UIC Law Review

Volume 18 | Issue 2 Article 3

Winter 1985

Offers of Judgment and Rule 68: A Response to the Chief Justice, 18 J. Marshall L. Rev. 341 (1985)

Lynn Sanders Branham

OFFERS OF JUDGMENT AND RULE 68: A RESPONSE TO THE CHIEF JUSTICE

LYNN SANDERS BRANHAM*

Chief Justice Warren Burger lamented the proliferation of lawsuits filed in state and federal courts during a speech recently delivered before members of the American Bar Association.[1] While remonstrating that this inundation of cases imperils the judicial system, Justice Burger mentioned some steps which may ease the almost unmanageable burden on the courts.[2] As an example of one such step, the Chief Justice mentioned that Rule 68 of the Federal Rules of Civil Procedure could be modified to further induce the settlement of cases.[3]

Chief Justice Burger's comments warrant the review of the terms of Rule 68,[4] a rule too often neglected in law school civil procedure courses and overlooked by practitioners. This article highlights the pertinent provisions of Rule 68 and identifies the problems posed by the rule as presently drafted. Then, proposed

* Assistant Professor, Thomas M. Cooley Law School; B.A., 1976, University of Illinois; J.D., 1980, University of Chicago Law School.

1. 70 A.B.A.J. 62 (1984).

2. Chief Justice Burger suggested improving trial court advocacy, increasing lawyer discipline programs, and curtailing discovery abuses as steps to ease the burdens on the court system. *Id.* at 64-66.

3. *Id.* at 66.

4. Rule 68 states as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

FED. R. CIV. P. 68.

revisions designed to rectify the problems and enhance the utility of Rule 68 as a settlement device are discussed.

THE PROVISIONS OF RULE 68

Under Rule 68, a defending party, including a party defending against a cross-claim or counterclaim,[5] may serve an offer of judgment upon the opposing party at any time more than ten days before trial. An offer of judgment may also be used in cases where the issue of liability has been resolved, but where the relief to be awarded must still be determined.[6] In the offer of judgment, the defending party agrees that a judgment may be rendered against him according to the terms of his offer. The offer of judgment must include the defendant's agreement to pay the plaintiff's costs which have accrued at the time of the offer.

The plaintiff has ten days to accept the offer by written notice served on the defendant. If accepted, either party may file the offer and the notice of acceptance with the court. The clerk of the court then enters judgment. If the plaintiff does not accept the offer within ten days after service, it is deemed withdrawn. Evidence of the offer is inadmissible except to decide what costs each party will bear.

If the plaintiff does not accept the defendant's offer, the plaintiff assumes a risk. Under Rule 68, if the plaintiff prevails at trial but recovers less than the relief afforded in the offer of judgment, the plaintiff must pay the "costs incurred" after the offer was made.[7] Requiring the prevailing plaintiff to pay costs is a departure from Rule 54(d) where the prevailing party is usually awarded costs.[8]

The potential effect of a Rule 68 offer of judgment is demonstrated in the following example. Assume that the plaintiff is injured in a car accident involving another car driven by the defendant. The plaintiff files suit alleging the defendant's negligence in a federal district court.[9] In the complaint, the plaintiff seeks $100,000 in compensatory damages. A month later the de-

5. Delta Air Lines v. August, 450 U.S. 346, 350 & n.5 (1981). Throughout this article it is assumed that the defending party or offeror is the defendant and the opposing party or offeree is the plaintiff.

6. In these cases the defending party must serve the offer of judgment within ten days before the date of the hearing. FED. R. CIV. P. 68.

7. *Id.*

8. Rule 54(d) provides in part: "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. . . ." FED. R. CIV. P. 54(d).

9. The federal district court has jurisdiction of the case because the plaintiff and the defendant are citizens of different states.

fendant tenders an offer of judgment to the plaintiff for $10,000 plus accrued costs. The plaintiff does not accept the offer, so discovery proceeds.

Several years later, the case comes to trial, and the jury returns a verdict of $9,000 for the plaintiff. Normally, under Rule 54(d), the victorious plaintiff can recover all of her costs from the defendant.[10] Under Rule 68, however, the plaintiff must bear all of her own costs incurred since service of the offer of judgment because the amount of money awarded her was less than the amount contained in the offer of judgment. In addition to paying her own post-offer costs, which may be several thousand dollars, the plaintiff must pay the defendant for the costs he incurred since the time the offer of judgment was made. Thus, the plaintiff's ultimate recovery is substantially diminished through the operation of Rule 68.

The cost-shifting under Rule 68 places pressure on the plaintiff to accept an offer of judgment and settle the case. Accepting the offer assures the plaintiff some substantive relief. The plaintiff also avoids the risk of paying the costs incurred by both parties after service of the offer of judgment.

Besides inducing the plaintiff to settle, Rule 68 relieves the defendant of the burden of paying post-offer costs when he makes an offer of judgment more favorable to the plaintiff than the judgment ultimately entered. This latter purpose of Rule 68, however, is only partially furthered under the United States Supreme Court's interpretation of the rule in *Delta Air Lines, Inc. v. August*.[11]

DELTA AIR LINES—RULE 68 AND THE PREVAILING DEFENDANT

In *Delta Air Lines*, the United States Supreme Court interpreted the following portion of Rule 68: "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 plaintiff had filed a Title VII suit against the defendant alleging that the defendant had discharged her because she was black.[12] The plaintiff sought reinstatement, approximately $20,000 in backpay, attorney's fees, and costs. Several months after the institution of the lawsuit, the defendant served the plaintiff with an offer of judgment for $450, indicating in the offer that the sum of $450 included the plaintiff's attorney's fees. The plaintiff rejected the offer and proceeded to trial where she lost.[13]

10. For pertinent text of Rule 54(d), see *supra* note 8.

11. 450 U.S. 346 (1981).

12. *Id.* at 348.

13. *Id.* at 348-49.

Although the district court entered judgment for the defendant, the court refused to require the plaintiff to pay the defendant's costs incurred after the defendant served the offer of judgment on the plaintiff.[14] The defendant contended that the cost-shifting provision of Rule 68 applied because the plaintiff had not recovered more than $450 after trial. The court rejected that argument and held that an offer of judgment must be at least "arguably reasonable" to trigger the operation of Rule 68.[15] The defendant's offer, in the court's opinion, did not meet this reasonableness requirement. Hence, Rule 68 did not apply, and the court would not order the plaintiff to pay any of the defendant's costs.[16]

On appeal, the Court of Appeals for the Seventh Circuit also imported a reasonableness requirement into Rule 68, suggesting that an offer of judgment should not be given effect unless it warrants the plaintiff's "serious consideration."[17] The court of appeals then affirmed the district court's order denying the defendant's motion for costs.[18]

The Supreme Court granted certiorari, but in the majority opinion written by Justice Stevens, the Court skirted the central question of whether a judge can disregard an offer of judgment under Rule 68 because of purported unreasonableness.[19] Instead, the Court held that Rule 68 is simply inapplicable when judgment has been entered for the defendant.[20] In reaching the conclusion that there is no mandatory cost-shifting under Rule 68 when the defendant prevails, the Court relied on the language, purpose, and history of the rule.[21]

In the majority's opinion, the less favorable "judgment finally obtained by the offeree" referred to in the rule means a judgment entered on the plaintiff's behalf.[22] Hence, the rule has no effect when judgment has been entered for the defendant.[23] Justice Rehnquist noted in his dissenting opinion, however, that the rule is somewhat ambiguous and susceptible to a contrary interpretation.[24] Justice Rehnquist made the defensible argument that the plaintiff

14. *Id.* at 349.

15. *Id.* at 349 & n.3.

16. *Id.*

17. August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979), *aff'd*, 450 U.S. 346 (1981).

18. *Id.* at 702.

19. Delta Air Lines v. August, 450 U.S. 346 (1981).

20. *Id.* at 352.

21. *Id.* at 350.

22. *Id.* at 351-52.

23. *Id.*

24. *Id.* at 366-80 (Rehnquist, J., dissenting). Chief Justice Burger and Justice Stewart joined Justice Rehnquist in his dissenting opinion.

has obtained a judgment even when the defendant has prevailed.[25] Rule 54(a) defines a judgment as an order or decree from which an appeal may be taken. Because the plaintiff may file an appeal once judgment is entered for the defendant, the plaintiff has obtained a judgment, albeit an unfavorable one, within the meaning of Rule 68.[26]

Justice Rehnquist's definition of when the plaintiff has obtained a judgment is buttressed by the examples of prototypical judgments found in the Appendix of Forms accompanying the Federal Rules of Civil Procedure.[27] These forms illustrate that when the plaintiff prevails, the judgment may state that the plaintiff is to recover a certain amount of money from the defendant. When the plaintiff loses, the judgment may state that the plaintiff is to "take nothing."[28] In either case, the plaintiff has obtained a judgment, although in the latter situation, the judgment obtained is a "take nothing" judgment.

The purpose of Rule 68 likewise refutes rather than substantiates the majority's interpretation of the rule. A central purpose of Rule 68 is to promote the settlement of cases by increasing the risks assumed by the plaintiff in pursuing a case through trial.[29] After an offer of judgment has been served upon the plaintiff, the plaintiff faces not only the usual risk of losing at trial, but also the prospect of being forced to pay both the plaintiff's and defendant's post-offer costs. The risk of paying these post-offer costs is diminished, however, under an interpretation of Rule 68 that proscribes mandatory cost-shifting when the defendant prevails.

In the Court's view, the purpose of inducing settlements will still be accomplished if Rule 68 is not applied when a defendant prevails, because the losing plaintiff must still pay the defendant's costs under Rule 54(d).[30] In other words, the Court believes that because a losing plaintiff will have to bear the defendant's costs under Rule 54(d) anyway, Rule 68 offers no additional incentive to settle in cases where the defendant ultimately prevails. This conclusion, of course, overlooks the discretionary nature of Rule 54(d) under which the trial court can relieve the losing party of the burden of paying the costs incurred by the prevailing party.[31]

---

25. *Id.* at 370-71.

26. *Id.*

27. FED. R. CIV. P., Forms 31 and 32, 28 U.S.C. app., at 530.

28. *Id.*

29. FED. R. CIV. P. 68 advisory committee note, 102 F.R.D. 433 (1984); 7 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 68.02 (1979); 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (1973).

30. *Delta Air Lines*, 450 U.S. at 352.

31. For pertinent text of Rule 54(d), see *supra* note 8.

There will be greater pressure placed on the plaintiff to settle a case if an offer of judgment is deemed to shift costs when the defendant prevails. This is made apparent in the following example. Assume that a nonindigent plaintiff is incarcerated in a state penitentiary. He files a suit for damages against the members of the state's parole board alleging that he has been denied parole because of his race. The facts corroborate the plaintiff's claim, but the defendants file a motion to dismiss, contending that they are absolutely immune from damages liability. At the same time, the defendants serve the plaintiff with an offer of judgment for $2,500. The district court denies the defendants' motion to dismiss, but recognizing that there is a substantial argument for deciding the immunity question the other way, permits the defendants to file an interlocutory appeal with the court of appeals. The plaintiff, however, cannot wait until the court of appeals resolves the immunity question to decide whether to accept the offer of judgment because after ten days it will be deemed withdrawn.

In deciding whether to accept or reject the offer of judgment, the plaintiff will know from *Delta Air Lines* that Rule 68 is inapplicable when the defendant prevails. Thus, if the court of appeals holds that the defendants are immune from damages liability, the case will be dismissed, and the plaintiff will not be required to pay the defendants' post-offer costs. In this situation, the plaintiff may be inclined to reject the offer of judgment. There is a chance the plaintiff may still be required to pay the defendants' costs under Rule 54(d). The court may exercise its discretion, however, and relieve the plaintiff of this burden because of the general importance of suits filed to vindicate constitutional rights, the strength of the plaintiff's claim of discrimination, and the tenuous nature of the plaintiff's legal argument on the immunity question.

The plaintiff would more likely accept the offer of judgment if Justice Rehnquist's interpretation of Rule 68 were adopted by the Court.[32] The plaintiff would know that if the defendants prevail on appeal, then he would have to pay the defendants' costs incurred after service of the offer of judgment, including the costs of appeal. The risks assumed by the plaintiff in rejecting the offer of judgment would be multiplied accordingly. Furthermore, the plaintiff would be aware that even if the court of appeals affirms the denial of the defendants' motion to dismiss, the parties would incur substantial costs in preparing for trial. Protracted discovery disputes would lead to mounting costs on both sides. Consequently, when served with the offer of judgment, the plaintiff would realize the substantial financial risks entailed in pursuing the case to trial if Rule 68 requires post-offer costs to be shifted to the plaintiff when the de-

32. *Delta Air Lines*, 450 U.S. at 366-80 (Rehnquist, J., dissenting).

fendant prevails. The prospect of mandatory shifting of thousands of dollars of costs under Rule 68 might therefore lead to acceptance of the offer of judgment. The same case might not be settled if the plaintiff had substantial reason to believe that payment of the defendants' costs could be circumvented under Rule 54(d).

The Supreme Court has, however, concluded that Rule 68, as presently drafted, is inapposite when a defendant prevails. Though the language and purpose of the rule would have supported a contrary conclusion,[33] the Court's interpretation of the rule is a *fait accompli* from which little backtracking can be anticipated. Amendment of the rule to encompass cases where the defendant prevails is nonetheless not precluded and is in fact advisable. Amending the rule so that post-offer costs shift when a defendant, who previously tendered an offer of judgment not accepted by the plaintiff, prevails will prevent the anomalous results now possible under the present interpretation of the rule. Presently, a defendant who obtains a total victory is in a worse position in terms of paying for costs than the defendant who obtains a partial victory. By amending the rule, costs will shift not only when the plaintiff recovers some relief which is less than that specified in the offer of judgment, but also when the plaintiff is awarded no relief at all.

ADVISABILITY OF ADDING A REASONABLENESS REQUIREMENT TO RULE 68

In considering possible amendments to Rule 68, the question arises whether a provision should be added vesting a trial judge with the discretion to disregard offers of judgment which the court deems unreasonable. This reasonableness requirement was judicially imported into the rule by the district court in *Delta Air Lines*.[34] The district court in that case refused to order the plaintiff to pay for the defendant's post-offer costs, stating that the $450 offer of judgment was not even "arguably reasonable" and hence not

33. The majority also based its conclusion on the purported history of Rule 68, noting that when Rule 68 was originally drafted, the state cases discussing offers of judgment were almost uniformly cases in which the plaintiff had prevailed. *Delta Air Lines*, 450 U.S. at 356-58 & nn.21-23. The "history" to which the majority alluded, however, is by no means conclusive on the question of the meaning of Rule 68, because under the general cost-shifting rules in the states referred to, trial courts did not have the discretion which the federal district courts have under Rule 54(d) to deny costs to a prevailing defendant. *Id.* at 373 (Rehnquist, J., dissenting). In those states, therefore, the offer of judgment statutes were inapplicable when a defendant prevailed, because costs had to shift anyway under the general cost-shifting rules. *Id.* at 373-74. For this reason, delving into the effect of offers of judgment was unnecessary when a defendant prevailed. *Id.*

34. August v. Delta Air Lines, Inc., 600 F.2d 699, 700 n.3 (7th Cir. 1979), *aff'd*, 450 U.S. 346 (1981).

a good-faith offer.[35] The court observed that $450 would have been a reasonable sum only if the plaintiff's claim was completely devoid of merit or if other factors existed which favored the defendant.[36]

The Court of Appeals for the Seventh Circuit affirmed the district court's order denying the defendant's motion for costs.[37] Like the district court, the Seventh Circuit found that Rule 68 contains an implicit reasonableness requirement with which the defendant's offer failed to comply. The Seventh Circuit determined that Rule 68 was inapplicable unless an offer of judgment warranted the plaintiff's "serious consideration."[38]

The Supreme Court did not resolve the question of whether Rule 68 contains a reasonableness requirement and held that the rule is simply inapplicable in cases where the defendant prevails.[39] The Court did, however, express some consternation at the thought that, absent some limitation on the express words of Rule 68, a palpably frivolous offer of judgment could trigger the provisions of the rule.[40] If the rule were then interpreted or amended to apply in cases in which the defendant prevails, defense counsel would, as a matter of course in every case, tender offers of judgment for a dollar or even a penny.[41] If the defendant subsequently prevailed, the court would be divested of its discretion under Rule 54(d) to deny post-offer costs to the prevailing defendant.[42]

The Supreme Court was obviously bothered by an interpretation of Rule 68 that would render meaningless the provision of Rule 54(d) granting trial courts the discretionary authority to deny costs to the prevailing party. But equally bothersome is the lower courts' interpretation of Rule 68 in *Delta Air Lines* under which the literal terms of the rule were rendered meaningless through judicial importation of a reasonableness requirement.[43] The rule itself should

35. *Id.*
36. *Id.*
37. *Id.* at 702.
38. *Id.* at 701.
39. *Delta Air Lines*, 450 U.S. at 352.
40. *Id.* at 353.
41. *Id.* at 353 n.11.
42. *Id.* at 353.
43. The lower courts' interpretation is troubling because the terms of Rule 68 regarding the shifting of costs are mandatory: "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." FED. R. CIV. P. 68 (emphasis added). This mandatory language can be contrasted with the language in other rules, such as Rule 30(g)(1), where the shifting of costs is discretionary: "If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court *may* order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees." FED. R. CIV. P. 30(g)(1) (emphasis added).

expressly delimit the circumstances when an offer of judgment will not be given effect.[44] Accordingly, unless the rule on its face confines its application to "arguably reasonable" offers, or offers warranting the plaintiff's "serious consideration," an offer of judgment should not be *sua sponte* nullified by a court because the offer fails to meet the judge's expectations of reasonableness.

The question remains whether the rule should be amended to exclude unreasonable offers of judgment. One obvious disadvantage of such an amendment is that, by making the cost-shifting under the rule discretionary rather than mandatory, the inducement to settle a case resulting from an offer of judgment will be weakened, perhaps substantially. As long as the plaintiff is afforded a means of escaping the effect of an offer of judgment, the plaintiff will be more inclined to disregard it.

Another related drawback of amending Rule 68 to include some sort of reasonableness limitation is the uncertainty that will replace the presently straightforward analysis under the rule. At present, a court simply compares the relief proffered in the offer of judgment with the relief finally awarded the plaintiff. The court orders the plaintiff to pay post-offer costs if the plaintiff obtains a less favorable recovery than that contained in the offer of judgment.

If a reasonableness requirement is added to the rule, a court will have to engage in a complicated *post hoc* review of the merits of the plaintiff's case to assess whether an offer of judgment tendered to the plaintiff, perhaps years earlier, was reasonable. In making this assessment, the court will presumably examine such factors as the likelihood that the plaintiff could have recovered more than the amount contained in the offer of judgment, the difference between the amount offered and the amount of the potential recovery, the plaintiff's actual recovery, the costs and fees incurred by both the plaintiff and the defendant in pursuing the litigation through trial, and the burdens placed on the judicial system in adjudicating the parties' dispute. The perplexity of this inquiry will invite disputes regarding the reasonableness of offers of judgment.[45] Rather than serving as a simple device to terminate controversy and promote

44. Other federal rules identify the circumstances in which the rules will not be given effect. *See, e.g.*, FED. R. CIV. P. 37(a)(4). Rule 37(a)(4) provides that when a motion to compel discovery is granted, the party whose conduct necessitated the filing of the motion shall pay the reasonable expenses incurred in obtaining the order compelling discovery "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." *Id. See also* FED. R. CIV. P. 37(b)(2)(E), 37(d), & 45(f).

45. *See, e.g.*, Chesny v. Marek, 547 F. Supp. 542, 546 (N.D. Ill. 1982), *aff'd in part and rev'd in part*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984). The plaintiff in *Chesny* attempted to avoid the cost-shifting effect of an

the settlement of cases, an offer of judgment will itself become a major source of controversy in a case.

In addition, an element of unfairness might be injected into a case when the plaintiff is faced with an offer of judgment whose effect is uncertain. The plaintiff might, for example, decide not to accept an offer of judgment, contemplating that a court will hold that the offer was unreasonable. The court's subsequent assessment of the offer of judgment might very well differ from the plaintiff's, however, because the assessments of the offer are made at different times. Thus, an offer of judgment that might appear unreasonable before discovery has commenced, might appear quite reasonable after discovery and a trial have revealed the strength of the defendant's position.[46] A plaintiff would then presumably have to pay for the parties' post-offer costs even though the plaintiff did not accept the offer because he assumed, in good faith, that the offer was unreasonable.

Adding an express reasonableness requirement to Rule 68 might therefore undermine and unduly complicate the rule's operation. At the same time, such an added requirement might be spurious and unnecessary because an offer of judgment which offered more relief to the plaintiff than the relief ultimately recovered is "arguably reasonable" on its face, at least when viewed in retrospect. From this perspective, even an offer of judgment for a dollar could be reasonable if the defendant ultimately prevails. If the defendant, on the other hand, does not prevail, and the plaintiff recovers more than the nominal amount proffered in the offer of judgment, the court could consider the defendant's half-hearted attempt to settle the case when exercising its discretion to allocate costs under Rule 54(d).

ATTORNEY'S FEES AND OFFERS OF JUDGMENT

Under some circumstances, however, an offer of judgment may be unreasonable even when the defendant prevails. For example, an offer of judgment for a nominal amount might be unreasonable when tendered to a plaintiff in a civil rights action in which the prevailing plaintiff is statutorily entitled to attorney's fees as part of

---

offer of judgment by arguing that the $100,000 offer was not "reasonable." *Id.* at 545.

46. The unfairness resulting from a retrospective determination of the reasonableness of an offer of judgment can be diminished if the court assesses the reasonableness of the offer of judgment from the plaintiff's viewpoint at the time the offer was made. Rule 68 would then be substantially weakened, however, as plaintiffs point to facts not known at the time the offer of judgment was made to support their contentions that the offer appeared unreasonable and hence should be given no effect.

his or her costs.[47] The attorney's fees provisions of these civil rights statutes are designed to induce attorneys to file suits on behalf of individuals whose civil rights have been violated but who cannot afford to pay the attorney's fees to vindicate their rights.

If a defendant's offer of judgment does not include attorney's fees in these civil rights cases, Rule 68 will discourage the filing of civil rights suits. When, for example, a defendant serves an offer of judgment on a plaintiff who has filed a civil rights claim, the plaintiff may want to accept the offer to avoid the risk of paying both parties' post-offer costs. If the plaintiff accepts the offer, the plaintiff's attorney will in most cases be left unrecompensed for the time already spent litigating the case. This lack of return for the time invested in the case, due to the client's acceptance of an offer of judgment, will strongly discourage attorneys from handling civil rights suits. The fact that acceptance of the offer of judgment will leave the attorney empty-handed may also lead to a conflict of interest in which the attorney's interests are furthered by pursuing the litigation while the client's interests are best served by accepting the offer of judgment.

Attorney's Fees as Part of the Offer

To avert these problems, several courts have interpreted Rule 68 to encompass the plaintiff's attorney's fees when an offer of judgment is tendered in a civil rights action.[48] An offer to pay "costs incurred" includes an offer to pay the plaintiff's attorney's fees that have accrued at the time the offer of judgment is made.[49] This interpretation, however, has spawned other problems.

First, if the attorney's fees incurred in prosecuting a civil rights claim are encompassed by Rule 68, it is unclear whether the offer of judgment must specifically state that the offer includes the plaintiff's accrued attorney's fees. Under one possible approach, the attorney's fees must be specifically offered or the offer of judgment is invalid. Under another approach, specification is unnecessary because payment of the fees is an implicit term of an offer in a case where the prevailing plaintiff is statutorily entitled to attorney's

47. *See, e.g.*, The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1982). This statute includes an award of attorney's fees as part of the prevailing plaintiff's costs. *See also* Alyeska Pipeline Service Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1975) (lists twenty-nine of the federal statutes providing for an award of attorney's fees).

48. *See, e.g.*, Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983); Chesny v. Marek, 547 F. Supp. 542 (N.D. Ill. 1982), *aff'd in part and rev'd in part*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984); Waters v. Heublein Inc., 485 F. Supp. 110 (N.D. Cal. 1979).

49. *Fulps*, 715 F.2d at 1095; *Waters*, 485 F. Supp. at 114; *see also* Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978) (offer in civil rights action was defective since it excluded attorney's fees).

fees as part of his costs.[50]

Under a third approach, the onus of identifying the plaintiff's attorney's fees as part of the recovery is placed on the plaintiff.[51] The plaintiff must state in the written acceptance that the defendant will pay the plaintiff's accrued attorney's fees. If the plaintiff fails to claim attorney's fees, and the offer of judgment is silent on the matter, the plaintiff cannot recover any fees from the defendant although the case will otherwise be settled in accordance with the terms of the offer.[52] Alternatively, if the offer does not specify fees as part of the plaintiff's recovery but the acceptance does, the offer will be void because there was not a "meeting of the minds" on the terms of the offer.[53] This will occur even if the plaintiff expected that the fees would be paid because the case was filed under a substantive statute which provided for attorney's fees. The litigation will then proceed.[54]

The uncertainty regarding the circumstances in which a plaintiff will recover attorney's fees after accepting an offer of judgment is not conducive to the settlement of cases, a primary objective of Rule 68. At present, a civil rights plaintiff, confronted with an offer of judgment that does not mention the plaintiff's attorney's fees, does not know if the offer is void on its face or valid. The dubious validity of the offer consequently diminishes the pressure exerted on the plaintiff to settle. The plaintiff, confronted with an offer of judgment whose legal effect is unknown, may prefer to reject the offer, pursue a greater recovery at trial, and if unsuccessful, contest the validity of the offer.

---

50. *See* Fulps v. City of Springfield, 715 F.2d 1088, 1095 (6th Cir. 1983).

51. Gamlen Chem. Co. v. Dacar Chem. Prod. Co., 5 F.R.D. 215, 216 (W.D. Pa. 1946). The defendants in that case were charged with copyright infringement and unfair competition. *Id.* at 215. The defendants tendered an offer of judgment under Rule 68 for $500, plus costs to date. *Id.* The plaintiffs accepted this offer, but later requested the court to award reasonable attorney's fees as part of the costs. *Id.* The court found that the defendants did not intend to include attorney's fees in their offer, even though plaintiffs are typically awarded attorney's fees in copyright actions. *Id.* at 216. The court then held that the acceptance of an offer under Rule 68 must specifically set forth the claim for attorney's fees if attorney's fees were not included as part of the offer. *Id. Cf.* Cruz v. Pacific Am. Ins. Corp., 337 F.2d 746 (9th Cir. 1964). The court in *Cruz* observed that it was unclear whether the offer of judgment was tendered pursuant to Rule 68 or pursuant to a Guam procedural statute. *Id.* at 748. The Guam statute was similar to Rule 68, but under the statute, accrued costs were not expressly required to be in the offer. *Id.* at 748 n.1. In any event, the plaintiffs in *Cruz* were not awarded attorney's fees because they failed to specifically claim them in their acceptance of the offer of judgment. *Id.* at 750.

52. *Gamlen Chem. Co.*, 5 F.R.D. at 216.

53. Greenwood v. Stevenson, 88 F.R.D. 225, 232 (R.I. 1980).

54. *Id.*

Specification of Attorney's Fees as Part of the Offer

Rule 68 should be clarified so that when a plaintiff has filed a claim under which the prevailing plaintiff is statutorily entitled to attorney's fees, the defendant must state in the offer of judgment that the offer includes these fees. Failure to specifically include attorney's fees within the offer to settle such a claim would then invalidate the offer of judgment.

Requiring the defendant in these cases to separately specify attorney's fees as part of the relief proffered in the offer of judgment will also obviate another problem. At present, some defendants make offers for a specified sum of money, stating that the plaintiff's attorney's fees are to be paid out of that designated sum.[55] These offers in which attorney's fees are merged with the other substantive relief offered the plaintiff can lead to innumerable problems when the offer has been rejected and the court must calculate whether the plaintiff's ultimate recovery has exceeded the defendant's offer of judgment.

Assume, for example, that the defendant in a section 1983 civil rights suit tenders to the plaintiff an offer of judgment for $10,000. The offer states that the amount includes both the plaintiff's attorney's fees and the plaintiff's substantive recovery. The plaintiff rejects the offer and proceeds to trial where the jury returns a verdict for $5,000. Calculating whether the $10,000 offer of judgment was more favorable to the plaintiff than the $5,000 verdict will depend on whether the judge awards the plaintiff attorney's fees which equal or exceed $5,000. What Rule 68 envisions as a simple cost-shifting procedure that can be handled by the clerk of the court will become a complicated process in which the shifting of costs will depend on the results of the judge's multifaceted inquiry into the amount of attorney's fees the plaintiff incurred.[56]

Permitting the defendant to subsume attorney's fees within a general amount of money offered the plaintiff may have even more egregious consequences if the offer is accepted. If the offer of judgment fails to distinguish the amount of money to be paid the plaintiff from the fees to be paid plaintiff's counsel, the plaintiff and the plaintiff's counsel will have to divide the sum when the offer is accepted. The plaintiff may be left with no recovery, or even a negative recovery, after paying attorney's fees. The plaintiff's recovery will be paltry even though it is apparent, under the realistic assess-

55. See, for example, the offer of judgment at issue in Delta Air Lines v. August, 450 U.S. 346 (1981).

56. That inquiry might in turn be affected and distorted by the court's awareness that its decision regarding the fee award might trigger the operation of Rule 68.

ment of the strength of the plaintiff's claim that the offer of judgment was designed to induce, that a larger recovery is warranted.

The plaintiff's attorney, on the other hand, may be left with a sum which is not satisfactory compensation for the time expended on the case.[57] As a consequence of this minimal compensation, attorneys will be dissuaded from filing such lawsuits. At the same time, those attorneys who continue to handle such cases may be faced with conflicts of interest when their clients are served with offers of judgment. The attorney's interests, unlike the client's, may be best served by rejecting the offer of judgment.

Determination of Fee Award by the Court

Such conflicts of interest will also arise if the decision regarding the amount of attorney's fees to be paid plaintiff's counsel is vested in the defendant. If the amount of fees specified by the defendant will not adequately compensate the plaintiff's attorney for the time devoted to the case, the plaintiff's attorney might be faced with a dilemma. The attorney's own interests, which favor rejection of the offer of judgment, may be at odds with the interests of the client, which favor acceptance.

At other times, the interests of the plaintiff's attorney might propel acceptance of an offer of judgment which would not be accepted if the attorney's self-interest did not skew his judgment and advice regarding the advisability of accepting the offer. Such a conflict will normally ensue when the Rule 68 offer contains a generous amount of attorney's fees. In such a situation, the economic pressure placed on the plaintiff's attorney, who has most likely agreed to handle the case without any assurance of compensation in the first place, is greatly exacerbated by the prospect of being barred from recovering any post-offer fees if the plaintiff prevails but recovers less than the amount specified in the offer of judgment.[58] An offer of attorney's fees in the offer of judgment will constitute a powerful inducement for plaintiff's counsel to settle.

57. The consequences of such minimal compensation would be much like the consequences which would follow if the defendants were not required to include attorney's fees as part of the relief proffered in offers of judgment served in actions in which there are statutory fee awards. *See supra* note 47 and accompanying text.

58. This economic pressure would be diminished, of course, if an offer of judgment had no effect on the recovery of the plaintiff's post-offer attorney's fees even though the defendant was required to offer attorney's fees as part of the offer of judgment. Excluding the plaintiff's post-offer attorney's fees from the scope of Rule 68 while requiring the defendant to include such fees in the offer would, however, eliminate a strong incentive for the settlement of cases involving statutory fees awards. Since this incentive can be preserved while settlements are reached which are compatable with the purposes of the statutes, see *infra* note 76 and accompanying text, the plaintiff's attorney's fees should not only be included in the relief tendered in an offer of judgment but

Vesting the trial court with the duty to determine the amount of plaintiff's attorney's fees after an offer of judgment is accepted will not eliminate the conflicts of interest which arise when the parties set the fees. If the offer of judgment contains an offer of attorney's fees, with the amount to be determined by the trial court, the plaintiff's attorney will still be assured reasonable compensation if the client accepts the offer. If the client rejects the offer, the attorney may still be barred from recovering any fees for the time expended on the case after service of the offer of judgment. The attorney's interest in accepting or rejecting the offer of judgment may therefore still not correspond with the client's.

The conflicts of interest will be diminished, however, if the trial judge determines the fee award rather than the defendant. The defendant will not be able to place additional pressure on plaintiff's counsel to settle by offering excessive compensation for the time expended on the case. The defendant will also be unable to offer an inadequate amount of attorney's fees in an offer of judgment. This would be desirable because giving a defendant the authority to unilaterally decide the amount of compensation to be paid opposing counsel will obviously deter attorneys from representing plaintiffs in civil rights actions and other lawsuits in which there is a statutory fee award.

Allocating to the judge, rather than to the defendant, the authority to decide the amount of attorney's fees to be paid to the plaintiff if an offer of judgment is accepted does have a disadvantage. The defendant may be able to calculate fairly accurately the costs incurred by the plaintiff before an offer of judgment is served. The amount of the plaintiff's attorney's fees, however, will be much more difficult to ascertain, especially if plaintiff's counsel has expended a lot of time in factual investigation, legal research, and other behind-the-scene matters. In making the offer of judgment then, the defendant will be exposing himself to an uncertain amount of liability. This indefiniteness might discourage defendants from making offers of judgment in cases in which defendants must include attorney's fees as part of the offer.

The uncertainty regarding the consequences of making such an offer of judgment appears almost infinitesimal, however, when compared to the uncertainty regarding the final outcome of the case if litigated through trial. If the case is tried, the defendant will not only not know the amount of attorney's fees which will be awarded the prevailing plaintiff, but the plaintiff's substantive relief will also be in doubt. Because of this compounded uncertainty, a defendant may still opt for the lesser uncertainty attending the making of an

---

also in the post-offer expenses barred through operation of an offer of judgment.

offer of judgment. In making such an offer, the defendant can still in a sense "control" the amount of fees paid to plaintiff's counsel by making the offer relatively early after the onset of the litigation.

In any event, the advantages of having the judge decide the amount of attorney's fees to be paid to the plaintiff pursuant to an offer of judgment outweigh the disadvantages. As discussed earlier, placing the decision in the hands of the judge reduces the conflicts of interest confronting a plaintiff's attorney whose client has been served with an offer of judgment.

THE MEANING OF "COSTS" UNDER RULE 68

Maintaining the Traditional Meaning of the Term "Costs"

Rule 68 should be amended so that attorney's fees are differentiated from costs and so that the authority to determine the amount of the plaintiff's fees is vested in the court. These changes will lend consistency to the federal rules. At present, some courts have held that the term "costs" has one meaning in Rule 54 and another meaning in Rule 68. These courts have held that the term "costs" in Rule 68 encompasses attorney's fees when there is an applicable statutory fee provision.[59] Distinguishing attorney's fees from costs in Rule 68 will reconcile the two rules so that in both, the term "costs" will retain its traditional meaning. Separating attorney's fees from costs in Rule 68 will also make the rule compatible with other federal rules in which, if an award of attorney's fees is contemplated, attorney's fees are specifically mentioned.[60]

Inclusion of Defendant's Costs

Amending Rule 68 so that the costs which the defendant offers to pay are separate from the plaintiff's attorney's fees will also make the rule itself consistent. Rule 68 refers to costs in two different places: first, in the requirement that an offer of judgment include an offer to pay "costs then accrued," and second, in the provision that the offeree pay "the costs incurred" after the offer is made if the offeree's recovery is less favorable than the offer of judgment. At least one court has interpreted Rule 68 so that a

59. Chesny v. Marek, 547 F. Supp. 542 (N.D. Ill. 1982) (under Rule 68 plaintiff could not recover post-offer costs, including attorney's fees in a civil rights action, because the jury award to plaintiff was less than defendant's offer of judgment), *aff'd in part and rev'd in part*, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984); Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979) (plaintiff, in a Title VII suit, could not recover attorney's fees incurred after defendant's offer of judgment because the offer exceeded plaintiff's final award).

60. *See, e.g.*, FED. R. CIV. P. 37(a)(4). Under Rule 37(a)(4), a court may award "reasonable expenses . . . including attorney's fees" to a party who wins a discovery dispute. *Id.*

plaintiff is only required to pay his own post-offer costs and not the defendant's.[61] This interpretation, however, is not supported by the language of the rule which states that the offeree must pay "the costs incurred" after the offer is made and not that the offeree must pay "the offeree's costs incurred."[62] The interpretation is also at odds with the purpose of Rule 68 to induce settlements, because the incentive to settle will of course be stronger if, in rejecting an offer of judgment, a plaintiff risks paying not only the plaintiff's but also the defendant's costs incurred after the making of the offer of judgment. Including the defendant's post-offer costs within the potential financial burden assumed by a plaintiff who rejects an offer of judgment will also be consonant with the rule's objective to relieve a defendant of the burden of paying for expenses that could have been avoided had the plaintiff accepted the offer of judgment.[63]

The Defendant's Attorney's Fees

If the term "costs" referred to in the first part of Rule 68 is interpreted to include attorney's fees, then it would seem logical that attorney's fees are also included when the same word is used subsequently in the rule. Such an interpretation, however, could mean that a civil rights plaintiff who rejected an offer of judgment and then obtained a less favorable recovery at trial will be forced to pay, not only the plaintiff's and defendant's post-offer costs, but also the plaintiff's and defendant's attorney's fees incurred after the offer was made.

The courts have balked at placing such an onerous financial burden on plaintiffs and have held that Rule 68 generally does not shift the burden of paying the defendant's attorney's fees to the plaintiff.[64] The result, although perhaps understandable on policy grounds, is a disconcerting example of judicial improvisation. The term "costs" in one part of the rule is given a meaning which departs from its traditional interpretation because of the concern that excluding fees from the relief proffered a civil rights plaintiff in an offer of judgment will discourage civil rights litigation. The meaning of the term "costs" is further contorted in a subsequent part of

61. *Delta Air Lines*, 450 U.S. at 359 n.24. *See also Chesny*, 547 F. Supp. at 547.

62. For text of Rule 68, see *supra* note 4.

63. Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969).

64. *See Delta Air Lines*, 450 U.S. at 366 n.5 (Powell, J., concurring) (dicta stating that an offer of judgment will not normally shift the defendant's post-offer attorney's fees because while attorney's fees are usually awarded to a prevailing plaintiff, a prevailing defendant is only awarded fees when the suit was frivolous); *Chesny*, 547 F. Supp. at 547 (defendants are not prevailing parties under statute because they have lost the case so their costs do not include attorney's fees); *Waters*, 485 F. Supp. at 117.

the rule with courts announcing that, although the word encompasses attorney's fees, only the plaintiff's attorney's fees and not the defendant's fees fall within the rubric of the rule.[65] This interpretation of the rule is again grounded not on its words but on a solicitous concern for plaintiffs, especially plaintiffs who have filed civil rights actions.[66]

These concerns should be addressed through amendment of Rule 68 rather than through a disingenuous twisting of the literal meaning of the words in the rule. Rule 68 should be amended so that an offer of judgment is required to contain, not only an offer to pay costs then accrued, but also an offer to pay the plaintiff's reasonably accrued attorney's fees when the plaintiff's claim includes statutory entitlement to attorney's fees. The rule should further specify that the amount of the fees will be determined by the court following acceptance of the offer of judgment.

Rule 68 should also be clarified to state that, if the judgment finally obtained by the offeree is less favorable than the offer of judgment, the offeree must pay the plaintiff's and defendant's costs incurred after the making of the offer as well as the plaintiff's attorney's fees incurred after the offer. The defendant's attorney's fees would then clearly not fall within the financial risks assumed by a plaintiff who rejects an offer of judgment.

Adding the defendant's attorney's fees to the risks taken in rejecting an offer of judgment would admittedly accentuate the pressure on the plaintiff not to proceed further with the litigation. Because Rule 68, as envisioned, will give effect to even nominal of-

---

65. *See supra* note 64.

66. When applying Rule 68, the courts rationalize the differential treatment of plaintiffs' and defendants' attorney's fees by pointing to the differential treatment of these fees under the substantive civil rights statutes. For example, while the prevailing plaintiff in a Title VII suit is ordinarily entitled to attorney's fees under 42 U.S.C. § 2000e-5(k) (1982), a prevailing defendant is entitled to attorney's fees only if the plaintiff's suit was frivolous or without foundation. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).

There is, however, no indication in the language or history of Rule 68 that its procedural effect is dependent on the substantive statute under which the plaintiff brought a claim. *Cf.* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980). In *Roadway Express*, the Supreme Court construed the meaning of the word "costs" in 28 U.S.C. § 1927, which provides for an assessment of costs against an attorney who "unreasonably and vexatiously . . . multiples" the proceedings in a lawsuit. The Court observed that it would resort to the understanding of the meaning of the term "costs" at the time § 1927 was enacted, and that the meaning of the word in § 1927 should not be changed by an expanded definition under each separate substantive statute upon which a lawsuit may be based. *Id.* at 759, 761. Consequently, the Court held that the word "costs" in § 1927 does not include attorney's fees, even in a lawsuit brought under Title VII in which attorney's fees may often be recovered as part of the costs. The Court also noted that it would be improper judicial legislation to incorporate into § 1927 Title VII's differential treatment of a prevailing plaintiff's and defendant's right to recover attorney's fees. *Id.* at 762.

fers of judgment, including the defendant's attorney's fees within the scope of the rule would effectuate a substantial overhaul of the American system of fee allocation under which each party generally bears his or her own attorney's fees.[67] The threat of being required to pay the potentially enormous attorney's fees of one's opponent would create a tremendous disincentive to the pursuit of litigation, not only of civil rights suits but of other lawsuits as well.[68]

Poor and middle class plaintiffs would be particularly disadvantaged by a rule change which makes it possible to place the burden of the defendant's post-offer attorney's fees on the plaintiff. The greatly enhanced risks of rejecting an offer of judgment might lead an individual who is poor or of moderate means to accept an offer of judgment even though the offer is pathetically low when compared to the merits of the case.

To prevent offers of judgment from giving such a comparative advantage to those of greater means against those of lesser means, the question of whether the defendant's post-offer attorney's fees should shift could fall within the discretion of the trial court. Adding such a discretionary component to Rule 68, however, would create the same problems of uncertainty and unfairness which would occur, as discussed above, if judges had the discretion to disregard unreasonable offers of judgment. Uncertainty as to how the

---

67. If abandonment of the "American Rule" of fees allocation is warranted, there will still remain the question of who should instigate the change, the Supreme Court under its rulemaking authority, or Congress by statute. In the past, the Supreme Court has resisted appeals to create exceptions to the "American Rule," noting that the longstanding practice of requiring each party to bear its own costs should be respected by the Court unless modified by statute. *See* Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 247-50 (1975). *See also* Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984). In *Chesny*, the court observed that courts have no power under Rule 68 to change the allocation of attorney's fees under 42 U.S.C. § 1988. The court cited the Rules Enacting Act, 28 U.S.C. § 2072, which states that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." For a discussion of pending statutory reform of attorney's fees, see Rader, *The Fee Awards Act of 1976: Examining the Foundation for Legislative Reform of Attorney's Fees Shifting*, 18 J. MAR. L. REV. 77 (1984).

68. *See* Chesny v. Marek, 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984). In *Chesny*, the court addressed the question of whether a plaintiff in a civil rights suit, whose recovery after trial was less than the amount proffered in an offer of judgment, was precluded from recovering post-offer attorney's fees. If an offer of judgment had not been tendered to the plaintiff, the plaintiff would have been entitled to these fees under 42 U.S.C. § 1988. Section 1988 authorizes reimbursement to the prevailing party in a civil rights suit of a "reasonable attorney's fee as part of the costs."

The court observed that interpreting Rule 68 to bar recovery of post-offer attorney's fees would conflict with the policy of § 1988 by discouraging attorneys from bringing civil rights suits. *Id.* at 478. The court accordingly held that the word "costs" in Rule 68 should not be interpreted to include attorney's fees incurred after service of the offer of judgment.

court will view the defendant's entitlement to attorney's fees might cause one plaintiff to accept an offer of judgment which would otherwise be rejected. On the other hand, another plaintiff might reject an offer of judgment because of a good-faith belief that the equities weighed against an award of post-offer fees to the defendant. A good-faith and reasonable but inaccurate prediction could then lead to the incursion of a crushing financial burden on an impecunious plaintiff.

Amending Rule 68 to encompass cases in which the defendant prevails, expanding the rule as discussed below so that plaintiffs can make offers of judgment, eliminating ambiguities in the rule which impair its effectiveness, and terminating the importation of a reasonableness limitation into the rule should strengthen Rule 68, making it an effective settlement device. Only if these measures prove inadequate to the task should more drastic steps be adopted.[69]

CLASS ACTION SUITS

When a plaintiff files a class action suit, the relief specified in an offer of judgment may be considered unreasonable even though the relief ultimately procured by the plaintiff class is less favorable than that afforded by the offer of judgment. This unreasonableness is due to the peculiar fact that a class action suit is brought by a class representative and not by every individual member of the class who will gain from a favorable judgment for the plaintiff. The class representative files the lawsuit and bears the financial cost of the lawsuit as it is being litigated. The benefits of this suit will be spread throughout the class if the plaintiff prevails. If the defend-

69. In 1983, the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure suggested the taking of such drastic steps to enhance the efficacy of Rule 68. Preliminary Draft of Proposed Amendment to the Federal Rules of Civil Procedure, 98 F.R.D. 361-63 (1983). Under the 1983 proposals to amend Rule 68, the offeree would have to pay the offeror's post-offer attorney's fees if the judgment ultimately obtained was not more favorable than the rejected offer. The proposals, which were heavily criticized, have since been withdrawn.

In July of 1984, the Advisory Committee submitted a new proposal to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. For the full text of the proposal, see Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 102 F.R.D. 432-33 (1984). Under the 1984 proposal, an offer of judgment may still lead to the shifting of post-offer attorney's fees, but the shifting of fees is permitted, rather than mandated, by the proposed rule. In determining the sanction to be imposed on an offeree who unreasonably rejected an offer of judgment, the court is to consider all of the circumstances existing at the time of rejection.

The proposal is presently being circulated for public comment scheduled to end on April 1, 1985. Letter of Submission to the Bench and Bar, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 102 F.R.D. 410 (1984).

ant prevails, however, the class representative will generally remain uncompensated for the costs incurred in litigating the lawsuit.[70] The class representative may not only be left paying for the plaintiff's costs and attorney's fees, but may also be required to pay the defendant's post-offer costs if Rule 68 encompasses class action suits. Consequently, when served with an offer of judgment, the risk confronting a class representative of paying a disproportionate share of the costs is accentuated and multiplied.

It is true that a class representative already faces the risk of paying a disproportionate share of the defendant's costs if the defendant prevails, because costs, both pre-offer and post-offer, are normally awarded to the prevailing party under Rule 54(d). If the defendant prevails, the class representative will pay these costs and generally have no right to reimbursement from other class members. As noted earlier, however, the award of costs under Rule 54(d) is discretionary with the court. In exercising its discretion, the court may consider the fact that an award of costs will be unduly burdensome to the unsuccessful party.[71] When awarding costs to the defendant might place an unfair financial burden on the class representative and dissuade the bringing of class action suits, the court may deny costs to the prevailing defendant.[72]

Rule 23(e) requires the approval of the court before a class action suit is dismissed or compromised.[73] This rule is designed to protect the class from a settlement which is against the interests of the class. But the juxtaposition of a class action suit under Rule 23 and an offer of judgment under Rule 68 may present the court with a Hobson's choice. A court may, under Rule 23(e), reject a settlement made pursuant to an offer of judgment because of the superseding interests of the plaintiff class, but this decision may cast a dispro-

---

70. 2 H. NEWBERG, CLASS ACTIONS § 2780 (1977).

71. Black Hills Alliance v. Regional Forester, 526 F. Supp. 257 (D.S.D. 1981). The plaintiffs in that case were awarded costs in an action which was dismissed because of mootness. *Id.* at 260. In awarding costs to the plaintiff, the court considered that the action was brought in good faith, that the public and the defendants benefited from the litigation, and that the denial of costs to the plaintiffs would unduly inhibit future environmental suits. *Id.* at 359-60; *see also* County of Suffolk v. Secretary of Interior, 76 F.R.D. 469 (E.D.N.Y. 1977). Costs were denied to the prevailing defendants after the court considered several relevant factors, including the enormous resources of the defendants and the substantial burden which would otherwise be imposed on the plaintiffs. *Id.* at 473-74.

72. The court may be especially reluctant to award costs to the defendant in those class action suits where the potential individual recovery of class members, including the class representative, is small.

73. This rule states:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

FED. R. CIV. P. 23(e).

portionate and possibly enormous financial burden on the class representative. In addition, the court will be nullifying the command of Rule 68. If, on the other hand, the court acknowledges the legitimate interests of the class representative in avoiding such a financial burden and allows the offer of judgment to be accepted, the court may be elevating the individual concerns of the class representative over the interests of the many class members. The court will then be ignoring the purpose of Rule 23(e) which is to protect class members from settlements which are contrary to the interests of the class.

The mandatory cost-shifting of Rule 68, therefore, seems ill-suited to class action suits.[74] The interests of the class must be preserved while protecting class representatives from the undue financial burdens which will deter the filing of class action suits. It is best then that Rule 54(d) govern the allocation of costs in a class action suit.

Even if the mandatory cost-shifting under Rule 68 does not extend to class action suits, the defendant is not necessarily precluded from making an offer of judgment. An offer of judgment in such a case will not automatically shift post-offer costs to the plaintiff if the plaintiff's recovery is less than the recovery offered by the defendant. The offer, however, could be considered by the court when exercising its discretion under Rule 54(d) to award or deny costs to the prevailing party.[75] For example, if the plaintiff had spurned an offer of judgment and then lost the case, the court might be more inclined to award costs to the prevailing defendant. Alternatively, if the plaintiff had rejected an offer of judgment providing substantially the same relief awarded the plaintiff class, the court might deny the recovery of post-offer costs by the prevailing plaintiff class.

PLAINTIFF'S OFFERS

While Rule 68 should be narrowed to exclude class action suits, it should be broadened so that plaintiffs as well as defendants can make offers of judgment. The purpose of the rule will be furthered by expanding its scope because plaintiffs as well as defendants will be able to use the threat of mandatory cost-shifting as leverage in inducing settlements. Plaintiffs will also be able to ensure that they

74. The court in Gay v. Waiters' and Dairy Lunchmen's Union, 86 F.R.D. 500 (N.D. Cal. 1980) refused to apply Rule 68 to a class action suit because of the peculiar problems associated with class actions. *See supra* notes 70-73 and accompanying text.

75. *Cf. Delta Air Lines*, 450 U.S. at 356 n.16 (1981) (although Rule 68 is inapplicable when a defendant has prevailed, an offer of judgment is still admissible to influence a judge's discretion under Rule 54(d)).

are relieved of the burden of paying for costs incurred after serving an offer of judgment containing a less favorable settlement than the relief ultimately obtained by the plaintiff.

CONCLUSION

Offers of judgment could represent useful devices for settling cases and controlling the escalating costs of litigation. They are neglected litigation tools, however, in part because their existence is not widely known among attorneys and, in part, because of ambiguities and gaps in Rule 68. The former problem is largely attributable to law schools whose pedagogical focus is on the trial of cases rather than the settlement of cases. This problem can be ameliorated by the educational efforts of law schools and attorneys' professional organizations.

The latter problem, the ambiguities and gaps in Rule 68, can be rectified through amendment of the rule. The following amendments will clarify Rule 68 and improve its efficacy as a settlement device. First, the rule should be amended so that the mandatory cost-shifting envisioned by the rule occurs when the defendant prevails and not just when the plaintiff prevails but recovers less than the amount offered by the defendant in the offer of judgment. Second, the rule should require a defendant to include the plaintiff's accrued reasonable attorney's fees as a separate part of the offer of judgment when the offer is to settle a claim in which the prevailing plaintiff would statutorily be entitled to attorney's fees. Third, Rule 68 should specify that in such a case the decision regarding the amount of attorney's fees to be awarded the plaintiff following acceptance of an offer of judgment will be vested in the court.

Fourth, it is advisable to amend Rule 68 so that it clearly states that, when a plaintiff's recovery is less than the recovery offered by the defendant, the plaintiff must assume not only the burden of paying for the plaintiff's own costs incurred after the offer of judgment was made, but must pay the defendant's post-offer costs as well. In addition, in a case in which the prevailing plaintiff would be entitled to a statutory fee award, the plaintiff would be barred from recovering post-offer attorney's fees from the defendant if the relief ultimately obtained was less favorable than the relief proffered in the Rule 68 offer. Fifth, Rule 68 should exempt class action suits from the rule's coverage. Finally, the rule should be amended so that plaintiffs as well as defendants can use offers of judgment to exert pressure to settle.

The proposed changes in the rule should remove uncertainties which have inhibited the effective use of offers of judgment, and the changes will also promote settlements by clearly increasing the

risks of rejecting an offer of judgment. In addition, they represent a fair means by which a party may transfer to an opponent the burden of paying for costs, and in some instances attorney's fees, whose incursion could have been avoided had the offeree accepted the offer of judgment which proved to be more favorable to the offeree than the final outcome.

There are some who will argue that applying Rule 68 to certain types of claims, such as civil rights claims, will serve as an impediment to the litigation of such claims. This argument is of course true since the purpose of Rule 68 is to discourage the further pursuit of claims which can and should be settled.[76] Plaintiff's attorneys may be especially vocal in their objections to an amendment which would bar the recovery of post-offer attorney's fees in civil rights cases. Recovery of a plaintiff's post-offer attorney's fees, however, would only be precluded when the incursion of those fees was for naught, when settlement would have avoided a useless expenditure of the parties' time and money and the court's resources. One might argue that to insist on litigating the case and representing the plaintiff in the face of such a settlement offer should be at the attorney's peril.

In addition, if Rule 68 is amended so that plaintiffs can also make offers of judgment, the plaintiff will not be left in a no-win, "take it or leave it" situation. If the plaintiff considers the amount offered by the defendant insufficient but is reticent to assume the risk of paying post-offer costs and the plaintiff's post-offer attorney's fees, the plaintiff can serve the defendant with an offer of judgment whose terms are more palatable to the plaintiff. The end result of the offers and counteroffers, all of which will be backed up by the threat of mandatory cost-shifting, will often be a settlement. The settlement, like most settlements, will generally not wholly please the parties; the settlement resulting from acceptance of an offer of judgment will, however, terminate a lawsuit when further litigation is needless.

76. In addition, although some causes of action are exempted from the federal rules under Rule 81 of the Federal Rules of Civil Procedure, civil rights actions are not presently so exempt. FED. R. CIV. P. 81.