

NOTE

RULE 68: A “NEW” TOOL FOR LITIGATION

Considering the ingenuity to be found among members of the litigating bar, it is not surprising to find attorneys attempting any trick in the book—and even some that are not—on behalf of a client. It is therefore quite ironic that a procedural device that *is* in the book and that can often prove tactically valuable, the offer of judgment provided for in rule 68 of the Federal Rules of Civil Procedure,¹ is not in the trial lawyer’s bag of commonly used tricks.²

Rule 68, designed to encourage the expedition of litigation through settlement,³ provides that a defendant can in effect formalize a settlement offer.⁴ If the plaintiff declines an offer, goes to trial and does not

1. FED. R. CIV. P. 68. Rule 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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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 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.

See generally 7 MOORE’S FEDERAL PRACTICE ¶ 68 (2d ed. 1972); 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 3001-3005 (1973).

2. *See* Committee Note to FLA. R. CIV. P. 1.442 (West Supp. 1977), which is that state’s counterpart of rule 68: “The committee believes that [the rule] . . . will not be used often based on information about the equivalent federal rule.”

3. “The purpose of rule 68 is to encourage settlements and avoid protracted litigation.” 7 MOORE’S FEDERAL PRACTICE ¶ 68.02 (2d ed. 1972), *cited in* Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969). *See also* Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240, 242 (W.D. La. 1949), *rev’d on other grounds*, 181 F.2d 320 (5th Cir. 1950); 12 C. WRIGHT & A. MILLER, *supra* note 1, at § 3001; Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 304 n.195 (1939).

Unfortunately, there is no legislative history or advisory committee note that specifically discusses the purpose of the rule. The advisory committee comment to the 1946 amendment to the rule does mention in passing that the purpose of the rule is “to encourage settlement and avoid protracted litigation.” FED. R. CIV. P. 68, Advisory Committee Note on 1946 Amendments, 28 U.S.C.A. (West 1970). It seems clear that this is the only purpose that could possibly be served by the rule.

4. In virtually all federal civil cases in which a rule 68 offer is not made, the awarding of costs is governed by FED. R. CIV. P. 54(d). Under that rule, costs are awarded to the prevailing party; however, the trial judge has discretion to deny those costs. Such discretion is generally

win a judgment more favorable than the offer, costs accruing after the making of the offer must be awarded to the defendant even though the plaintiff may secure some relief.⁵ The rule has been adopted by most states that have rules of civil procedure based upon the federal model,⁶ and similar provisions are in effect in other states.⁷

It is not clear why offers of judgment are not more frequently employed. One possible explanation is that the statutory costs saved by employing the rule have been modest in the past.⁸ It may also be that practitioners are unaware of the rule.⁹ Whatever the reason for ignoring the rule in the past, certain recent developments suggest that the rule should no longer receive such short shrift.

One of these developments is a recent district court holding¹⁰ that whenever a plaintiff does not obtain a judgment exceeding an offer

available only in special circumstances. See note 29 *infra*. See generally 6 MOORE'S FEDERAL PRACTICE ¶ 54.70 (2d ed. 1972).

5. FED. R. CIV. P. 68. The case of *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974), discussed in text accompanying notes 25-44 *infra*, raises the question whether it is a prerequisite to the operation of the rule that some relief be secured. *Id.* at 610. It seems implicit in the language of the rule that the plaintiff must prevail: "[i]f the judgment finally obtained by the offeree is not more favorable." FED. R. CIV. P. 68 (emphasis added). In *Mr. Hanger*, the plaintiff lost its claim on the merits and judgment was rendered against it. However, the court indicated without discussion that the mandatory cost-shifting provision applied because the amount recovered—zero—was less than the amount of the defendant's offer. 63 F.R.D. at 609-11. See text accompanying notes 25-50 *infra*.

6. See, e.g., ALA. R. CIV. P. 68; ARIZ. R. CIV. P. 68; D.C. R. CIV. P. 68; NEV. R. CIV. P. 68. *But see* OHIO R. CIV. P. 68. The Ohio rulemakers did not adopt the cost-shifting provisions of the federal rule. The Staff Note to the Ohio Rule 68 states, without referring to any authority: "The use of offers of judgment as the basis of costs proceedings has in the past often had a one-sided, coercive effect." *Id.*, Staff Note. This analysis ignores the true purpose of the rule, which is to encourage parties to settle the case as early as possible in the proceedings. The federal rule has the dual effect of giving the defendant an incentive to make an offer and giving the plaintiff an incentive to accept. Moreover, the device serves to defuse the obvious coercive advantage enjoyed by a plaintiff who brings a very weak or spurious suit and can hold the axe of costs and attorneys' fees over the defendant's head. See generally Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 78 (1963).

7. See, e.g., CAL. CIV. PROC. CODE § 998 (West Supp. 1978); MO. ANN. STAT. § 514.400 (Vernon 1952); N.Y. CIV. PRAC. § 3221 (McKinney 1970); WIS. STAT. ANN. § 807.01 (West 1977).

8. See 28 U.S.C. § 1920 (1970); King, *Thumbs in the Dike: Procedures to Contain the Flood of Personal Injury Litigation*, 39 FORDHAM L. REV. 223, 232 (1970) (author asks "[d]oes the imposition of a portion of the costs qualify as a realistic inducement? For a case that involves more than a trivial amount, the answer to this question *must* be that it does not") (emphasis in original).

9. The infrequency with which the rule is employed is matched by the dearth of comment concerning it. One of the few discussions of the rule, which dealt with a similar provision in the Iowa rules, IOWA CODE ANN. § 677.4 (West 1950), was written in 1947. "The value of this proceeding in terminating litigation is obvious When it is fully understood and its advantages appreciated, it will be used more often and many controversies will be more speedily terminated." Joiner, *Determination of Controversies Without a Factual Trial*, 32 IOWA L. REV. 417, 433 (1947).

10. *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974). See text accompanying notes 25-44 *infra*.

made by the defendant, even if it were only a token offer, the cost-shifting provisions of the rule are mandatory; that is, the judge loses the discretion he normally has to deny costs to the defendant.¹¹ This holding suggests that it would always be advisable for a defendant to make an offer of judgment of at least one dollar, for if the defendant then prevails the trial judge must award him costs.¹² Though this result is questionable as a matter of policy,¹³ it is possible that it is a correct interpretation of the rule as written. The gain that can result from such a riskless offer¹⁴—eliminating uncertainty about recovering all costs when a judgment favorable to the defense is obtained—makes the offer a profitable strategy.

A second factor that might portend increased use of the rule is that the amount of costs that may be assessed, particularly in complex litigation, is increasing.¹⁵ Added to this general increase in allowable costs are statutes recently enacted by Congress that allow for the taxation of attorneys' fees as costs in a considerably broadened range of cases.¹⁶ The effect that these statutes will have on the offer of judgment rule is still unclear,¹⁷ but it will likely be argued that, as costs, these fees fit within the provisions of rule 68. If the courts agree, the effect would be to raise significantly the dollar amount at stake when an offer of judgment is made, thus creating a stronger incentive for use of the device.

This Note will examine the offer of judgment and its use under current law. It will also discuss the ways in which the rule can be suc-

11. *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974).

12. See note 40 and text accompanying notes 39 & 40 *infra*.

13. See notes 45-48 *infra* and accompanying text.

14. Such an offer is riskless because it almost certainly will not be accepted and because, if the courts properly employ the rule, there is no possibility that the judgment will operate to preclude the determination of issues through *res judicata* in future litigations, since there are no matters "actually litigated and determined by a valid and final judgment." RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). See text accompanying notes 84-87 *infra*.

15. See, e.g., *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173 (2d Cir. 1975), *cert. denied*, 424 U.S. 934 (1976) (costs awarded in excess of \$100,000); *Kaiser Indus. Corp. v. McLouth Steel Corp.*, 50 F.R.D. 5 (E.D. Mich. 1970) (costs requested exceeding \$178,000 reduced to final award of approximately \$25,000).

In this light, the point raised by Professor King in his article, *supra* note 8, that when the damages claimed are very large the costs may seem inconsequential, should be borne in mind. However, such a case is no more likely than complex litigation in which the damages requested are low and the costs therefore become financially significant. Examples that come readily to mind are civil rights suits and consumer class actions. Cf. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 168 (1974) (Court recognizes that, in class action, assessing cost of notice to plaintiff class representative sounds death knell of action); *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253 (S.D.N.Y. 1971) (lower court reaches same conclusion).

16. See statutes cited at note 51 *infra*.

17. See note 60 and text accompanying notes 51-61 *infra*.

cessfully employed and assess the impact that recent developments in this area will have. Finally, the Note will suggest that even with the limited experience under the rule thus far, a possible change in the text of the rule would make its operation more equitable and trouble-free.

I. EMPLOYING THE RULE

The mechanics of employing the offer of judgment rule are rather simple.¹⁸ Any party defending against a claim, be he a defendant, third-party defendant, or a party defending against a counterclaim or cross-claim, may serve upon the claimant an offer that judgment be taken against him for a certain amount or for other relief. The offer must include costs accrued until that point in the litigation, and it must be served at least ten days prior to trial or ten days before proceedings to determine the amount of damages when there has been a separate verdict establishing liability. If the claimant wishes to accept the offer he merely serves notice of the acceptance on his adversary. At this point, either party may file both the offer and acceptance, and the clerk will enter judgment. If the offeree does not accept the offer within ten days it is deemed withdrawn,¹⁹ and it may not be used further in the proceeding, except in connection with assessing costs. If the claimant is not awarded a judgment that is more favorable than the offer, he must pay to the defendant all costs accruing from the time the offer was made.²⁰

The offer of judgment can be made in any type of case, not only those in which money damages are sought. However, difficult problems arise in determining the correct application of the rule in cases where nonmonetary damages are sought.²¹ If, as has been held recently, the application of rule 68 is nondiscretionary, there seems to be no reason why an offer should not be made in every case;²² even an offer of one dollar will have the effect of shifting costs automatically if the defend-

18. The text of rule 68 is reprinted in note 1 *supra*. See generally 7 MOORE'S FEDERAL PRACTICE ¶¶ 68.01-.06 (2d ed. 1972); 12 C. WRIGHT & A. MILLER, *supra* note 1, at §§ 3001-3005.

19. See, e.g., *Staffend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218, 220 (N.D. Ohio 1969).

20. FED. R. CIV. P. 68; *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607 (E.D.N.Y. 1974).

21. In *Meisel v. Kremens*, 405 F. Supp. 1253, 1254 (E.D. Pa. 1975), an offer of judgment was made in a civil rights suit brought under 42 U.S.C. § 1983 (1970), in which the plaintiff sought a declaratory judgment that a state mental health commitment statute was unconstitutional. While the opinion neither discussed the content of the offer nor reached the issue of relief (the plaintiff won judgment on the constitutional claim), the case still points to a difficult problem which this aspect of the rule presents: by what standards does a judge determine whether a judgment "is not more favorable than" the offer of judgment when nonmonetary relief is at issue? FED. R. CIV. P. 68. See the discussion at note 76 and text accompanying notes 73-77 *infra*.

22. See note 5, and text accompanying notes 5, 10-13 *supra*.

ant prevails.²³ However, the rule seems to serve its intended purpose best when the defendant makes an honest evaluation of what he thinks the plaintiff's claim is actually worth and decides that he is willing to settle for that amount. If he makes his settlement proposal in the form of an offer of judgment he forces the plaintiff also to make an honest evaluation of his claim, rather than an evaluation of how much he thinks the defendant is *really willing* to pay. If the plaintiff refuses the offer, generally the side that more realistically evaluated the worth of the claim will benefit. This approach seems to serve the purpose of the rule.²⁴

II. THE *MR. HANGER* CASE—INTRODUCING DISCRETION INTO THE RULE THROUGH THE BACK DOOR

In *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*,²⁵ a district court had a rare opportunity to consider the scope of the offer of judgment rule. The plaintiff brought suit alleging patent infringement by the defendant, seeking both declaratory relief and damages.²⁶ Prior to trial the defendant made an offer of judgment in the amount of twenty-five dollars, and also served notice that it would no longer manufacture its product in the manner asserted by plaintiff to constitute an infringement.²⁷ The plaintiff rejected the offer and the case proceeded to trial. At the conclusion of the trial the court ruled that the patent was invalid²⁸ and entered judgment for the defendant. The court ruled that although the defendant had prevailed, it was not entitled, under rule 54(d), to recover the costs of the action.²⁹ The defendant then made a post-trial motion asking the court to reconsider its decision in light of the rule 68 offer.

Upon reconsideration the court awarded costs to the defendant. The court rejected the plaintiff's suggestion that "the awarding of costs is always a matter to be determined in the sound discretion of the court,"³⁰ stating: "the express language of the rule, and certain pertinent cases, leave no doubt that costs *must* be awarded once a proper

23. Of course, if the defendant prevails, he would be entitled to costs under rule 54(d), but the trial judge, in his discretion, could deny these costs. See note 4 *supra*.

24. See note 3 *supra*.

25. 63 F.R.D. 607 (E.D.N.Y. 1974).

26. *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 372 F. Supp. 88 (E.D.N.Y. 1974).

27. 63 F.R.D. at 608-09.

28. 372 F. Supp. at 95.

29. 63 F.R.D. at 609. At the trial on the merits, the court apparently applied the "exceptional case" rule for attorneys' fees in patent infringement actions, 35 U.S.C. § 285 (1970), to costs. 372 F. Supp. at 95. However, the court in its decision on the post-trial motion cleared up this discrepancy, stating that costs were denied based on rule 54(d). 63 F.R.D. at 609.

30. 63 F.R.D. at 609.

offer of judgment has been made."³¹ The court's reference to "a proper offer of judgment" was directed to the plaintiff's assertion that the defendant's offer was a tactical sham and not made in good faith. The court held that the offer was made in good faith and was therefore proper:

The offer of Twenty-five Dollars constituted an acknowledgment of plaintiff's rights and an admission of the infringement. Furthermore, defendant's promise to desist in the infringing practice was valuable consideration, and afforded the plaintiff substantially the relief prayed for in its complaint.³²

The *Mr. Hanger* case raises three separate questions that must be analyzed and understood in order to properly employ rule 68. First, when it is clear that an offer has been made which is greater than the judgment, is the cost-shifting provision mandatory? Second, for the cost-shifting provision of the rule to apply is it necessary that the plaintiff be given at least some relief?³³ Third, may the judge investigate whether an offer has been made in good faith?

The court answered affirmatively the question whether the cost-shifting provision of rule 68 is mandatory.³⁴ This holding seems clearly correct. As the court noted, the rule states that if the judgment is not more favorable than the offer "the offeree *must* pay the costs incurred after the making of the offer."³⁵ The few state courts that have considered state analogues of this provision agree that it requires a mandatory application.³⁶ A ruling to the contrary would fly in the face of the plain meaning of the language of the rule.

31. *Id.* at 610 (emphasis added). The cases referred to by the court are: *Stafford v. Lake Central Airlines, Inc.*, 47 F.R.D. 218 (N.D. Ohio 1969); *Nabors v. Texas Co.*, 32 F. Supp. 91 (W.D. La. 1940). Neither case is authority for the point made.

32. 63 F.R.D. at 610. Contrary to the assertion of the court, the offer of twenty-five dollars should not be seen as an admission of fault. See text accompanying notes 84-94 *infra*.

33. See note 5 *supra*.

34. 63 F.R.D. at 610.

35. *Id.* at 611 (quoting FED. R. CIV. P. 68) (emphasis added by the court).

36. See, e.g., *Santiesteban v. McGrath*, 320 So. 2d 476 (Fla. Dist. Ct. App. 1975). *But see* *Insurance Co. of N. America v. Twitty*, 319 So. 2d 141 (Fla. Dist. Ct. App. 1975), holding, incorrectly it would seem, that when an offer is made and not beaten the trial judge is forbidden by the rule from granting costs to the plaintiff, but that he may, in his discretion, refuse the defendant's request for costs. *Id.* at 143. The court took this position despite the fact that on the prior page of the opinion it had quoted the entire text of the rule, adding emphasis to that portion which states: "plaintiff *must* pay the costs." *Id.* at 142 (emphasis in original). The only discussion or explanation the court supplied is that "[t]he taxation of costs in a civil action is a matter which lies within the broad discretion of the trial court." *Id.* at 143.

It should be noted that California had, for a short time, a rule that made the cost-shifting provision discretionary, CAL. CIV. PROC. CODE § 998, *cited in* *Pomeroy v. Zion*, 19 Cal. App. 3d 473, 475, 96 Cal. Rptr. 822, 823 (1971) (upholding discretionary denial of costs under that rule to a defendant who had made an offer of judgment that was not more favorable than the judgment). Seemingly in response to the *Pomeroy* case, the California legislature quickly repealed the section

The second and more difficult question is whether a plaintiff must be afforded at least some relief in order for the cost-shifting provisions of the rule to apply.³⁷ The court in *Mr. Hanger* did not actually deal with this point; it implicitly assumed that the plaintiff need not win any relief.³⁸ However, despite the fact that the court failed to address the point, there is a strong argument that the plaintiff must win at least some relief. Such an interpretation is suggested by the language of the rule, which states at the beginning of the cost-shifting provision: "*If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs . . .*"³⁹ This phrasing suggests that the application of the rule is limited to those cases in which the plaintiff prevails, at least in part. And there is sound reason for such a limitation—it would discourage the making of token offers. An offer by a defendant of ten dollars at the beginning of a difficult and complex case, or of a case based on a novel legal theory, is not likely to produce an early settlement of the case, which is the purpose of the rule. Yet, if the rule is not limited to cases in which the plaintiff prevails, the ten dollar offer will have the effect of assuring that the defendant is awarded practically all of his costs if he prevails, even if there are good reasons why the defendant should not be awarded his costs. This is clearly not the result that the rulemakers envisioned. If interpreted to require that the plaintiff secure at least some relief, the rule would insure that token offers will not be made because nothing would be gained by them. In most cases, the defendant, as the prevailing party, will be entitled to costs under rule 54(d).⁴⁰ When the defendant is not so entitled, he ought not be able to employ rule 68 to override the discretion that the court would otherwise have, in order to compel the awarding of costs.

The *Mr. Hanger* court's reasoning seems to be based, first, on its misapprehension that costs should not generally be granted to the prevailing party.⁴¹ The reasoning seems further to rest on the assumption that the rulemakers would not be so arbitrary as to allow costs against a

and adopted in its place a rule that makes clear the intent that the provisions be mandatory when the defendant makes the offer. CAL. CIV. PROC. CODE § 998(c) (West Supp. 1978).

37. See note 5 *supra*.

38. If the court had not so held, it would not have been bound by the mandatory cost-shifting provisions of the rule because the plaintiff did not secure relief. See text accompanying notes 28-29 *supra*.

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

40. FED. R. CIV. P. 54(d). See note 4 *supra*. It is worth noting again that in *Mr. Hanger* the court had originally denied defendant's costs. 372 F. Supp. at 95. This ruling is almost certainly incorrect. See note 29 *supra*. It is the exceptional case in which a prevailing defendant is *not* awarded costs. See note 4 *supra*.

41. See note 40 and text accompanying notes 39-40 *supra*.

plaintiff who received a judgment of one dollar, but not to allow costs against a plaintiff who was not afforded even this token relief. However, since there is good reason to exclude prevailing defendants from the purview of rule 68, this rationale is not satisfactory. The court therefore erred in holding that the cost-shifting provision is applicable when the defendant has prevailed.⁴²

Having decided that a defendant who prevailed could take advantage of the rule, the court dealt with a third question that seemed to present itself: whether the offer must have been made in good faith. The reason this question "seemed" to present itself is that the court, by holding that a prevailing defendant could take advantage of the rule, had opened the door to sham offers made only for the purpose of gaining costs and not with the good faith intention of abbreviating the litigation.⁴³ Although the court held that a demonstration of good faith is required to come within rule 68,⁴⁴ there are several factors weighing against such a requirement.

As a preliminary matter, it should be noted that a good faith requirement is simply not stated in, nor can it easily be inferred from, the text of the rule. More important, however, a judicially created "good faith" requirement would constitute an invitation to litigate the question whether the offer was made in good faith where a party has refused an offer of judgment and has failed to win a judgment for an amount greater than the offer. The effect would run against the purpose of the rule, which is to speed up, not slow down litigation. Additionally, while federal courts have on occasion read a good faith requirement into procedural rules,⁴⁵ the standards applied to the good faith test have been rigid and clear.⁴⁶ Moreover, so long as there is no breach of professional ethics, it ought not be considered bad faith for a litigant to

42. The New York rule relating to offers of judgment, N.Y. CIV. PRAC. § 3221 (McKinney 1970), is worded differently from the federal rule: "If the offer is not accepted *and the claimant fails to obtain a more favorable judgment*" (emphasis added). This language, though not incontrovertible, implies more clearly than its federal counterpart that the rule should apply when the defendant prevails.

43. See text accompanying notes 11 & 39 *supra*.

44. The court determined that defendant's offer was made in good faith. 63 F.R.D. at 610.

45. For example, in diversity cases it has been held that an allegation in a complaint that damages meet the \$10,000 jurisdictional amount must be made in good faith. See, e.g., *Johns-Manville Sales Corp. v. Mitchell Enterprises, Inc.*, 417 F.2d 129 (5th Cir. 1969); *Jones v. Landry*, 387 F.2d 102 (5th Cir. 1967).

46. In addition, in the case of jurisdictional amounts a bad faith litigant is trying to use subterfuge to avoid the specific directive of the statute: he is asserting that his claim is over \$10,000, which the statute requires. In the offer of judgment situation, a finding of bad faith would result in punishing someone for following the rule to the letter. For example, in the jurisdictional amount situations, the standards are relatively clear: "Whether the claim is made in good faith is 'measured by the standard of legal certainty that the plaintiff cannot recover as much as the juris-

use the provisions of a rule to his advantage. Since there is no basis in the rule for imposing a good faith test and there are strong policy reasons weighing against such a test, it was a mistake for the *Mr. Hanger* court to introduce one. Thus, interpreting the rule to require plaintiff to secure at least some relief would obviate the problem of token offers, and would eliminate the question of good faith.

A problem similar to the one presented by the making of token offers, which is not amenable to so easy a solution, can be envisioned: if the judgment obtained is less than a sizable offer, but the difference between the offer and the judgment that is obtained is inconsequential, equity might indicate that costs should not be imposed on the prevailing plaintiff.⁴⁷ For example, the plaintiff might bring an action based on two separate claims on which he alleges damages of \$5,000 and \$30,000. If the defendant responded with an offer of \$5,001, there would be good reason for the plaintiff to press on with his claim and refuse the offer. However, if the plaintiff did not prevail on the larger claim despite valid reasons to proceed with it but did prevail on the smaller one, the defendant would have to be awarded costs under the rule. This would follow despite the fact that by making such an offer the defendant would seem to have admitted the validity of plaintiff's first claim. In effect, defendant's offer would amount to a concession on the first claim but a token \$1 offer on the second one. Viewing the second claim as if it were a separate case, the situation duplicates the one discussed above of a token offer and no recovery. In this situation, by *requiring* cost-shifting, the rule does not seem to serve its purpose because it forces the plaintiff to choose between foregoing what he feels is a meritorious claim or paying the costs of the action.

The solution to this problem would be to introduce some judicial discretion into the cost-shifting provision of the rule. This would, of course, require an amendment to the rule, but such an amendment is called for. The amendment⁴⁸ would assure that the rule can be employed as it was designed to be, yet it would reduce the possibility that it could be misused. It should be kept in mind that the range of discre-

dictional amount." *Johns-Manville Sales Corp. v. Mitchell Enterprises, Inc.*, 417 F.2d 129, 131 (5th Cir. 1969) (citing *Jones v. Landry*, 389 F.2d 102, 104 (5th Cir. 1967)).

47. See *Santiesteban v. McGrath*, 320 So. 2d 476 (Fla. Dist. Ct. App. 1975) (interpreting FLA. R. CIV. P. 1.442, which is identical to the federal rule). The defendant was awarded costs under the rule when it made an offer of \$6,001 and the plaintiff ultimately recovered \$5,400. The jury had stated that the amount of damages was \$6,000, but this amount was reduced under Florida's comparative negligence rule.

48. The amendment would only require the introduction into the rule of the italicized phrase: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must, *unless the court otherwise directs*, pay the costs incurred after the making of the offer."

tion available to a court to deny costs to a prevailing party generally is narrow,⁴⁹ and discretion to deny post-offer costs to a defendant whose offer is not exceeded by the judgment should be even more strictly limited. However, some measure of discretion is necessary to assure that the purposes of the rule are adequately served.⁵⁰

III. THE EFFECT OF ATTORNEYS' FEES STATUTES ON RULE 68

In the past several years Congress has enacted numerous statutes that award attorneys' fees to parties litigating certain claims in federal court.⁵¹ One of the more important statutes, the Civil Rights Attorneys' Fees Awards Act of 1976,⁵² will likely have a marked effect on civil rights litigation in general. The Act is a response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*,⁵³ which held that in most circumstances attorneys' fees could not be awarded to prevailing parties in civil rights cases without explicit statu-

49. See notes 4 & 29 *supra*.

50. There is an alternative to amending the rule which might also solve this problem. Courts could interpret the rule's edict that the judgment must be "more favorable than the offer" to mean that there must be something more than an insignificant difference between the offer and the judgment. This alternative, though requiring less energy to initiate than an amendment to the rule itself, is not nearly as desirable. Such an interpretation would give a rather odd meaning to what otherwise seems to be a clear directive of the rule. Moreover, the term "significant" (or some similar term) could not easily be defined. Situations may arise in which there might appear to be a significant difference between the offer and the judgment, and yet equity might still require that costs not be awarded to the defendant. For example, in the hypothetical discussed in text following note 47 *supra*, if the defendant had offered \$7,500 there would be a difference between the offer and the judgment obtained of \$2,500 which, in a case with a \$35,000 prayer for relief, would seem significant. Yet a strong argument could be made that the plaintiff in that case ought not be constrained by rule 68, particularly if the second claim were a constitutional one, which often has value greater than the money damages to be won. See text accompanying notes 73-76 *infra*. Another factor which speaks against such an interpretation is that it very well might encourage parties to litigate the question whether an amount was legally significant, which would protract the litigation. Finally, an amendment providing for judicial discretion in awarding costs under the rule would help ease other difficulties which the rule as presently phrased seems to create. See text accompanying notes 51-94 *infra*.

51. Ninety of these statutes are compiled in SUBCOMM. ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976: SOURCE BOOK 303-13 (Comm. Print 1976).

Among the statutes which provide for attorneys' fees are: Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976); Bankruptcy Act, 11 U.S.C. § 104(a)(1) (1970); Clayton Act, 15 U.S.C. § 15 (1976); Truth in Lending Act, 15 U.S.C. § 1640(a)(3) (1976); Consumer Product Safety Act, 15 U.S.C. § 2059(e)(4) (1976); Copyright Act, 17 U.S.C.A. § 505 (West 1977); Patent Infringement Act, 35 U.S.C. § 285 (1970); Voting Rights Amendments of 1975, 42 U.S.C. § 1973j(e) (Supp. V. 1975); Civil Rights Attorneys' Fees Awards Act, 42 U.S.C.A. § 1988 (West Supp. 1978); Fair Housing Act of 1968, 42 U.S.C. § 3612(c) (1970).

52. 42 U.S.C.A. § 1988 (West Supp. 1978).

53. 421 U.S. 240 (1975).

tory authorization.⁵⁴ The rationale for awarding fees was that such litigants served the important role of a "private attorney general." The legislation evinces a congressional intent to encourage such private endeavor.⁵⁵

Virtually all of the federal attorneys' fee statutes direct that such fees that are awarded should be assessed as costs.⁵⁶ Some permit the fees to be awarded only to a prevailing plaintiff,⁵⁷ while others allow them to any prevailing party.⁵⁸ All leave the awarding of the fees, at least to some extent, to the court's discretion.⁵⁹ Because the statutes speak in terms of awarding the fees as costs, it is likely that litigants will assert that the attorneys' fee statutes come within the purview of rule 68's cost-shifting provision.⁶⁰ Indeed, a district court has already gone so far as to say: "There is no reason why [rule 68] should not be extended by analogy to statutes allowing attorneys' fees to the 'prevailing party.'"⁶¹

The inclusion of attorneys' fees within the cost-shifting provision of the rule is desirable; the larger the "costs," the stronger the incentive to use the rule, and the stronger the incentive to accept an offer.⁶² Yet the inclusion of attorneys' fees in the cost-shifting provision may prove troublesome, both in the practical application of the rule and in the balancing of the interests served by the rule with the interests furthered by the attorneys' fees statutes.

There are two arguments defendants could rely upon when asserting that attorneys' fees are costs under rule 68 when a plaintiff has not beaten a rejected offer of judgment in a suit brought under a statute that provides attorneys' fees for the prevailing party. The first is to sug-

54. S. REP. NO. 1011, 94th Cong., 2d Sess. 4-5 (1976).

55. *Id.* See generally Derfner, *One Giant Step: The Civil Rights Attorneys' Fees Awards Act of 1976*, 21 ST. LOUIS L.J. 441 (1977).

56. See statutes cited at note 51 *supra*.

57. See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a) (1976); Clayton Act, 15 U.S.C. § 15 (1976).

58. See, e.g., Copyright Act, 17 U.S.C.A. § 505 (West 1977); Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C.A. § 1988 (West Supp. 1978).

59. See statutes cited at note 51 *supra*.

60. *See Scheriff v. Beck*, 452 F. Supp. 1254 (D. Colo. 1978) (attorneys' fees awarded as costs under the Civil Rights Attorneys Fees Awards Act are governed by rule 68, defendant's offer excluding attorneys' fees ruled ineffective, and plaintiff allowed to recover judgment less than the offer); *cf. Baldwin Cooke Co. v. Keith Clark, Inc.*, 73 F.R.D. 564 (N.D. Ill. 1976) (cost-shifting provision of rule inapplicable because judgment exceeded offer; however, court recognized awarding of attorneys' fees otherwise would have been covered by the rule).

61. *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976) (dictum). See also *Honea v. Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201 (E.D. La. 1975).

62. See *Baldwin Cooke Co. v. Keith Clark, Inc.*, 73 F.R.D. 564 (N.D. Ill. 1976) (damages of \$224,000 awarded; costs and attorneys' fees awarded totaled \$78,986.39).

gest that since the plaintiff has prolonged the litigation for no good reason, and because his attorneys' fees would not have accrued had he accepted the offer, the judicial discretion permitted by the attorneys' fees statute should not be used to allow him attorneys' fees. A second argument is that rule 68 expressly provides that the defendant, *not* the plaintiff, is to recover costs if the plaintiff's judgment does not exceed the defendant's offer. Since attorneys' fees are taxed as costs, the plaintiff at least should not recover the statutory attorneys' fee. Both of these arguments have merit. The first focuses on the intent of the rule. The second is directed towards the specific language of the present rule. Under the present rule the two together seem to require that fees not be awarded to the plaintiff.

In the only reported case in which a litigant has asserted that rule 68 applies to statutory attorneys' fees,⁶³ the party only suggested that the plaintiff must be denied attorneys' fees; it did not assert that the costs should *shift* and that the defending party should be awarded *its* attorneys' fees. Such an argument is plausible under the rule. However, the weakness of this argument is that the awarding of attorneys' fees under the statutes is *always* discretionary,⁶⁴ even though the shifting of costs under the rule is mandatory.⁶⁵ Thus, the court would have to shift costs pursuant to the rule, but in its discretion it could refrain from including attorneys' fees in the costs. In most cases this result is probably the correct one. However, in some instances the purpose of the rule will be best served by awarding the attorneys' fees to the defendant under the rule.⁶⁶

A difficulty that arises when considering attorneys' fees under rule 68 is that the granting of attorneys' fees to a party who has not prevailed (but who has made a rule 68 offer that is greater than the judgment) ignores the express language of a statute which grants attorneys' fees only to the *prevailing* party. This problem, which is really one of statutory construction, is more acute when fees are sought under a statute which allows attorneys' fees to be awarded only to a prevailing

63. *Id.* See note 60 *supra*.

64. See note 59 *supra* and accompanying text.

65. See notes 31-32 *supra* and text accompanying notes 30-32 *supra*.

66. A clear example of such a case would be when the defendant had made a fair offer and there was evidence that the plaintiff had persisted merely to raise the fees, with the hope that the increasing fees would coerce the defendant to make a higher offer. In such a case the court would be justified in awarding attorneys' fees to the defendant.

The Supreme Court has said that the discretion to be used in awarding attorneys' fees to a successful defendant is narrower than the discretion to deny plaintiff's fees. The Court held that fees should be awarded to the defendant only when plaintiff's action is unreasonable, frivolous, meritless or brought for a vexatious purpose. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

plaintiff.⁶⁷ Under such a statute it would be anomalous to award attorneys' fees to a defendant under the cost-shifting provision of rule 68, though it would not be as egregious to deny the fees to a plaintiff.

This statutory construction problem points to a more basic problem: the shifting of attorneys' fees under rule 68, or the more likely step of merely denying them to a prevailing plaintiff under the rule, may in some situations conflict with the congressional purpose behind the attorneys' fees statute in question. For example, when one considers the purpose of the Civil Rights Attorneys' Fees Awards Act, to encourage private parties to seek redress of civil rights grievances,⁶⁸ one realizes that shifting the attorneys' fees to a defendant, or merely denying them to a plaintiff, has a chilling effect on the very litigation which Congress sought to encourage. Moreover, a civil rights suit under the Act is one in which an offer of judgment might well be successful. One of the purposes of the Act is to encourage colorable, though possibly novel, claims of civil rights violations. To further this purpose the legislative history of the Act makes clear that a party who prevails on only one of a number of claims, but still furthers some worthwhile purpose as a "private attorney general" is entitled to attorneys' fees.⁶⁹ If, however, a defendant offers judgment on other claims upon which plaintiff does not prevail, rule 68 requires that the plaintiff not receive attorneys' fees. It is difficult to support the proposition that the purpose of rule 68, encouraging settlements, should outweigh the congressional purpose embodied in the Civil Rights Attorneys' Fees Awards Act of encouraging the vindication of civil rights.

One approach to this problem might be for the courts to declare that civil rights litigation was not the type of case to which rule 68 was addressed. Courts might hold that suits to protect constitutional rights are difficult, if not inappropriate cases in which to apply rule 68.⁷⁰ However, such an ad hoc approach would create unnecessary complications; litigants would debate (and litigate) whether the rule applied to

67. See text accompanying note 57 *supra*.

68. S. REP. NO. 1011, *supra* note 54, at 4-5.

69. *Id.* 5.

70. The Nevada Supreme Court took a similar approach in *Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (1971). In that case the court was faced with a difficult and inequitable application of the Nevada offer of judgment rule, NEV. R. CIV. P. 68, to a divorce case and held that divorce cases were not the type of action to which the rule ought apply. Such an ad hoc approach by courts to specific types of cases is both erroneous and unnecessary. If the rule is not meant to apply to all types of actions, the rule should so state. See ARK. STAT. ANN. § 27-1501, which allows offers to be made only in actions for the recovery of money alone. Both the federal and Nevada rules of civil procedure, by their own terms, apply to *all* civil actions. FED. R. CIV. P. 1; NEV. R. CIV. P. 1. If an exception is to be carved out, it should be done by an amendment to the rules. See text accompanying notes 71-72 *infra*.

their case. A better solution would be simply to amend rule 68 to allow the district judge discretion in applying the cost-shifting provision of the rule, as suggested above.⁷¹ The court would then be free to prevent the shifting of costs, including fees, to a defendant who has made an unbeaten offer when it would not be desirable, as in certain civil rights cases when the plaintiff has been awarded at least some relief. An objection to such an amendment might be that the introduction of judicial discretion into the rule makes it so weak as to hinder, if not negate, any inducement to settlement that it provided. However, this objection fails to take account of the fact that the court must exercise sound discretion and that such discretion should be employed only in cases which present persuasive reasons why the costs should not shift.⁷²

IV. OTHER DIFFICULTIES PRESENTED BY THE RULE

A. *Rule 68 in Cases in Which Nonmonetary Relief Is Sought.*

A difficult problem arises when a rule 68 offer is made in a case where the plaintiff seeks only declaratory relief,⁷³ or some other relief that does not involve money damages. *Mr. Hanger*⁷⁴ was, of course, in part such a case. The difficulty arises when a court must decide whether the judgment obtained is "not more favorable" than the offer. It is difficult to weigh one type of relief against another; this imperfect comparison is particularly acute when the court must compare monetary recovery with the value of prevailing upon the assertion of some constitutional right. The plaintiff might, for example, seek both damages and an injunction, decline an offer of judgment for damages alone, and then win an injunction (plus, perhaps, damages less than the offer).

At least one state's approach to this problem is to allow offers of judgment only in suits for monetary damages.⁷⁵ This approach is undesirable, however, because the reasons that support rule 68, encouraging settlement and discouraging vexatious litigation, are applicable to non-monetary cases as well as those seeking money damages. Moreover, there are many cases in which there will be little or no difficulty determining whether or not the judgment is better than the offer.⁷⁶

71. See note 48 *supra* and accompanying text.

72. See text accompanying note 49 *supra*.

73. See note 21 *supra*.

74. See text accompanying notes 25-32 *supra*.

75. ARK. R. CIV. P. 27-1501.

76. In *Mr. Hanger*, for example, the offer for relief other than money damages—the promise to desist from patent infringement—was, as the court noted, clearly equal to any judgment that plaintiff could have won, since it was identical to the relief sought. See text accompanying note 32

It is highly likely that precise standards could never be drawn that would be applicable in every case. However, if a measure of judicial discretion in employing the rule is added by amendment,⁷⁷ the problems that are posed by the lack of such a clear guide become less severe. Under rule 68 as presently written, the court *must* make a decision whether the judgment obtained is more favorable than the offer, because the mandatory nature of the cost-shifting provision requires such a determination in each case to decide which party is to receive costs. If the rule had an element of discretion the trial judge might be able to avoid deciding whether the offer was less favorable if he concluded that in any event he would not award costs to the defendant. The standard which a judge ought apply in exercising such discretion is whether, in light of all the circumstances of the case, the plaintiff's rejection of the offer was reasonable at the time the offer was made. Thus, the court would not have to try and place impossibly vague values on different types of relief in order to determine if the rule applies.

B. *Rule 68 in Class Actions.*

The offer of judgment in the context of multiparty and class action litigation poses the problem to the defendant of to whom to make the offer. It has been argued in cases in which a defendant made a single offer to multiple plaintiffs that even though the offer was not beaten by the plaintiffs collectively, the offer should have no effect because, at the time it was made, the plaintiffs could not determine how much each was to receive. One court has accepted the argument,⁷⁸ and another has rejected it.⁷⁹ The latter approach is the better one because it does not allow formal distinctions to obscure the fact that no matter how the offer had been split up, the plaintiffs, the defendants and the court would all have been better off had the offer been accepted.⁸⁰

This problem will generally not occur in class actions brought

supra. The Arkansas approach, see text accompanying note 75 *supra*, would make the device unavailable even in a case like this where applying the rule is obviously desirable.

77. See note 48 *supra*.

78. *Randles v. Lowry*, 4 Cal. App. 3d 68, 84 Cal. Rptr. 321 (1970).

79. *Tucker v. Shelvy Mut. Ins. Co.*, 343 So. 2d 1357 (Fla. Dist. Ct. App. 1977).

80. There is the possibility that some of the plaintiffs may receive a better judgment by waiting out a jury verdict, while others would receive a lesser one. This would happen when one of the plaintiffs received a large proportion of the verdict. Such a plaintiff could argue that by dividing the settlement offer he would not have received as much as the judgment which he won. Though this argument has merit in a few cases, it should be rejected in favor of an approach which puts the burden on the plaintiffs to determine how much the defendant is offering each plaintiff. In this way the mere *possibility* that one of the plaintiffs could have been better off does not serve to defeat the purpose of the rule.

under federal rule 23;⁸¹ in such cases, the offer can be made to the class representative. Difficulties will arise, however, because rule 23(e)⁸² requires that all class action settlements first be approved by the court. It is not hard to imagine the incongruous results that would occur if the two rules ever clashed. Suppose a defendant offers judgment for an amount that the class representative considers acceptable, but that the judge, exercising his authority under rule 23(e), determines is insufficient. If the case proceeds to trial and the plaintiff class recovers less than the offer, the current rule 68 read literally requires that the plaintiff class pay costs, even though it was compelled to reject the offer by the order of the court. Although such a possibility aptly demonstrates why the rule should be amended to permit an element of discretion, even under the present rule a court should reject a strict interpretation that would permit such an untenable result.⁸³

C. *Former Adjudication: The Effects of an Offer of Judgment on Future Proceedings.*

In the *Mr. Hanger* case, the district court suggested that an offer of judgment constitutes an admission of wrongful conduct.⁸⁴ If this suggestion means that in any future action the plaintiff could point to the previous judgment as barring relitigation of the *issue* of wrongful conduct, the court appears to be in error. Issue preclusion is appropriate only when there has been an actual litigation and determination of the issue.⁸⁵ In a case involving an accepted offer of judgment, no litigation or determination of issues occurs and no future treatment of any issue as established is warranted. Aside from the fact that to permit this type of issue preclusion would depart from long-standing principles of former adjudication,⁸⁶ such a rule would also inhibit use of the offer of judgment. If by making an offer of judgment a party is making an admission that can be used against him in future litigation, he is quite likely to be disinclined to do so. Moreover, if part of the recovery sought by the plaintiff is an admission of wrongdoing, the admission could be expressly included in defendant's offer. If the admission is sought and is not offered by the defendant, the trial court should con-

81. FED. R. CIV. P. 23.

82. *Id.* 23(e).

83. A court might hold that rule 1, which provides that "[these rules] shall be construed to secure the just, speedy, and inexpensive determination of every action," would permit enough discretion to disregard rule 68 in such a case. FED. R. CIV. P. 1.

84. See text accompanying note 32 *supra*.

85. RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977).

86. See *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877); RESTATEMENT OF JUDGMENTS § 68 (1942).

sider this fact in determining whether the offer was more favorable than the judgment. Without an express inclusion in the offer of such an admission, one should never be inferred.⁸⁷

While the doctrine of issue preclusion should never apply to an offer of judgment, the rule that prohibits a plaintiff from maintaining an action on the same claim after he has received a valid and final judgment, known as the doctrine of merger,⁸⁸ should always apply when a plaintiff has accepted an offer. A defendant who makes an offer should be assured that he will not be subject to suit on the same claim by the same party again.⁸⁹

An example of the misuse of former adjudication techniques can be seen in the case of *Card v. Budini*,⁹⁰ which arose under the New York counterpart to rule 68.⁹¹ In the *Card* case the plaintiff and defendant were involved in an automobile accident. The plaintiff sued for property damages, and the defendant made an offer of judgment which was accepted. The plaintiff then sued the defendant in another court for her personal injuries. The second court held that the judgment in the first suit precluded further inquiry into the issue of liability.⁹² The only possible justification for the unfortunate result of the case is the somewhat confused state of the law in New York concerning the collateral effects of consent orders in general.⁹³ If a litigant is considering making an offer of judgment he should first be sure that the law in his jurisdiction regarding collateral effect might not be interpreted to force a preclusion of issues if the judgment is accepted.⁹⁴ However, no court should follow the *Card* case by holding that accepted offers of judgment have issue preclusion effect.

V. CONCLUSION

The rule 68 offer of judgment procedure provides defendants with a valuable litigation tool, particularly in light of the recent increase in allowable costs and the statutorily created right of attorneys' fees in certain actions. As the rule was interpreted in the *Mr. Hanger* case, in almost every litigation the defendant should make a nominal offer, as

87. See generally 1B MOORE'S FEDERAL PRACTICE ¶ 0.444[1] (2d ed. 1972).

88. RESTATEMENT (SECOND) OF JUDGMENTS § 47 (Tent. Draft No. 1, 1973).

89. See generally 1B MOORE'S FEDERAL PRACTICE ¶0.409[5] (2d ed. 1972).

90. 29 App. Div. 2d 35, 285 N.Y.S.2d 734 (1967).

91. N.Y. CIV. PRAC. § 3221 (McKinney 1970).

92. 29 App. Div. 2d at 38, 285 N.Y.S.2d at 737.

93. See Rosenberg, *Collateral Estoppel in New York*, 44 ST. JOHNS L. REV. 165, 177-81 (1969).

94. In New York one could avoid the problems of the *Card* case by inserting in the offer a specific denial of any preclusive effect the judgment might otherwise have.

he has nothing to lose and must receive costs if he prevails. However, as has been shown above, the *Mr. Hanger* holding is incorrect. To avoid the problems created by *Mr. Hanger* and similar situations, as well as to avoid difficulties that may arise in class actions, attorney-fee-shifting cases and litigation involving nonmonetary relief, the rule ought to be amended to introduce an element of judicial discretion. Though it is possible that these problems could be avoided by liberal judicial interpretation of the rule, an amendment would have the advantage of eliminating most ambiguities that presently exist and of providing clear direction to litigants and the courts.