

5-2006

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Edward H. Cooper

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### Recommended Citation

Cooper, Edward H. (2006) "Symposium Reflections: A Rulemaking Perspective," *Mercer Law Review*. Vol. 57: No. 3, Article 10.

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# Symposium Reflections: A Rulemaking Perspective

by Edward H. Cooper\*

These reflections seek to situate this most excellent Symposium in the rulemaking process. All contributors are working with an eye to that process. Their goal is to achieve a better understanding of how offer-of-judgment rules actually work in practice. The major focus is on Rule 68 of the Federal Rules of Civil Procedure<sup>1</sup> as it has affected practice in actions brought under fee-shifting statutes, but Professor Yoon's article<sup>2</sup> adds insights into state practice in the very different world of automobile accident claims. There is no reason to attempt to summarize or synthesize the papers or discussions that stand so well on their own. Taken together, they illustrate many ways in which Rule 68 might be revised. Rule revision, however, is not an easy task. Among the many barriers to rule revision, three will be described here in relation to Rule 68. Any proposed amendment must overcome the inertia that protects against the costs of continual tinkering and the risks of mistaken innovation. Some proposals, and many Rule 68 proposals are prominent among them, also test the uncertain line between "general rules [of] practice and procedure" and rules that improperly "abridge, enlarge[,] or modify any substantive right."<sup>3</sup> Finally, if revisions are to be made, just how far to push toward detailed dictates for every foreseeable problem remains to be decided.

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\* Thomas M. Cooley Professor of Law, The University of Michigan. Dartmouth College (A.B., 1961); Harvard Law School (LL.B., 1964). The Author is a Reporter for the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. These notes are personal; nothing in them reflects Advisory Committee views.

1. FED. R. CIV. P. 68.

2. See Albert Yoon, *Symposium on Rule 68: Lessons from New Jersey*, 57 MERCER L. REV. 825 (2006).

3. See *Marek v. Chesny*, 473 U.S. 1, 35 (1985) (quoting 28 U.S.C. § 2072 (2000 & Supp. 2005)).

## I. RULEMAKING INERTIA

A. *The Burdens of Rule Changes*

The Rules Enabling Act<sup>4</sup> assigns to the United States Supreme Court “the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts. . . .”<sup>5</sup> The ordinary process for exercising this power begins with detailed consideration in the Advisory Committee on the Federal Rules of Civil Procedure. The Advisory Committee is one of five advisory committees that report to the Standing Committee on Rules of Practice and Procedure.<sup>6</sup> If the Standing Committee approves an advisory committee recommendation, the proposed amendment or new rule is published for public comment. Ordinarily, the comment period runs for six months and includes one or more public hearings. Following the comment period, the advisory committee considers the comments and decides whether to recommend further work, adopt the proposal as improved in light of the comments, or abandon the effort.

When adoption is proposed, the Standing Committee again reviews the proposal. The Standing Committee may recommend the proposal for adoption, perhaps with some changes; send the proposal back to the advisory committee for further work; or abandon the effort. When the Standing Committee recommends adoption, the rule goes to the Judicial Conference of the United States, which is charged by statute with the duty to carry on a continuous study of Enabling Act rules and to recommend “changes in and additions to those rules” to the Supreme Court.<sup>7</sup> Finally, the Supreme Court considers the proposal. If the Supreme Court adopts a proposal, the Court sends the rule to Congress “not later than May 1 of the year in which [the] rule . . . is to become effective”; the rule takes effect the following December 1 “unless otherwise provided by law.”<sup>8</sup>

A relatively simple rule proposal may travel through this procedure in three years. More complex or potentially controversial proposals may require several more years. The process is long, drawn-out, and painstaking by deliberate design. The design is a good thing. But, the

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4. 28 U.S.C. § 2072 (2000 & Supp. 2005).

5. *Id.*

6. This Committee structure is created under 28 U.S.C. § 2073 (2000 & Supp. 2005).

7. 28 U.S.C. § 331 (2000 & Supp. 2005).

8. 28 U.S.C. § 2074 (2000).

cost of such elaborate work is itself a reason for care in selecting rules amendments.

The work accompanying a rule amendment begins with the process for formal adoption. A large amount of work is involved in implementing any rule change. Lawyers and judges must learn about the new rule, and they must come to understand it. Once they understand the new rule, they must learn how to use it. Some new rules are easy to use and offer few opportunities for misuse. Other new rules are deliberately framed to rely on district court discretion, often because the drafters know that they cannot do more than provide a general sense of direction for approaching multifaceted and often difficult tasks. Discretion transfers part of the rulemaking responsibility from the formal Enabling Act process to the lawyers and judges charged with implementing the discretion. In the process, lawyers who fully understand what the rule is intended to do will attempt to bend the rule to partisan advantage. Any rule change must be justified by a strong showing that the long-term benefits will outweigh the short-term costs of implementation and the risks of general misunderstanding or even perversion.

The costs of rule changes are regularly reflected in laments by practicing lawyers and judges, which suggests that rule changes are adopted too regularly. The most modest suggestion is that lawyers should not be responsible for nervously searching out new rules on the first of every December. Instead, the Supreme Court should adopt rule changes in larger sets once every few years. More agonized suggestions advise that it would be wise to suspend the process for a while, perhaps five years, to provide the legal community with an opportunity to digest all the changes that have been made in recent years. The rules committees are sensitive to these complaints and have taken the complaints more seriously than the constant flow of amendments indicate. The possibility of taking a holiday from rulemaking is actually discussed from time to time, at least informally, but the constant flow of proposals to address troubling issues—both large and small—is difficult to ignore. Still, many worthy suggestions in fact are put aside to stem the tide of actual changes. To result in actual change, a proposal must be more than just good to win a place on the active agenda of amendments.

### *B. The Risks of Mistake*

The risk of getting it wrong is an additional reason for caution in proposing amendments. The more important and sensitive the issues concerning a particular proposal, the greater the need for confidence in the outcome.

Actual experience with formal rules in practice provides the safest foundation for rules changes. The experience may arise from state court rules, from local district rules, or from practice developed from interpreting the framework of existing national rules. Generally, it is impossible to study this experience with all the rigor of an experiment in social science, although studies such as Professor Yoon's work with the New Jersey offer-of-judgment rule illustrate the possibilities of formal methodology. Often, the experience must be gleaned by less formal methods. The carefully framed and widespread interview study by Professors Lewis and Eaton is a fine illustration of one good method.<sup>9</sup> The Federal Judicial Center which, among other roles, is the research arm of the judiciary, frequently undertakes specific research tasks for the advisory committees. One of its projects was a Rule 68 survey study conducted for the Civil Rules Committee.<sup>10</sup>

Theory may help to fill in gaps left by evidence of experience, whether the evidence be measured by rigorous methodology, less rigorous conferences, informal discussions with judges and practicing lawyers, or comments and testimony on rules published on the way to deciding how to act on a specific proposal. But only the strongest theory, or the greatest need, can support action when the lessons of experience are dim, confused, or seriously contested. Additionally, if theory is itself confused there is great risk in making rules changes that lack strong support in experience.

The most recent focused consideration of Rule 68 in the advisory committee process was initiated by Judge Schwarzer's proposal for adding force to a formal Rule 68 offer by adopting a capped benefit-of-the-judgment fee-shifting sanction.<sup>11</sup> Even with this persuasive theoretical prompt, and with the further support of the Federal Judicial Center survey, initial consideration of a draft rule raised significant doubts about the wisdom of amending Rule 68 without a better understanding of the ways in which an amended rule might work.

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9. Professor Harold S. Lewis, Jr., with the generous aid of grants from the Law School and the Walter F. George Foundation, completed in 2004-05 interviews with 52 employment discrimination and civil rights lawyers in 13 cities to explore the reasons underlying the underutilization of Federal Rule of Civil Procedure 68 in federal fee-authorization litigation. Together with his research partner, Professor Thomas A. Eaton of the University of Georgia Law School, who is conducting an additional 12 interviews, Professor Lewis will ultimately present proposals to amend the Rule to the Federal Civil Rules Advisory Committee in Washington, D.C. This study is on file with Professor Lewis.

10. JOHN E. SHAPARD, *FED. JUDICIAL CTR., LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE* (1995).

11. William W Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 *JUDICATURE* 147, 151 (1992).

Traditionally, it was believed that Rule 68 offers were seldom made outside the purview of actions in which a prevailing plaintiff's failure to beat a rejected offer at trial cut off a statutory right to post-offer attorney fees. It later came to be understood that Rule 68 offers are not often made even when the prize is the reduction of a losing defendant's liability for the prevailing plaintiff's attorney fees. Then there was great puzzlement as to the infrequent use of Rule 68 offers in fee-shifting cases. Also, growing from the lack of any significant experience outside fee-shifting cases, there was still greater puzzlement as to what uses might be made of a reinvigorated offer-of-judgment procedure. These uncertainties were compounded, at least for some committee members, by doubts about the desirability of the interpretation that made Rule 68 a tool for reducing statutory fee liabilities. A few committee members wondered whether it might be better to repeal Rule 68 entirely. The upshot was to leave Rule 68 for further consideration in the indefinite future.<sup>12</sup>

Independent suggestions continue to be made that Rule 68 should be amended to give it sharper "teeth." Despite the advances made by this Symposium and the underlying work, the question remains whether enough is known, in fact and in theory, to warrant venturing into the risky world of proposing amendments. Addressing this question requires consideration of two further sets of questions. The first set asks whether we need still greater encouragement or pressure to settle, and whether the Rules Enabling Act process is the best means to respond to any perceived need. The second set asks whether a satisfactory rule can in fact be drafted with reasonable assurance that the results will be desirable.

## II. FOSTERING SETTLEMENT

### A. *The Benefits*

It is common ground in this Symposium, and generally, that only a very small fraction of federal court actions survive until trial. Many of those actions that disappear without trial are settled. Settlement can be a very good thing for all parties and for the courts. Rules that encourage good settlements are good rules. Rules that advance the time of reaching the same good settlements that would be reached later without the rules are also good rules, particularly if acceleration is

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12. The most useful summaries of the deliberations are recorded in the Civil Rules Committee Minutes for May 1993, October 1993, April 1994, and October 1994. The Minutes are available at <http://www.uscourts.gov/rules/minutes.htm>.

accomplished in part by reducing investments in preparing for motions, trial, or settlement.

### *B. The Costs*

Not all settlements are desirable. Settlement terms shaped by an imbalance of knowledge are not likely to respond well to the risks and uncertainties of pressing forward to a decision on the merits. Settlement terms coerced by risk aversion, imbalances of resources, and pressing needs may be an inevitable product of the costs and delays built into our adjudication system, but they are not to be championed. A severely injured victim of an accident or a victim of police force<sup>13</sup> may be without income and in need of ongoing medical care, housing, and food for self and family. The negotiation will be affected by factors apart from probability-weighted estimates of probable outcomes on damages and liability. Rules changes that add to settlement pressures, including pressures for early settlement before discovery of at least the central fact information, may promote settlements that we do not want to encourage.

Beyond these common practical concerns lies a more conceptual concern. We have built a system that entitles a plaintiff to full compensation for all damages once fact uncertainty is reduced to an acceptable point. For most issues in civil litigation, the standard of proof is only by a preponderance of the evidence. Residual uncertainties often play out by compromising the relief afforded. Settlements are negotiated against the competing possibilities of full relief and compromised relief, but there is no duty to settle. Plaintiffs are not even required to accept an offer that most plaintiffs would accept with alacrity. The plaintiff may pursue values beyond money or specific relief, including vindication of a position, restoration of reputation, or the abstract values of full restorative justice. In some circumstances, a rationally compromised money award may not satisfy the plaintiff's pressing needs, thus making it better for a plaintiff to risk total defeat than to accept less than full relief. The plaintiff's insistence on pursuing the full measure of rights established by law on the facts is not a wrong.

### *C. The Means*

To the extent that courts embark on putting themselves out of the adjudication business by promoting settlement, it is important to choose the fairest and most effective settlement devices. Court-supervised and

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13. This example illustrates a situation proposed and discussed at the Symposium. See Symposium Transcript, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 57 MERCER L. REV. 771 (2006).

encouraged settlement negotiations gradually blend into various forms of court-annexed alternative dispute resolution devices. Rules such as Rule 26(f)<sup>14</sup> may help by simply directing the parties to confer about the case. Even if there are no direct settlement discussions, improved knowledge of each other's positions should advance settlement. Formal offer-of-judgment rules may play a role in this mix, but it is important to account for the alternative devices in defining that role.

*D. Fee-Shifting Sanctions: Enabling Act Doubts*

The Symposium reflects the common belief that the lack of significant sanctions accounts for the great rarity of Rule 68 offers outside of the fee-shifting context. Even the opportunity to cut off a prevailing plaintiff's post-offer statutory fees has not inspired universal use of Rule 68 in fee-shifting cases. A common response from those who wish to promote more settlements, or at least earlier settlements, is to propose two-way fee shifting. The proposals vary in approaching statutory fee-shifting cases, but for cases outside the ambit of fee-shifting statutes the common ground is that an offeree should pay the offeror's post-offer attorney fees after the offeree fails to beat a rejected offer at trial.

The fee-shifting proposals stand in contrast to the "American Rule" that outside specific statutory settings, each party, win, lose, or draw must pay its own attorney fees. Fee shifting seems most attractive in the cases in which there are the greatest doubts about the American Rule. The requirement that a party must pay its own attorney fees can deter a plaintiff from suing on a strong claim for relief that will not support reasonable fees. In addition, this requirement can encourage a defendant to settle a nuisance claim rather than outspend the settlement on attorney fees. A fee-shifting offer of judgment rule could reduce these consequences. Under this rule, the plaintiff can offer a figure that the defendant fears the plaintiff can meet or beat at trial (a strong prospect of paying all parties' attorney fees is a strong inducement to settle a just claim). In addition, a defendant can offer a low figure, particularly if an amended rule allows a defendant to recover fees after a no-liability judgment.

Doubts about the American Rule, however, may not be a secure basis for adopting a fee-shifting sanction in Rule 68. Congress has addressed fee shifting in many statutes, but has never undertaken wholesale revision. An attempt to adopt a general fee-shifting rule as a Federal Rule of Civil Procedure would severely test the limits of Enabling Act authority. Whether the rule would qualify as a rule of "practice and

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14. FED. R. CIV. P. 26(f).



procedure," and whether it would "abridge, enlarge[,] or modify"<sup>15</sup> the substantive right to claim or defend without liability for an adversary's attorney fees as a penalty for defeat is dubious. Those doubts would be augmented if the supposed rule imposed fee-shifting liability on a plaintiff favored by present statutes, which award fees on victory but protect against fee liability on defeat.

Whatever the formal Rules Enabling Act verdict might be, a general fee-shifting rule would founder on parallel obstacles. Liability for a defendant's attorney fees would raise a high barrier to many actions that now come before federal courts. Many people believe that there are enough barriers without adding this one. Furthermore, access to courts would be reduced, perhaps dramatically in some areas. We have come to rely heavily on litigation to respond to many needs and to enforce many social policies, either directly or by prompting resort to alternative means of resolution. Changes in this structure call for sound political judgment, not the more confined processes of the Rules Enabling Act.

If a general fee-shifting rule is not acceptable, why should fee shifting be different if it only results in failure to improve upon a formal offer of judgment? The common explanation is that the authority to adopt a rule of procedure includes authority to make the rule effective by imposing sanctions. Discovery sanctions are familiar. Discovery sanctions arise, however, from failure to comply with rules that clearly have procedural purposes, and depend on a judicial determination of wrong behavior. Failure to accept a formal offer of judgment seems no more a procedural sin than failure to settle outside of the Rule 68 process. Rule 11<sup>16</sup> sanctions for maintaining unfounded claims or defenses, appear to be a closer analogy, in part because Rules 68 and 11 have survived arguments that the two rules transgress the Rules Enabling Act by expanding on tort remedies for wrongful litigation. However, Rule 11 sanctions are not visited on reasonable behavior. Most Rule 68 proposals would carry forward the approach of present Rule 68, which imposes sanctions no matter how reasonable the plaintiff's decision was to reject the offer that in the end proved better than the judgment.<sup>17</sup> Yet if fee-shifting consequences are to attach to Rule 68, it may be better

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15. *Marek v. Chesny*, 473 U.S. 1, 35 (1985) (quoting 28 U.S.C. § 2962 (2000 & Supp. 2005)).

16. FED. R. CIV. P. 11.

17. The 1984 Rule 68 proposal was a clear exception, authorizing "an appropriate sanction" if "an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation." See 102 F.R.D. 407, 433 (1984).

As noted below and elsewhere in the Symposium, some margin of protection for reasonable rejection can be accomplished by imposing sanctions only if the judgment departs from the offer by some stated margin, such as 20%.

to adhere to the “sanctions” label. Characterizing the duty to pay attorney fees as a remedy brings the matter suspiciously close to the substantive rules of remedy, even though the remedy would apply across a full spectrum of legal wrongs.

A pair of related doubts must also be noted. One such doubt arises from proposals to award attorney fees to a defendant who wins a judgment lower than an offer the plaintiff rejected. If the action is governed by a fee-shifting statute that sets a threshold for an award to a defendant higher than for an award to a plaintiff, is there a disabling effect on substantive rights? The Supreme Court’s ruling in *Marek v. Chesny*<sup>18</sup> seems to answer this question. The Court held that Rule 68 can be used to cut off post-offer statutory attorney fees that are otherwise due a prevailing plaintiff.<sup>19</sup> A statutory fee-award right seems no more and no less substantive whether the rule cuts back the rights of a favored plaintiff or expands the rights of a disfavored defendant.

The second doubt arises from efforts to make a fee-shifting sanction meaningful when a prevailing plaintiff would have been entitled to statutory fees without regard to winning a judgment more favorable than an offer rejected by the defendant. One possibility discussed in the Symposium is to award a fixed multiple of the statutory fee.<sup>20</sup> But how does a rule that, for example, awards 1.25 times the statutory fee, not enlarge the substantive statutory right? A different possibility was also noted—a revised rule might simply advise the courts to take account of settlement behavior in measuring the statutory award. This approach might encounter difficulty distinguishing between rejection of a Rule 68 offer and failure to accept a settlement offer outside of Rule 68. Apart from that difficulty, the Enabling Act process has not customarily been used to offer advice on statutory interpretation. The propriety of moving that far from specific rules and specific consequences is an open question.

#### *E. Encouragement, Coercion, and Agency Costs*

The doubts about whether settlement is always a good thing can be expressed in a different way. The line between encouragement and coercion is thin and often blurred. Attaching significant costs to

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18. 473 U.S. 1 (1985).

19. *Id.* at 9.

20. A more open-ended approach that would direct an indeterminate additional sanction is proposed in the American Law Institute/UNIDROIT Principles of Transnational Civil Procedure, Reporters’ Study Rule 16.6, 117-20 (2006). The need arises in this project because it awards attorney fees to the victor as part of costs. *See id.* Rule 32, 148-50.

rejecting a formal offer of judgment can weigh heavily on a risk-averse litigant. Commonly, the greatest sympathy is reserved for the plaintiff of small means and great need, particularly if the plaintiff is at risk of obtaining a judgment below a rejected offer and sustaining substantial liability for the defendant's attorney fees. Discussion at the Symposium suggested that this concern may be reduced if the plaintiff is judgment-proof, but discussion also reflected the reality that many plaintiffs of limited means can be held to respond in some measure. As long as the applicable fee rules would not otherwise hold the plaintiff liable for the defendant's fees, the possibility of severe pressure in some cases is manifest.

Symposium discussion also touched delicately on a sensitive topic. The prospect of a statutory fee award may be the only realistic means of retaining counsel for relatively small-dollar claims. Even the present rule that cuts off a post-offer fee award to a prevailing plaintiff if the statute describes the fee as "costs" creates some tension. The plaintiff's attorney is torn between offering the plaintiff neutral advice on whether to accept an offer of judgment and the fear that a rejected offer will defeat the practical prospect of earning a reasonable fee. This tension will increase if fee opportunities are further reduced by the prospect that a judgment for less than a rejected offer will itself be eaten up by Rule 68 sanctions. Although stiffer sanctions would not trespass directly on the rules of professional responsibility, they would exacerbate the difficulties of providing totally disinterested representation.

### III. IMPLEMENTING DETAILS

#### A. *Rule Detail in General*

The lure of drafting ever more detailed rules springs endemic. It is not always resisted, but time and again it seems better to declare general principles that guide judicial discretion, relying on the generally reasonable behavior of attorneys and judicial enforcement when needed. This approach is often the child of necessity. Familiarity with a specific set of problems may suggest a reasonably specific answer, but this understanding also suggests sets of related problems that cannot be addressed in any specific way. For example, in addressing discovery of electronically stored information, it would be imprudent to frame a rule based on the difficulties of retrieving information from "back-up" tapes preserved by technologies that are rapidly giving way to more easily accessed storage systems. Instead, more open-ended and functional

approaches must be found.<sup>21</sup> Brevity is valuable in its own right even when it seems possible to draft highly detailed rules with confidence that the answers will endure. A large number of Civil Rules exist, many of them long, and sheer ignorance of particular rule provisions frequently cause mistakes. Symposium discussion, for example, prompted repeated suggestions that one reason for the relatively infrequent use of Rule 68 offers is that many defense lawyers do not know about Rule 68. The longer the rules and the greater the level of detail, the greater the risks of unfamiliarity and mistake.

One of the specific Symposium suggestions illustrates the possibilities of augmented detail. Rule 68 does not say anything about the interpretation that cuts off a prevailing plaintiff's post-offer statutory fee rights if the judgment fails to beat a rejected offer and if the fee statute happens to express the right to fees as a right to "costs." There is a real concern that some plaintiffs' attorneys, confronted with the unfamiliar beast of a formal Rule 68 offer, will read the rule and escape without any inkling of the most serious consequence that may flow from rejection. Is there no principle of fair notice that requires the rule to spell out this consequence? If so, how about also spelling out the near-consensus proposition that although Rule 68 says that "the offeree must pay the costs incurred after the making of the offer," and although the plaintiff's statutory attorney fees are costs for this purpose, the defendant's non-statutory fees are not "costs" that must be paid by the plaintiff?<sup>22</sup> And just to make sure, why not say something about how fees are calculated, including fees for litigating the fee award?

The point is made. Judgment must constantly be exercised in adjusting the level of rule details to immediate need. There are, however, powerful reasons to opt for brevity.

*B. Minimum Rule 68 Changes, if Changes There Be (Two Supreme Court Decisions That Must be Overruled)*

Regardless of what is done to amend Rule 68, one task cannot be ignored. No one could have intended to write a rule that cuts off post-offer statutory attorney fees if the underlying statute characterizes fees as costs, but not if the statute characterizes fees expressly as fees. There is no reason to believe that the authors of the original 1938 rule intended any such distinction, and there is even less reason to believe that Congress had Rule 68 consequences in mind when it chose the

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21. See *Proposed Amendment to Rule 26(b)(2)(B)*, Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 30-32 (2005).

22. See Harold S. Lewis, Jr. & Thomas A. Eaton, *Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723 (2006).

words that create a right to fees. Any attempt to sort through the dozens of statutes, looking for plausible explanations of the distinction drawn by *Marek v. Chesny*,<sup>23</sup> must end in ludicrous failure. The rule should cut off fees to prevailing plaintiffs under all fee statutes or under none.

Choosing between two uniform rules may not be difficult. The best reason for enacting a right to fees is to facilitate litigation of favored claims by favored claimants. Cutting off the statutory right when a plaintiff prevails, but has guessed wrong in rejecting an offer that proved better than the judgment, deeply trenches on this purpose. The effects will radiate far beyond the cases that actually go to such a judgment. The stakes of persisting to trial are dramatically changed by the offer, both for the plaintiff, and, most often, for counsel. Risk aversion by both the plaintiff and counsel will encourage acceptance of an offer that would not be accepted outside of the Rule 68 framework. Furthermore, this risk aversion may weaken the quality of advice counsel offers on the wisdom of accepting the defendant's settlement offer. Of course, others may view the choice as more difficult, or they may even prefer to generalize post-offer fee forfeiture to all fee statutes. Whatever the outcome, the issue must be faced and resolved.

Another Supreme Court ruling must also be reconsidered. In *Delta Air Lines v. August*,<sup>24</sup> the Court ruled that because Rule 68 sanctions follow only "[i]f the judgment finally obtained by the offeree is not more favorable than the offer,"<sup>25</sup> a judgment that the defendant is not liable at all defeats any Rule 68 sanction. In this situation, the plaintiff has not actually "obtained" a "judgment." If a defendant makes a nuisance offer for \$10,000 followed by a manifestly compromised verdict for \$5,000, sanctions are available to the defendant. But if the defendant wins outright, there are no sanctions. This result is, to say the least, counter-intuitive. The best that can be said is that this result operates eccentrically to reduce the risk that a plaintiff may wind up out-of-pocket. Furthermore, this result may be marginally acceptable under the present rule. The costs that the plaintiff must pay after winning a small judgment are not likely, in most cases, to impose a duty to pay great sums to the defendant. And if the plaintiff loses entirely, there is no occasion for the defendant to worry about losing the right to receive post-offer fees. But if greater sanctions are adopted, such as a right to attorney fees that are not capped at the amount of the plaintiff's judgment, the consequence is more difficult to justify. Moreover, if

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23. 473 U.S. 1 (1985).

24. 450 U.S. 346 (1981).

25. *Id.* at 352.

greater sanctions are coupled—as surely they must be—with adopting a bilateral rule that allows plaintiffs to make offers, the *Delta Air Lines* rule would become quite strange.

There is nothing to impede rules amendments that undo Supreme Court interpretations that rest on the perceived “plain meaning” of present rule language. Nonetheless, the need to reconsider two Supreme Court decisions may dampen enthusiasm for a revision project.

### C. *Changes Galore*

Several additional changes to Rule 68 were proposed in the Symposium, working only from the perspective of cases brought under statutes that allow plaintiffs to recover attorney fees as costs. The list that follows is far from complete, and none of the possibilities has been explored beyond a mere sketch. The list’s purpose is only to show that fallen angels may torment us by cataloguing the details that might be considered. Describing the possibilities and hinting at the perplexities does not mean that every possible circumstance must be addressed in an amended rule. However, careful rulemaking requires consideration of each possibility, if only to reject it as too uncertain or too complicating.

The list is as follows:

*All Party Offers.* It may seem natural to provide only for defending party offers when the sanctions are limited to costs and a prevailing plaintiff generally recovers costs in any event. However, this line of thinking simply provides some additional force to the arguments that there should be greater sanctions. A one-way rule provides a tactical weapon to defendants with no balancing defense for plaintiffs. In any event, as noted above, if sanctions are provided beyond forfeiture of routine costs awards, fairness surely will require that plaintiffs be allowed to make Rule 68 offers.

*Margin for Error.* It is often protested that predicting the probability-weighted outcome of litigation is imprecise at best, and at times is hopeless. The offer that proves marginally better than the outcome may reflect a lucky guess, or it may provide an added bonus for a strategic attempt to demoralize a risk-averse adversary. A minimum response may be found in Judge Schwarzer’s benefit-of-the-judgment proposal: The advantage represented by the difference between an offer and a more favorable judgment is subtracted from any fee sanction.<sup>26</sup> Another response may be found by introducing a margin-of-error buffer: There is no award if the judgment is within some set percentage of the offer. Yet another response might be to average competing offers: If the

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26. See Schwarzer, *supra* note 11.

plaintiff's rejected offer is \$50,000, and the defendant's rejected offer is \$30,000, sanctions are determined by comparing the judgment to the \$40,000 average value.

Any of these choices will complicate the strategic use of offer and counter-offer. A party faced with an offer under the average-of-offers approach, for example, has a strong incentive to reduce the risk of sanctions by making a counteroffer, even if the party hopes the counteroffer will not be accepted.

*Multiple Offers.* Suppose a defendant offers \$100,000 early in an action. After extensive discovery and a substantial investment of time by the plaintiff's attorney, the defendant offers \$200,000. If the plaintiff wins \$90,000 (including any attorney fees and costs that might be awarded up to the time of the \$100,000 offer), should sanctions run from the time of the first offer? If so, the strategic calculations used in making and responding to offers will become substantially more complicated. Is this the kind of adversarial bargaining tool we want to create?

*Exemptions.* It seems generally agreed upon, as noted in Symposium discussions, that Rule 68 should not apply to class-action lawsuits. It would not be attractive to impose sanctions on class members who took no active part in deciding whether to accept the offer. Moreover, a class representative should not be subjected to the pressure of substantial personal risk as a price for undertaking representation. May there be other types of litigation that should be exempt for similar reasons when a named plaintiff seeks to represent broadly public interests? Many environmental actions, for example, hang standing on very slender threads of injury and causation.<sup>27</sup> Oftentimes, the plaintiff is an organization that borrows standing from an organization member who satisfies the injury-cause-redress standing requirements, but not all environmental organizations are so richly endowed. Another example is provided by many cases that recognize individual standing to challenge public participation in religious matters.<sup>28</sup> Examples could be multiplied, including sympathetic claims for relatively low-stakes individual injury. A universal offer-of-judgment rule has the potential for untoward consequences if the sanctions are stiffened.

*Specific Relief.* Claims for specific relief present at least two distinct challenges. The more familiar example arises from the need to

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27. See *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973).

28. See 13 CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS* § 3531.4 n.67-72 (2d ed. 2006).

determine whether a judgment is more favorable than the offer. Attempts to put a dollar figure on different elements of specific relief, whether measured by value to the plaintiff or cost to the defendant, are difficult. Direct attempts to compare different elements of specific relief can easily be even more difficult if there is any substantial difference between the offer terms and the actual judgment. A less frequently discussed example arises from the question of how much force to read into the present Rule 68 provision that when the offer and acceptance are filed "the clerk shall enter judgment."<sup>29</sup> Is a court really obligated to enter a decree that it thinks is unlawful, contrary to public interest, or too burdensome to administer?

*Multiple Parties or Claims.* How far should a rule attempt to move beyond the laconic references in present Rule 68 to "a party defending against a claim" and to "the adverse party"?<sup>30</sup> Consider first the analogy to Rule 54(b),<sup>31</sup> providing for entry of final judgment before conclusion of the action as to a single claim or as to all claims among a specific pair of parties. Should Rule 68 extend to an offer of a Rule 54(b) judgment on one "claim," thus leaving others for continued proceedings? If so, how are post-offer costs (or expanded measures of relief) to be allocated among the claim associated with the offer and other claims?

More familiar examples concern an offer extended to multiple parties. For example, under the present rule, a defendant hoping for total peace might make an offer conditioned on acceptance by all three plaintiffs. If two accept but one rejects, who should bear Rule 68 sanctions when the judgment fails to better the offer?<sup>32</sup> If all the plaintiffs in the action are immune, Rule 68 loses much of its potential utility in multiple-plaintiff cases. Imposing sanctions on all, on the other hand, may be unfair to plaintiffs who genuinely preferred to accept the offer. Furthermore, imposing full sanctions on the one hold-out may create undue pressure to accept.

*Period To Accept.* One of the questions explored in the Symposium was whether the ten-day period to accept an offer is too brief, indeed, far too brief for an offer made early in an action when one party may suffer from a serious information disadvantage. It is easy to imagine a sliding time scale that allows a generous amount of time to consider an offer made early in the litigation, but less and less time as the litigation

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29. FED. R. CIV. P. 68.

30. *Id.*

31. FED. R. CIV. P. 54(b).

32. There is a discrete element to this problem. The defendant controls the offer terms. If the terms do not support plaintiff-by-plaintiff comparison between offer and judgment, sanctions may fail without more.



advances. Drafting a workable rule in those terms, however, would be a formidable task. An alternative might extend the present period to approximately twenty days or a bit beyond.<sup>33</sup> However, if there is much of an extension, it may be necessary to provide for withdrawal. An offering party is at risk that circumstances may change, particularly through discovery that facilitates evaluation of the case, making unattractive an offer it originally was willing to have accepted.

*Offer of Settlement.* One of the clear prospects for reform emerging from the Symposium arises from the suggestions of many defense lawyers. Defense lawyers suggest that offers are deterred by the prospect that acceptance leads to entry of judgment. For example, an individual police officer's career may be blighted by a judgment for use of unlawful force in a way much softened by settlement. Similarly, both a manager and an employer may lose much if they are named in a judgment for sex discrimination. Although some care should be taken with the details, it should not be difficult to revise Rule 68 to establish a procedure for offering settlement, not judgment.

Of course there might be some collateral consequences. A settlement that leads to dismissal without incorporating the terms of the agreement in a judgment can be enforced only by an independent action, including an independent basis for federal subject-matter jurisdiction, unless an exception is somehow created for Rule 68.<sup>34</sup> Another possibility suggested in Symposium discussion should not be a problem. Issue preclusion attaches only to an issue actually litigated and actually and necessarily decided. Disposition by a Rule 68 "judgment" does not satisfy any of these elements.<sup>35</sup> If the judicial system wishes to encourage use of sanction-inspired offers, however, this change might well be effective.

*Accrued Fee Disclosure.* Another practical impediment discussed in the Symposium arises in fee-shifting cases. A defendant may have a

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33. An extension to twenty days would not be as great an extension as it might seem. Under present Rule 6(a), Saturdays, Sundays, and legal holidays are excluded in calculating a period less than eleven days. FED. R. CIV. P. 6(a). Therefore, the Rule 68 ten-day acceptance period is a minimum of fourteen calendar days, and with the right combination of legal holidays, can run still longer.

34. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 381-82 (1994); *Fafel v. DiPaolar*, 399 F.3d 403 (1st Cir. 2005).

35. See *WRIGHT, MILLER & COOPER*, *supra* note 28, at §§ 4419-4421 (exploring the elements of issue preclusion in greater detail). A more uncertain question would arise if the offer were made and accepted after actual litigation and decision of a particular issue. Final disposition by acceptance of a Rule 68 offer, however, does not seem to satisfy the requirement that the decision have been necessary to the judgment. This conclusion is further supported by the lack of opportunity for appellate review.

general idea of the reasonable fees already incurred by the plaintiff, but the defendant may not. The defendant could more easily make an offer if the defendant could either include a realistic, specific fee award, or rely on an accurate estimate of the likely award. Plaintiff's lawyers, however, resisted disclosure. Among the grounds for resistance, the lawyers proffered that it would be unwise to signal that enough time had not yet been invested to form a realistic evaluation of the case. A different problem would arise if Rule 68 was revised in ways that encourage offers in cases without statutory fee shifting. How is a contingent-fee attorney to disclose? Even if a log were required to support an ultimate application for a Rule 68 fee sanction, should that be added? Is this a desirable wrinkle on the adversary process?

#### *D. Transsubstantive Effects*

Rule 68, like the Civil Rules generally, applies across the board to all civil actions in federal court. It applies despite the disparities in the parties' resources, sophistication, risk-aversion, or sheer tactical cunning. Many would believe it a good thing that Rule 68 is substantially moribund in, for example, personal injury litigation. The focus of the Symposium is narrower, looking to use in statutory fee-shifting cases for employment discrimination or civil rights violations. It is easier to imagine ways to increase the use of Rule 68 in such cases because the risk that a prevailing plaintiff may lose post-offer fees for failure to beat a Rule 68 offer can be severe. However, that prospect must confront the question already put: Is it really the place of general rules of practice and procedure to raise barriers that are primarily effective against classes of litigants singled out for special protection by Congress?

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