the Federal Rules of Civil Procedure began to propose revisions of the Rule. Two proposals to revise Rule 68, both of which were flawed, were put forth in 1983 and in 1984.

A. The 1983 Proposed Revision

The 1983 Proposed Revision would have made a large number of changes, both major and minor, in the operation of Rule 68. The time during which the offer remained open would have been extended from ten days to thirty days. In addition, the terminology of the Association of the Bar of the City of New York, reported in N.Y.L.J., Dec. 5, 1984 at 1, col. 3 (if the Supreme Court were to find that Rule 68 did cut off attorney's fees, the "consequences" would be not just "significant" but "potentially devastating" and would be a "terrible body blow to the civil rights bar and to civil rights litigation in general").

306. The 1983 Proposed Revision, supra note 17, at 361-63, provides:

At any time more than 30 days before the trial begins, any party may serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the money or property or to the effect specified in his offer, and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 30 days unless a court authorizes earlier withdrawal. An offer not accepted in writing within 30 days shall be deemed withdrawn. Evidence of an offer is not admissible except in a proceeding to enforce a settlement or to determine costs and expenses.

If the judgment finally entered is not more favorable to the offeree than an unaccepted offer that remained open 30 days, the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest from the date of the offer on any amount of money that a claimant offered to accept to the extent such interest is not otherwise included in the judgment. The amount of the expenses and interest may be reduced to the extent expressly found by the court, with a statement of reasons, to be excessive or unjustified under all of the circumstances. In determining whether a final judgment is more or less favorable to the offeree than the offer, the costs and expenses of the parties shall be excluded from consideration.
would have changed from “offer of judgment” to “offer of settlement.” The proposal also included a revision to allow either side to make an offer.

However, the major change proposed by the 1983 Revision was that if the judgment should exceed the offer, the offeree would “pay the costs and expenses, including reasonable attorneys’ fees, incurred by the offeror after the making of the offer...” The Court would be allowed, however, to reduce these “expenses” where they were “excessive or unjustified under all the circumstances” or to deny costs, expenses, and interest where the offer was made in bad faith.

Thus, under the terms of the 1983 Proposed Rule, an offeree, including a defendant, who did not obtain a judgment exceeding the proposed offer would find himself required to shoulder both the offeror’s “costs” and fees, unless he could demonstrate to the court the injustice of such a burden. This rule would apply even if the statute under which the action was brought did not provide for fee shifting. The Proposed Revision of Rule 68 thus would reverse the “American Rule” in cases where the offeree actually won the suit. This would mean that in many instances the prevailing party could end up owing money to the loser. This aspect of the 1983 Proposed Revision set off a storm of protest from the organized bar. It was subsequently withdrawn.

Costs, expenses, and interest shall not be awarded to an offeror found by the court to have made an offer in bad faith.

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, any party may make an offer of settlement under this rule, which shall be effective for such period of time, not more than 30 days, as is authorized by the court. This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.

307. Id.
308. The ten day period was thought to be too short by the Advisory Committee. 98 F.R.D. 337, advisory committee note at 364.
309. Id. at 361-63.
310. Id.
311. Id.
312. Id.
313. See supra notes 111, 112 and accompanying text.
B. The 1984 Proposed Revision

A new revision was proposed in 1984.\textsuperscript{315} While the 1983 Proposed Revision went too far in the direction of strengthening Rule 68, the 1984 version went too far toward fatally weakening it.

\textsuperscript{315} The 1984 Proposed Revision, supra note 17, at 432, reads as follows:

\begin{quote}
At any time more than 60 days after the service of the summons and complaint on a party but not less than 90 days (or 75 days if it is a counter-offer) before trial, either party may serve upon the other party but shall not file with the court a written offer, denominated as a [sic] offer under this rule, to settle a claim for the money, property, or relief specified in the offer and to enter into a stipulation dismissing the claim or to allow judgment to be entered accordingly. The offer shall remain open for 60 days unless sooner withdrawn by a writing served on the offeree prior to acceptance by the offeree. An offer that remains open may be accepted or rejected in writing by the offeree. An offer that is neither withdrawn nor accepted within 60 days shall be deemed rejected. The fact that an offer is made but not accepted does not preclude a subsequent offer. Evidence of an offer is not admissible except in proceedings to enforce a settlement or to determine sanctions under this rule.

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

In determining the amount of any sanction to be imposed under this rule the court also shall take into account (1) the extent of the delay, (2) the amount of the parties' costs and expenses, including any reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection, (3) the interest that could have been earned at prevailing rates on the amount that a claimant offered to accept to the extent that the interest is not otherwise included in the judgment, and (4) the burden of the sanction on the offeree.

This rule shall not apply to class or derivative actions under Rules 23, 23.1, and 23.2.
\end{quote}

The 1984 Proposed Revision extends the time that the offer will remain open to sixty days.\textsuperscript{316} It also provides that the offer cannot be made (1) until sixty days after service of the summons and complaint and (2) prior to ninety days before trial.\textsuperscript{317} The expressed

A number of organizations opposed the revision, including: the Association of the Bar of the City of New York, \textit{Washington Hearing, supra}, at 26-32 (Testimony of Sheldon Elsen and Michael W. Schwartz); the National Association of Railroad Trial Counsel, \textit{Washington Hearing, supra} at 32-43 (Testimony of Stephen A. Trimble); The Federal Courts Committee of the New York State Bar Association, \textit{Washington Hearing, supra}, at 55-61 (Testimony of Bernard A. Friedman); the Alliance for Justice, \textit{Washington Hearing, supra}, at 102-22 (Testimony of Laura Macklin); the National Association for the Advancement of Colored People—Legal Defense Fund, \textit{Washington Hearing, supra}, at 122-37 (Testimony of Barry Goldstein); the American Civil Liberties Union, \textit{Washington Hearing, supra}, at 138-49 (Testimony of E. Richard Larson); \textit{San Francisco Hearing, supra}, at 90-94 (Testimony of Fred Okrand); the Federal Courts Committee of the California State Bar Association, \textit{San Francisco Hearing, supra}, at 3-12, 16-21 (Testimony of Gilbert Ross Sorota and James Wagstaffe); the Committee on Civil Procedure of the Arizona State Bar, \textit{San Francisco Hearing, supra}, at 27-39 (Testimony of John P. Frank); the San Francisco Women Lawyers Alliance, \textit{San Francisco Hearing, supra}, at 46-57 (Testimony of Elizabeth D. Laporte); and the Mexican American Legal Defense and Education Fund, \textit{San Francisco Hearing, supra}, at 76-90 (Testimony of Morris Baller). The only organization to appear to support the 1984 Proposed Revision was the International Association of Insurance Counsel, \textit{San Francisco Hearing, supra}, at 137-53 (Testimony of Perry L. Fuller).

A number of speakers felt that the 1984 Proposed Revision created problems under the Rules Enabling Act. See \textit{Washington Hearing, supra}, at 25-29 (Testimony of Michael L. Schwartz); \textit{Washington Hearing, supra}, at 32-41 (Testimony of Stephen A. Trimble); \textit{Washington Hearing, supra}, at 140-45 (Testimony of E. Richard Larson). Speakers also expressed concern that the courts would have considerable difficulty in determining whether the offeree had "reasonably" rejected the offer, which might result in satellite litigation. See \textit{Washington Hearing, supra}, at 6-32 (Testimony of Sheldon Elsen); \textit{Washington Hearing, supra}, at 123-37 (Testimony of Barry Goldstein); \textit{Washington Hearing, supra}, at 118-22 (Testimony of Laura Macklin); \textit{San Francisco Hearing, supra}, at 16-21 (Testimony of James Wagstaffe); \textit{San Francisco Hearing, supra}, at 32-34 (Testimony of John P. Frank); \textit{San Francisco Hearing, supra}, at 55-57 (Testimony of Elizabeth D. Laporte); \textit{San Francisco Hearing, supra}, at 101-02 (Testimony of Fred Okrand); \textit{San Francisco Hearing, supra}, at 114-21, 131-33 (Testimony of Judith Resnick).

The 1984 Proposed Revision was further criticized as giving too much power to defendants which could be used to coerce plaintiffs into agreeing to unfavorable settlements. \textit{Washington Hearing, supra}, at 106-18 (Testimony of Laura Macklin); \textit{Washington Hearing, supra}, at 140-42 (Testimony of E. Richard Larson); \textit{San Francisco Hearing, supra}, at 94-99 (Testimony of Morris Baller). The ethical problems were also raised. See \textit{Washington Hearing, supra}, at 145-48 (Testimony of E. Richard Larson); \textit{San Francisco Hearing, supra}, at 94-99 (Testimony of Fred Okrand), as well as concern about the effect of the Proposed Rule on civil rights litigation in general. See \textit{San Francisco Hearing, supra}, at 46-51 (Testimony of Elizabeth D. Laporte); \textit{San Francisco Hearing, supra}, at 77-79 (Testimony of Morris Baller).

\textsuperscript{316} For the text of the 1984 Proposed Rule, see \textit{supra} note 315.

\textsuperscript{317} \textit{Id.} The 1984 Proposed Rule and the commentary do not explain whether "trial" means the date for which the trial is "set," the date when proof actually begins to be offered, or some other point in time. See \textit{supra} note 17, at 746.
purpose for leaving the offer open for such an extended period of time is to allow the offeree time to evaluate the offer and to conduct any necessary discovery.\footnote{318} The effect of these changes, however, would be to reduce the utility of Rule 68. A defendant who makes a serious Rule 68 offer usually does so based upon an assessment of the risks of a bad result and the costs in fees and inconvenience of continuing the litigation to an uncertain result. The offeree is likely to try to compress as much discovery into the sixty days as possible. If the offeree does this, the offeror will have to bear the expense and inconvenience of the discovery, even though the offer was made with the intent of avoiding such expense.

\section*{VII. Drawbacks of the Proposed Revisions}

Both proposed revisions allow plaintiffs, as well as defendants, to make offers,\footnote{319} and provide for an extended discovery period during which the offer remains open. However, plaintiffs and defendants have radically different needs for information to assess such offers. In most cases, a plaintiff confronted with an offer will have the information readily at hand to assess what his damages may be. However, a defendant confronted with an offer from a plaintiff needs to assess whether the plaintiff can establish liability at all, as well as what is a reasonable estimate of the plaintiff's damages, before he knows whether to settle for the amount of the offer. Thus the lengthened periods provided in the proposed revisions may be more time than most plaintiffs need to assess the offer and less than most defendants need.

As with Rule 68 as it now exists and the 1983 Proposal, the 1984 Proposal contemplates offers of non-monetary relief.\footnote{320} It, too, fails to provide guidelines as to how such offers are to be compared with the relief ultimately obtained.

The main problem with the 1984 Proposed Revision is that it provides for so much discretion that it makes Rule 68 not only useless, but dangerous as well. The 1984 Proposed Revision is discretionary as to when the Rule is triggered, whether a sanction will be imposed and what, if anything, that sanction will be.\footnote{321} If the

\footnote{318. The 1984 Proposed Revision, \textit{supra} note 17, advisory committee note at 432.}
\footnote{319. \textit{Id.} at 432; \textit{supra} note 306.}
\footnote{320. The 1984 Proposed Revision, \textit{supra} note 17, advisory committee note at 432.}
\footnote{321. \textit{Id.} at 433; \textit{see supra} note 315.}
present Rule 68, which is relatively clear on these points, is underutilized, the uncertainty as to the benefits to be gained under the 1984 Proposed Revision is likely to result in the Rule not being used at all.

Initially, it is unclear just what it takes to trigger the 1984 Revision. This Proposed Revision provides that:

If, upon a motion by the offeror within 10 days after the entry of judgment, the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree.\(^1\)

If, for example, the offeree rejects a $50,000 offer at the beginning of the litigation and recovers only $55,000 after years of expensive litigation, the offeree has arguably rejected the offer unreasonably, because the expenses of litigation probably resulted in a net recovery of less than $50,000 in terms of the dollar values in existence at the beginning of the suit. Conversely, an offeree who recovers slightly less than the offer arguably has not rejected it unreasonably if all the discovery had already been completed when the offer was made.

The 1984 Proposed Revision expressly requires the court to consider at least six separate criteria in determining whether the Rule should come into play, as well as "all of the relevant circumstances at the time of the rejection," an unclear direction at best. The six criteria are:

1. the then apparent merit or lack of merit in the claim that was the subject of the offer,
2. the closeness of the questions of fact and law at issue,
3. whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer,
4. whether the suit was in the nature of a "test case," presenting questions of far-reaching importance affecting non-parties,
5. the relief that might reasonably have been expected if the claimant should prevail, and
6. the amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.\(^2\)

Indeed, counsel only need look for the largest judgment achieved in the country in a case of his type and then state that he believed

\(^{322}\) The 1984 Proposed Revision, *supra* note 17, advisory committee note at 433.
\(^{323}\) *Id.*
\(^{324}\) *Id.*
his case was worth at least that much in order to evade the rule. The 1984 revision contains risks for the offeree as well. To properly determine whether the offer was rejected unreasonably the court would probably need to conduct a collateral litigation and inquire into exactly what the offeree and his counsel reasonably thought at the time of the rejection. This is likely to require discovery of otherwise privileged documents and confidences, depositions of both client and counsel and, possibly, a full blown hearing.

Assuming that the offeror is successful in fighting his way through all these barriers and persuading the court that the rejection was "unreasonable," there is no certainty that the reward would be worth the effort. Just as there is discretion in determining whether the Rule applies, there is discretion in determining what "sanction" will be imposed. While the sanction might include an award to the offeror of his fees accruing after the offer, it apparently would not have the Marek effect of cutting off the offeree's fees where they are recoverable by statute. Nevertheless, it might shift the offeror's fees to the offeree or result merely in a "slap on the wrist" of the offeree. The effect of all this discretion would likely be to emasculate Rule 68 because it fails to provide any certainty in the use of the Rule.

Rather than extensively revising Rule 68 just when it is becoming known to the Bar and when its sanctions are becoming significant, it would be wiser to make some minor technical changes in the Rule to alleviate potential problems and then to evaluate the Rule's operation over the next few years. One necessary change would be to provide some specific means of applying the Rule to class actions rather than providing that the Rules would not apply to class actions, as did both the 1983 and 1984 Proposed Revisions.

325. The commentary states:
Nothing in the rule affects the court's statutory authority to award attorneys' fees to a prevailing party in certain types of cases . . . . Rule 68 implements an entirely different policy—encouraging settlements at the earliest possible time—by imposing a sanction on conduct that is found to be unreasonable and that results in unnecessary delay or needless increase in litigation costs.

Id. at 436.

326. It appears unlikely that the 1984 Proposed Revision will be enacted in the near future. The 1984 Proposed Revision is not scheduled to go before the Advisory Committee until April, 1986. Should the Advisory Committee refer it to the Statutory Committee, it is unlikely that it could do so within 1986 due to the time constraints involved. Telephone interview with Professor Maurice Rosenberg, Columbia University School of Law, Member of the Advisory Committee on Civil Rules (January 21, 1986).

327. In Gay v. Waiters & Dairy Lunchmen's Union Local No. 30, 86 F.R.D.
While it is probably fair to extend the ten day period for consideration of the offer, the proposed periods may be too long. A better procedure would be to lengthen the period of the offer to twenty days and allow a party to apply to the court for an extension. The party would have to show why more time is necessary to evaluate the offer and what specific discovery is needed to evaluate it. The opposing party would then have to demonstrate a prejudicial effect from such an extension. A useful revision would also provide the courts with guidance in comparing non-monetary offers with non-monetary recovery and to clarify other minor technical matters such as the last date on which such an offer can be made. These types of changes would leave the present rule fundamentally intact.

VIII. Conclusion

The proliferation of statutes awarding legal fees and the escalation of the amount of the fee awards represent a significant departure from the "American Rule." The ready invocation of Rule 68 is

500 (N.D. Cal. 1980), the court ruled that Rule 68 could not properly be applied to class actions. The court noted that, due to the difficulty of recovering costs from the entire class, the class representative would become liable for the entire amount of costs should the judgment exceed the offer. This would force the class representative to "balance his personal liability for costs against the prospects of sharing with the class in any recovery." Id. at 502-03. In addition, under Rule 23(e) class action settlements must be approved by the court; it would be inherently unfair to impose costs upon the class representative where the court prevented the acceptance of an offer. Id. at 503. The court further noted that the mechanics of notification of class members could not be completed within the ten day period. Id.

The Gay court's objections have been followed by the commentators. See Branham, supra note 110, at 360-62; Offer of Judgment in a Title VII Suit, supra note 100, at 337; A Fundamental Incompatibility, supra note 58, at 995-96.

Despite the case's conclusion that Rule 68 does not apply to class actions, three courts have assessed offers made in complicated class actions. See supra notes 45-59 and accompanying text. This suggests that something similar to Rule 68 can be useful in these types of cases to provide some incentive to the parties to settle. One solution would be to hold that Rule 68 is not applicable to class actions, but to follow Justice Brennan's suggestion in the dissent to Marek that the plaintiff's "unreasonable" rejection of a Rule 68 offer might provide the basis for reducing the plaintiff's fee award. Marek, 105 S. Ct. at 3032-34 (1985) (Brennan, J., dissenting); see also Branham, supra note 110, at 362. Another solution would be to provide specific mechanisms in the Rule for its operation in class action cases. These would include keeping the offer open until the court has an opportunity to accept or reject the proposed settlement, providing that the sanctions of the Rule do not fall solely on the class representative and providing the court with some discretion in the application of the Rule to class actions. The present Rule is clearly an awkward fit with class action litigation and, as Rule 68 becomes more commonly used, change in this area will become imperative.

328. See supra notes 111-24 and accompanying text.
an appropriate response to this shift. As interpreted by the *Marek* Court, Rule 68 protects defendants from the imposition of fee awards under numerous statutes. The effect will be to encourage defendants to routinely make settlement offers in the form of Rule 68 offers. The possible sanctions under Rule 68 provide the plaintiff with strong incentive to consider seriously the defendant’s settlement offer. In addition, the increased use of the Rule is likely to encourage defendants to make offers they otherwise might not make. This result serves the best interests of the litigants and of a burdened judiciary. After nearly fifty years, Rule 68 is finally beginning to fulfill the role intended for it by the drafters of the Federal Rules of Civil Procedure.

**Addendum**

On April 21, 1986, while this issue was going to press, the Supreme Court ruled, in *Evans v. Jeff D.*, that the Fees Act does not bar either simultaneous negotiation of liability on the merits and fees or a conditional offer in which the defendant asks the plaintiff to waive fees in exchange for a settlement on the merits. The Court also held that it is the party rather than the attorney who has the statutory eligibility for the fee award thereby strongly indicating that in comparing the “judgment finally obtained by the offeree” with the amount of a Rule 68 offer that the fees accrued to the date of the offer must be totalled together with the plaintiff’s recovery on the merits.

---

329. 54 U.S.L.W. 4359 (U.S. Apr. 21, 1986). For a discussion of the propriety of prejudgment fee negotiation, see *supra* notes 198-217 and accompanying text.
334. *See supra* note 44 (comparing offers and judgments).