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A Remedy For Rule 238

*Lawrence M. Lebowitz**

I. Introduction

Is the United States undergoing a "litigation explosion?" Many commentators[1] have recently answered this question in the affirmative, and the statistics appear to support their conclusion. For example, from 1967 to 1976 appellate filings in state courts increased eight times as fast as the population, while state trial court filings increased at double the rate of population growth.[2] A similar growth pattern has occurred in the federal courts, where civil filings in district courts have increased from approximately 35,000 in 1940 to nearly 200,000 in 1984.[3] The work load of the courts of appeals has risen even more dramatically. In the year ending June 30, 1982, 27,946 cases were filed in those courts—an increase of 6% over the record established in 1981, over 46% more than in 1977, and an

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1. *See, e.g.*, Barton, *Behind the Legal Explosion*, 27 Stan. L. Rev. 567 (1975); Glazer, *Towards an Imperial Judiciary?*, 41 Pub. Interest 104, 105 (1975); Manning, *Hyperlexis: Our National Disease*, 71 Nw. U.L. Rev. 767, 767-770 (1977); Silberman, *Will Lawyering Strangle Democratic Capitalism?*, Regulation, March-April 1978, at 15, 19; Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, Atlantic, July, 1979, at 25. Some authors, on the other hand, argue that this country is not experiencing a "litigation explosion". *See, e.g.*, Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. Rev. 4 (1983) ("the view that Americans are unusually litigious is based more on myth than careful analysis of the data."); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 U.C.L.A. L. Rev. 72 (1983).

2. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982).

3. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1981 Annual Report of the Director 56, 94. [hereinafter 1981 Report]; *See generally*, Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. Cal. L. Rev. 65, 89-90 (1981).

astounding jump of almost 488% over the number of appeals filed in 1962.[4] While the number of circuit and district judgeships has also increased, they have not kept pace with the surge in filings, thereby causing a substantial increase in the work load of federal judges.[5] The future presents an even more drastic picture. One commentator has predicted that a federal appellate judiciary consisting of five thousand judges will produce over one thousand volumes of federal reports in the course of disposing of more than one million appeals per year by early in the twenty-first century.[6]

Besides a growing fear that these numbers are getting out of hand, there is also concern about the adverse effects which this "explosion" will have on the administration of justice. In his article entitled "The Rising Work Load and Perceived 'Bureaucracy' of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies," Judge Harry T. Edwards of the United States Court of Appeals for the District of Columbia points out that:

> What most consumers and suppliers (of legal services) presumably share is a desire that legalization and the concomitant burdens that it imposes on the federal courts not diminish those courts' ability to perform three basic functions—protecting individual rights, interpreting and enforcing federal law, and ensuring the vitality of democratic process of government.[7]

According to Judge Edwards, there are two major reasons why this distressing scenario may result. First, burgeoning caseloads may force courts to create judicial procedures designed to speed cases through the system; quantity could replace quality as the trademark of the judiciary as courts are inevitably transformed from "deliberative institutions" to "bureaucratic assembly lines."[8] Moreover, these same pressures could have an adverse effect on the individual

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4. These percentages are derived from 1981 Report, *supra* note 3, at 45; *See generally*, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 124-128 (Fed. Jud. Center 1984).

5. *See* 1981 Report, *supra* note 3, at 45.

6. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975). For a criticism of this bleak scenario, *see* Sander, *Varieties of Dispute Processing*, reprinted in *The Pound Conference: Perspectives on Justice in the Future* 65, 65-66 (A. Levin & R. Wheeler eds. 1979).

7. Edwards, *The Rising Work Load and Perceived Bureaucracy of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 874-75 (1983).

8. *Id.* at 878.

judges by changing their role in the system from a "collegial arbiter and solitary craftsman" to "the judicial equivalent of the managing partner in a small law firm."[9] These changes, which present a radical departure from the traditional judicial model, indicate "a crisis of overload that threatens the integrity of the courts and the quality of justice."[10]

A notable adherent to this pessimistic outlook is Warren E. Burger, former Chief Justice of the United States Supreme Court. In his annual report on the state of the judiciary, given to delegates of the American Bar Association in June of 1982, Chief Justice Burger cited statistics to prove the existence of a "litigation explosion"[11] in our nation, and urged his audience to find alternatives to litigation in an attempt to end this crisis. The former Chief Justice strongly argued that "there must be a better way,"[12] and in so doing echoed sentiments expressed by Abraham Lincoln over a century ago: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time."[13]

Justice Burger concluded his address by warning that a movement away from litigation is not only needed to end the current crisis and alleviate the accompanying fears, but simply must take place if attorneys are to continue performing their traditional role in society:

> The obligation of our profession is, or has been thought to be, to serve as healers of human conflicts. To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants. That is what justice is all about. The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures, or rules can become obsolete. Just as the carpenter's handsaw was replaced with the power saw and his hammer was replaced by the

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9. *Id.*

10. *Id.* at 877. *See, e.g.*, Bork, *Dealing With the Overload in Article III Courts, reprinted in, The Pound Conference: Perspectives on Justice in the Future* 150, 151-52 (A. Levin & R. Wheeler eds. 1979); Clark, *A Commentary on Congestion in the Federal Courts*, 8 ST. MARY'S L.J. 407, 407 (1976); McCree, *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 781-82 (1982).

11. Burger, *supra* note 2, at 275.

12. *Id.*

13. *Id.*

stapler, we should be alert to the need for better tools to serve our purposes.[14]

In September of 1978, the Pennsylvania Civil Procedure Rules Committee responded to these calls for reform by proposing Rule 238 to the Supreme Court of Pennsylvania for its review and promulgation. In its accompanying explanatory comments, the Committee expressed many of the same concerns that have surfaced in recent articles on the "litigation explosion":

> The judicial system has long been vexed by the problem of congestion and delay in the disposition of civil actions for bodily injury, death or property damages pending in the trial court[15]. . . . Statistics show that. . .thirty-eight percent are settled without going to trial. Some are settled through pretrial conciliation techniques, but in too many cases meaningful negotiations commence only after a trial date is fixed or on the courthouse steps or in the courtroom, thus leading to delay in the disposition of cases and congestion in the courts. The present practice provides no incentive for early settlement.[16]

As a result, the Pennsylvania Supreme Court, pursuant to its constitutional authority,[17] promulgated PA. R. CIV. P. 238[18] on

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14. *Id.* at 274.
15. *See supra* notes 3-6 and accompanying text.
16. 8 *Pa. Admin. Bull.* 2668 (1978).
17. The Supreme Court of Pennsylvania is empowered to "prescribe general rules governing practice, procedure, and the conduct of all courts . . . if such rules are consistent with the Constitution and neither abridge, enlarge, nor modify the substantive rights of any litigant. . . ." PA. CONST. art. V, § 10(c).
18. The Pennsylvania Rules of Civil Procedure presently provide:

Rule 238. Award of Damages for Delay in an Action for Bodily Injury, Death or Property Damage.

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court or the arbitrators appointed under the Arbitration Act of June 16, 1936, P.L. 715, as amended 5 P.S. §30 et. seq., or the Health Care Services Malpractice Act of October 15, 1975, P.L. 390, 40 P.S. §1301.101 et. seq., shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict, or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict, or decision.

(b) In arbitration under the Act of 1836, the amount of damages for delay shall not be included in determining whether the amount in controversy is

November 20, 1978, effective April 15, 1979.[19] The fundamental purpose of this Rule was "to encourage pre-trial settlement. . . . Undeniably, the Rule serves to compensate the plaintiff for the inability to utilize funds rightfully due him, but the basic aim of the Rule is to alleviate delay in the disposition of cases, thereby lessening congestion in the courts."[20] The question still facing us today, however, is whether Rule 238 has fulfilled these goals. Very recently, the Pennsylvania Supreme Court answered this question with an emphatic "no" when it directly overruled its prior decision in *Laudenberger v. Port Authority of Allegheny County*[21] by deeming the Rule unconstitutional in *Craig v. Magee Memorial Rehabilitation Center*.[22] This paper will argue that the only way in which

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within the jurisdiction of the arbitrators.

(c) Except as provided in subdivision (e), damages for delay shall be added to the award, verdict, or decision against all defendants found liable, no matter when joined in the action.

(d) The court may, and on request of a party shall, charge the jury that if it finds for the plaintiff, it shall not award the plaintiff any damages for delay because this is a matter for the court.

(e) If a defendant at any time prior to trial makes a written offer of settlement in a specified sum with prompt cash payment to the plaintiff, and continues that offer in effect until commencement of trial, but the offer is not accepted and the plaintiff does not recover by award, verdict, or decision, exclusive of damages for delay, more than 125 percent of the offer, the court or the arbitrators shall not award damages for delay for the period after the date the offer was made.

(f) If an action is pending on the effective date of this rule, or if an action is brought after the effective date on a cause of action which accrued prior to the effective date, damages shall be computed from the date plaintiff files the initial complaint or from a date one year after the accrual of the cause of action, or from a date six (6) months after the effective date of this rule, whichever date is later.

(g) This rule shall not apply to

(1) eminent domain proceedings;

(2) pending actions in which damages for delay are allowable in the absence of this rule.

19. A dissent was filed by Justice Roberts. *See* 480 Pa. XLI (1978).

20. Laudenberger v. Port Authority of Allegheny County, 496 Pa. 52, 59, 436 A.2d 147, 151 (1981). *See, e.g.*, Quach v. Filiaggi, 609 F. Supp. 847 (E.D. Pa. 1985); Krupa by Krupa v. Williams, 316 Pa. Super. 408, 463 A.2d 429 (1983); Renner v. Lichtenwalner, 513 F. Supp. 271 (E.D. Pa. 1981).

21. 496 Pa. 52, 436 A.2d 147 (1981).

22. 512 Pa. 60, 515 A.2d 1350 (1986). The author recognizes the fact that on the surface the majority opinion in *Craig* did not declare Rule 238 to be unconstitutional. However, certain language contained therein, specifically concerning violations of due process and the Rule's "inequitable operation" (*Craig*, 512 Pa. at 63, 515 A.2d at 1353) leads to the conclusion that the *Craig* court was, albeit indirectly, deeming certain portions of Rule 238 to be unconstitutional.

Rule 238 will be able to achieve its original goal of promoting the early settlement of cases[23] is through a major revision of the Rule. Specifically, the presently existing pre-judgment interest provision must be amended and then combined with a type of "costs" provision found in FED. R. CIV. P. 68,[24] thereby leaving Pennsylvania with a rule similar to the ones found in Michigan[25] and Wisconsin.[26]

Whether or not the supreme court actually did find the Rule to be unconstitutional is, however, basically irrelevant for purposes of this article, for the court emphatically announced a need for the Rule to be amended. This paper puts forth one possible alternative for such an amendment of Rule 238.

23. Underlying this article is the assumption that increasing the number of cases which are settled before going to trial is in the best interests of society as a whole and should therefore be a high priority of the judicial system. Advocates of this belief stress the tremendously overcrowded condition of our nations courtrooms, and look to settlement as an efficient, cost-effective alternate means of settling disputes. *See, e.g.*, Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970). Interestingly, in their article entitled "For Reconciliation", Professors McThenia and Shaffer offer an unusual but interesting alternative rationale for encouraging settlement. These authors add a religious dimension to the debate, and appear to be moved by a conception of social organization that takes the insular religious community as its model: "Justice is what we discover—you and I, Socrates said—when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from." McThenia and Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1665 (1985). For a scathing attack on this article, *see* Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985).

Other authors, however, disagree with this basic assumption and argue that litigation is a far superior means of dispute resolution than is settlement. A well-known adherent to this position is Professor Owen Fiss of Yale University, who concludes in his recent article:

> I do not believe that settlement as a generic practice is preferable to judgment or should be institutionalized on a wholesale and indiscriminate basis. It should be treated instead as a highly problematic technique for streamlining dockets. Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done. Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984).

Although I have a difficult time understanding, let alone concurring with, the rationale provided by Professors McThenia and Shaffer, I do agree with the commentators who view settlement as an effective and worthwhile means of dispute resolution. Although Professor Fiss makes some thought-provoking arguments, none of them can overcome the far too obvious need for a mechanism which will impede the growth of the "litigation explosion". It is the opinion of the author that settlement—despite its potential weaknesses—could be just the mechanism we are searching for.

24. FED. R. CIV. P. 68.

25. In Michigan, these two provisions are found in two separate enactments

II. Basic Operation of Rule 238

As noted earlier, the basic purpose behind Rule 238 is to encourage parties to settle their cases as early as possible in order to avoid the costs, both to the court system and the parties themselves, of litigation.[27] Rule 238 is based on the assumption that the overcrowding problems which inevitably result when parties opt not to settle can be solved by compelling the defendant, via "financial incentives,"[28] to seek settlement. Accordingly, in cases involving bodily injury, death, or property damage, the Rule imposes delay damages on defendants at ten (10) percent per annum, which run either from the date on which the complaint is originally filed or from a date one year after the accrual of the cause of action (whichever is later).[29] Pursuant to section (e) of the Rule,[30] a defendant can avoid the imposition of delay damages only when the following two requirements have been satisfied: (1) the defendant has made a written offer of settlement (which is rejected by the plaintiff); and (2) the judgment obtained by the plaintiff does not exceed the offer of settlement by more than twenty-five (25%) percent.[31] Another interesting feature of this Rule is found in section (c),[32] which stipulates that all defendants, no matter when they are joined in the action, face the same amount of delay damages unless they can satisfy the two requirements of section (e).[33]

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but are used in conjunction with one another. The pre-judgment interest portion is found in Mich. Comp. Laws Ann. § 600.6013 (1980), while the "costs" provision, almost identical in format to Fed. R. Civ. P. 68, is found in Mich R. Civ. P. 519.

26. In Wisconsin, the two provisions are both located in Wis. Stat. § 807.01 (1979).

27. *See supra* note 20.

28. 1 Goodrich-Amram 2d § 238:1.

29. Pa. R. Civ. P. 238(a)(2).

30. Pa. R. Civ. P. 238(e).

31. For example, assume P (plaintiff) and D (defendant) are parties involved in a lawsuit. D makes an offer of settlement to P in the amount of $10,000. P rejects the offer, and the case proceeds to trial. The jury returns a verdict for P in the amount of $15,000. Since the plaintiff's judgment *does* exceed the settlement offer by more than twenty-five (25%) percent, or $2,500, delay damages are imposed on D pursuant to Rule 238. If, however, the same settlement offer was made and rejected, yet this time plaintiff received a judgment for $12,000, no delay damages would be imposed. Here, the judgement is only $2,000 more than the settlement proposal, and therefore *does not* exceed the offer of settlement by the requisite 25%.

32. Pa. R. Civ. P. 238(c).

33. Several other states also have pre-judgment interest provisions similar

III. *Laudenberger v. Authority of Allegheny County*: The Pennsylvania Supreme Court's First Examination of Rule 238

In *Laudenberger v. Port Authority of Allegheny County*,[34] the plaintiff launched an attack on the constitutionality of PA. R. CIV. P. 238,[35] arguing that it violated both the equal protection clause[36] and the requirements of substantive due process[37] under the Constitution of both the Commonwealth of Pennsylvania and the United States of America.[38] Concerning the equal protection clause, the plaintiff argued that despite the fact that both parties to the lawsuit were viewed as being "similarly circumstanced," Rule 238 treated them differently, thereby violating the dictates of the Constitution.[39] Specifically, the plaintiff asserted that "the Rule does not provide

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to the one found in PA. R. CIV. P. 238: Colorado: COLO. REV. STAT. § 13-21-101 (1973); Louisiana: LSA-R.S. 13:4203 (1971); Michigan: MICH. COMP. LAWS ANN. § 600.6013 (1980); New Hampshire: N.H. REV. STAT. ANN. § 524:1-6 (Supp. 1969); North Dakota: N.D. CENT. CODE § 32-03-05 (1970); Ohio: OHIO REV. CODE ANN. § 1343:03 (Page 1979); Oklahoma: OKLA. STAT. ANN. tit. 12 § 727(1) (1965); Rhode Island: R.I. GEN. LAWS § 9-21-10 (1976); South Dakota: S.D. CODIFIED LAWS ANN. § 21-1-11 (1972); Wisconsin: WIS. STAT. § 807.01 (1979). A closer examination of some of these statutes is undertaken by the author towards the end of this paper.

34. 496 Pa. 52, 436 A.2d 147 (1981).

35. The plaintiff also argued that the Rule involved a substantive right and was therefore beyond the procedural rule-making authority of Pennsylvania's Supreme Court. The majority disagreed and concluded that the Rule involved procedural questions and only had a collateral effect on the substantive rights of the parties. *Laudenberger*, 496 Pa. at 66, 67, 436 A.2d at 155. As a result, the court was not over-extending its authority upon its promulgation of Rule 238.

36. U.S. CONST. amend. XIV, § 1; PA. CONST. art. III, § 32. The requirements of the equal protection clause dictate that:

> A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."

Reed v. Reed, 404 U.S. 71, 76 (1971), *quoting* Royster Guano Co. v. Virginia, 253 U.S. 412 (1920).

37. The constitutional standard of substantive due process dictates that:

> A law which purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.

Gambone v. Commonwealth, 375 Pa. 547, 551, 101 A.2d 634, 637 (1954).

38. *Laudenberger*, 496 Pa. 52, 54, 436 A.2d 147, 149.

39. In Commonwealth v. Kramer, 474 Pa. 341, 378 A.2d 824 (1977), the Pennsylvania Supreme Court reiterated the basic principle that the concept of equal protection demands that uniform treatment be given to similarly situated parties.

for delay damages to be awarded to the defendant if it is the plaintiff who is delaying the action."[40] The court rejected this argument, and did so not by specifically addressing the question of fault,[41] but by attacking the plaintiff's underlying assumption that the plaintiffs and defendants are similarly situated for purposes of Rule 238:

> Rule 238 obviously creates distinctions between plaintiffs and defendants. The difference upon which the classification rests is that the plaintiffs have been wrongly injured and have suffered financial losses because of the defendants' action. The losses then become exacerbated by defendants' refusal to settle the lawsuit in a timely fashion. The defendants, on the other hand, have suffered no wrong. . . . It is in their best interest to protract the litigation process as long as possible, so that they may benefit from the funds rightfully owing to the plaintiffs.[42]

In order to satisfy the requirement of the equal protection clause, this distinction, incorporated into the "workings" of Rule 238, must bear a "fair and substantial relation to its articulated goal—the encouragement of defendants to settle meritorious claims as soon as is reasonably possible."[43] According to the majority of the court,[44] the requirements are satisfied, for the imposition of delay damages on the defendants' "encourages early activity . . . to resolve legitimate claims in an expeditious fashion and deprives them of the opportunity to benefit from needless delays and last-minute settlements."[45]

The plaintiff in *Laudenberger* also attacked Rule 238 on the grounds that it violated his rights guaranteed by substantive due process. Here again, plaintiff argued that Rule 238 was not rationally related to a legitimate state goal, and further alleged that its application worked to deny him of certain property rights.[46] The court quickly rejected this argument by reiterating its belief that

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40. *Laudenberger*, 496 Pa. at 68, 436 A.2d at 156.

41. The question of fault raised by the plaintiff in *Laudenberger* is the basis for the court's reversal of the *Laudenberger* decision five years later in *Craig*. A detailed discussion of this case takes place later in the article.

42. *Laudenberger*, 496 Pa. at 68, 69, 436 A.2d at 156.

43. *Id.* at 69, 436 A.2d at 156.

44. Chief Justice O'Brien wrote the majority opinion for the court. His views were shared by the remainder of the court with the exception of Justice Roberts, who filed a dissenting opinion.

45. *Laudenberger*, 496 Pa. at 69, 436 A.2d at 156.

46. *Id.* at 70, 436 A.2d at 157. *See, e.g.*, Rogin v. Bensalem, 616 F.2d 380 (3d Cir. 1980) and cases cited therein.

"the prejudgment interest rule serves the purpose for which it was promulgated."[47] Accordingly, Chief Justice O'Brien concluded his opinion by stating that "Rule 238 therefore must be viewed as comporting with the constitutional requirements of both equal protection and substantive due process."[48] Concerning the ability of the Rule to fulfill its original objectives, the court once again wholeheartedly approved, and stated: "The delay in disposition of cases emasculates the judicial system's ability to hear those cases which must be litigated. Rule 238 fulfills this Court's obligation to the legislature and to the public to effectuate prompt, expeditious trial and settlement of cases."[49] Clearly, the majority opinion in *Laudenberger* may be viewed as a glorification of PA. R. CIV. P. 238.

However, the dissenting opinion in *Laudenberger*, authored by Justice Roberts,[50] takes a very different position. Contrary to the majority's conclusion concerning the ability of the Rule to fulfill its legislative purpose, Robert's argues that "Rule 238 imposes arbitrary, unreasonable, and unequal burdens in the absence of tangible evidence that such measures will serve to accomplish the Rule's intended purpose of eliminating delay."[51] To support this conclusion, Justice Roberts points out three ways in which the defendant is unfairly treated by Rule 238.[52] First, the Rule automatically imposes liability without regard to the good or bad faith of the defendant. For example, defendant A can make a good faith settlement offer which would appear reasonable and still be subjected to the imposition of delay damages if the judgment exceeds the offer by twenty-six (26%) percent. Conversely, defendant B, who deliberately offers an unreasonably low sum in an effort to force the plaintiff into litigation, will nevertheless be automatically relieved of the penalty if the factfinder should enter an award which

47. *Laudenberger*, 496 Pa. at 70, 436 A.2d at 157.

48. *Id.* at 71, 436 A.2d at 157.

49. *Id.* at 61, 436 A.2d at 152.

50. It should be noted that besides dissenting from the majority opinion in *Laudenberger*, Justice Roberts also dissented from the court's original promulgation of Rule 238. *See* 480 Pa. XLI (1978).

51. *Laudenberger*, 496 Pa. at 77, 436 A.2d at 160 (Roberts, J., dissenting). Justice Roberts also disagreed with the majority on the substantive/procedural issue, concluding that Rule 238 involved only substantive issues and as such, was solely within the "jurisdiction" of the legislature and not the judiciary.

52. *Laudenberger*, 496 Pa. at 77, 78, 436 A.2d at 160 (Roberts, J., dissenting).

falls a few dollars shy of exceeding the settlement offer by 25%.[53]

Second, Rule 238 can impose a penalty on the defendant even where the settlement offer *is* within the requisite proximity to the factfinder's award; as a result, even a defendant who fulfills the requirements of section (e) cannot always protect himself from the imposition of delay damages. Specifically, pursuant to section (a)(2), interest is to be computed from either the date on which the complaint is filed or one year after the cause of action has accrued,[54] whichever is later. If the plaintiff files a complaint immediately after the accrual of the cause of action, the defendant is given time to evaluate the merits of the complaint and make a reasoned settlement offer without having to worry about the imposition of delay damages. However, where the plaintiff does not file his complaint until more than one year after the cause of action has occurred (which is often the case), the defendant is immediately subjected to the interest penalty, and is left without any non-penalized "free time" to make a reasoned evaluation of the plaintiff's claim. Thus, even if the judgment exceeds the defendant's offer of settlement by less than 25%, he is still forced to incur delay damages for the time he used to formulate his offer. To make matters worse, this time (and accompanying penalty) will generally not be insignificant, for in order to make an accurate settlement offer, the defendant will, at a minimum, be forced to spend time closely examining the complaint and undergoing some preliminary discovery.

Finally, Justice Roberts' third argument is that "if the object of the Rule is to discourage delay, the Rule should not only require the defendant to make reasonable settlement offers, but also should require the plaintiffs to make reasonable demands."[55] According to the dissent, both the defendant and the plaintiff should be forced

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53. The author recognizes the fact that in order to rectify this particular form of unfairness, the court would be required to determine the motives behind the settlement offers. Although this type of subjective decision making can be problematic, it has been done successfully by courts in other situations. For example, in contract disputes the court is often called upon to reach a result which is "consistent with the intent of the parties at the time of contracting"; the court can make this determination by referring not only to evidence on the record, but to all of the facts and circumstances surrounding the case. It is my contention that the same type of analysis can be successfully applied in the context of Rule 238.

54. PA. R. CIV. P. 238(a)(2).

55. *Laudenberger*, 496 Pa. at 78, 436 A.2d at 160 (Roberts, J., dissenting).

to incur similar sanctions when their respective unreasonable behavior precludes the settlement of their case.

IV. *Craig v. Magee Memorial Rehabilitation Center*: The Pennsylvania Supreme Court Reexamines Rule 238

Approximately six years after deciding *Laudenberger*, the Pennsylvania Supreme Court was again faced with a constitutional challenge to Rule 238 in *Craig v. Magee Memorial Rehabilitation Center*.[56] As will be discussed in the following paragraphs, the court opted to adhere to the conclusions of Justice Roberts' dissent in *Laudenberger* and accordingly overruled the previous case.[57]

An examination of the facts in *Craig* provides an excellent example of how Rule 238 works in practice. In May of 1974, the plaintiff, Mrs. Craig, was receiving medical treatment at the Magee Memorial Rehabilitation Center. While in the hospital, Mrs. Craig suffered injuries as a result of her coming into contact with an airblower which was being utilized in the treatment of a decubitis ulcer. Two years later, the plaintiff instituted a medical malpractice action against the defendant hospital. As it turned out, however, it was not until December of 1980, more than four years after the cause of action had accrued, that the case came to trial. Even worse, a mistrial occurred at that time, and it was not until three years later—in January, 1983—that the case was tried to conclusion. Importantly, the pre-trial record revealed that many lengthy postponements, delays and requests for continuances could be attributed to the plaintiff, Mrs. Craig. The record also indicated that the defendant had made a $25,000 settlement offer which was quickly rejected. The jury found for the plaintiff, and awarded Mrs. Craig a judgment in the amount of $50,000. Since the jury's verdict exceeded the defendant's settlement offer by more than twenty-five (25%) percent, delay damages of $16,450 were imposed pursuant to Rule 238. The Rehabilitation Center subsequently filed a post-trial motion asserting the unconstitutionality of Rule 238. Both lower courts dismissed the appellant's Rule 238 arguments, directly relying on the supreme court's decision in *Laudenberger* as support.

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56. 512 Pa. 60, 515 A.2d 1350 (1986).

57. Of the seven Supreme Court justices who took part in the *Craig* decision, four (including Chief Justice Nix) followed the majority opinion written by Justice McDermott, one justice concurred, while two others, Papadakos and Larsen, joined in the dissent.

The Pennsylvania Supreme Court granted allocatur to reexamine both its holding in *Laudenberger* as well as PA. R. CIV. P. 238.

Justice McDermott began the majority opinion by describing Rule 238 as a "bold experiment" which, at the time of its promulgation, "seemed reasonable, salutory, and equitable."[58] Although the opinion does not specifically label it as such, the *Craig* court infers that this experiment can now be deemed a failure. The *Craig* opinion discusses *Laudenberger*, and points out that the court's holding there would only be equitable in the limited situation where the defendant was the sole cause of the delay—exactly the scenario found in *Laudenberger*.[59] The facts in *Craig* presented a completely different situation, however, for Rule 238 was invoked here when the plaintiff was single-handedly responsible for a large portion of the delay. As a result, the *Laudenberger* holding was simply non-applicable to *Craig*. Instead of directly attacking its previous decision in *Laudenberger*, the court instead chose the Rule itself as its target, and concluded: "In short, Rule 238 has become an uncontestable presumption that all fault lies with the defendant. There are too many reasons why such is not always the case; and what is not always so may not be irrebuttable when a penalty follows."[60]

Importantly, the court went on to directly reject its *Laudenberger* holding by suspending the Rule and concluding that it was simply unable to achieve the goals which the legislature had originally intended:

> Having had now the opportunity for observation of the workings of Rule 238, and being presented herein with a factual context which frames in sharp relief the Rule's inequitable operation, we direct that those mandatory provisions of Rule 238 which assess delay damages against defendants without regard to fault are suspended as of this date. . . .[61]

In order to determine if indeed the defendant was at fault (and thereby equitably trigger the imposition of Rule 238 delay damages), the *Craig* majority went on to provide the Pennsylvania courts with procedures for a post-judgement Fault Hearing.[62] These directions,

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58. *Craig*, 512 Pa. 60, 64, 515 A.2d 1350, 1352.
59. *Id.* at 64, 515 A.2d at 1353.
60. *Id.* at 65, 515 A.2d at 1353.
61. *Id.*
62. *Id.* at 65, 66, 515 A.2d at 1353.

consistent with the practice in both Ohio[63] and South Dakota,[64] tell the lower courts when the hearing will occur, which court shall make the decision, and the factors which the decision-maker should take into consideration when deciding which party was at fault for the delay.[65]

In summary, the *Craig* holding, while agreeing with Justice Roberts' earlier dissent that Rule 238 is unconstitutional, limited its rationale for this conclusion to the lack of a Fault Hearing and, specifically, that under the present Rule a defendant can incur delay damages even when the plaintiff alone is at fault. By limiting its holding in this manner, the Pennsylvania Supreme Court missed an excellent opportunity to bring out other equally fundamental problems associated with Rule 238. For example, besides the absolutely correct recognition of the unfairness imposed upon the defendant without the opportunity to have a Fault Hearing, the court seemingly failed to recognize other critically important forms of unfairness (some of which are discussed by Justice Roberts in his *Laudenberger* dissent) which make the Rule even more unworkable and unconstitutional. Moreover, the opinion did not even touch upon a basic defect in the Rule and a major reason why it simply cannot, as it now stands, fulfill its original objective of fostering early settlements

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63. *See* Ohio Rev. Code Ann. § 1343-03(c) (Page 1979). In his *Craig* dissent, Justice Larsen criticized the type of procedure provided by the majority as "unnecessary," "burdensome," and contradictory to the original purpose of the Rule in its creation of another step which a party must take in the litigation process. *Craig*, 512 Pa. 60, 73, 515 A.2d 1350, 1357 (Larsen, J., dissenting). This attack is unwarranted for several reasons. First, the costs incurred as a result of the Fault Hearing are outweighed by the benefits, for not only will this additional time be minimal, but it will also be extremely valuable in its elimination of the fundamental inequity imposed on the defendant by present Rule 238. Moreover, research into the Ohio statute which imposes very similar post-verdict fault hearing procedures indicates little dissatisfaction on the part of the litigants. For example, in two fairly recent Ohio cases, Caston v. Buckeye Insurance Co., No. 10-008, slip op. (Ohio Ct. App. March 23, 1984) and Hicks v. Warren General Hospital, No. 3345, slip op. (Ohio Ct. App. May 4, 1984), the statute and its fault hearing procedures were apparently applied without any problem.

64. *See* S.D. Codified Laws Ann. § 21-1-11 (1972) and a case which interpreted the relevant portions of this statute: Safeco Insurance Co. v. City of Watertown, 538 F. Supp. 49 (D.S.D. 1982).

65. The *Craig* majority posited the following factors for courts to evaluate when determining fault: (1) the length of time between the starting date and the verdict; (2) the parties' respective responsibilities in requesting continuance; (3) the parties' compliance with rules of discovery; (4) the respective responsibilities for delay necessitated by the joinder of additional parties. *Craig*, 512 Pa. at 66, 515 A.2d at 1353.

of cases. Specifically, while the Rule provides ample incentive for the defendant/offeror to tender reasonable settlement offers, it provides no real incentive for the plaintiff/offeree to act in a "reasonable manner" and accept these offers. Only when both parties are "encouraged" to act "reasonably" will the number of settlements increase. The remainder of this article is dedicated to a detailed analysis of these shortcomings in the *Craig* opinion, and concludes with a proposal for a new Rule 238 which would incorporate the elements necessary to permit the Rule to fulfill its original expectations.

V. The Necessary Expansion of *Craig v. Magee Memorial Rehabilitation Center*

Although Justice Roberts' dissent in *Laudenberger* and the majority opinion in *Craig* bring out some of the ways in which the operation of Rule 238 is unfair to defendants, there are several other fundamental inequities that need to be addressed. For example, the following excerpt from the dissenting opinion in *Craig* unintentionally reveals three separate problems stemming from the Rule:

> A defendant can *always* protect himself from the assessment of prejudgment interest by extending a reasonable settlement offer in a timely manner. Delays in a case coming to trial, such as those which occurred in the instant case, are of no consequence to a defendant who has made a *reasonable settlement offer*. It is only where a defendant chooses to make an unreasonable settlement offer, or fails to make any offer that he will be subject to the mandatory requirements of Rule 238.[66] (emphasis added)

First, as discussed earlier and contrary to the above conclusion of Justice Larsen, even a defendant who makes a "reasonable settlement offer" is not always able to totally protect himself from the imposition of delay damages under present Rule 238.[67] To the contrary, a defendant who is unfortunate enough to have a plaintiff that waits more than a year after the cause of action has accrued to file his complaint inevitably incurs this prejudgment interest.

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66. *Craig*, 512 Pa. 60, 70, 515 A.2d 1350, 1355 (Larsen, J., dissenting)

67. Justice Roberts, speaking in his dissenting opinion in *Laudenberger*, briefly mentioned this form of unfairness to defendants, but did not, according to the author, give it the full treatment that it warrants. *See supra* note 54 and accompanying text.

The term "reasonable settlement offer" reveals yet another fundamental inequity of Rule 238. When one reads the Rule for the first time, a very legitimate question easily comes to mind: What constitutes a "reasonable settlement offer"? A literal reading of the Rule indicates that a "reasonable" offer is one that is not more that twenty-five (25%) percent below the judgment rendered to the plaintiff.[68] Although this estimation may appear to be simple enough for the defendant to make,[69] it is, in reality, quite the opposite. First, we must not lose sight of the fact that people, not machines, are setting the amount of the verdict. As a result, it is difficult for a defendant to predict what either twelve members of a jury, a judge, or an arbitrator will decide when making this decision—especially to the requisite degree of accuracy. This task is made even more difficult by the fact that there is frequently no statutory cap on damages, so a defendant usually has no maximum amount with which to work. Clearly, the defendant has no easy task when he attempts to satisfy the "reasonable settlement offer" requirement of section (e) and extinguish the tolling of the pre-judgment interest.

Equally important, and something which neither Justice Roberts nor the *Craig* majority considered, is the unfairness imposed by Rule 238 on a defendant who quite simply does not want to make a settlement offer due to his good faith belief that he is not liable. Rule 238, as it presently stands, basically forces a defendant to make a settlement offer even when he sincerely feels that he has a good chance of winning the lawsuit. For if he opts not to make the offer, and contrary to his belief loses the lawsuit,[70] he can face a substantial penalty in delay damages imposed by the court under Rule 238. The fear of this "additional" penalty could quite easily

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68. PA. R. CIV. P. 238(e).

69. In his dissenting opinion in *Craig*, Justice Larsen not only incorrectly makes light of the task which the defendant faces when required to make a "reasonable settlement offer", but also personally fails to apply the proper percentage:

> What constitutes a reasonable settlement offer in any particular case is not left to the subjective judgment of the defendant, the plaintiff or the court. Rule 238 provides the objective criteria that an offer that is eighty (80%) percent or more of an eventual verdict is reasonable and if it falls short of eighty (80%) percent, it fails to meet the standard of reasonableness.

Craig, 512 Pa. 60, 70, 515 A.2d 1350, 1355 n.1 (Larsen, J., dissenting).

70. We are all aware of situations where despite the fact that a litigant has the much stronger case, he still ends up losing the lawsuit. This is an unfortunate but inevitable result of a judicial system in which people, not computers, make the critical decisions.

convince a defendant to make a settlement offer when he really does not want to do so.

Finally, there are three additional reasons why Rule 238 is unfair to defendants. First, the Rule clearly dictates that defendants must keep settlement offers open until the date on which the trial begins.[71] This requirement contradicts the basic purpose behind the Rule, i.e., to provide an incentive for the *early* settlement of cases. By imposing a cut-off point for making these offers, and thus making sure that they occur well in advance of trial, the Rule would give the parties that necessary incentive to settle before the most intensive preparation for trial has occurred.[72] Next, there is no real reason why only defendants should be permitted to make settlement offers under Rule 238.[73] It is not difficult to recognize that permitting both parties in the lawsuit to initiate the settlement process can only increase the number of cases which are settled before going to trial.[74] Third, section (c)[75] of the Rule is very unfair to a certain type of defendant—a party who is forced to defend after the proceedings begin. Under this section, these defendants suffer the same pre-judgment interest penalty as all other defendants in the lawsuit, no matter when they became a party. These particular defendants were in no way at fault for delays which occurred prior to their entrance into the suit; nevertheless, the Rule punishes them just the same. This clear example of unfairness, just like the ones provided by Justice Roberts in *Laudenberger*, the majority in *Craig*, and in the preceding paragraphs, indicate the fundamentally defective nature of Rule 238.

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71. PA. R. CIV. P. 238(e).

72. It is interesting to note that FED. R. CIV. P. 68, entitled "Offer of Judgment", presently imposes the cut off date for settlement offers at ten days before the trial commences. Both the 1983 and 1984 proposed amendments to this Rule suggest that this time period should be extended even further from the date of the trial. *See* Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1986).

73. Section (e) of the Rule begins: "If the defendant at anytime prior to trial makes an offer of settlement. . . ." Clearly, no mention is made of plaintiff initiating the settlement process.

74. Although in the present form FED. R. CIV. P. 68 only permits a defendant to make settlement offers, both the 1983 and 1984 proposed amendments suggest that the plaintiff should also be given this opportunity. *See supra* note 72. Moreover, it should be pointed out that the analogous Wisconsin statute, which will be discussed in some detail later in the article, permits either the plaintiff or the defendant to make settlement offers. *See* WIS. STAT. ANN. § 807.01 (West 1979).

75. For an examination of this particular section of the Rule, *see supra* note 18.

As mentioned earlier, Rule 238 suffers from another equally severe flaw.[76] Specifically, while it is clear that the Rule provides the defendant/offeror with an incentive to make a "reasonable settlement offer,"[77] it simply does not provide an incentive for the plaintiff/offeree to act in a "reasonable" manner by accepting "reasonable" settlement offers.[78] In fact, a close examination of the Rule reveals that a plaintiff who acts in an unreasonable, or even "bad faith" manner, will not suffer any adverse consequences under Rule 238. This fact is of critical importance, for only when *both* parties to the lawsuit are "encouraged" to act in a "reasonable" manner will the ultimate goal of increasing the number of settlements become a reality. It is clear, then, that there is a tremendously important "gap" left in PA. R. CIV. P. 238 which must be filled before the Rule can achieve its purpose. The big question remains: What can the Rules Committee use to fill this void?

VI. FEDERAL RULE OF CIVIL PROCEDURE 68: THE "GAP FILLER"

The answer to this critical question can be found in FED. R. CIV. P. 68.[79] This rule, entitled "Offer of Judgment," dictates that a

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76. This critical flaw was only briefly mentioned by Justice Roberts in his *Laudenberger* dissent, *see supra* note 38 and accompanying text. More importantly, the defect was not even discussed by the majority in *Craig*.

77. Quite obviously, if the defendant makes a settlement offer which is rejected and turns out to be within twenty-five (25%) of the judgment, he is "rewarded" by not having to pay delay damages to the plaintiff.

78. Clearly, *every* recipient of a settlement offer has a basic incentive to act in a "reasonable" manner and accept a "fair" offer—the opportunity to obtain compensation from the opponent without taking the inevitable risk of going to trial. This incentive, however, exists whether or not Rule 238 is applicable. This fact, along with its minimal impact on offerees (plaintiffs normally only bring lawsuits when they feel that they have a relatively good chance of winning at trial) renders this incentive irrelevant in our analysis.

79. FED. R. CIV. P. 68 provides:

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

defendant may offer, any time up to ten days before trial, to allow judgment to be taken against him on specified terms.[80] Subsequently, the plaintiff has ten days to accept or reject the offer. If, on the one hand, the plaintiff decides to accept the defendant's offer, either party may file the offer with the court, and the clerk will enter judgment accordingly. However, if the plaintiff decides to reject the offer and ultimately obtains a judgment that is less favorable than the rejected offer, the plaintiff "must pay the cost incurred[81] after the making of the offer." In the words of one commentator:[82] "Rule 68 is designed to encourage settlement and avoid protracted litigation by forcing a prevailing plaintiff to pay any costs that accrue (to the defendant) after the plaintiff rejects a settlement offer more favorable than the plaintiff's judgment at trial."[83]

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

80. Pursuant to the Rule, the offer may be for money, property, or other terms specified in the offer, with costs accrued to the date of the offer.

81. A large portion of the controversy surrounding FED. R. CIV. P. 68 has involved the question of what constitutes the "costs incurred" by a party who has made a settlement offer that is later rejected by his opponent. Specifically, the debate has centered on whether attorney fees should be included in this computation. Although very interesting, this topic is extremely complex and is beyond the scope of this paper. For recent judicial discussion on this topic, *see* Marek v. Chesney, 473 U.S. 1 (1985); Hensley v. Eckerhart, 461 U.S. 424 (1983); Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978). For recent law review commentaries on this same subject, *see* Note, *The Proposed Amendments to Federal Rule of Procedure 68: Toughening the Sanctions,* 70 IOWA L. REV. 237 (1954); Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1 (1986).

82. Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 3 (1986).

83. It should be pointed out that although this discussion is basically beyond the scope of this article, FED. R. CIV. P. 68, like PA. R. CIV. P. 238, has been criticized for not being able to fulfill its legislative purpose of encouraging settlement. According to Professor Simon, two principle defects account for this alleged failure. First, like its Pennsylvania counterpart, Rule 68 only permits defendants to make settlement offers. Second, the sanction of post offer "costs" is usually too small to motivate parties to settle. As a result of these problems, in 1983 the Advisory Committee to the Federal Rules of Civil Procedure put forth a proposed amendment to overhaul Rule 68. Because intense controversy surrounded the requested changes, the Committee was forced to withdraw the 1983 proposal and seek a better solution. In the fall of 1984, the Committee proposed

For the purposes of this paper, the critical section of Rule 68 is the so-called "costs" provision, which basically forces the plaintiff to pay the defendant's costs which were incurred after the plaintiff had rejected a "reasonable"[84] settlement offer. This portion of the Rule clearly provides an incentive for the plaintiff to act in a "reasonable" manner and accept settlement offers which appear to be "reasonable"—exactly what is missing in PA. R. CIV. P. 238.[85] Accordingly, the author proposes that only by adding a type of "costs" provision found in FED. R. CIV. P. 68 to an amended version of the delay damages provision already found in the Pennsylvania Rule will Rule 238 be able to fulfill its original purpose of fostering the early settlement of cases and thereby alleviating the congestion existing in the courtrooms of this Commonwealth.

It should first be pointed out that such a step would not be so unusual for the Civil Procedure Rules Committee in Pennsylvania, for at least two other rules of procedure contain this type of "costs" provision.[86] Rule 217, entitled "Costs of Continuance," states in pertinent part:

> When a continuance is granted upon application made subsequent to the preliminary call of the trial list, the court may impose on the

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its second effort to revamp Rule 68. This proposal, like the one a year earlier, was vigorously attacked. According to Judge Weis of the Third Circuit Court of Appeals, the Chairman of the Advisory Committee, the proposed changes will not come up for a vote for quite some time, for the 1984 version is now being examined by a House Sub-Committee which has yet to render a recommendation. For a more complete discussion of the 1983 and 1984 proposed amendments, *see* Simon, *supra* note 82.

84. Although no numerical value for a "reasonable" settlement offer is imposed in Rule 68 (as it is in PA. R. CIV. P. 238), the Rule forces the plaintiff to bear his opponent's financial burden any time the offer of settlement exceeds the plaintiff's judgment at trial.

85. An argument can be made that Federal Rule 68 unfairly "pushes" plaintiffs who really do not want to settle their cases toward settlement in much the same way that Pennsylvania Rule 238 does to defendants. Although this argument has some merit, it suffers from a fatal flaw. Specifically, as noted in a preceding footnote, there is presently a great deal of debate concerning whether the defendant's attorney fees should be incorporated into the "costs" incurred by a plaintiff under Rule 68. *See supra* note 81. As it now stands, however, these fees are not to be included in this calculation. Marek v. Chesney, 473 U.S. 1 (1985). As a result, it is probably safe to say that at least in general, "costs" which can be borne by a plaintiff under the federal rule are less expensive than the pre-judgment interest which a Pennsylvania defendant may be forced to incur under Rule 238. As a result, Rule 68 imposes a much weaker "push" to settle than does Rule 238, and will therefore have a relatively slight impact on a plaintiff who has a good faith belief that he will win the lawsuit.

86. It must be pointed out, however, that neither of these rules involve settlement offers.

> party making the application the reasonable costs actually incurred by the opposing party which would not have been incurred if the application had been made at or prior to such preliminary call.[87]

Similarly, Rule 4019, generally entitled "Sanctions," imposes penalties on parties who have in some way failed to conform to "standard operating procedure" or court rules and in so doing have retarded the litigation process. For example, section (d) dictates:

> If at the trial or hearing, a party who has requested admissions as authorized by Rule 4014 proves the matter which the other party has failed to admit as requested, the court on motion may enter an order taxing as costs against the other party the reasonable expenses incurred in making such proof.[88]

Importantly, both of these rules, like Federal Rule 68, provide a definite incentive to act in a manner which the court deems to be "reasonable" and which expedites the litigation process.[89] This same type of incentive can easily be incorporated into Rule 238.

VII. Michigan and Wisconsin: Two States Which Have Combined These Two Provisions

At least two other states, Michigan and Wisconsin, have done exactly what the author proposes Pennsylvania should do, i.e., combine a "delay damages" provision with a "costs" provision in the context of a rule concerning settlement offers to achieve the

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87. Pa. R. Civ. P. 217. The remaining two paragraphs of the Rule are as follows:

> Where a continuance has been so granted and costs imposed, the party upon whom such costs have been imposed may not, so long as such costs remain unpaid, take any further step in such suit without prior leave of court.
>
> If the party upon whom such costs are so imposed was at fault in delaying the application for continuance he may not recover such costs, if ultimately successful in the action; otherwise such costs shall follow the judgment in the action.

88. Pa. R. Civ. P. 4019(d).

89. It is interesting to note that both Rule 217 and Rule 4019, unlike Rule 238, contain a fault provision. Toward this end, under the former two Rules a party must incur these costs only if he was responsible for the "unreasonable" conduct. For Rule 217, *see supra* note 87. For Rule 4019, the following portion of the Rule is explanatory:

> (g)(1) Except as otherwise provided in these rules, . . . the court . . . may . . . require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses . . . incurred in obtaining the order of compliance and the order for sanctions. . . .

desired result of an increased number of settlements. Michigan does this in two different, yet connected, enactments. First, in section 660.6013,[90] entitled "Same; Interest on Judgment, Rate, Settlement," the court is permitted to impose pre-judgment interest on a party which is responsible for delay. Like its Pennsylvania counterpart, however, the statute has an "escape hatch":

> If a bona fide written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and the offer of settlement is substantially identical or substantially more favorable to the prevailing party than the judgment, the court may order that interest shall not be allowed beyond the date the written offer of settlement is made.[91]

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90. 600.6013. Same; interest on judgment, rate, settlement

(1) Interest shall be allowed on a money judgment recovered in a civil action, as provided in this section.

(2) For complaints filed before June 1, 1980, in an action involving other than a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment shall be calculated from the date of filing the complaint to June 1, 1980 at the rate of 6% per year and on and after June 1, 1980 to the date of satisfaction of the judgment at the rate of 12% per year compounded annually.

(3) For complaints filed before June 1, 1980, in an action involving a written instrument having a rate of interest exceeding 6% per year, the interest on the judgment shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. However, the rate after the date judgment is entered shall not exceed the following:

(a) Seven percent per year compounded annually for any period of time between the date judgment is entered and the date of satisfaction of the judgment which elapses before June 1, 1980.

(b) Thirteen percent per year compounded annually for any period of time between the date judgment is entered and the date of satisfaction of the judgment which elapses after May 31, 1980.

(4) For complaints filed on or after June 1, 1980, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually unless the judgment is rendered on a written instrument having a higher rate of interest. In that case interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

(5) If a bona fide written offer of settlement in a civil action based on tort is made by the party against whom the judgment is subsequently rendered and the offer of settlement is substantially identical or substantially more favorable to the prevailing party than the judgment, the court may order that interest shall not be allowed beyond the date the written offer of settlement is made.

91. MICH. COMP. LAWS ANN. § 600.6013 (1980).

The legislative intent behind this section is also analogous to Pennsylvania Rule 238: "The provision in the statute relating to cases in which bona fide offers of settlement have been made indicates the public policy for settlement of tort claims."[92]

Rule 519,[93] entitled "Offer of Judgment: Offer of Damages at Specified Sum," is a Michigan Rule of Civil Procedure which goes hand-in-hand with section 600.6013. Of particular import to this discussion is the penultimate sentence in the first paragraph of the Rule which is identical to the "costs" provision found in FED. R. CIV. P. 68: "If the judgment finally obtained by the offeree is not more favorable than the rejected offer, the offeree must pay the taxable costs incurred after the making of the offer."[94] The motivation behind this particular Rule also sounds very familiar: "The purpose of Rule 519.1 was to encourage settlements and avoid protracted litigation. . . ."[95] When these two enactments are used in conjunction with one another both the Michigan plaintiff and defendant are given a strong (monetary) incentive to settle the case as early as possible. As a result, the identical legislative intent behind both section 600.6013 and Rule 519 can be accomplished.

Interestingly, unlike its bordering state of Michigan, Wisconsin combines both the delay damages provision and the costs provision

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92. Davis v. Howard, 14 Mich. App. 342, 344, 165 N.W.2d 505, 507 (1968).

93. MICH. R. CIV. P. 519.1. The Rule, in pertinent part, is as follows:
Rule 519 Offer of judgment: Offer of Damages at Specified Sum.

> 1. Offer of Judgment. A party defending against a claim may serve upon the adverse party an offer, in writing, to allow judgment to be taken against him for all or a part of the claim for relief in accordance with the term of the offer together with costs then accrued. If the adverse party serves written notice that the offer is accepted, within 10 days after the service of the offer and before the evidence is closed, 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 which is received 10 days before the evidence is closed and is not accepted within 10 days after being received shall be considered rejected. An offer received less than 10 days before the evidence is closed may be accepted or expressly rejected before the evidence is closed but if it is not thus expressly accepted or rejected the offer shall not be considered as rejected and shall have no effect on costs. Evidence of an offer is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the rejected offer, the offeree must pay the taxable costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.

94. MICH. R. CIV. P. 519.1(1).

95. Bertilacci v. Avery, 42 Mich. App. 483, 485, 202 N.W.2d 331, 333 (1972).

in the same statute to meet the desired goal of increasing the number of settled cases. Section 807.01,[96] entitled "Settlement Offers," contains four separate paragraphs. The first three are very similar to FED. R. CIV. P. 68, and specifically have an analogous "cost" provision: "If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint."[97] The fourth paragraph of the

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96. WIS. STAT. ANN. § 807.01 (1979). The present form of the statute is as follows:

(1) After issue is joined but at least 20 days before the trial, the defendant may serve upon the plaintiff a written offer to allow judgment to be taken against the defendant for the sum, or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer and serves notice thereof in writing, before trial and within 10 days after receipt of the offer, the plaintiff may file the offer, with proof of service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly. If notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of judgment is not accepted and the plaintiff fails to recover a more favorable judgment, the plaintiff shall not recover costs but defendant shall recover costs to be computed on the demand of the complaint.

(2) After issue is joined but at least 20 days before trial, the defendant may serve upon the plaintiff a written offer that if the defendant fails in the defense the damages be assessed at a specified sum. If the plaintiff accepts the offer and serves notice thereof in writing before trial and within 10 days after receipt of the offer, and prevails upon the trial, either party may file proof of service of the offer and acceptance and the damages will be assessed accordingly. If the notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer is not accepted and if damages assessed in favor of the plaintiff do not exceed the damages offered, neither party shall recover costs.

(3) After issue is joined but at least 20 days before trial, the plaintiff may serve upon the defendant a written offer of settlement for the sum, or property, or to the effect therein specified, with costs. If the defendant accepts the offer and serves notice thereof in writing, before the trial and within 10 days after receipt of the offer, the defendant may file the offer, with proof of service of the notice of acceptance, with the clerk of court. If the notice of acceptance is not given, the offer cannot be given as evidence nor mentioned on the trial. If the offer of settlement is not accepted and the plaintiff recovers a more favorable judgment, the plaintiff shall recover double the amount of the taxable costs.

(4) If there is an offer of settlement . . . by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest . . . at the annual rate of 12% on the amount recovered from the date of the offer of settlement until the amount is paid. Interest under this section is in lieu of interest computed under §§ 814.04(4) and 815.05 (8).

97. WIS. STAT. ANN. § 807.01(1) (1979).

statute, which was added through an amendment in 1979,[98] is very similar to PA. R. CIV. P. 238 in its providing the offeror with an incentive to settle cases via the imposition of pre-judgment interest:

> If there is an offer of settlement by a party under this section which is not accepted and the party recovers a judgment which is greater than or equal to the amount specified in the offer of settlement, the party is entitled to interest at the annual rate of twelve (12) percent on the amount recovered from the date of the offer of settlement until the amount is paid.[99]

The legislative intent behind section 807.01 is identical to that behind the Federal Rule, the Pennsylvania Rule and the analogous Michigan statutes: "The purpose of the statute regarding settlement offers is to encourage settlement of cases prior to trial."[100] As with Michigan, the Wisconsin statute can fulfill this objective due to the fact that the combination of the costs provision with the delay damages gives *both* parties to the lawsuit a strong incentive to settle.

VIII. THE AUTHOR'S PROPOSED SOLUTION

As this article has discussed, the Pennsylvania Advisory Committee on the Rules of Civil Procedure needs to overhaul Rule 238 by amending the already existing "delay damages" provision and combining it with a "costs" provision similar to the one in FED. R. CIV. P. 68. In so doing, Pennsylvania would join its sister states of Michigan and Wisconsin in having a rule involving settlement offers which can fulfill the legislative purpose of increasing the number of settled cases and alleviating the overcrowded condition of this Commonwealth's courtrooms. Although this article will not put forth a specific proposal for Rule 238, it does posit the following suggestions which should be adopted by the Rules Committee when it performs this function.[101]

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98. An examination of the legislative history behind this statute reveals that it was originally promulgated in 1953, and was largely based on FED. R. CIV. P. 68. The fourth paragraph, which is not at all similar to this Federal Rule, was added to § 807.01 in 1979, and has been amended in 1981 and again in 1983 to arrive at its present form.

99. WIS. STAT. ANN. § 807.01 (4) (1979).

100. DeMars v. LaPour, 123 Wis. 2d 366, 367, 366 N.W.2d 891, 892 (1985).

101. As a result of Craig v. Magee Memorial Rehabilitation Center, 512 Pa. 60, 515 A.2d 1350 (1986), it seems quite certain that in the near future the Rules Committee will amend Rule 238. At the close of its opinion, the majority strongly hinted that such is the case: "Our directive in this matter is to remain in effect until a new Rule on delay damages can be promulgated. The issue will be

First, as to the delay damages portion of the new Rule, the Committee can start with the present format of Rule 238 and make amendments which are necessary to eliminate or at least alleviate some of the previously discussed unfairness it imposes on defendants. For example, in order to ensure that only a party who causes delay is forced to incur delay damages, the Committee should accept the Pennsylvania Supreme Court's "suggestion"[102] (and also follow the practice of the State of Ohio)[103] and incorporate a post-judgment Fault Hearing into the Rule.[104] The Committee should then proceed to amend section (c) of the Rule to ensure that joined defendants, like all other defendants, are permitted to take advantage of the Fault Hearing procedure. Also, in keeping with the ultimate goal of increasing the number of settlements, section (e) of the new Rule should permit either the plaintiff or the defendant to initiate the process by serving settlement offers upon his opponent.[105] Importantly, the author does not contend that these proposed changes will eliminate all of the ways in which the present Rule is unfair to defendant/offerees. These parties will, however, be placed in a better position not only by these amendments, but by their knowledge that now at least their opponents will also face the threat of sanctions as a result of the "cost" provision of the new Rule.

Concerning this provision of the proposed Rule, the Committee will not have the luxury of merely amending an already existing

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immediately brought to the attention of the Civil Procedure Rules Committee for their consideration." *Craig*, 512 Pa. at 64, 515 A.2d at 1353. Accordingly, in January of 1988 the Committee published a proposed version of an amended PA. R. CIV. P. 238 for purposes of public comment and discussion. The Committee will accept comments on this proposal through the end of May, 1988. Based on these comments and its own revisions, the Civil Procedure Rules Committee will submit its final proposal for an amended Rule 238 to the Supreme Court of Pennsylvania for its ultimate consideration.

102. *See supra* note 65 and accompanying text.

103. OHIO REV. CODE ANN. § 1343.03 (Page 1979). The relevant portion of the statute is as follows:

> (C) Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is paid did not fail to make a good faith effort to settle the case.

104. *See supra* note 63 and accompanying text.

105. In so doing, Pennsylvania would follow both Ohio (*see supra* note 103) and Wisconsin (*see supra* note 96).

Pennsylvania rule. It will, however, have many resources from which it can come up with this portion of Rule 238. The place to start is, of course, Federal Rule 68. As this paper has discussed, the Rule has undergone tremendous criticism, and currently faces a proposed amendment.[106] One answer, then, would be for the Rules Committee in Pennsylvania simply to inject the present form of Federal Rule 68 into the Pennsylvania Rule, and incorporate the amendments when, and if, the Federal Rules Committee adopts them. A better solution, however, would be for the Pennsylvania Committee to examine the proposed amendments (as well as commentaries which discuss them)[107] for itself and use these resources to come up with its own "costs" provision. The state legislature in Wisconsin opted to do just this in section 807.01,[108] for this statute incorporates two of the changes to Federal Rule 68 recommended in the 1984 proposed amendment: (1) both the plaintiff and the defendant can make settlement offers;[109] and (2) settlement offers can only be extended up to twenty (20) days before the trial begins.[110] Pennsylvania should make these same changes, for they would not only help to lessen the unfairness of Rule 238, but would simultaneously assist in fulfilling the ultimate goal of increasing the number of cases which are settled before proceeding to trial.

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106. *See supra* note 83.
107. *Id.*
108. Wis. Stat. Ann. § 807.01 (1979).
109. *See supra* note 74.
110. *See supra* note 72.