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ATTORNEYS' FEES AND THE CONFLICT BETWEEN RULE 68 AND THE CLEAN WATER ACT'S CITIZEN SUIT PROVISION

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Abstract: Environmental “citizen suit” statutes provide incentives for citizens to bring enforcement actions by awarding successful plaintiffs reasonable attorneys’ fees. Defendants have attempted to use Federal Rule of Civil Procedure 68 to block a successful plaintiff’s recovery of attorneys’ fees. Under Rule 68, defendants may offer to allow a judgment to be issued against them for a fixed dollar amount. Plaintiffs may either accept this judgment offer or proceed to trial. If plaintiffs proceed to trial, however, they must receive a judgment more favorable than the offer or pay the defendants’ litigation costs. Defendants argue that the word “costs” as used in Rule 68 applies to attorneys’ fees in addition to other litigation costs. If so, the use of Rule 68 can have a great influence on the economics of citizen suit litigation. This Note explores whether or not Rule 68 should be read to apply to attorneys’ fees in citizen suits under the Clean Water Act and other environmental statutes.

INTRODUCTION

In February 2002, two environmental organizations in North Carolina sued the owners of a tract of land—adjacent to wetlands—for alleged violations of various provisions of the Federal Water Pollution Control Act,¹ commonly known as the Clean Water Act (CWA).² The plaintiffs in *North Carolina Shellfish Growers Ass’n v. Holly Ridge Associates*³ were among the many citizens and environmental groups to have utilized section 505 of the CWA, which allows any person to file a “citizen suit” against persons or entities who violate the Act and awards successful plaintiffs reasonable attorneys’ fees for their efforts.⁴

* Symposium Editor, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW, 2005–06.

¹ Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2000).

² *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 660 (E.D.N.C. 2003).

³ *Id.*

⁴ 33 U.S.C. § 1365(d).

Approximately nine months later, the defendants served upon the plaintiffs an offer of judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure in which the defendants offered to enter into a consent decree to settle the suit.⁵ If the plaintiffs had rejected the offer and received a judgment less favorable at trial, Rule 68 takes from plaintiffs the award of attorneys' fees to which they would have otherwise been entitled.⁶

Because attorneys' fees often represent a significant amount of money, the plaintiffs responded by filing a motion for a declaration that the Rule 68 offer was null and void.⁷ The plaintiffs argued that Rule 68 "would have a chilling effect upon the willingness of plaintiffs to maintain [citizen suits] and would therefore frustrate the purposes of Congress" in enacting the citizen suit provision.⁸ However, the U.S. Supreme Court's decision in *Marek v. Chesny* appears to reject this argument.⁹ In this 1985 decision, the Court rejected a similar argument with regards to the Civil Rights Attorney's Fees Awards Act (Civil Rights statute). When the result at trial is less favorable than the offer of judgment, the Court held that Rule 68 operates to deny plaintiffs any award for attorneys' fees for work done after the offer is rejected.¹⁰ However, in *Holly Ridge*, the court virtually ignored *Marek* and found Rule 68 inapplicable to citizen suits under the CWA.¹¹ As a result, the plaintiffs could reject the defendants' offer to enter a consent decree and be confident that, even if the result at trial was less favorable, there would be no adverse effect on the award of post-offer attorneys' fees.

This Note argues that the *Holly Ridge* court erred by failing to apply the *Marek* holding to the CWA. While many valid criticisms have been levied against the *Marek* decision, it is still good law. Furthermore, its reasoning, though flawed, applies to section 505 of the CWA.

Part I of this Note explores the history and policies underlying environmental citizen suit statutes and the treatment of attorneys' fees under those statutes. Part II examines the workings of Rule 68, the limits imposed by the Rules Enabling Act under which Rule 68 was promulgated, and the key cases interpreting Rule 68. Part III de-

⁵ *Holly Ridge*, 278 F. Supp. 2d at 666.

⁶ *Id.* at 666-67.

⁷ *Id.* at 666.

⁸ *Id.*

⁹ See 473 U.S. 1, 10, 11 (1985).

¹⁰ *Id.* at 10.

¹¹ See *Holly Ridge*, 278 F. Supp. 2d at 668-69.

scribes three cases in which courts have examined how Rule 68 interacts with section 505 of the CWA with respect to attorneys' fees. Finally, Part IV argues that section 505 of the CWA is indistinguishable from the U.S. Supreme Court's analysis of the Civil Rights statute in *Marek*. This Note concludes by suggesting that a change in the law of Rule 68 is desirable, but the *Marek* holding controls the interaction of Rule 68 and the CWA until such a change is made. The *Marek* holding requires that when a plaintiff rejects a Rule 68 offer and obtains a judgment that is less favorable than the Rule 68 offer, he is not entitled to receive attorneys' fees for post-offer work.¹²

I. CITIZEN SUITS UNDER THE CLEAN WATER ACT

Many federal statutes—especially environmental statutes—contain citizen enforcement provisions.¹³ These “citizen suit” provisions enable private citizens to supplement administrative enforcement of these statutes with a judicial remedy.¹⁴ Therefore, by “standing in the shoes of the government,” plaintiffs who file citizen suits provide a public service by ensuring that the laws are enforced.¹⁵ An example of a citizen suit provision is section 505 of the CWA.¹⁶ This Part will explore the policies which led to the enactment of section 505 and the history and development of citizen suit provisions in general. It will then explore one of the fundamental elements of a citizen suit statute—the allocation of attorneys' fees.

¹² See *Marek*, 473 U.S. at 10.

¹³ See, e.g., Toxic Substances Control Act, 15 U.S.C. § 2619 (2000); Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2000); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (2000); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (2000); Deepwater Ports Act of 1974, 33 U.S.C. § 1515 (2005); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2000); Noise Control Act of 1972, 42 U.S.C. § 4911 (2000); Clean Air Act Amendments of 1970, 42 U.S.C. § 7604 (2000); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972 (2000); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (2000); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11,046 (2000); Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (2000).

¹⁴ See S. REP. NO. 92-414, at 79 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3745.

¹⁵ *N.C. Shellfish Growers Ass'n v. Holly Ridge Ass'n*, 278 F. Supp. 2d 654, 667 (E.D.N.C. 2003) (quoting *Friends of the Earth v. Chevron Chem. Co.*, 885 F. Supp. 934, 940 (E.D. Tex. 1995)); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (noting that Congress often uses private enforcement to implement public policy).

¹⁶ Federal Water Pollution Control Act, 33 U.S.C. § 1365 (2000).

A. History and Development of Environmental Citizen Suit Statutes

Environmental enforcement prior to 1970 was “cumbersome and ineffective” because administrative agencies suffered from a combination of inadequate resources and lack of political will.¹⁷ Citizen enforcement of public rights was not a new concept at this time—in fact, the term “private attorney[] general” was used as early as 1943 to refer to citizens who sued to enforce public rights.¹⁸ For issues where an applicable cause of action existed, such as in the civil rights context, the citizen suit was a valuable tool.¹⁹ Unfortunately, interested citizens often lacked an appropriate cause of action to resolve many environmental issues, and therefore had to rely upon common law causes of action with varying degrees of success.²⁰

This situation changed, however, in 1970 when a citizen suit provision was added to the Clean Air Act (CAA).²¹ This citizen suit provision, contained in section 304 of the CAA, served as a model for many of the citizen suit provisions subsequently enacted including section 505 of the CWA.²² Proponents of the CAA citizen suit provision thought it would promote greater enforcement not only by providing direct enforcement against polluters, but by causing administrative agencies, such as the Environmental Protection Agency (EPA), to act.²³

¹⁷ JEFFREY G. MILLER, ENVTL. LAW INST., CITIZEN SUITS: PRIVATE ENFORCEMENT OF FEDERAL POLLUTION CONTROL LAWS 3–4 (1987).

¹⁸ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 1.02, at 1-3 (1995) (concluding that “if Congress could authorize the Attorney General to bring an action . . . to enforce a public right, Congress also could authorize citizens to bring such actions” (citing *Associated Indus. v. Ickes*, 134 F.2d 694 (2d Cir. 1943))). However, this suit involved industrial coal consumers who had an economic interest in the outcome. *Id.* They were not seeking to protect public rights in which they had a noneconomic interest. *Id.*

¹⁹ *See id.* § 1.02, at 1–4.

²⁰ *See id.* For example, *qui tam* and public nuisance actions were common in the late 1960s. *Id.*

²¹ 42 U.S.C. § 7604 (2000); MILLER, *supra* note 17, at 4; AXLINE, *supra* note 18, § 1.02, at 1-4. Axline points out the importance of the U.S. Supreme Court’s approval of citizen standing to enforce environmental and aesthetic interests in *Sierra Club v. Morton*, 405 U.S. 727 (1972). AXLINE, *supra* note 18, § 1.02, at 1-4 to 1-5.

²² Lucia A. Silecchia, *The Catabyst Calamity: Post-Buckhannon Fee-Shifting in Environmental Litigation and a Proposal for Congressional Action*, 29 COLUM. J. ENVTL. L. 1, 11 (2004). For a description of the legislative history of the CAA, see MILLER, *supra* note 17, at 5–6. Miller describes how Congress had a tendency to “lift” section 304 of the CAA and insert it into other environmental statutes without much independent debate concerning its enactment. *Id.*

²³ *See* KERRY D. FLORIO, Comment, *Attorneys’ Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 711–12 (2000).

B. *Text and Underlying Policies of the Clean Water Act Citizen Suit Provision*

Section 505 of the CWA permits any citizen to commence a suit against any person who violates an effluent standard or limitation of the CWA, or against the Administrator of EPA (Administrator) for failing to perform any nondiscretionary duty.²⁴ Prior to filing suit, the citizen is required to give notice to the Administrator and to the state in which the violation occurs.²⁵ Then, the Administrator or state may file a separate enforcement action.²⁶ This furthers the policy that the enforcement action should be initiated by the administrative agency, but that the citizen right of action serves as a check on that agency.²⁷ If the agency action is inadequate or nonexistent, the citizen may then supplement that action with a citizen suit.²⁸

In addition to their equitable powers, courts are permitted to impose civil penalties of up to twenty-five thousand dollars.²⁹ However, these amounts are not paid to the citizen suit plaintiff, but are instead paid to the United States Treasury.³⁰ Therefore, in order to encourage citizens to undertake the substantial financial burden of bringing an enforcement action, section 505, like most citizen suit statutes, permits the recovery of attorneys' fees.³¹ The court may award costs—including reasonable attorney and expert witness fees—to any “prevailing or substantially prevailing party” whenever the court determines such award is appropriate.³² In response to concern that an award of attorneys' fees

²⁴ Federal Water Pollution Control Act, 33 U.S.C. § 1365(a)(1), (2) (2000).

²⁵ *Id.* § 1365(b).

²⁶ See S. REP. NO. 92-414, at 80 (1972), as reprinted in 1972 U.S.C.C.A.N. 3668, 3745–46.

²⁷ See *id.*, as reprinted in 1972 U.S.C.C.A.N. at 3745–46.

²⁸ See *id.*, as reprinted in 1972 U.S.C.C.A.N. at 3745–46. Through the citizen suit provision, courts are only required to enforce compliance with minimum water quality standards established by EPA, or nondiscretionary actions by the Administrator. See *id.* at 79, as reprinted in 1972 U.S.C.C.A.N. at 3745. Use of such objective enforcement criteria is intended to simplify citizen enforcement of the CWA in the courts. See *id.*, as reprinted in 1972 U.S.C.C.A.N. at 3745.

²⁹ 33 U.S.C. §§ 1319(d), 1365(a).

³⁰ *Id.*; N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs., 278 F. Supp. 2d 654, 667 (E.D.N.C. 2003) (citing Chesapeake Bay Found. v. Bethlehem Steel Corp., 608 F. Supp. 440, 449 (D. Md. 1985)); S. REP. NO. 92-414 at 79, as reprinted in 1972 U.S.C.C.A.N. at 3745.

³¹ 33 U.S.C. § 1365(d); see AXLINE, *supra* note 18, at § 8.01, at 8-2; see also S. REP. NO. 92-414 at 81, as reprinted in 1972 U.S.C.C.A.N. at 3747 (explaining that courts should award litigation costs to parties who bring legitimate actions because they are performing a public service).

³² 33 U.S.C. § 1365(d). The “prevailing or substantially prevailing” language was added by the 1987 amendments to the CWA. Water Quality Act of 1987, Pub. L. No. 100-4, § 505(c), 101 Stat. 7 (1987).

to plaintiffs encourages abuse of the statute, the legislative history indicates that the “whenever appropriate” language allows fees to be awarded to prevailing defendants when the action is frivolous or harassing.³³ Therefore, the attorneys’ fees provision in section 505 serves both to encourage citizens to bring meritorious suits as a public service, while penalizing those who bring harassing or frivolous suits.³⁴

C. *Treatment of Costs and Attorneys’ Fees*

Citizen suits are critical to the effective enforcement of environmental laws,³⁵ just as the ability of plaintiffs to recover attorneys’ fees is critical to the effectiveness of citizen suits.³⁶ The “American Rule” is that each side in litigation pays its attorneys’ fees.³⁷ While there are some common law exceptions, most departures from the American Rule are statutory.³⁸ This Part explores how Congress and the courts allocate the costs of litigation in citizen suits in the absence of Rule 68.

1. The American Rule

The common law American Rule requires each party to bear its own attorneys’ fees.³⁹ The rule has been justified on the grounds that: (1) a system in which the loser pays would deter individuals from bringing claims because of the risk of having to bear the opponent’s litigation costs;⁴⁰ (2) the legal merits of a claim are difficult to judge prior to instituting an action;⁴¹ and (3) litigation is more efficient under the American Rule because it does not require a separate proceeding to determine a fee award.⁴²

³³ S. REP. NO. 92-414 at 81, as reprinted in 1972 U.S.C.C.A.N. at 3747.

³⁴ See *id.*

³⁵ See Florio, *supra* note 23, at 712.

³⁶ See AXLINE, *supra* note 18, at § 8.01, at 8-2. “[W]ithout some method of compensating citizens for the expense of bringing citizen suits, statutes authorizing citizens to bring such suits would be virtually meaningless, because no one could afford to exercise the power granted.” *Id.*

³⁷ *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 245 (1975); Silecchia, *supra* note 22, at 6-7.

³⁸ See discussion *infra* Part I.C.3.

³⁹ See *Alyeska Pipeline*, 421 U.S. at 245; Silecchia, *supra* note 22, at 6-7.

⁴⁰ Silecchia, *supra* note 22, at 7.

⁴¹ *Id.* at 7-8.

⁴² *Id.* at 8.

2. Judicial Exceptions to the American Rule

Despite these arguments in favor of the American Rule, the courts have recognized that, in some circumstances, shifting attorneys' fees is desirable.⁴³ Consequently, the courts have developed a "bad faith" exception to the American Rule that allows fees to be assessed against parties who act in bad faith.⁴⁴ A second exception to the American Rule is the "common benefit" exception, which spreads the cost of litigation to those persons benefiting from its success.⁴⁵

Despite the existence of these judicial exceptions, the U.S. Supreme Court has stated that any further exceptions to the American Rule must derive from Congress, not the judiciary.⁴⁶ However, prior to 1975, the courts recognized a "private attorney general" exception to the American Rule, under which fees could be awarded to litigants who act to vindicate important statutory rights of all citizens.⁴⁷ The Court in *Alyeska Pipeline Service Co. v. Wilderness Society*, however, ruled that only Congress could fashion such a "far-reaching" exception to the American Rule beyond the narrow circumstances found at common law.⁴⁸ The Court's historical analysis of the American Rule found implicit congressional acceptance of the bad faith and common benefit exceptions, but ultimately led it to conclude that any further deviations should emanate from the legislature, not the judiciary.⁴⁹

3. Statutory Exceptions to the American Rule

The Court's ruling in *Alyeska Pipeline* left untouched the many federal statutes which provided for attorneys' fees.⁵⁰ Courts have looked to the language in these statutes and their legislative histories to determine whether to award attorneys' fees in a given case.⁵¹ Further, because the U.S. Supreme Court has held that similar statutory phrases are to be interpreted consistently, courts also look to similarly

⁴³ *Alyeska Pipeline*, 421 U.S. at 270–71.

⁴⁴ *Id.* at 245.

⁴⁵ *Id.*

⁴⁶ *Id.* at 260, 271.

⁴⁷ *Id.* at 245.

⁴⁸ *Id.* at 247.

⁴⁹ *Alyeska Pipeline*, 421 U.S. at 260, 271.

⁵⁰ See *id.* at 263, 271. For a sampling of the many statutes which award attorneys' fees sorted by the type of statutory language used, see the appendix to Justice Brennan's dissenting opinion in *Marek v. Chesny*, 473 U.S. 1, 44–51 (1985).

⁵¹ See generally *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983); *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412 (1978).

worded statutes for interpretive guidance.⁵² Thus, while the law of attorneys' fees may not be entirely uniform, there is consistency among statutes. Most attorneys' fees statutes use one or both of two formulations:⁵³ the "prevailing or substantially prevailing party" formulation⁵⁴ or the "whenever appropriate" formulation.⁵⁵

A plaintiff is a "prevailing or substantially prevailing party" if the plaintiff is successful on "any significant issue in litigation which achieves some of the benefit the part[y] sought in bringing suit."⁵⁶ Plaintiff awards must be reduced if the plaintiff achieves only limited success in relation to the relief sought or fails on certain claims that are distinct from the successful claims.⁵⁷ It is not entirely clear from the statutes whether forms of success other than a court judgment will constitute "prevailing" under statutes with this formulation.⁵⁸ One court decision suggests that only plaintiffs who obtain judicial relief are "prevailing parties."⁵⁹ However, the question over what constitutes "prevailing" should not be relevant in the context of Rule 68, since a judgment must be reached in order for the rule to operate.⁶⁰

The "whenever appropriate" formulation on its face appears to grant a greater level of discretion to the court in determining fee awards than does the "prevailing party" formulation.⁶¹ However, this discretion has been bounded by several decisions and has different ramifications for parties depending on whether they are plaintiffs or defendants.⁶² Even though the statute in question may not explicitly require a party to prevail, the U.S. Supreme Court has ruled that it is never appropriate to award attorneys' fees to plaintiffs whose claims are

⁵² See *Ruckelshaus*, 463 U.S. at 691.

⁵³ See *Silecchia*, *supra* note 22, at 12–13; *Florio*, *supra* note 23, at 716.

⁵⁴ See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659(f) (2000); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11,046(f) (2000).

⁵⁵ See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (2000); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270 (2000).

⁵⁶ *Hensley*, 461 U.S. at 433 (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278–79 (1st Cir. 1978)).

⁵⁷ *Id.* at 440.

⁵⁸ *Silecchia*, *supra* note 22, at 13.

⁵⁹ See *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 600 (2001); see also *Silecchia*, *supra* note 22, at 13 (noting that the language of attorneys' fees statutes does not specifically address whether plaintiffs can prevail only by winning in court, or also by other forms of success short of a court judgment).

⁶⁰ See FED. R. CIV. P. 68.

⁶¹ See *Florio*, *supra* note 23, at 731–32.

⁶² *Id.*

wholly unsuccessful.⁶³ Rather, this language differs from the “prevailing party” language by allowing courts discretion to grant attorneys’ fees to a party who partially prevailed.⁶⁴ As long as plaintiffs prevail, however, courts will find it “appropriate” to award fees to these plaintiffs, unless “special circumstances” exist.⁶⁵ Therefore, the “whenever appropriate” language permits a court to award fees to a partially prevailing plaintiff and, under special circumstances, to divest a prevailing plaintiff of an attorneys’ fees award, but never to confer an attorneys’ fees award upon a nonprevailing plaintiff.

Prevailing defendants may only recover attorneys’ fees from unsuccessful plaintiffs when a suit is frivolous, unreasonable, or without foundation, even though it may not have been brought in subjective bad faith.⁶⁶ The Supreme Court in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* found that the attorneys’ fees provision in the Civil Rights Act of 1964, which allowed a court to use its discretion in awarding attorneys’ fees, only allowed an award to defendants in these limited circumstances.⁶⁷ In making this ruling, the Court explicitly noted that the provision in question was similar to section 505 of the CWA in that it allowed courts discretion in implementing the statutory policy.⁶⁸ Therefore, by implication, section 505 also restricts fee awards to defendants only in situations where a suit is frivolous, unreasonable, or without foundation.⁶⁹

⁶³ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983) (interpreting section 307(f) of the CAA, which relates to citizen actions against administrative agencies).

⁶⁴ See *id.* at 688.

⁶⁵ *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968); see *Christiansburg Garment Co. v. Equal Employment Opportunity Comm’n*, 434 U.S. 412, 416–17 (1978). For an example of these special circumstances, see *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976). In *Chastang*, the court refused to make defendant, the trustee of a retirement plan, liable for plaintiff’s attorneys’ fees. *Id.* The court found that the defendant engaged in no discriminatory act, its liability only occurred due to a change in the law, and an award would only serve to hurt innocent plan participants. *Id.*

⁶⁶ *Christiansburg*, 434 U.S. at 421.

⁶⁷ *Id.* at 413–14, 421.

⁶⁸ *Id.* at 416 & n.7.

⁶⁹ See *id.* at 416 & n.7, 421. The Court also noted that:

In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

Id. at 421–22.

Section 505 contains both statutory formulations, allowing costs including reasonable attorneys' fees to be awarded to "any prevailing or substantially prevailing party, whenever the court determines such an award is appropriate."⁷⁰ Therefore, prevailing or partially prevailing plaintiffs are presumptively entitled to attorneys' fees absent special circumstances.⁷¹ However, attorneys' fees may only be awarded to prevailing defendants when a suit is frivolous, unreasonable, or without foundation.⁷²

4. Calculation of Reasonable Attorneys' Fees

Most attorneys' fees statutes, including section 505, refer to "reasonable" attorneys' fees.⁷³ A reasonable fee is determined first by multiplying the number of hours *reasonably* expended by a *reasonable* hourly rate.⁷⁴ The party seeking the award submits evidence of the hours worked.⁷⁵ The court then makes adjustments by excluding hours not reasonably expended because they were excessive.⁷⁶ This starting point is commonly referred to as the "lodestar" amount.⁷⁷

After establishing this starting point, the court can make further adjustments—upward or downward—based upon the result of the case.⁷⁸ Where a plaintiff has achieved excellent results, an attorney should recover a full compensatory fee.⁷⁹ Conversely, if a plaintiff has achieved only partial or limited success—succeeding on only some of his claims, or receiving only part of the requested relief—then the lodestar amount may be excessive, and the court should reduce it.⁸⁰

⁷⁰ Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2000). Some argue that the addition of the "prevailing or substantially prevailing party" language to the "whenever appropriate" language is somewhat redundant because the provisions are interpreted similarly. See Brief of Sierra Club et al. as Amici Curiae Supporting Plaintiff-Appellees at 7–14, *Marbled Murrelet v. Babbitt*, 182 F.3d 1091 (9th Cir. 1999) (No. 98-15788), available at 10 Newburg on Class Actions, App. X-B (WL, CLASSACT database); Silecchia, *supra* note 22, at 13.

⁷¹ See *supra* note 65 and accompanying text.

⁷² *Christiansburg*, 434 U.S. at 421.

⁷³ See, e.g., 33 U.S.C. § 1365(d); Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. § 1988 (2000).

⁷⁴ *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

⁷⁵ *Id.*

⁷⁶ *Id.* at 434.

⁷⁷ See Peter Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes that Do and Do Not Classify Attorneys' Fees as "Costs,"* 73 IOWA L. REV. 413, 431 (1988); Roy D. Simon, Jr., *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 897 (1984).

⁷⁸ *Hensley*, 461 U.S. at 434.

⁷⁹ *Id.* at 435.

⁸⁰ *Id.* at 436–37.

The reasonableness inquiry does not lend itself to any precise mathematical rule or formula, but rather relies on a court's discretion to apply the various factors relevant to a particular case, subject to the bounds of the "prevailing party" and "whenever appropriate" language.⁸¹

5. Treatment of Costs Other than Attorneys' Fees

Rule 54 of the Federal Rules of Civil Procedure allows the prevailing party to recover its costs, "unless the court otherwise directs."⁸² These costs are taxable by the clerk of the court upon one day's notice, though no definition of costs appears in the rules.⁸³ However, costs are statutorily defined and includes fees for the court clerk, marshal, court reporter, printing and witnesses, copies, docket fees, and court appointed experts and interpreters.⁸⁴

Prior to 1993, the federal rules were silent with regard to attorneys' fees as well.⁸⁵ The 1993 amendments to Rule 54(d) were designed "to provide for a frequently recurring form of litigation not initially contemplated by the rules—disputes over the amount of attorneys' fees to be awarded."⁸⁶ Rule 54(d)(2) now contains the procedural method used to determine any award of attorneys' fees;⁸⁷ but the grounds for such an award are determined by the appropriate substantive statute.⁸⁸ The former language of Rule 54 was revised to explicitly exclude attorneys' fees from the enumeration of taxable costs routinely awardable to the prevailing party on one day's notice.⁸⁹

⁸¹ *Id.* The court also emphasized that "[a] request for attorney's fees should not result in a second major litigation," and that the fee applicant has the burden of establishing entitlement to the fees by proper documentation of hours and rates. *Id.* at 437.

⁸² FED. R. CIV. P. 54(d)(1).

⁸³ *See id.*

⁸⁴ 28 U.S.C. § 1920 (2000). The effect of this statute was considered by Justice Brennan in his dissent in *Marek v. Chesny*, 473 U.S. 1, 13–35 (1985) (Brennan, J., dissenting).

⁸⁵ *See* FED. R. CIV. P. 54(d) advisory committee's note to 1993 amendment.

⁸⁶ *See id.* This comment undercuts one of the principal arguments advanced by the U.S. Supreme Court in *Marek v. Chesny*, which contended that the drafters of Rule 68 contemplated a definition of costs that would, at least in some contexts, include attorneys' fees. *See* 473 U.S. at 8–9.

⁸⁷ FED. R. CIV. P. 54(d)(2).

⁸⁸ *See id.* at (d)(2)(B).

⁸⁹ *Id.* at (d)(1) (awarding "costs other than attorneys' fees").

II. OFFERS OF JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 68

Rule 68 is a mechanism intended to encourage settlement of claims and avoid litigation.⁹⁰ It was designed to accomplish these goals by encouraging litigants to “evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.”⁹¹ Specifically, Rule 68 provides a disincentive to plaintiffs who reject reasonable offers of settlement by requiring them to pay any costs incurred by defendants after the offer is made.⁹²

Rule 68 states, in pertinent part:

[a]t any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party [accepts the offer], thereupon the clerk shall enter judgment. . . . 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.⁹³

Evidence of a rejected offer is admissible only in a proceeding to determine costs.⁹⁴

Therefore, the terms of Rule 68 indicate that an offer is usually irrelevant to the judicial proceeding until a final judgment is entered.⁹⁵ A court must then determine whether a judgment is more favorable than the rejected offer.⁹⁶ However, when cases involve injunctive relief, the effect of Rule 68 is less predictable,⁹⁷ causing “inherent difficulty” both for courts and plaintiffs who must quantify the relief obtained.⁹⁸

⁹⁰ *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

⁹¹ *Id.*

⁹² *See* FED. R. CIV. P. 68.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Thomas L. Cabbage III, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465, 469 (1991). *But see infra* note 171 and accompanying text (noting that some plaintiffs have been successful at obtaining declarations that Rule 68 offers are null and void while cases are still pending).

⁹⁶ Cabbage, *supra* note 95, at 470.

⁹⁷ *See id.*

⁹⁸ *Marek v. Chesny*, 473 U.S. 1, 33 n.48 (1985) (Brennan, J., dissenting). For a discussion of how courts should approach the problem of determining whether an offer is more

This Part will look at the history and policies behind Rule 68, U.S. Supreme Court decisions interpreting the rule, and the limits on rulemaking power imposed by the Rules Enabling Act in order to determine if Rule 68 “costs” include attorneys’ fees in a given situation.

A. History and Policies Behind Rule 68

The central purpose behind Rule 68 is to encourage settlement.⁹⁹ Since plaintiffs are presumptively entitled to costs under Rule 54(d),¹⁰⁰ the Rule 68 penalizes plaintiffs who choose to continue litigating after refusing a settlement offer which was greater than the final judgment.¹⁰¹ These plaintiffs must bear their own post-offer costs and must pay any post-offer costs incurred by the defendant.¹⁰²

While the Federal Rules of Civil Procedure were enacted in 1938, as recently as 1983 the Advisory Committee acknowledged that the rule “ha[d] rarely been invoked and has been considered largely ineffective in achieving its goals.”¹⁰³ One possible reason for this ineffectiveness—suggested by the Advisory Committee—is that plaintiffs’ costs were ordinarily too small to provide an effective incentive for litigants.¹⁰⁴ Other reasons may include that only defendants make Rule 68 offers, and that defendants have a greater incentive to defer judgment and earn interest on their money rather than to avoid costs.¹⁰⁵ Subsequent decisions by the U.S. Supreme Court clarified the interpretation of Rule 68. In particular, *Marek v. Chesny* increased the incentive for defendants to use Rule 68 when their case involves a statute that define “costs” to include attorneys’ fees.¹⁰⁶ After *Marek*, Rule 68

or less favorable than the judgment finally obtained, see Roy D. Simon, Jr., *The New Meaning of Rule 68: Marek v. Chesny and Beyond*, 14 N.Y.U. REV. L. & SOC. CHANGE 475, 485–89 (1986).

⁹⁹ See 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 1997); see also Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 403–14 (1997) (discussing strategic considerations of Rule 68 for both plaintiffs and defendants).

¹⁰⁰ FED. R. CIV. P. 54(d). “[C]osts other than attorneys’ fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . .” *Id.* (d)(1).

¹⁰¹ See 12 WRIGHT ET AL., *supra* note 99, § 3001.

¹⁰² See *id.*

¹⁰³ See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 363 (1983); Bonney et al., *supra* note 99, at 380–81; Simon, *supra* note 77, at 891.

¹⁰⁴ See Simon, *supra* note 77, at 891; 12 WRIGHT ET AL., *supra* note 99, § 3001.

¹⁰⁵ See Simon, *supra* note 77, at 891.

¹⁰⁶ See *infra* Part II.B.

applies to attorneys' fees when such statutes are involved.¹⁰⁷ In these cases, the economics of litigation can be profoundly altered by this "little known rule of court."¹⁰⁸

B. Significant U.S. Supreme Court Precedent for Rule 68

In *Roadway Express, Inc. v. Piper*, the U.S. Supreme Court held that the word "costs" did not include attorneys' fees for purposes of a procedural statute which imposed costs upon attorneys who unreasonably and vexatiously multiplied the proceedings in any case.¹⁰⁹ While the underlying dispute involved a civil rights statute that allowed for the award of attorneys' fees "as part of the costs" of litigation,¹¹⁰ the Court held that—based upon the history of the provision—the word "costs" should be read to mean the definition contained in 28 U.S.C. § 1920, rather than the substantive statute.¹¹¹ The Court favored the "uniform" approach to awardable costs contained in § 1920.¹¹² Furthermore, the Court did not find any evidence of legislative intent to impose attorneys' fees upon individual attorneys in the substantive statute—it merely referred to the ability to impose attorneys' fees upon other parties.¹¹³

In *Delta Air Lines, Inc. v. August*, the Court held that the plain language of Rule 68 limited its application to only those cases where a plaintiff prevails.¹¹⁴ Rule 68 does not apply to cases where judgment was entered in favor of the defendant who made the offer; in that case, the defendant is presumptively entitled to costs under Rule 54, subject to the court's discretion.¹¹⁵ Therefore, the only possible effect of Rule 68 would be to divest judges of their discretion in awarding costs when the defendant prevails, but there was no indication that the legislature intended this result.¹¹⁶ This ruling was intended to avoid situations in

¹⁰⁷ See *infra* Part II.B.

¹⁰⁸ Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985).

¹⁰⁹ 447 U.S. 752, 756–57, 767 (1980); see 28 U.S.C. § 1927 (2000). The statute was subsequently amended to award attorneys' fees in such cases. Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 94 Stat. 1156 (1980).

¹¹⁰ *Piper*, 447 U.S. at 756.

¹¹¹ *Id.* at 759–60. Section 1920 did not include attorneys' fees as costs, while the Civil Rights statute, the substantive law in the case, did include attorneys' fees as costs. *Id.* at 761.

¹¹² *Id.* at 760–61.

¹¹³ *Id.* at 761.

¹¹⁴ 450 U.S. 346, 351–52 (1981).

¹¹⁵ *Id.* at 352–53.

¹¹⁶ See *id.*

which a defendant makes a small Rule 68 offer—which was unlikely to be accepted—for the purpose of obtaining “cheap insurance” against costs should the defendant prevail.¹¹⁷

While *August* did not involve the question of whether attorneys' fees were recoverable as costs, Justice Rehnquist examined this question in his dissent.¹¹⁸ He argued that the Court should look to the contemporaneous meaning of the word as it was understood when the statute was enacted.¹¹⁹ Justice Rehnquist further argued that the legislative history of Rule 68 did not indicate that Congress meant to refer to attorneys' fees as part of the taxable costs of litigation.¹²⁰

However, in *Marek*, Justice Rehnquist changed his position on this issue,¹²¹ and agreed with the Court that when the underlying statute defines attorneys' fees as costs, they should be included for purposes of Rule 68.¹²² The Court reasoned that the drafters of Rule 68 were well aware that there were statutes that allowed recovery of attorneys' fees “as part of costs,” and that it was unlikely that the lack of a definition of costs was mere oversight.¹²³ The Court distinguished *Piper* by stating that the § 1927 provision included its own definition of costs in § 1920, while Rule 68 contained no definition of costs.¹²⁴

After discussing its “plain language” interpretation of Rule 68, the Court proceeded to analyze the policy ramifications of their conclusion.¹²⁵ Contrary to the appeals court, the majority did not think that its result would frustrate Congress' objective of “ensuring that civil rights plaintiffs obtain effective access to the judicial process” because Rule 68 was neutral and “favor[ed] neither plaintiffs nor defendants.”¹²⁶ Therefore, the policy of Rule 68 favoring the settlement of litigation did not conflict with the policy of the Civil Rights statute authorizing attorneys' fees in order to encourage meritorious suits.¹²⁷

¹¹⁷ *Id.* at 349 n.4 (quoting *August v. Delta Air Lines, Inc.*, 600 F.2d 699, 701 (7th Cir. 1979)).

¹¹⁸ *See id.* at 376–80 (Rehnquist, J., dissenting).

¹¹⁹ *Id.* at 377.

¹²⁰ *See August*, 450 U.S. at 377–78 (Rehnquist, J., dissenting).

¹²¹ 473 U.S. 1, 13 (1985) (Rehnquist, J., concurring).

¹²² *Id.* at 9 (majority opinion).

¹²³ *Id.* at 8–9.

¹²⁴ *Id.* at 9 n.2; *see also* Simon, *supra* note 77, at 913 (distinguishing *Piper* and *Marek* by noting that history required that the statute be read together with § 1920 which did not include attorneys' fees as “costs”).

¹²⁵ *See Marek*, 473 U.S. at 10.

¹²⁶ *Id.* (internal quotation omitted).

¹²⁷ *Id.* at 11.

In his dissenting opinion, Justice Brennan sharply criticized the majority for its apparent inconsistency with *Piper* and its creation of a shifting definition of Rule 68 “costs” that would change depending on the relevant statute.¹²⁸ He argued that the limited history of Rule 68 suggested that § 1920 contained the proper definition of “costs.”¹²⁹ Justice Brennan further argued that if Rule 68 costs were defined by the substantive statute to include attorneys’ fees, then Rule 68 would conflict with the rule that defendants only received attorneys’ fees when the suit was vexatious, frivolous, or harassing, fundamentally altering the Civil Rights statute.¹³⁰

Justice Brennan chastised the majority for carrying the “plain language” approach of statutory construction to absurdity, observing that many fee-shifting statutes contained slightly different wording that would have pronounced effects with no rational justification.¹³¹ He criticized the majority for abandoning the “reasonableness” analysis of attorneys’ fees awards in favor of an automatic, per se rule,¹³² and for its assertion that its interpretation of the rule was “neutral.”¹³³ Instead, he argued that its application will have a deterrent effect on civil rights plaintiffs in contravention of Congress’ goals,¹³⁴ and therefore, Rule 68 would violate the judiciary’s rulemaking authority under the Rules Enabling Act (REA).¹³⁵

C. *The Rules Enabling Act and the Sibbach-Hanna Doctrine*

When the *Marek* Court held that the word “costs” in Rule 68 included attorneys’ fees for purposes of the Civil Rights statute, it called

¹²⁸ *Id.* at 16, 19 (Brennan, J., dissenting).

¹²⁹ *Id.* at 18.

¹³⁰ *Id.* at 22.

¹³¹ *Marek*, 473 U.S. at 23–24 (Brennan, J., dissenting). (“[Congress] sometimes has referred to the awarding of ‘attorney’s fees *as part of* the costs,’ to ‘costs *including* attorney’s fees,’ and to ‘attorney’s fees and *other* litigation costs.’ . . . Congress frequently has referred in other statutes to the awarding of ‘costs *and* a reasonable attorney’s fee,’ of ‘costs *together with* a reasonable attorney’s fee,’ or simply of ‘attorney’s fees’ without reference to costs.”). Section 505 of the CWA is one of the many fee-shifting statutes which refers to litigation costs “including reasonable attorney and expert witness fees.” Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2000).

¹³² *Marek*, 473 U.S. at 28–29. (Brennan, J., dissenting).

¹³³ *Id.* at 31.

¹³⁴ *Id.* at 31–32.

¹³⁵ *Id.* at 35; see Rules Enabling Act, 28 U.S.C. § 2072(b) (2000) (mandating that rules “shall not abridge, enlarge or modify any substantive right”).

attention to the debate between substance and procedure.¹³⁶ The Federal Rules of Civil Procedure are promulgated by the U.S. Supreme Court pursuant to a legislative grant of authority.¹³⁷ This authority is limited by the REA, under which these rules are promulgated.¹³⁸ The REA limits the judiciary's rulemaking ability to only procedure and not substance.¹³⁹

Two important U.S. Supreme Court decisions illustrate the difficulty in articulating a test of whether a rule affects a substantive right and violates REA. The first was *Sibbach v. Wilson & Co.*, which determined that the rule authorizing medical examinations during pre-trial discovery was procedural, rather than substantive.¹⁴⁰ The Court attempted unsuccessfully to define a substantive right; instead, the Court implied that if the rule was procedural, then it did not abridge a substantive right.¹⁴¹ The Court said that the test "must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."¹⁴² However, this decision was guided by the policy of achieving uniform federal procedure, rather than concerns for modifying congressional statutes.¹⁴³

¹³⁶ See Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 284.

¹³⁷ 28 U.S.C. § 2072(a); see also Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828, 829 n.7 (1985) (describing conflicting views over whether the U.S. Supreme Court possesses an inherent power to make procedural rules, whether a statutory delegation of authority is necessary, and how to resolve conflicts between the two).

¹³⁸ 28 U.S.C. § 2072(b).

¹³⁹ *Id.* The line between substance and procedure is important in numerous ways; however, this Note will focus on how the distinction affects the judiciary's ability to make rules which conflict or potentially conflict with federal statutory policies. See Carrington, *supra* note 136, at 284–88. Carrington describes other uses of the distinction between "substance" and "procedure"—the most notable of which are the conflicts in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), between federal procedural rules and state substantive law. See *Id.* at 285–86. In federal diversity cases, courts will often find attorneys' fees to be a "substantive" right such that courts will apply the state law rather than federal law. See, e.g., *Montgomery Ward & Co. v. Pac. Indem. Co.*, 557 F.2d 51, 55–58 (3d Cir. 1977); *Woods Masonry, Inc. v. Monumental Gen. Cas. Ins. Co.*, 198 F. Supp. 2d 1016, 1045 (N.D. Iowa 2002). For a thorough explanation of the distinction between the *Sibbach-Hanna* doctrine and the *Erie* doctrine, see 19 WRIGHT ET AL., *supra* note 99, § 4508.

¹⁴⁰ 312 U.S. 1, 11, 16 (1941); Carrington, *supra* note 136, at 285 n.29.

¹⁴¹ See *Sibbach*, 312 U.S. at 11–14; Note, *supra* note 137, at 830.

¹⁴² *Sibbach*, 312 U.S. at 14.

¹⁴³ Note, *supra* note 137, at 834.

This test proves insufficient because the line between substance and procedure is unclear.¹⁴⁴ In *Hanna v. Plumer*, the Court further explained the limits imposed by the REA.¹⁴⁵ In *Hannah*, the Court considered whether a Massachusetts rule for service of process governed the case at bar or whether Federal Rule of Civil Procedure 4(d)(1) should govern.¹⁴⁶ Therefore, the Court had to determine whether Rule 4(d)(1) was within the scope of the rulemaking authority conferred by the REA.¹⁴⁷

The Court in *Hanna* reaffirmed that the analysis in *Sibbach* was the proper method for evaluating the validity of a federal rule of civil procedure.¹⁴⁸ The Court resolved the controversy by creating a presumption that the federal rules were procedural—and therefore valid—because of the Congressional approval process required to enact a new rule.¹⁴⁹ This presumption could be overcome only if the Advisory Committee, the Court, and Congress “erred in their prima facie judgment that the Rule in question transgresses neither the terms of the [REA] nor constitutional restrictions.”¹⁵⁰

For the purposes of this Note, it is not necessary to define the full scope of a substantive right. It must only be determined whether Rule 68’s cost-shifting provision modifies or abridges a substantive right when it is interpreted to include attorneys’ fees.¹⁵¹ However, it is difficult to determine whether attorneys’ fees are a substantive right for the purpose of REA, since “[s]tatutory fee shifting provisions reflect congressional intent ‘to encourage private enforcement of

¹⁴⁴ See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (stating that Congress has the “power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either”).

¹⁴⁵ See *id.* at 463–64.

¹⁴⁶ *Id.* at 461–62. Service of process had been accomplished by leaving the court papers with the respondents’ wife, which complied with Rule 4(d)(1), but conflicted with the Massachusetts rule. *Id.*

¹⁴⁷ *Id.* at 464.

¹⁴⁸ *Id.* at 470–71.

¹⁴⁹ Note, *supra* note 137, at 831; see *Hanna*, 380 U.S. at 471.

¹⁵⁰ *Hanna*, 380 U.S. at 471; see Note, *supra* note 137, at 831–32.

¹⁵¹ Attorneys’ fees statutes have been interpreted as substantive in other settings. See *supra* note 139. Whether Rule 68, when interpreted to include attorneys’ fees, abridges a substantive right may depend upon which fee-shifting statute interacts with Rule 68; while the *Marek* Court found no conflict between the Civil Rights statute and the REA, courts have not yet found the *Marek* analysis applicable to section 505 of the CWA. See *Marek v. Chesny*, 473 U.S. 1, 7–11 (1985); *infra* Part III. However, this Note argues that with respect to Rule 68, the CWA is indistinguishable from the Civil Rights statute in *Marek*. See *infra* Part IV.B.

statutory substantive rights, be they economic or non-economic, through the judicial process.”¹⁵²

The *Marek* Court sidestepped the REA question, asserting that there was no conflict between the Civil Rights statute and Rule 68.¹⁵³ The Court reasoned that the Civil Rights statute only awarded “reasonable” fees, and that because the plaintiff’s post-offer legal services resulted in a judgment eight thousand dollars less than the offer, fees for these post-offer services were per se unreasonable.¹⁵⁴ Therefore, Rule 68 did not conflict with the Civil Rights statute because it only divested plaintiffs of fees for services which were unreasonably incurred—fees to which they were not entitled regardless of whether Rule 68 “costs” included attorneys’ fees.¹⁵⁵ Thus, claiming to follow the rule of *Hensley v. Eckerhart*, the Court looked only to the end result of the litigation to determine what fees were reasonable.¹⁵⁶

However, Justice Brennan argued that the Civil Rights statute gave the courts discretion to determine reasonable fees.¹⁵⁷ He reasoned that there were some circumstances under which a plaintiff could reject a Rule 68 offer, prevail at trial for an amount less than the offer, and still be entitled to attorneys’ fees.¹⁵⁸ In effect, the majority’s per se rule divested these plaintiffs of fees to which they would be entitled in the absence of Rule 68.¹⁵⁹ This modified the structure of incentives inherent in the citizen suit provision of the Civil Rights stat-

¹⁵² *Petruzzi’s, Inc. v. Darling-Delaware Co.*, 983 F. Supp. 595, 602 (M.D. Pa. 1996) (quoting REPORT OF THE THIRD CIRCUIT TASK FORCE, COURT AWARDED ATTORNEY FEES, 15 (Oct. 8, 1985), reprinted at 108 F.R.D. 237, 250).

¹⁵³ Margulies, *supra* note 77, at 422 & n.61; see *Marek*, 473 U.S. at 10–11; see also 12 WRIGHT ET AL., *supra* note 99, § 3001 n.31 (noting that by asserting that Rule 68 was neutral and favored neither plaintiffs nor defendants, the court was able to avoid the REA challenge to its interpretation of Rule 68).

¹⁵⁴ See *Marek*, 473 U.S. at 11.

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 37–38 (Brennan, J., dissenting).

¹⁵⁸ See *id.* at 37.

As interpreted by the court, [Rule 68] will operate to divest a prevailing plaintiff of fees to which he otherwise might be entitled under the reasonableness standard simply because he guessed wrong, or because he did not have all the information reasonably necessary to evaluate the offer, or because of unforeseen changes in the law or evidence after the offer.

Id.

¹⁵⁹ See *id.*

ute.¹⁶⁰ Therefore, Justice Brennan argued that Rule 68 modified a substantive right of the Civil Rights statute in violation of the REA.¹⁶¹

Accordingly, divesting a prevailing plaintiff of reasonable attorneys' fees appears to conflict with REA.¹⁶² Therefore, how one defines "reasonable" attorneys' fees becomes the key question. Should "reasonable" attorneys' fees be defined by whether a plaintiff's rejection of a Rule 68 offer was reasonable at the time of rejection, or should "reasonable" attorneys' fees be defined by whether, in hindsight, the end result was more or less favorable than the Rule 68 offer? The U.S. Supreme Court decided in *Marek* that the latter approach should be taken for the Civil Rights statute and found no conflict with the REA.¹⁶³ This Note examines whether this approach should also apply to section 505 of the CWA.

III. CASES INVOLVING SECTION 505 AND OFFER OF JUDGMENT RULES

Three federal court decisions have examined the interaction of section 505 of the CWA and offers of judgment. First, in *Public Interest Research Group of New Jersey, Inc. v. Struthers-Dunn, Inc.*, the court held that Rule 68 was inapplicable to citizen suits under section 505 of the CWA.¹⁶⁴ Similarly, in *Friends of the Earth, Inc. v. Chevron Chemical Co.*, a local offer of judgment rule—similar to Rule 68, though enacted under the Civil Justice Reform Act (CJRA)—was held inapplicable to the CWA.¹⁶⁵ More recent is the decision in *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates*,¹⁶⁶ which is similar to the *Struthers-Dunn* case.¹⁶⁷ The plaintiffs in each case sued for violations of the CWA, and in each case the offer of judgment rule was held not to apply.¹⁶⁸

¹⁶⁰ *Marek*, 473 U.S. at 38 (Brennan, J., dissenting).

¹⁶¹ *Id.* at 37–38.

¹⁶² *But see* Christopher W. Carmichael, *Encouraging Settlements Using Federal Rule 68: Why Non-Prevailing Defendants Should Be Awarded Attorney's Fees, Even in Civil Rights Cases*, 48 WAYNE L. REV. 1449, 1464 (2003) (arguing that shifting attorneys' fees does not violate the REA because attorneys' fees are not a "right" under the REA).

¹⁶³ *See Marek*, 473 U.S. at 10–11.

¹⁶⁴ *See* No. 87-1773 (SSB), 1988 WL 147639, at *5, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) 21,398, 21,400 (D.N.J. Aug. 16, 1988).

¹⁶⁵ 885 F. Supp. 934, 940 (E.D. Tex. 1995), *overruled on other grounds*, *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 265–68 (5th Cir. 1997).

¹⁶⁶ 278 F. Supp. 2d 654 (E.D.N.C. 2003).

¹⁶⁷ 1988 WL 147639.

¹⁶⁸ *Holly Ridge*, 278 F. Supp. 2d at 660, 668; *Chevron*, 885 F. Supp. at 940; *Struthers-Dunn*, 1988 WL 147639, at *5, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

A. *The Struthers-Dunn Decision*

In *Struthers-Dunn*, the parties settled their claims for prospective injunctive relief; the litigation focused upon monetary penalties for past violations of the CWA.¹⁶⁹ The defendant tendered a Rule 68 offer while motions by both sides were pending.¹⁷⁰ Plaintiffs responded by moving for a declaratory judgment that the defendant's offer was null and void.¹⁷¹

In granting the plaintiffs' motion, the court noted that the textual approach of *Marek v. Chesny*¹⁷²—examining the statute to determine if “costs” were defined to include attorneys' fees—would result in a denial of attorneys' fees for plaintiffs if they obtained a verdict less favorable than the Rule 68 offer.¹⁷³ The court distinguished *Marek* on the grounds that CWA citizen suit plaintiffs were on a different footing than civil rights plaintiffs because the former would not keep any money ultimately paid by the defendant.¹⁷⁴ Therefore, the incentives for plaintiffs to hold out for greater penalties to the defendant were offset by the greater risk of bearing costs.¹⁷⁵ Thus, for CWA plaintiffs, “there is no ‘upside’ benefit . . . if they reject defendant's offer, while there is a substantial ‘downside.’”¹⁷⁶

This application of Rule 68 was inconsistent with the legislative intent of the CWA because “[s]uch an impingement on a Congressional statute through the application of a federal rule of civil procedure is barred by the [REA].”¹⁷⁷

¹⁶⁹ *Struthers-Dunn*, 1988 WL 147639, at *1, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,399.

¹⁷⁰ *Id.* at *1, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,399.

¹⁷¹ *Id.* at *1, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,399. The procedural posture of this case is noteworthy, especially for plaintiffs faced with Rule 68 offers. By succeeding on the merits at the trial court level in nullifying the effect of Rule 68 prior to judgment, and therefore eliminating the risk of losing an attorneys' fees award, the plaintiffs may have significantly enhanced their bargaining position early in the litigation process. Conversely, the Rule 68 issue in *Marek v. Chesny* was decided only after the plaintiffs had obtained a judgment on the merits which was less favorable than the offer, triggering the applicability of Rule 68. *See* 473 U.S. 1, 4 (1985).

¹⁷² 473 U.S. at 7–10.

¹⁷³ *Struthers-Dunn*, 1988 WL 147639, at *3–4, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

¹⁷⁴ *Id.* at *4, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

¹⁷⁵ *Id.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

¹⁷⁶ *Id.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

¹⁷⁷ *Id.* at *5, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

B. *The Chevron Decision*

The decision in *Chevron* involved the interaction of section 505 of the CWA and an offer of judgment rule enacted by the district court under the authority granted by the CJRA.¹⁷⁸ Unlike the court in *Struthers-Dunn*, the *Chevron* court did not have to decide whether the district court's rule included attorneys' fees as costs, because the rule specifically included reasonable attorneys' fees.¹⁷⁹

As a result, the court only had to consider whether the offer of judgment provision "would directly conflict with and frustrate the purpose of citizen suits under the [CWA]."¹⁸⁰ The court noted that in a section 505 action, the "[p]laintiff is acting as a private attorney general performing a public service. . . . In performing this public service, a citizen has no profit interest; rather, a citizen may only be reimbursed for her costs and attorney's fees."¹⁸¹ Therefore, the hazard of paying a defendant's attorneys' fees and costs would have an undesirable "chilling effect" on the effectiveness of section 505.¹⁸²

The analysis of the rule's effect on CWA citizen suits was similar to that of Justice Brennan¹⁸³ and *Struthers-Dunn*,¹⁸⁴ although unlike Rule 68, this rule did confer discretion on courts to reduce the award of litigation costs to avoid undue hardship to a party.¹⁸⁵

¹⁷⁸ 885 F. Supp. 934, 936 (E.D. Tex. 1995). The Fifth Circuit Court of Appeals later ruled that the district court rule was not authorized by the CJRA. *Ashland Chem. Inc. v. Barco Inc.*, 123 F.3d 261, 265-68 (5th Cir. 1997). The local rule was different from Rule 68 in certain respects, though not in ways that are relevant to the court's analysis or for purposes of this Note. See *Chevron*, 885 F. Supp. at 936 n.1. For example, both parties may make offers under the local rule and the final judgment must be less than the offer by more than ten percent in order to trigger application of the rule. *Id.*

¹⁷⁹ *Chevron*, 885 F. Supp. at 936 n.1; see *supra* notes 169-77 and accompanying text (describing the *Struthers-Dunn* decision).

¹⁸⁰ *Chevron*, 885 F. Supp. at 939.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ See *Marek v. Chesny*, 473 U.S. 1, 31-35 (1985) (Brennan, J., dissenting) (discussing the deterrent effect of Rule 68).

¹⁸⁴ See *Pub. Interest Research Group of N.J., Inc. v. Struthers-Dunn, Inc.*, No. 87-1773 (SSB), 1988 WL 147639, at *3-5, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 21,398, 21,399-400 (D.N.I. Aug. 16, 1988).

¹⁸⁵ *Chevron*, 885 F. Supp. at 940.

C. *The Holly Ridge Case*

The most recent case analyzing the conflict between Rule 68 and section 505 of the CWA is *Holly Ridge*.¹⁸⁶ The defendants served plaintiffs with their offer, causing the plaintiffs to subsequently file a motion to declare the offer null and void.¹⁸⁷ The court agreed with the analyses of *Struthers-Dunn* and *Chevron*, and granted plaintiffs' motion.¹⁸⁸ The court concluded that because plaintiffs, acting as "private attorneys general," could not be awarded damages for successful claims, they were in a different position than other civil litigants.¹⁸⁹ The benefit of the CWA suit would inure to the public instead of the plaintiffs.¹⁹⁰ Therefore, application of Rule 68 would conflict with Congress' intent "that enforcement of [CWA] provisions be immediate, that citizens should be unconstrained to bring these actions, and that the courts should not hesitate to consider them."¹⁹¹ This conflict was a violation of the Rules Enabling Act.¹⁹²

The court noted that their characterization of the plaintiffs as "private attorneys general" may appear inconsistent with the standing requirement.¹⁹³ While plaintiffs need to have a personal stake in the outcome for standing purposes, the citizen suit serves a broader public purpose.¹⁹⁴ The broader public purpose—clearly contemplated by the legislature—conflicts with Rule 68.¹⁹⁵

IV. THE EFFECT OF RULE 68 UPON ATTORNEYS' FEES AWARDS UNDER SECTION 505 OF THE CWA

This Part explores the effect of a rejected Rule 68 offers upon the allocation of attorneys' fees in citizen suits under section 505 of the CWA.¹⁹⁶ First, this Part examines whether the holding in *Marek v.*

¹⁸⁶ 278 F. Supp. 2d 654, 666–69 (E.D.N.C. 2003). The parties settled this case in 2004. North Carolina Coastal Federation, Historical Highlights 2004, http://www.nccoast.org/about/history/history_04 (last visited Apr. 13, 2006).

¹⁸⁷ *Holly Ridge*, 278 F. Supp. 2d at 666, 668.

¹⁸⁸ *Id.* at 667–68.

¹⁸⁹ *Id.* at 668. (internal quotation marks omitted).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 667 (alteration in original) (quoting S. REP. NO. 92-414, at 80 (1971), as reprinted in 1972 U.S.C.A.N. 3668, 3746).

¹⁹² See *id.* at 667.

¹⁹³ *Holly Ridge*, 278 F. Supp. 2d at 668.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See, e.g., *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 666–69 (E.D.N.C. 2003) (determining the effect of Rule 68 on a citizen suit plaintiff).

Chesny applies to section 505.¹⁹⁷ Second, this Part explores the two principal rationales behind the Court's decision in *Marek* and applies them to section 505. Through this comparison, this Part explains that the reasoning in *Marek* is equally applicable to section 505 of the CWA. The distinction between the Civil Rights statute in *Marek* and section 505 at best illustrates that the case was wrongly decided, but fails to remove section 505 from the scope of the *Marek* holding.¹⁹⁸ Finally, this Part concludes by suggesting an alternative approach based upon Justice Brennan's focus on the reasonableness of a rejection of a Rule 68 offer. This alternative framework would retain the positive aspects of the *Marek* decision—encouraging plaintiffs to accept reasonable offers—while reducing the “chilling effect” on environmental citizen suits and providing uniformity to the law of Rule 68.¹⁹⁹

A. Critique of Rule 68 and the *Marek* Decision

There has been significant academic inquiry into Rule 68 following the *Marek* decision.²⁰⁰ The rule has been criticized because: (1) it does not permit plaintiffs to make a counteroffer; (2) offers must be accepted within ten days; (3) an offer can be made before discovery is complete, forcing plaintiffs to make a critical decision with incomplete information; and (4) the rule's mandatory nature leaves no room for judicial discretion.²⁰¹ One article notes that “Rule 68 is a sleeping giant because its enormous potential to bring civil disputes to an early resolution is presently overshadowed by its undefined terms, confusing time frames, and many troublesome intricacies.”²⁰²

The *Marek* decision added new complexity to Rule 68 by holding that when the underlying statute defines the word “costs” to include attorneys' fees, those fees are considered costs for purposes of Rule 68.²⁰³ Both an argument based upon the “plain meaning” of the statutory text,²⁰⁴ and a policy argument support the Court's

¹⁹⁷ 473 U.S. 1, 9 (1985) (holding that Rule 68 applied to “costs properly awardable” under the relevant statute).

¹⁹⁸ See *infra* Part IV.B.

¹⁹⁹ See Pub. Interest Research Group of N.J., Inc. v. Struthers-Dunn, Inc., No. 87-1773 (SSB), 1988 WL 147639, at *3, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 21,398, 21,400 (D.N.J. Aug. 16, 1988).

²⁰⁰ See generally Bonney et al., *supra* note 99; Margulies, *supra* note 77; Simon, *supra* note 77, at 921.

²⁰¹ See Simon, *supra* note 77, at 921.

²⁰² Bonney et al., *supra* note 99, at 430.

²⁰³ *Marek*, 473 U.S. at 9.

²⁰⁴ See *id.* at 7–9.

holding.²⁰⁵ Peter Margulies writes that the *Marek* problem involves the interaction of three related policies: (1) vindicating important statutory and constitutional rights; (2) promoting settlement through alternative dispute resolution; and (3) reducing uncertainty.²⁰⁶ He argues that every possible approach to the *Marek* problem involves sacrificing one of these values.²⁰⁷ This Part will evaluate the *Marek* approach based upon these values.

1. The Textual Argument

The textual argument in *Marek* can be characterized as follows: (1) Rule 68 refers to “costs”; (2) the drafters of the federal rules knew that there were many statutes that referred to attorneys’ fees as “costs” when Rule 68 was enacted; and (3) for these statutes, the Rule 68 drafters intended that attorneys’ fees be included in Rule 68 costs.²⁰⁸ Because the drafters chose not to define the word “costs,” the Court found that “the most reasonable inference is that the term ‘costs’ in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute”²⁰⁹

Justice Brennan criticized the majority for failing to explain why the definition of “costs” in 28 U.S.C. § 1920 was not applicable, since it is a statute that was designed to “standardize the treatment of costs in federal courts.”²¹⁰ He asserted that the majority’s “plain meaning” argument, while “in a sense logical,”²¹¹ would “produce absurd variations in Rule 68’s operation based on nothing more than picayune differences in statutory phraseology. Neither Congress nor the drafters of the Rules could possibly have intended such inexplicable variations in settlement incentives.”²¹² The Advisory Committee’s notes to

²⁰⁵ *Id.* at 10–11.

²⁰⁶ Margulies, *supra* note 77, at 415, 421–31.

²⁰⁷ *Id.* at 415–16, 431. Margulies focuses upon “hybrid” cases in which a given case involves multiple fee-shifting statutes, some of which define attorneys’ fees as costs, while others define attorneys’ fees as separate from costs. *See generally id.* The situation described is similar to the one faced by the *Marek* Court, which arguably made a policy-based decision without clear textual guidance. *See* 473 U.S. at 10–11.

²⁰⁸ *See Marek*, 473 U.S. at 7–9.

²⁰⁹ *Id.* at 8–9.

²¹⁰ *See id.* at 17–18 (Brennan, J., dissenting) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 761 (1980)).

²¹¹ *See id.* at 16 (quoting *Chesny v. Marek*, 720 F.2d 474, 478 (7th Cir. 1983), *rev’d*, 473 U.S. 1 (1985)).

²¹² *Id.* at 14–15. Margulies notes:

the 1993 amendment to Rule 54 also supports the conclusion that Congress did not consider attorneys' fees to be included in costs.²¹³

The "plain meaning" approach in *Marek* may produce inexplicable differences between statutes.²¹⁴ However, it reduces uncertainty by simplifying interpretation of other statutes—one need only focus on whether the statutory language is similar to the language at issue in *Marek*.²¹⁵ Furthermore, adherence to the "plain meaning" approach comports with Rule 68's central goal of promoting settlement and promotes the interests of defendants who wish to settle.²¹⁶ However, achieving these goals results in less effective enforcement of the laws.²¹⁷

2. The Policy Argument

The U.S. Supreme Court's conclusion in *Marek* would have been particularly questionable had it merely relied upon the textual argument outlined above. As Justice Brennan pointed out, "plain meaning" can only be carried so far.²¹⁸ Thus, while the textual argument explains why Congress intended the result the Court reached, the policy argument attempts to explain why such a result makes sense.

The *Marek* Court identified the degree of success obtained as "the most critical factor" of reasonableness of attorneys' fees.²¹⁹ The Court implied that the rejection of an offer that is more favorable than the judgment is per se unreasonable,²²⁰ despite the caution in *Hensley v.*

[T]he plain meaning argument in *Marek* is persuasive only if one believes that the legislature was aware of the rule 68 language when it drafted and enacted the fee-shifting statute or that legislatures in general have a duty to *be aware* of wording in all prior statutes, rules, and regulations, on pain of courts interpreting statutes as imputing such awareness. The first contention is questionable. The second contention would require the impossible and paralyze the legislative process.

See Margulies, *supra* note 77, at 424 (citations omitted).

²¹³ See *supra* notes 85–86 and accompanying text.

²¹⁴ Margulies, *supra* note 77, at 417–18.

²¹⁵ This approach can create difficulties when a lawsuit is brought under two causes of action with fee-shifting statutes that use different definitions of costs. See *id.* at 425.

²¹⁶ *Id.*

²¹⁷ See *infra* notes 223–26 and accompanying text.

²¹⁸ *Marek v. Chesny*, 473 U.S. 1, 16 n.5 (1985) (listing cases which warn that reading statutory text too literally can have results contrary to the statute's purpose).

²¹⁹ *Id.* at 11 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)); see *supra* notes 74–81.

²²⁰ See *Marek*, 473 U.S. at 10–11.

Eckerhart against “mathematical approaches.”²²¹ However, Justice Brennan and others reject a per se approach, contemplating that a plaintiff who obtains a judgment that is less than the Rule 68 offer may still have acted reasonably in rejecting the offer.²²²

Many commentators have argued that the per se approach will have a “negative distributional effect” or “chilling effect” on plaintiffs.²²³ Judge Richard Posner has developed an economic analysis to argue that Rule 68 will not increase settlements, but rather transfer wealth from plaintiffs to defendants.²²⁴ While plaintiffs who have more to lose from litigation may demand smaller settlements, defendants will offer less in settlements, having less to lose from going to trial.²²⁵ The per se approach ignores the greater risk aversion of plaintiffs faced with the possibility of paying costs, especially when those costs include attorneys’ fees that they would not otherwise have to bear in the absence of Rule 68.²²⁶

If plaintiffs can act reasonably and still lose under the Rule 68 calculation, then it is plausible that they may be willing to accept reduced settlement offers to avoid losing awards of attorneys’ fees. Thus, the basic difference between the majority approach and Justice Brennan’s

²²¹ *Hensley*, 461 U.S. at 435 n.11 (internal quotation marks omitted); see *Marek*, 473 U.S. at 28–29 (Brennan, J., dissenting).

²²² See *Marek*, 473 U.S. at 30 (Brennan, J., dissenting) (arguing that the per se rule of *Marek* “will require the disallowance of some fees that otherwise would have passed muster under § 1988’s reasonableness standard”); Simon, *supra* note 98, at 500 n.123 (suggesting circumstances in which a plaintiff who acts reasonably may have obtained a judgment less favorable than the Rule 68 offer, such as “a key plaintiff’s witness may die, disappear, or change her story after the offer is rejected, or a persuasive judicial opinion damaging to the plaintiff’s case may be handed down after a rule 68 offer is rejected”).

²²³ Margulies, *supra* note 77, at 414–15, 422–23 (1988) (arguing that the Court “treated cavalierly the policy that underlies fee-shifting legislation—improving access to justice” by ignoring the negative distributional effects on risk-averse plaintiffs that occur in the presence of uncertainty); see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.12, at 592–93 (6th ed. 2003); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 94, 105 (1986). This effect is also commonly referred to as a “chilling effect” on citizen suits. *N.C. Shellfish Growers Ass’n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 666–67 (E.D.N.C. 2003); *Friends of the Earth v. Chevron Chem. Co.*, 885 F. Supp. 934, 939 (E.D. Tex. 1995); *Pub. Interest Research Group of N.J. v. Struthers-Dunn*, No. 87-1773 (SSB), 1988 WL 147639, at *3, 18 *Envl. L. Rep.* (Envtl. L. Inst.) 21,398, 21,400 (D.N.J. Aug. 16, 1988).

²²⁴ POSNER, *supra* note 223, § 21.12, at 592–93. “The plaintiff would not turn down a Rule 68 offer unless he expected to do better at trial. . . . So the rule penalizes the plaintiff only for a mistake.” *Id.* § 21.12, at 593.

²²⁵ *Id.*; see Miller, *supra* note 223, at 94, 105; see also Bonney et al., *supra* note 99, at 406 (encouraging defendants to make Rule 68 offers at the earliest possible time for an amount equal to the lowest possible outcome).

²²⁶ POSNER, *supra* note 223, § 21.12, at 593.

approach may lie in whether or not plaintiffs can act reasonably and still lose in the Rule 68 calculation.²²⁷ The majority in *Marek* said that a plaintiff who fails to obtain a judgment that is greater than the settlement offer receives no benefits from the post-offer services of an attorney and, therefore, is not entitled to attorneys' fees for this work.²²⁸ By accepting a per se approach the Court ignores instances in which a plaintiff acts reasonably and still loses under Rule 68, promoting settlement over the goal of rights vindication.²²⁹ This Note will now examine how *Marek* affects the interaction of Rule 68 and section 505 of the CWA—whether CWA citizen suit plaintiffs are bound by the *Marek* Rule 68 post-offer attorneys' fees decision.

B. *Is There a Difference Between the Clean Water Act and the Civil Rights Attorneys' Fees Awards Act with Respect to Rule 68?*

Based upon the "plain meaning" argument of *Marek*, there may be no difference between section 505 and the Civil Rights statute, since both statutes define the word "costs" to include attorneys' fees.²³⁰ Accordingly, one may expect an uphill battle for citizen suit plaintiffs seeking to avoid the operation of the *Marek*. However, in every reported case dealing with this issue, courts have not found Rule 68 applicable.²³¹

Of the three major cases discussed above, only the decision in *Public Interest Research Group of New Jersey, Inc. v. Struthers-Dunn, Inc.* devoted any significant discussion to distinguishing *Marek*.²³² The court first invoked the argument that plaintiffs must face the choice of either accepting a judgment they deem inadequate or risking loss of

²²⁷ See *supra* Part II.C.

²²⁸ *Marek v. Chesney*, 473 U.S. 1, 11 (1985).

²²⁹ See *supra* notes 206–07 and accompanying text.

²³⁰ See *Pub. Interest Research Group of N.J., Inc. v. Struthers-Dunn, Inc.*, No. 87-1773 (SSB), 1988 WL 147639, at *4–5, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) 21,398, 21,399–400 (D.N.J. Aug. 16, 1988) (stating that according to *Marek*, plaintiffs would be precluded from receiving post-offer fees under section 505 of the CWA if they received a less favorable judgment than the Rule 68 offer). Compare *Federal Water Pollution Control Act*, 33 U.S.C. § 1365(d) (2000) ("The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party . . ."), with *Civil Rights Attorneys Fee Award Act*, 42 U.S.C. § 1988(b) (2000) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . .").

²³¹ See *supra* Part III.

²³² *Struthers-Dunn*, 1988 WL 147639, at *4–5, 18 *Envtl. L. Rep.* (Envtl. L. Inst.) at 21,399–400.

attorneys' fees later.²³³ Rule 68 would, therefore, have a "chilling effect" on citizen suits in violation of the policy underlying section 505.²³⁴ However, this argument was squarely rejected in *Marek*.²³⁵

The court attempted to distinguish the Civil Rights statute on grounds that, while a civil rights plaintiff would personally benefit from rejecting a settlement offer if the judgment was higher, this would not be true for CWA plaintiffs because any penalties imposed upon the defendant would be paid to the U.S. Treasury.²³⁶ Thus, there is no monetary upside benefit to plaintiffs, while there is a substantial downside.²³⁷ The defendant in *Struthers-Dunn* urged that this reality makes a CWA plaintiff no different than a civil rights plaintiff who seeks injunctive relief.²³⁸ However, the court responded that even in a civil rights case, the "value" of injunctive relief still inures to the plaintiff—not to a CWA plaintiff—and is, therefore, considered in the Rule 68 calculus for civil rights plaintiffs.²³⁹ Nevertheless, it is unlikely that the court meant that CWA citizen suit plaintiffs derived no benefit from these suits. Otherwise, as the *North Carolina Shellfish Growers Ass'n v. Holly Ridge Associates* court pointed out, these plaintiffs may not have had standing to sue in the first place.²⁴⁰

Courts may try to vacillate and dodge criticism with this "personal benefit" argument, but ultimately it resembles the "chilling effect" argument—Rule 68 makes it harder for plaintiffs to bring citizen suits when it includes attorneys' fees as costs and, therefore, contradicts the policy underlying citizen suits. The U.S. Supreme Court rejected this argument,²⁴¹ though it was likely in error.²⁴² Furthermore, even if the "chilling effect" argument counsels against mechanically applying the "plain meaning" approach from *Marek*, it does not address the other

²³³ *Id.* at *4, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²³⁴ *Id.* at *3, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²³⁵ 473 U.S. 1, 10–11 (1985) (stating that "[c]ivil rights plaintiffs—along with other plaintiffs" will not recover attorneys' fees under this ruling, and that it would require plaintiffs to "think very hard" about whether continued litigation is worthwhile) (emphasis added) (internal quotation marks omitted).

²³⁶ *Struthers-Dunn*, 1988 WL 147639, at *4–5, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²³⁷ *Id.* at *4, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²³⁸ *Id.* at *5, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²³⁹ *Id.*, 18 Env'tl. L. Rep. (Env'tl. L. Inst.) at 21,400.

²⁴⁰ *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654, 668 (E.D.N.C. 2003) ("standing analysis requires plaintiffs to have a personal stake in the case"). See *supra* notes 193–95.

²⁴¹ *Marek v. Chesny*, 473 U.S. 1, 10–11 (1985).

²⁴² See *supra* Part IV.A.

rationale in *Marek*—that attorneys’ fees incurred in obtaining a judgment less favorable than the Rule 68 offer are not “reasonable” attorneys’ fees, regardless of whether the plaintiff benefits personally from the judgment of the underlying dispute.²⁴³ While judging reasonableness in this way may be erroneous,²⁴⁴ courts must follow *Marek* so long as it is still good law.

C. A “Reasonable” Proposal to Reconcile Rule 68
with Section 505 of the CWA

The courts in *Struthers-Dunn*²⁴⁵ and *Holly Ridge*²⁴⁶ strained to distinguish the cases from *Marek*; given the shortcomings of *Marek*, this may be desirable.²⁴⁷ However, when the lower courts held that *Marek* and Rule 68 did not apply to *Struthers-Dunn* and *Holly Ridge*, they may have done injustice to the defendants who made at least a nominal effort to settle their dispute.²⁴⁸

This section describes an alternative framework for assessing the impact of Rule 68 upon fee-shifting statutes that use the “reasonable” language, regardless of whether these statutes define “costs” as attorneys’ fees. This framework evaluates Rule 68 as one element in the reasonableness calculation—not because the word “costs” in Rule 68 includes attorneys’ fees, but rather because an offer of judgment represents an opportunity to avoid the costs of litigation so plaintiffs should be encouraged to act reasonably.²⁴⁹

Regardless of *Marek*, much would remain unchanged from the current U.S. Supreme Court jurisprudence on attorneys’ fees, even if this framework were adopted. If the defendant prevailed in a suit, the plaintiff would not be entitled to fees.²⁵⁰ But, the defendant could still recover fees from the plaintiff when the plaintiff continued to litigate

²⁴³ See *Marek*, 473 U.S. at 11.

²⁴⁴ See *supra* Part IV.A.

²⁴⁵ No. 87-1773 (SSB), 1988 WL 147639, at *3–5, 18 Env’tl. L. Rep. (Env’tl. L. Inst.) 21,398, 21,398–21,400 (D.N.J. Aug. 16, 1988).

²⁴⁶ 278 F. Supp. 2d 654, 666, 668 (2003).

²⁴⁷ This Note does not address the ethical question of whether lower courts should dutifully apply U.S. Supreme Court precedent that may produce seemingly unjust results.

²⁴⁸ See Margulies, *supra* note 77, at 425. Neither opinion provides the amount of the offer, so it is impossible to evaluate the significance of these efforts to settle. See *Holly Ridge*, 278 F. Supp. 2d at 666; *Struthers-Dunn*, 1988 WL 147639, at *1, 18 Env’tl. L. Rep. (Env’tl. L. Inst.) at 21,399.

²⁴⁹ See *Marek v. Chesny*, 473 U.S. 1, 28–30 (1985) (Brennan, J., dissenting) (defining a reasonableness standard that focuses on the plaintiff’s conduct in rejecting or accepting a Rule 68 offer).

²⁵⁰ See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 694 (1983).

a frivolous, unreasonable, or groundless suit.²⁵¹ Plaintiffs would be entitled to reasonable attorneys' fees where the judgment was more favorable than the Rule 68 offer, absent special circumstances.²⁵²

Therefore, the only change would occur where a plaintiff receives less at trial than offered by the defendant. Accordingly, the court should examine the facts of the case to determine whether the plaintiff's decision to reject the offer of judgment was reasonable *at the time the decision was made*.²⁵³ The court could establish a rebuttable presumption that fees for post-offer services are not reasonably incurred, but allow the plaintiff to demonstrate that circumstances made it reasonable to reject the offer. The court could consider factors including: (1) the difference between the offer and the actual judgment, where a small difference points towards reasonableness and a large difference points towards unreasonableness; (2) whether discovery was complete when the decision was made;²⁵⁴ and (3) whether there was a change in circumstances after the offer was rejected, such as the death of a key witness or a detrimental judicial opinion.²⁵⁵ Furthermore, a court may consider awarding post-offer fees to a defendant when a plaintiff's decision to prolong litigation after a Rule 68 offer could be characterized as unreasonable or frivolous.²⁵⁶ This structure would provide plaintiffs with more security; as long as a plaintiff can show that rejecting an offer was reasonable, there should be some recovery of post-offer fees, subject to the *Hensley* criteria.²⁵⁷

Peter Margulies suggests valid criticisms of the reasonableness approach, such as tensions with the work-product rule and attorney-client privilege that would occur when an attorney must prove what information was known at different times.²⁵⁸ The problems he identifies with the reasonableness approach are decisional uncertainty and lack of predictability in the outcomes a court will reach.²⁵⁹ While problem-

²⁵¹ *Christiansburg Garment Co v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422 (1978).

²⁵² *See Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968) (per curiam).

²⁵³ *See Marek*, 473 U.S. at 28–31 (Brennan, J., dissenting).

²⁵⁴ Margulies, *supra* note 77, at 438–40.

²⁵⁵ Simon, *supra* note 98, at 500 n.123.

²⁵⁶ *See Christiansburg*, 434 U.S. at 422. Since a plaintiff presumably would still be entitled to pre-offer fees, and a judgment on the merits, this fee award to defendants could offset the other amounts paid to plaintiffs.

²⁵⁷ *See supra* Part I.C.4.

²⁵⁸ Margulies, *supra* note 77, at 430–31.

²⁵⁹ *Id.* at 439–40. Margulies notes that the decisional uncertainty caused by the reasonableness approach can “discourage settlement, drain judicial resources, and threaten judicial legitimacy.” *Id.* at 430. While these are valid criticisms, they are inherent in the regime

atic, these issues are small in comparison with the problems associated with the *Marek* framework. Although the reasonableness approach may cause a drain in judicial resources, this slight drain will result in greater protection of the statutory rights served by citizen suits. Margulies suggests a percentage-based approach that would key a reduction of plaintiff fee awards to the judgment as a percentage of the offer.²⁶⁰

One need only look to decisions under statutes that do not define costs to include attorneys' fees to find examples of the reasonableness approach. For example, in *Haworth v. Nevada*, the court had to decide how Rule 68 interacted with the Fair Labor Standards Act, a statute that does not define costs as attorneys' fees.²⁶¹ The court found that *Marek* did not apply because of the difference in statutory language, but held that the rejected offer must be considered on remand in determining the reasonableness of awarding post-offer fees.²⁶² The court followed the textual approach of *Marek*.²⁶³ However, if the *Haworth* court had followed the policy reasoning of *Marek*, it would have found—without need for remand—that because the offer of judgment was more favorable than the judgment at trial, any post-offer fees incurred were per se unreasonable.²⁶⁴

of statutes relying upon the “reasonable attorney fee” language, which requires scrutiny of the attorneys' services for reasonableness. See *supra* Part I.C.4. This may be a workable legislative change to the current Rule 68 regime—trading a reduction in decisional uncertainty in exchange for an arbitrary bright-line rule.

²⁶⁰ Margulies, *supra* note 77, at 441–42.

²⁶¹ 56 F.3d 1048, 1051 (9th Cir. 1995).

²⁶² *Id.* at 1051, 1052.

In the present case, other than the one [Fair Labor Standards Act] violation [defendant] conceded, the plaintiffs succeeded on not a single theory at trial. And, even on the conceded claim, the plaintiffs failed to recover the damages they sought. They recovered a judgment which was close to a quarter of a million dollars less than they could have had by accepting the Rule 68 offer. Clearly, the only one who benefited by pursuing the litigation after the Rule 68 offer was made was the plaintiffs' attorney.

Id. at 1052.

²⁶³ See *id.* at 1051; *cf.* *Marek v. Chesny*, 473 U.S. 1, 7–9 (1985) (presenting the Court's textual argument).

²⁶⁴ *Haworth*, 56 F.3d at 1051–52; *cf.* *Marek*, 473 U.S. at 10–11 (presenting the Court's policy argument). This illustrates another shortcoming of *Marek*—that depending upon which approach a court applies, inconsistent results may be reached. The failure of a statute like the Fair Labor Standards Act to define costs as attorneys' fees—under the plain meaning, textual approach—could be interpreted as legislative intent not to include attorneys' fees as Rule 68 costs. See *supra* Part IV.A.1.

The reasonableness method is a preferable analysis for the interaction of Rule 68 with citizen suits because it harmonizes the disparate treatment between statutes that define attorneys' fees as costs and statutes that do not. The approach also reduces the "chilling effect" on citizen suit plaintiffs, while being fair to defendants, because it retains incentives for plaintiffs to accept reasonable offers. Moreover, this approach avoids any conflict with the Rules Enabling Act (REA) by focusing on the reasonableness of the fee award instead of the text of Rule 68.

CONCLUSION

Citizen suits are important to the enforcement of the CWA and many other environmental statutes. Congress has granted the courts discretion to use the attorneys' fee awards contained in these statutes to encourage meritorious citizen suits, while discouraging frivolous ones.²⁶⁵ The rigid, mechanical application of Rule 68 in *Marek v. Chesny* eliminates the courts' discretion and divests plaintiffs of attorneys' fees even in cases where the plaintiff has acted reasonably in rejecting the offer of judgment. As a result, *Marek* causes a "chilling effect" on the effectiveness of citizen suits. Furthermore, because of this "chilling effect," CWA plaintiffs faced with Rule 68 offers attempt to avoid *Marek's* holding by seeking declarations that Rule 68 does not apply to the CWA. These plaintiffs have been successful. Three district courts have agreed that the CWA is distinguishable from the *Marek* analysis; no appellate court has ever considered the issue in any reported decision.²⁶⁶ However, in spite of these decisions, the reasoning in *Marek* applies with equal force to the CWA as it does to the Civil Rights statute. The district court decisions to the contrary appear to be made in order to avoid the "chilling effect" that *Marek* would have on CWA citizen suits, not because of a meaningful distinction between the CWA and the Civil Rights statute.

Courts should not have to choose between precedent and the policies underlying citizen suit statutes. A change is desirable. One bill, which progressed very little in the legislature, would have exempted the CWA from Rule 68's operation.²⁶⁷ Such an approach

²⁶⁵ See *supra* Part I.C.3.

²⁶⁶ See *supra* Part III.

²⁶⁷ Clean Water Enforcement and Compliance Improvement Act of 2003, H.R. 1624, 108th Cong. § 11(h) (2003), 2003 CONG US HR 1624 (Westlaw).

would only add to the “schizophrenic” interpretation of Rule 68,²⁶⁸ and detract from the goal of having uniform rules of civil procedure.²⁶⁹ It also would fail to address the interaction of Rule 68 with citizen suit provisions other than section 505 of the CWA. A better legislative solution would be to amend Rule 68 and define costs so as not to include attorneys’ fees. This would render *Marek* moot, but still allow courts the discretion to apply the reasonableness approach as contemplated by the drafters of section 505. In the absence of legislative change, the U.S. Supreme Court would have to overrule its own precedent. For such an issue to reach the U.S. Supreme Court, a trial court will likely have to find against plaintiffs—often national groups that repeatedly bring citizen suits²⁷⁰—in order to give a party sufficient incentive to carry a suit that far.

Until change is made, district courts may continue to exercise the judicial gymnastics that distinguish section 505 of the CWA from the Civil Rights statute. However, fairness to defendants requires that these courts still evaluate the reasonableness of rejecting a Rule 68 offer when calculating reasonable attorneys’ fees, even if Rule 68 is found inapplicable to CWA citizen suits.

²⁶⁸ *Marek v. Chesny*, 473 U.S. 1, 19 n.9, 21–22 (1985) (Brennan, J., dissenting).

²⁶⁹ *See id.* at 18 (citing FED R. CIV. P. 1).

²⁷⁰ Jenny R. Rubin, Note, *Rule 68: A Red Herring in Environmental Citizen Suits*, 12 GEO. J. LEGAL ETHICS 849, 855 (1999).