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Foreword

Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68

by **Harold S. Lewis, Jr.***
and **Thomas A. Eaton****

This Symposium brings together, from around the nation, eight civil rights and employment discrimination lawyers, four legal academics, and an eminent federal judge, all with deep experience and interest in the promise and pitfalls of Federal Rule of Civil Procedure 68.¹ We gather to unravel a mystery. In an oversimplified nutshell, Rule 68, as construed, enables the defendants to say to the plaintiffs in employment discrimination and civil rights cases: "If you don't beat my offer at trial, you forfeit your right to any future statutory attorney fees." Rule 68

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

would, therefore, appear to give the defendants a significant incentive to make offers and to give the plaintiffs a significant incentive to accept them. Yet, the rule is seldom used. The mystery is why? Before turning to that question, some background information may be in order.

I. RULE 68 BEFORE *MAREK V. CHESNY*:
OFFERS THAT COULD BE REFUSED

Rule 68 allows the defendants to offer the plaintiffs a judgment in a particular form; affords the plaintiffs ten days to accept or reject; and provides that if a judgment finally obtained (months or years later after a trial) fails to exceed a rejected offer, the insufficiently prevailing offeree has to pay the "costs incurred after the making of the offer."² As stated, Rule 68 creates two categorical exceptions to Federal Rule of Civil Procedure 54(d),³ which usually allows "costs other than attorneys' fees . . . as of course to the prevailing party unless the court otherwise directs. . . ."⁴ First, Rule 68 requires the insufficiently prevailing plaintiff to bear his own post-offer costs, which any other prevailing party would ordinarily recover under Rule 54(d). Second, such a plaintiff also has to pay the defendant's post-offer costs, which Rule 54(d) would usually not assign to a prevailing party.⁵

Critical for present purposes is that in most instances the post-offer "costs" that a "Rule 68-ed" plaintiff would forfeit, and those she would have to pay the defendant, are relatively modest. Prior to 1985, it was assumed that the costs at stake in Rule 68 were identical to the costs taxable under Rule 54(d); and the latter refer mainly to the fees charged for the clerk, marshal, court reporter, printing, witness, copying, docketing, and court-appointed expert listed in 28 U.S.C. § 1920.⁶ As the language of Rule 54(d) states, those costs did not, and standing alone still do not, include the big-ticket item of attorney fees.⁷ Consequently, a federal civil defendant who anticipated some risk of liability, whether in diversity litigation or actions under various federal statutes that authorize fees to a prevailing plaintiff, had little incentive to make a

2. *Id.*

3. FED. R. CIV. P. 54(d).

4. *Id.* at (d)(1).

5. *Marek v. Chesny*, 473 U.S. 1, 21 n.14 (1985). See also *Pouillon v. Little*, 326 F.3d 713, 718 (6th Cir. 2003); *Tunison v. Cont'l Airlines Corp.*, 162 F.3d 1187, 1193-94 (D.C. Cir. 1998); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986); *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 442 (9th Cir. 1982).

6. 28 U.S.C. § 1920 (2005).

7. FED. R. CIV. P. 54(d)(1) is entitled "Costs Other than Attorneys' Fees." See generally *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

Rule 68 offer. Even when an offer triggered the Rule's consequences—because the plaintiff's ultimate judgment failed to exceed the defendant's rejected offer—the defendant would not be relieved of paying the plaintiffs' attorney fees but only the relatively modest section 1920 costs that the plaintiff incurred after making the offer.⁸

Moreover, a federal civil defendant who was highly confident of defeating liability was given even less incentive to make a Rule 68 offer. The Rule allows offers to be made only by “a party defending against a claim,” and is triggered when there is a “judgment finally obtained by the offeree [that] is not more favorable than the offer. . . .”⁹ In 1981 the Supreme Court held, in *Delta Air Lines, Inc. v. August*,¹⁰ that when the above two quoted phrases are read together, Rule 68's “cost” consequences can be triggered only when the plaintiff obtains a judgment on liability, albeit one that is less favorable than, or equally favorable as, the offer she had rejected.¹¹ Under this reading of the Rule, only an extremely humble or shrewd defendant would have an incentive to make a Rule 68 offer in a case where it is extremely confident of a no-liability judgment. If it viewed the making of a Rule 68 offer as cost-free, a humble defendant might make the offer on the long-shot guess that its own estimate of liability might be wrong. The less humble, but shrewd, defendant who is confident of victory might nevertheless make an almost nominal offer in the hope that the plaintiff (erroneously in the defendant's view) counts on victory, but at a level even lower than the defendant's offer. The defendant's hope would be that the plaintiff would fear that by rejecting the defendant's offer she would suffer the consequences of the Rule. But, of course, the consequences to a plaintiff of forfeiting and having to pay post-offer Rule 68 costs were *de minimis* so long as those costs were viewed as merely the section 1920 costs taxed by Rule 54(d).

8. Rule 68 would also give the defendant a judgment for its own relatively modest post-offer section 1920 costs.

9. FED. R. CIV. P. 68.

10. 450 U.S. 346 (1981).

11. *Id.* at 351-52. Dissenting Justice Rehnquist would have considered a defense judgment on liability a species of judgment obtained by the plaintiff-offeree that is not more favorable than the rejected offer. *Id.* at 369-72 (Rehnquist, J., dissenting). On this view, a defendant could obtain the benefit of Rule 68 and would have an incentive to make an offer of judgment, not only in cases where it anticipates losing at a level lower than the plaintiff estimates, but also where it anticipates winning altogether.

II. UPPING THE ANTE: *MAREK V. CHESNY*

In 1985 the Supreme Court put teeth in Rule 68 with its decision in *Marek v. Chesny*.¹² In that case, the defendants made a \$100,000 Rule 68 offer of judgment in the plaintiff's action under 42 U.S.C. § 1983.¹³ The sum of the plaintiff's judgment on the merits, plus his pre-offer costs and pre-offer attorney fees, totaled only \$92,000. In the Court's view, therefore, the final judgment the plaintiff obtained failed to exceed the defendants' offer. In deciding what adverse consequences the plaintiff should accordingly bear, the Court melded the Rule 68 term "costs" with the phrase "fees as part of the costs" that appears in 42 U.S.C. § 1988,¹⁴ which authorizes fees to the plaintiffs who prevail under, among other statutes, section 1983. A variation of that same phrase is commonly (but not invariably)¹⁵ used in other statutes that authorize courts to award attorney fees to parties who prevail on a host of other federal question claims. Chief Justice Burger reasoned for the majority that even as early as 1938, when Rule 68 was adopted as part of the original Federal Rules of Civil Procedure, "the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute. . . ."¹⁶ As a result,

[A]ll costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying ["fee-shifting"] statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.¹⁷

The Civil Rights Attorney's Fees Act of 1976, codified in section 1988,¹⁸ authorized fees to prevailing plaintiffs "as part of" the costs in actions under a number of federal civil rights statutes, including section 1983.¹⁹ Accordingly, the plaintiff, having failed to obtain a judgment exceeding the defendants' offer, forfeited \$139,692 in claimed post-offer costs, including the post-offer attorney fees the defendants likely would have been ordered to pay on his behalf.

12. 473 U.S. 1 (1985).

13. 42 U.S.C. § 1983 (2005).

14. 42 U.S.C. § 1988 (2005).

15. In an appendix to his dissent in *Marek*, Justice Brennan observed that Congress had enacted over 100 such "fee-shifting" statutes, only about half of which unequivocally provided for fees "as part of" the "costs." 473 U.S. at 43 (Brennan, J., dissenting).

16. *Id.* at 9.

17. *Id.* (citations omitted).

18. 42 U.S.C. § 1988(b) (2005).

19. *Id.*

The potential practical significance of this expansive interpretation of Rule 68 “costs” is enormous. A plaintiff who prevails in an action based on a federal statute that authorizes attorney fees as part of costs, but who obtains a judgment that is less than or equal to the Rule 68 offer he rejected, not only forfeits Rule 54(d) post-offer costs and must pay the defendant’s post-offer costs, but he also forfeits post-offer attorney fees—usually a far more substantial component of recovery. In brief, Rule 68 “costs” still include only section 1920 costs in diversity litigation and in federal question cases where fees are not authorized or are authorized separately from costs; but after *Marek*, the costs potentially forfeitable under Rule 68 also include attorney fees in those more numerous federal question cases where a statute authorizes the recovery of attorney fees “as part of” costs.

While a significant number of federal fee-shifting statutes authorize attorney fees to prevailing parties without employing the “fees as part of costs” language to which *Marek* accorded magical Rule 68 significance,²⁰ the great bulk of contemporary federal question litigation is founded on statutes that do award fees as part of costs. Notably, this latter group includes litigation under most civil rights legislation,²¹ Title VII of the Civil Rights Act of 1964,²² and a significant number of environmental statutes.²³ Civil Rights and employment discrimination cases are the largest discrete categories of privately initiated lawsuits in the United States District Courts.²⁴

20. Justice Brennan describes sixty-three then extant federal “fee-shifting” statutes as linguistically providing for attorney fees as part of costs; another forty-nine as authorizing fees separately from costs; and another seven as referring to fees and costs in a manner that leaves it unclear if the fees are awardable as part of the costs and as such are forfeited by insufficiently prevailing plaintiffs via the *Marek* majority’s reading of Rule 68. *Marek*, 473 U.S. at 43-45 (Brennan, J., dissenting).

21. Governed by the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b).

22. 42 U.S.C. § 2000e-5(k) (2005). But the Age Discrimination in Employment Act, a parallel national employment discrimination statute, awards fees in addition to, rather than as part of, costs. 29 U.S.C. § 626(b) (2005). Thus, under the *Marek* reasoning, if a Rule 68 offer is triggered in an action under that Act, the plaintiff would not forfeit post-offer attorney fees. *Marek*, 473 U.S. at 25-27 n.36.

23. See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (2005); Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (2005); Safe Drinking Water Act, 42 U.S.C. §§ 300j-8(d), 300j-9(2)(B)(i),(ii) (2005); Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (2005); Clean Air Act and Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7413(b), 7604(d), 7607(f), 7622(e)(2) (2005).

24. Table C-2, “U.S. District Courts—Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the Twelve-Month Period Ending September 30, 2004,” available at <http://www.uscourts.gov/judbus2004/appendices1c2.pdf>.

The competing policies that form the grist for post-*Marek* debate were succinctly foreshadowed in the majority's opinion. "Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits."²⁵ The majority specifically rejected the dissent's argument that the *Marek* view of the interplay between the civil rights fee-shifting statute and Rule 68 "will frustrate Congress' objective in § 1988 of ensuring that civil rights plaintiffs obtain 'effective access to the judicial process.'"²⁶

Civil rights plaintiffs—along with [certain] other plaintiffs—who reject an offer more favorable than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by [our reading of] Rule 68.²⁷

Even for those plaintiffs "who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation."²⁸

Henceforth, wrote the Court,

[a]pplication of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer. There is no evidence . . . that Congress, in considering [§] 1988, had any thought that civil rights claims were to be on any different footing from other civil claims insofar as settlement is concerned. Indeed, Congress made clear its concern that civil rights plaintiffs not be penalized for "helping to lessen docket congestion" by settling their cases out of court.²⁹

As expressed by Justice Powell in his concurrence, "The purpose of Rule 68 is to 'facilitat[e] the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.'"³⁰

25. *Marek*, 473 U.S. at 10.

26. *Id.* (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983)).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 12-13 (quoting *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 n.1 (1981) (Powell, J., concurring)).

III. THE LOOSE ENDS AND LIMITS OF *MAREK* AND THE TEXT OF RULE 68

An irony of the Court's opinion, immediately pointed out in Justice Brennan's dissent,³¹ is that while the majority purports to derive its holding from the intersection of recoverable Rule 68 costs and the section 1988 phrase authorizing a reasonable attorney "fee as part of the costs," it draws back from applying this "plain text" approach to other situations implicated by the term costs in Rules 68 and 54(d).³² Rule 68, for example, requires the insufficiently prevailing offeree to "pay the costs incurred after the making of the offer."³³ Read literally, this text should mean that if costs in an action governed by section 1988 include attorney fees, Rule 68 would require the insufficiently prevailing plaintiff not only to forfeit her own post-offer fees, as *Marek* holds, but also to pay the post-offer attorney fees, not just the section 1920 costs, of the defendant. Similarly, because Rule 54(d) ordinarily allows costs to the prevailing party, one might expect that the plaintiff who loses altogether on a federal statutory claim governed by section 1988 or another statute authorizing fees as part of costs would have to pay the defendant's attorney fees, pre- as well as post-offer.

Yet both of these consequences would fly in the face of Congressional intent as reflected in the Senate Report³⁴ accompanying the Attorney's Fee Award Act of 1976.³⁵ The report accompanying the Senate Bill, which was the version ultimately passed, states explicitly that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."³⁶ This was needed for civil rights plaintiffs to secure competent counsel to perform the function of a "private attorney general" in enforcing civil rights laws.³⁷ However, although the statutory language does not distinguish between prevailing plaintiffs and prevailing defendants, the Senate Report makes clear that prevailing defendants should not be awarded attorney fees as a matter of course.³⁸ Civil rights plaintiffs "should not be deterred from bringing good faith actions to vindicate the fundamen-

31. *Marek v. Chesny*, 473 U.S. 1, 21-22 (1985) (Brennan, J., dissenting).

32. *Id.*

33. FED. R. CIV. P. 68.

34. S. REP. NO. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5909.

35. 42 U.S.C. § 1988 (2005).

36. S. REP. NO. 94-1011, at 4 (quoting *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

37. *Id.* at 3.

38. *Id.* at 4-5.

tal rights here involved by the prospect of having to pay their opponent's counsel fees should they lose."³⁹ Prevailing defendants should be awarded attorney fees only when the "suit was clearly frivolous, vexatious, or brought for harassment purposes."⁴⁰ Prior to its decision in *Marek*, the Supreme Court embraced this limitation on awards of attorney fees to prevailing defendants in both civil rights and employment discrimination suits.⁴¹

A careful reading of the Court's opinion in *Marek* reflects the majority's recognition of the tension between the party-neutral language of the fee-shifting statutes and the policy, found in both the legislative history and later judicial opinions, of not deterring civil rights and employment discrimination plaintiffs from filing good faith claims. In two successive sentences, the majority in *Marek* implicitly limits the circumstances under which Rule 68 costs will include fees by stating that only costs "properly awardable" under the relevant substantive statute should be viewed as part of Rule 68 costs.⁴²

In subsequent civil rights and employment discrimination cases governed by statutes that the Supreme Court has construed to authorize fees principally to prevailing plaintiffs, the federal circuit courts have attended to this *Marek* limitation. They have held that when Rule 68 is triggered by a judgment in favor of a plaintiff that fails to exceed the defendant's offer, it relieves the defendant of what would otherwise be its liability for the plaintiff's post-offer attorney fees and costs, entitles the defendant to an award of its own post-offer section 1920 costs,⁴³ but does not render the defendant eligible for an award of its own post-offer fees.⁴⁴ In fact, this last conclusion is effectively dictated by the

39. *Id.* at 5 (citing *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 522 (E.D. La. 1971)).

40. *Id.* (citing *U.S. Steel Corp. v. United States*, 385 F. Supp. 346, 347 (W.D. Pa. 1974)).

41. *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983) (civil rights action governed by section 1988); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (interpreting Title VII's "fees as part of the costs" provision, section 706(k)).

42. *Marek*, 473 U.S. at 9 (citations omitted).

43. *See Pouillon v. Little*, 326 F.3d 713, 718, 719 (6th Cir. 2003); *Tunison v. Cont'l Airlines Corp.*, 162 F.3d 1187, 1193-94 (D.C. Cir. 1998); *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986); *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 442 (9th Cir. 1982). Because Rule 68 mandates this payment of the defendant's post-offer costs, exclusive of fees, only when the plaintiff has prevailed (although insufficiently to beat the defendant's rejected offer), it represents a pro tanto exception to Rule 54(d), which presumptively awards such costs (subject to the district court's discretion) only to, and not against, prevailing parties.

44. *See Le v. Univ. of Pennsylvania*, 321 F.3d 403, 410-11 (3d Cir. 2003) (Title VII action); *Payne v. Milwaukee County*, 288 F.3d 1021, 1027 (7th Cir. 2002) (section 1983 action); *EEOC v. Bailey Ford, Inc.*, 26 F.3d 570, 571 (5th Cir. 1994) (section 1983 action);

Supreme Court opinions that have construed civil rights, employment discrimination, and other statutes to authorize fee awards against only those few plaintiffs whose claims were frivolous or asserted in bad faith. By hypothesis, no plaintiff against whom Rule 68 is applied brought a frivolous action because, as observed above, even before *Marek*, the Court had held in *Delta Air Lines, Inc. v. August*⁴⁵ that Rule 68 applies only where the plaintiff prevails to some degree.

Another dangling thread of the opinion in *Marek* is the uncertainty about its scope. The majority's fee-forfeiture interpretation of Rule 68 depends on whether the text of the particular fee-shifting statute at issue authorizes the payment of fees "as part of," rather than in addition to or distinct from, costs. Justice Brennan, dissenting, alludes to the traditional understanding that the Federal Rules are intended to be transsubstantive when he writes, "As with all of the Federal Rules, the drafters intended Rule 68 to have a uniform, consistent application in *all* proceedings in federal court."⁴⁶ The result of the majority's contrary approach, he contends, "is to sanction a senseless patchwork of fee shifting that flies in the face of the fundamental purpose of the Federal Rules—the provision of uniform and consistent procedure in federal courts."⁴⁷

On the other hand, even in the class of federal statutory litigation where *Marek* expands Rule 68 costs to compel the forfeiture of the plaintiffs' post-offer fees (although not to require them to pay the defendants' fees), the decision in *Delta Air Lines* restricts the resulting settlement incentives to cases in which the defendant reckons the plaintiff may prevail on liability.⁴⁸ This reasoning means that Rule 68, even as made potentially more significant by *Marek*, will have limited utility in circuits generally hostile to certain federal statutory claims, notably those asserted under civil rights and employment discrimination statutes. In such cases in these circuits, the defendants will be exceedingly confident of an ultimate plaintiff-take-nothing judgment. Consequently, those defendants will seldom achieve financial benefit from the primary sanction available under Rule 68: relief from an order directing them to pay the post-offer fees of prevailing plaintiffs. Of

O'Brien, 873 F.2d at 1120 (section 1983 action); *Crossman*, 806 F.2d at 334 (section 1983 action). *But cf.* *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (awarding fees to the defendant under Rule 68 where underlying fee award statute, the Copyright Act, defined "costs" to include fees but had not been construed by the Supreme Court as ordinarily allowing fees only to the plaintiffs).

45. 450 U.S. 346 (1981).

46. *Marek*, 473 U.S. at 23 (Brennan, J., dissenting).

47. *Id.* at 24 (Brennan, J., dissenting).

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

course, a defendant who is justifiably confident of winning might nevertheless submit a modest Rule 68 offer simply because doing so might cause the plaintiff, fearful of the consequences of rejecting the offer, to accept it. This rationale assumes, however, that the defendant and hourly paid defense counsel are both dominantly motivated by a desire to conclude the litigation as quickly and economically as possible, even when one or both of them is overwhelmingly confident of ultimate success.

Another limit to the Rule's potential utility inheres in its requirement that the offer be in the form of a judgment, coupled with its silence about nonadmission-of-liability clauses like those that are a standard feature of private settlement agreements.⁴⁹ Many individual defendants, police officers being a signal example, would understandably be loathe to confess formal judgment. Doing so may entail adverse effects on insurability or creditworthiness, not to mention on the defendant's prospects for future advancement in employment. Private corporate defendants may have even more general reluctance to consent to the entry of judgment. Even if the actual terms of the Rule 68 offer are not part of the court record following the clerk's entry of judgment after an offer is filed, the bare fact of a publicly visible judgment against the corporation may attract the attention of regulators, generate adverse publicity among customers, or encourage copycat litigation by similarly situated employees. Government defendants in states where the law requires all settlements to be a matter of public record may be less concerned about the necessity of making a Rule 68 offer in the form of a judgment. Yet even they might be more inclined to extend offers if the terms of the Rule expressly contemplated provisions disclaiming liability. With these concerns in mind, a number of states have changed the "judgment" terminology of their counterpart rules to the softer language of "settlement" or "agreement."

The text of Rule 68 limits its potential utility in another respect by allowing offers to be submitted only by the defendants. A growing number of states, in contrast, have enacted or amended Rule 68 counterpart statutes that enable the plaintiffs as well as the defendants to make offers of judgment, often allowing either type of offeror to recover attorney fees and not just ordinary costs. Professor Albert Yoon has studied one such New Jersey statute in detail⁵⁰ and will describe

49. The defendant's offer in *Delta Air Lines* did, however, contain such language and was not considered invalid for that reason. *Id.* at 348 n.2. Perhaps, in part, for that reason the scant lower court authority on the issue tends not to invalidate a defendant's offer for inclusion of language disclaiming liability.

50. N.J. Ct. R. 4:58-1 to 4:58-4 (2005).

his conclusions about its efficacy in encouraging earlier settlement across a range of tort litigation. We may assume that the states' experience with two-way, fee-shifting offer of judgment rules predicts that similar rules would encourage earlier, cheaper settlement of federal civil rights and employment discrimination litigation. However, the plaintiffs in ordinary tort or contract litigation are generally able to attract counsel without the incentive of recovering their attorney fees. On average, they may also have less need than federal civil rights and employment discrimination plaintiffs to be protected from paying defendants' attorney fees. The federal statutory policies that impelled the Supreme Court ordinarily to forbid awards of fees against losing plaintiffs in those federal cases make it difficult or impossible to imagine valid amendments of Rule 68 that would simply transplant to all federal litigation the two-way offer rules employed in the states.

One possible reason for underutilization of Rule 68 is that the principal consequence of its successful use, the plaintiff's forfeiture of post-offer attorney fees, appears nowhere in the text of the Rule and requires reference to an extrinsic source, the Court's opinion in *Marek*. Further, the text of the Rule affords no guidance on how to apply that decision. For example, exactly which components of a final judgment that a plaintiff might obtain in federal statutory fee-shifting cases—pre-offer costs or also pre-offer fees—should be added to his judgment on the merits to yield a total that must then be measured against the defendant's rejected offer? This uncertainty is largely resolvable by a close reading of Part II A of the Court's opinion in *Marek*, which effectively tells the district court to measure against the defendant's offer the sum of the plaintiff's merits recovery plus the amount the court would award her for pre-offer costs and pre-offer fees.⁵¹ But particularly in employment discrimination and civil rights actions, many plaintiffs' counsel may be one-shot or occasional novices who take such cases as byproducts of state tort, domestic, or criminal litigation. Does the silence on such issues in the text of Rule 68 afford these federal plaintiffs, whose claims are the especial object of federal policy protection, adequate notice of the risks of rejecting an offer?

There are also practical impediments to the Rule's effectiveness, even if counsel on both sides are familiar with the case law. Does private defense counsel, who is paid by the hour, have the same incentive as the client under *Marek* to make a Rule 68 offer in an action under a statute authorizing fees as part of costs? After all, *Marek* endows a defendant's Rule 68 offer of judgment with greater leverage than an ordinary offer

51. 473 U.S. at 5-7.

of settlement. Therefore, the making of a Rule 68 offer may terminate the litigation much sooner, with significantly lower compensation for defense counsel. While one or more local district court rules specifically require counsel to certify that they have discussed Rule 68 with their clients,⁵² there is no national mechanism tending to assure those discussions.

Moreover, even the defendant who is genuinely seeking to formulate the terms of an offer will encounter a practical difficulty in an action under a statute authorizing fees as part of costs. To calculate an amount likely to trigger forfeiture of the plaintiff's post-offer attorney fees under the *Marek* formulation, and thus force the plaintiff to focus on the offer seriously and early, the defendant must estimate more than the usual likelihood and magnitude of the plaintiff's success on the merits. The defendant will also have to estimate the plaintiff's pre-offer attorney fees and costs to arrive at a total offer that will represent the defendant's best estimate of what the plaintiff might recover after trial. How is defense counsel to estimate the attorney fee liability the plaintiff will have accrued under an agreement with her own counsel at the particular stage of the litigation at which the defendant proposes to make a Rule 68 offer? He might simply inquire of the plaintiff's counsel, but the plaintiff's counsel may choose not to reply. The occasional local federal district court rule in effect addresses this problem by requiring counsel for parties seeking a statutory award of attorney fees periodically to file with the court a summary of time records reflecting the fee liability that party has incurred to date.⁵³ But again, there is no national mechanism to encourage disclosure of the plaintiffs' fees for the purpose of enabling interested defendants to make an offer at a level of tactical advantage.

The Rule is also silent on how to measure, for Rule 68 purposes, the value of a plaintiff's judgment for prospective, equitable, or other nondamages relief. To state the possibilities most broadly, one might

52. See, e.g., D. Colo. Local Rules of Practice, Appendix G, "Final Pretrial Order" Item 11 entitled, "Offer of Judgment." Significantly, however, the certification required by that local rule, which, by its terms, apparently applies not only to the defendants but also to the plaintiffs with respect to counterclaims, need only be included in the final pretrial order. By that late stage of the litigation, relatively few attorneys' hours remain to be expended, and accordingly the threat to a party and his counsel of forfeiting those hours in a fee award by rejecting the offer may be relatively slight.

53. See, e.g., N.D. Fla. Local Rule 54.1(B)(1), (2), (4) (2005) (requiring monthly electronic filing of time records with the clerk, but permitting that filing to be made under seal); D. Md. Local Rules, Revised 2004, Appendix B1.c. (requiring parties intending to seek fees under civil rights or employment discrimination statutes to make quarterly statements to opposing counsel showing amount of time spent on a case and total value of time).

calculate an injunction's value to the plaintiff, or one might take its value as the cost of compliance to the defendant. In the relatively few reported nondamages cases in which the defendants have made Rule 68 offers, the problem of measuring the value of a plaintiff's judgment has proven intractable in the absence of any textual guidance from the Rule.⁵⁴

IV. SOUND THE ALARM: THE PLAINTIFF'S BAR, CIVIL RIGHTS ORGANIZATIONS, AND ACADEMIC COMMENTATORS REACT TO *MAREK*

Marek was greeted with alarm by the plaintiff's bar, civil rights advocates, and academic commentators. The principal concerns expressed were that the defendants in actions under statutes authorizing prevailing plaintiffs to recover fees as part of costs would routinely make early, low-ball offers of judgment; the plaintiffs, fearful of forfeiting what is often the largest part of their recovery (attorney fees), would feel compelled to accept many such offers without having had the opportunity to conduct sufficient discovery to evaluate with care the probability and magnitude of success; and the federal policies underlying these fee-authorization statutes would be seriously undermined as a result.⁵⁵

V. A TEMPEST IN A TEAPOT? DEFENDANTS LARGELY FAIL TO USE THE RULE, AND PUTATIVE REFORMERS ARE UNABLE TO AMEND IT

For the most part, it appears that the *Marek*-generated concerns of the plaintiffs and other supporters of the policies expressed in these federal

54. See Thomas L. Cubbage III, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465, 484-94 (1991).

55. See generally Richard W. Swope & Samuel J. Webster, *The Defense Goes on the Offense: Use of Rule 68 in Civil Rights Litigation*, 55 DEF. COUNS. J. 153, 154 (1988); Jay H. Krulewitch, Note, *Anatomy of a Double Whammy: The Application of Rule 68 Offers and Fee Waivers of Civil Rights Attorneys' Fees under Section 1988*, 37 DRAKE L. REV. 103, 114-15 (1987-88); Gale C. Shumaker, Case Note, *Marek v. Chesny: Civil Rights Attorney's Fees and Federal Rule of Civil Procedure 68: The Conflict Resolved*, 12 OHIO N.U. L. REV. 287, 299-300 (1985). One author summarizes:

After *Marek* was decided, commentators predicted that Rule 68 would provide a strong incentive for plaintiffs to accept settlement offers in civil rights cases. . . . [P]laintiffs might potentially be deterred from prosecuting claims that had the potential to expand civil rights protection when such claims were not clearly going to prevail or to result in a predictable monetary award. In addition, Rule 68 offers might be made at such an early date in litigation that plaintiffs might be led to make uninformed settlement decisions. Thus, the consensus was that Rule 68's primary effect would be to give defendants litigating under many civil rights statutes leverage that they would not have under other statutes.

Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197, 222-223 (1997) (citations omitted).

fee-authorization statutes did not materialize. To be sure, one cannot be confident that Rule 68 is only rarely utilized, even in fee-shifting litigation where it could garner the defendants the biggest payoff. Unaccepted offers are not filed with the court, and even the defendants who have made offers of judgment may ultimately prefer to settle privately.⁵⁶ Further, the federal litigation statistics maintained by the Administrative Office of the U.S. Courts have not been coded to denote which lawsuits were terminated by means of a Rule 68 offer. But in the two decades following *Marek*, there have been only occasional reported decisions construing Rule 68, and these decisions mostly grapple with basic issues that likely would already have been resolved if the Rule were being used on a regular basis. In addition, anecdotal reports from both plaintiffs' and defense counsel, whose practices are devoted to employment discrimination and civil rights, confirm the rarity of Rule 68 offers.⁵⁷ This Symposium is the outgrowth of what is believed to be the first nationwide empirical inquiry into the incidence of practitioner use of Rule 68 in the federal fee-authorization cases where, after *Marek*, one would expect its use to be most common. With some notable exceptions, most lawyers interviewed as part of this project report that Rule 68 is used at most sporadically.

History suggests that would-be reformers of Rule 68 should approach the task with considerable caution. In 1983 an attempt was made in the

56. Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 89-90 (2001). Fisher observes that the plaintiff is usually agreeable to settling privately, even if negotiations were initiated by means of a defendant's Rule 68 offer, and may gain additional concessions from the defendant in the process. *Id.*

57. See, e.g., FED. R. CIV. P. 68 advisory committee's note on proposed section 1983 amendments, asserting that Rule 68 "has rarely been invoked and has been considered largely ineffective as a means of achieving its goals." 98 F.R.D. 337, 363 (1983). See also JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE 1* (1995). The author of an article summarizing interviews with thirty-five San Francisco Bay Area civil rights attorneys reports:

Despite Rule 68's potential to reduce attorneys' fees and induce settlements, in reality, it does not appear to be a major factor in the practices of the civil rights lawyers I interviewed, whether they represent plaintiffs or defendants. Many plaintiffs' attorneys were surprised that they had not received more Rule 68 offers and could count the number of times they had on one hand. Defense attorneys like Rule 68 in theory, but most do not use it frequently in practice.

Davies, *supra* note 55, at 223. She adds, however, "There is some evidence that City Attorneys' offices have awakened to the possibilities inherent in Rule 68 offers in handling police misconduct cases, and that when civil rights plaintiffs receive these offers, they are forced to evaluate their cases in a very conservative fashion." *Id.* at 225. See also Robert W. Erb, *Offers of Judgment: An Underrated Tactic; Surprisingly Few Intellectual Property Litigants Use Rule 68*, NAT'L L.J. 530-32 (Nov. 1, 1993).

Advisory Committee on Civil Rules to amend Rule 68 to make it a two-way rule and automatically require prevailing or losing plaintiffs, as well as the defendants who had “erroneously” (with the hindsight of a judgment) rejected an opponent’s offer of judgment, to pay an opponent-offeror’s full costs, including attorney fees. This proposal closely resembled the “loser pays” English Rule on attorney fees, to which federal statutes authorizing fees for prevailing parties have stood as exceptions. “In the face of [an] onslaught of criticism, the Advisory Committee withdrew the 1983 proposal. . . .”⁵⁸ A 1984 Advisory Committee proposal entitled “Offer of Settlement; Sanctions” would have authorized a district court, after judgment, to impose a range of discretionary sanctions if it “determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the costs of the litigation”⁵⁹ The determination would have been based on “all of the relevant circumstances at the time of rejection”⁶⁰ This proposal, too, met substantial opposition, much of it centered on concerns about excessive collateral litigation over whether rejection of an offer was unreasonable, and was also rejected.⁶¹

Marek followed a year later. In 1992 Senior U.S. District Judge William W. Schwarzer, then Director of the Federal Judicial Center, proposed a model for capped and limited two-way fee shifting that would have exempted claims under civil rights statutes.⁶² An attempt to amend the Rule along the lines of this more moderate proposal also failed. Indeed, the ensuing discussion evidently excited sufficient residual controversy that the Advisory Committee’s October 1994 minutes recite: “A motion to abrogate Rule 68 was made and seconded twice. Brief discussion suggested that there was support for this view. . . .”⁶³ That, however, did not happen. Instead, Rule 68 continues unamended, apparently underutilized, yet still influenced by the Supreme Court’s interpretation in *Marek*. Professor Edward H. Cooper,

58. Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 16 (1985).

59. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, *Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States, District Courts*, reprinted in 102 F.R.D. 407, 433 (1984).

60. *Id.*

61. Simon, *supra* note 58, at 17-19.

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

63. Minutes of the Advisory Comm. on Federal Rules of Civil Procedure (Oct. 1994), in 1994 WL 880348 at 18, cited in Merenstein, *More Proposals to Amend Rule 68; Time to Sink the Ship*, 184 F.R.D. 149, 167 n.32 (1999).

Reporter to the Advisory Committee during the turmoil surrounding these proposals to amend Rule 68 in the 1990s, will review the lessons of these failed attempts.

VI. WHAT'S GOING ON OUT THERE?

The predicted onslaught of coerced settlements in the wake of *Marek* did not appear to transpire. The operative word is "appear" because there are no hard data on the use or effect of Rule 68 offers of judgment.⁶⁴ We decided that the best way to fill this informational void was to talk directly to plaintiffs' and defense attorneys, the people most likely to have experience with Rule 68. Our goals were twofold. The first objective was simply to describe how Rule 68 is used in practice: its frequency of use, the factors that influence decisions whether or not to make or accept a Rule 68 offer, and its overall impact upon litigation. The second goal was to explore what, if any, modifications of Rule 68, acceptable to the plaintiffs' and the defendants' bar, might be effective in encouraging fair and timely settlement of disputes.

VII. RESEARCH DESIGN

Our research involved in-depth interviews with experienced employment discrimination and civil rights attorneys throughout the country. In-depth interviews are a form of qualitative empirical research well recognized by social scientists.⁶⁵ We interviewed cohorts of four attorneys in each of sixteen cities. Each cohort consisted of attorneys who represent plaintiffs in civil rights actions, civil rights defense, plaintiffs employment discrimination, and employment discrimination defense. We selected one city in each of twelve federal appellate circuits as well as additional cities in circuits that have the greatest number of civil rights and employment discrimination cases.⁶⁶

64. See text accompanying *supra* note 57. Cf. Davies, *supra* note 55, at 222-25 (interviews with thirty-five civil rights lawyers in California, Idaho, and Florida indicated that Rule 68 offers are rarely made).

65. EARL BABBIE, *THE BASICS OF SOCIAL RESEARCH* 260 (1999) ("In-depth interviewing is a mainstay of field research. . ."); GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 4 (1994) ("Qualitative research . . . covers a wide range of approaches [including] intensive interviews. . ."). For a thorough description and critique of both quantitative and qualitative empirical legal scholarship see Lee Epstein & Gary King, *Empirical Research and the Goals of Legal Scholarship*, 69 U. CHI. L. REV. 1 (2002).

66. First Circuit (Boston); Second Circuit (New York); Third Circuit (Philadelphia); Fourth Circuit (Charlotte); Fifth Circuit (Houston and New Orleans); Sixth Circuit (Memphis); Seventh Circuit (Chicago); Eighth Circuit (Minneapolis); Ninth Circuit (Seattle, San Francisco, and San Diego); Tenth Circuit (Denver); Eleventh Circuit (Atlanta and

The identification and selection of attorneys was more difficult. We wanted subjects who had considerable experience in civil rights or employment discrimination litigation. These would be the people most likely to have made or received Rule 68 offers in the course of their practice. They would be in the best position to reflect and comment upon its use or lack of use. To identify such attorneys, we solicited referrals from professional organizations, state bar committees, individual attorneys, and law professors. The lawyers we approached about participating in our project often identified adversaries whom they respected and thought were appropriate individuals to interview. This process produced a group of lawyers rich in experience and varied in perspective. Collectively, these men and women practice in large firms, small firms, and government agencies. We are fortunate to have several of these attorneys participate in this Symposium.

VIII. THE STRUCTURE OF THE INTERVIEW

Each attorney who agreed to be interviewed received a written summary of the research project and a set of reform proposals. We did not, however, provide them with a list of questions we would ask. This approach gave each lawyer the opportunity to reflect upon their experiences with Rule 68, but provide unscripted responses to specific questions.

The interviews were structured to cover four broad topics: the background and experience of the attorneys; their understanding of Rule 68; their experience with Rule 68 in particular cases; and their reaction to various reform proposals. The questions were drafted prior to the interview to ensure that the same topics would be addressed by every lawyer.⁶⁷ A significant advantage of an interview over a survey is the opportunity for follow up.⁶⁸ Each interview lasted between one and two

Miami); and the District of Columbia Circuit (Washington, D.C.).

67. The in-depth interview is structured more to cover specific topics than to elicit specific answers to particular questions.

A *qualitative interview* is an interaction between an interviewer and a respondent in which the interviewer has a general plan of inquiry but not a specific set of questions that must be asked in particular words and in a particular order. It is essentially a conversation in which the interviewer establishes a general direction for the conversation and pursues specific topics raised by the respondent. Ideally, the respondent does most of the talking.

BABBIE, *supra* note 65, at 268-69.

68. The in-depth interview "is especially effective for studying the subtle nuances of attitudes and behaviors. . . ." *Id.* at 280.

hours, depending on the number of follow-up questions and detail of the responses. Each interview was audiotaped and transcribed.⁶⁹

IX. HYPOTHESES

We wanted to test a number of hypotheses that may, in combination, account for the apparent failure of the Rule to achieve its intended purpose. For example, putting aside the method of compensating counsel, one might expect a greater willingness among defense lawyers representing private employment discrimination defendants to recommend Rule 68 offers than among defense lawyers representing public entities. The private employers, or their shareholders, have more to gain from early, cheaper settlement, as they must bear the expense of protracted litigation internally. Public defendants, by contrast, can “externalize” the economic costs by passing them on to taxpayers.

We were also interested in whether the incidence of use of Rule 68 offers varies with the nature of defense counsel’s engagement or the method of defense counsel’s compensation. For instance, one might expect defense counsel on regular retainer to recommend the offers more frequently than single-engagement counsel, as the former might be expected to place higher priority on minimizing costs for a repeat client. On the other hand, one might expect less frequent utilization of Rule 68 by private counsel paid by the hour than by government attorneys whose compensation is constant, regardless of how long it takes to resolve a dispute. One might also expect that in federal circuits relatively less receptive to employment discrimination or civil rights litigation, the defendants would be less inclined to make Rule 68 offers, but the plaintiffs more inclined to accept them. A specific question we proposed was whether the typical employment discrimination plaintiff, who is presumably more solvent than the typical civil rights plaintiff, might as a result be more vulnerable to any new proposed Rule 68 sanctions that would require the plaintiff to make affirmative payments to the defendants, beyond the current required payment of the defendant’s post-offer costs.

X. LET THE DISCUSSION BEGIN

The following discussion includes the voices of plaintiffs’ and defense counsel, judges and academics, government attorneys and those in

69. The entire project was submitted to and approved by the Institutional Review Boards (IRB) of Mercer University and the University of Georgia. IRBs oversee research involving human subjects, protecting, among other things, the confidentiality of subjects’ responses.

private practice. Robert Bennett from Minneapolis and Brian Spears of Atlanta will provide the perspective of plaintiff civil rights attorneys. Muriel Goode-Trufant of New York and John F. Kennedy of Gig Harbor, Washington will speak from their vantage point as lawyers who defend governments and public officials in civil rights litigation. Edward Buckley from Atlanta and Barry Roseman from Denver represent plaintiffs in employment discrimination cases. They will be joined by Maureen McClain of San Francisco and Richard Alfred of Boston, who defend such claims.

Professors Lewis and Eaton will moderate; Professor Yoon will suggest lessons from his study of the New Jersey rule; Professor Cooper will offer the perspective of a Federal Rules Advisory Committee Reporter who witnessed an ill-fated attempt to amend Rule 68; and Judge Schwarzer will comment on the fate of his own Rule 68 proposal and, more generally, provide the view of a veteran trial judge and Federal Rules expert on the untapped potential of current Rule 68. The panel as a whole should shed light on our mystery: Why is Rule 68 apparently underutilized, and what, if anything, can or should be done about it?
