

---

---

## LET'S SETTLE THIS: A PROPOSED OFFER OF JUDGMENT RULE FOR PENNSYLVANIA \*

### I. INTRODUCTION

The American judicial system faces numerous challenges, including backlogged court calendars, rising legal expenses, sparse judicial resources, and limited access to the courts for all potential litigants.<sup>1</sup> Attorneys' fees and the responsibility for paying them are central factors preventing access to the courts.<sup>2</sup> In England, the English Rule, or the "loser pays" rule, is utilized where the losing party pays the attorneys' fees and other costs of the prevailing party.<sup>3</sup> In contrast, the American Rule, the general rule used in courts in the United States, provides that litigants will pay their own attorneys' fees regardless of the outcome of the case.<sup>4</sup>

One mechanism used by federal courts to help address some of the concerns with the judicial system is Federal Rule of Civil Procedure 68 ("Rule 68").<sup>5</sup> Enacted in 1938, Rule 68, also known as an offer of judgment rule, is a form of fee shifting that "serves as a hybrid of the English and American rules."<sup>6</sup> Under Rule 68, a defendant may make an offer to the plaintiff for judgment to be taken against the defendant.<sup>7</sup> If the plaintiff accepts the offer, judgment is entered for the amount of the offer.<sup>8</sup> If the plaintiff rejects the offer, and recovers less than the amount offered at trial, the plaintiff must pay for the defendant's post-offer costs and cannot recover his own post-offer costs.<sup>9</sup> The purpose of Rule 68 is to promote settlement,<sup>10</sup> and it is the only federal rule

---

\* Alexander G. Osevala, J.D. Candidate, Temple University Beasley School of Law, 2013. I first need to thank my parents, whose unwavering love and support have provided me with countless opportunities and gotten me to where I am today. I also must thank Professor David Sonenshein for his wisdom and guidance and for taking the time to work with me throughout the entire writing process. Finally, my sincerest gratitude goes to the staff and editorial board of the *Temple Law Review*, especially Michelle Modery, Brittany Wilson, Dan Mozes, and Nikos Kaplanov, whose tireless work and effort greatly contributed to making this Comment a success.

1. See Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs By Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 814 (1984) (listing some problems with the American court system).

2. Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 717-18 (2010).

3. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the "Odd Man Out" in How it Pays its Lawyer?*, 16 ARIZ. J. INT'L & COMP. L. 361, 403 (1999).

4. Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1863 (1998).

5. Varon, *supra* note 1, at 814.

6. Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 162 (2006).

7. FED. R. CIV. P. 68(a).

8. *Id.*

9. *Id.* 68(d).

of any kind that directly inflicts consequences upon a litigant who irrationally refuses to settle.<sup>11</sup>

Despite its ambitious goal, Rule 68 has proven to have a minimal effect on encouraging settlement.<sup>12</sup> A major criticism of Rule 68 is that the penalty for rejecting an offer is too weak to induce settlement, as Rule 68 only includes minimal taxable court costs and leaves out the most expensive item in the litigation, attorneys' fees.<sup>13</sup> Other critiques of Rule 68 are that the rule is only available for use by defendants, it requires a judgment to be entered rather than a settlement, and the timing requirements make pragmatic use of the Rule difficult.<sup>14</sup> As a result of this criticism, scholars have written proposals to amend Rule 68,<sup>15</sup> and most states have come up with their own variation of the Rule.<sup>16</sup> However, Pennsylvania is one of the six states that does not have an offer of judgment rule in its Rules of Civil Procedure.<sup>17</sup> In the absence of such a rule, this Comment will propose an offer of judgment rule for Pennsylvania that is well equipped to promote settlement and address the problems with the American Rule, the English Rule, and Rule 68.

Part II.A of this Comment provides an overview of the English Rule, exceptions to the English Rule, and situations in which the English Rule is waived. This Part also addresses the benefits and criticisms of the English Rule. Part II.B offers an overview of the American Rule, including its exceptions. This Part also provides an explanation of how the contingency fee system developed as a response to concerns about the American Rule. Finally, this Part discusses the benefits and criticisms associated with the American Rule and several scholarly proposals to amend the American Rule. Part II.C presents an explanation of Federal Rule 68. This Part also addresses the major criticisms of Rule 68 and the scholarly proposals to amend it. Finally, this Part provides

---

10. Jay Horowitz, *Rule 68: The Settlement Promotion Tool That Has Not Promoted Settlements*, 87 DENV. U. L. REV. 485, 485 (2010).

11. Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 869 (2007).

12. 12 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3001, at 67 (2d ed. 1997).

13. Robert G. Bone, "To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure, 102 NW. U. L. REV. 1561, 1566 (2008). The "costs" referenced to in Rule 68 are costs awarded pursuant to FED. R. CIV. P. 54(d)(1) and are itemized in 28 U.S.C. § 1920:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2006 & Supp. II 2008).

14. Bone, *supra* note 13, at 1562.

15. See *infra* Part II.C.3 for scholarly proposals to amend Rule 68.

16. See *infra* Part II.C.4 for state offer of judgment statutes.

17. See *infra* Part II.C.4 for description of which states have offer of judgment statutes.

a fifty-state survey of state offer of judgment rules.

Part III.A of this article proposes an offer of judgment rule for Pennsylvania (Proposed Rule 68). Part III.B explains Proposed Rule 68 and defends its most contentious provisions. Part III.B.1 discusses how Proposed Rule 68 will encourage settlement, reward litigants who make reasonable offers, and not suppress a party's ability to bring a meritorious suit or advance a valid defense. Part III.B.2 clarifies why it is necessary to include attorneys' fees in the sanctions imposed by Proposed Rule 68. Part III.B.3 explains how Proposed Rule 68 makes it easier for litigants to accurately create offers, examine offers, and estimate whether they will be subject to sanctions if they decline an offer. Part III.B.4 describes Proposed Rule 68's margin of error provision and how it will encourage litigants to use the rule. Part III.B.5 explains how Proposed Rule 68's counteroffer provision further promotes the goal of settlement. Part III.B.6 discusses Proposed Rule 68's option to request a judicial conference before accepting or declining an offer and how the judge can be a valuable asset in facilitating settlement negotiations between the parties. Part III.B.7 describes the sliding percentage scale Proposed Rule 68 uses to determine the amount of post-offer attorneys' fees to be awarded, and how this scale accurately reflects the objective of encouraging settlement and punishing litigants who unreasonably refuse to settle. Finally, Part III.C explains the inadequacies of the potential criticisms of Proposed Rule 68.

## II. OVERVIEW

### A. *The English Rule*

The English Rule, referred to as the "loser pays" rule, is a two-way fee-shifting system in which the losing party pays the attorneys' fees and other costs of the prevailing party.<sup>18</sup> The two-way fee-shifting rule applies whether the plaintiff or the defendant loses.<sup>19</sup> In contrast, under a one-way fee-shifting rule, either the plaintiff or the defendant is the beneficiary of the rule, and only when that party prevails are the fees shifted in its favor.<sup>20</sup> It is important to note "that legal costs overseas are almost always lower than in the [United States], because of lower or nonexistent discovery costs" and statutory tariffs that limit the amount attorneys can charge their clients.<sup>21</sup>

---

18. Christopher R. McLennan, Note, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 FLA. COASTAL L. REV. 357, 369 (2011). Although it is referred to as the English Rule, many countries around the world other than the United States follow a similar rule. See Sherman, *supra* note 4, at 1863 (noting adherence to English Rule in many European nations).

19. Davis, *supra* note 3, at 403.

20. *Id.*

21. *Id.* at 405. This decreases the amount of attorneys' fees litigants are obligated to pay to the opposing side. *Id.*

### 1. Exceptions to the English Rule

The English Rule has three main exceptions.<sup>22</sup> The most significant exception forces each party to bear its own costs in small-claims disputes.<sup>23</sup> The reason for this exception was to “encourage private claimants to bring small claims without legal representation, for even if they lost, they would not have to pay the costs of the other side.”<sup>24</sup> A second exception compels each party to pay its own costs in tribunals, such as the industrial tribunals where litigants bring claims for unfair dismissal, equal pay, and redundancy.<sup>25</sup> The third exception arises when one party receives legal aid.<sup>26</sup> If a privately funded party prevails over a legally aided party, the former will not normally receive compensation for legal costs against the legal aid fund.<sup>27</sup>

### 2. Waiver of the English Rule

Additionally, under the English Rule fee shifting is not automatic; courts have a significant amount of discretion to determine whether to award fees at all, and if awarded, the amount of the fees.<sup>28</sup> Professor Werner Pfennigstorf identified nine types of cases that can qualify for a waiver of the English Rule<sup>29</sup>:

- 1) “Unprovoked action”: if a defendant, who has not provoked the plaintiff’s resort to legal action, offers a settlement before trial, but the plaintiff proceeds to trial anyway and wins, the plaintiff will often be denied recovery of costs.<sup>30</sup>
- 2) “Excusable ignorance of material facts”: if the plaintiff prevails on facts the defendant did not know and could not have been expected to know, attorneys’ fees may not be awarded.<sup>31</sup>
- 3) “Substantial mutual doubts about facts”: if neither party can justifiably agree about material facts and litigate in good faith, the court may split the costs between the parties.<sup>32</sup>

22. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the “American Rule” and “English Rule”*, 15 *IND. INT’L & COMP. L. REV.* 583, 591 (2005).

23. Geoffrey Woodroffe, *Loser Pays and Conditional Fees—An English Solution?*, 37 *WASHBURN L.J.* 345, 346 (1998).

24. *Id.* at 347. When small claims are brought, they are referred to arbitration by a district judge, who adopts an informal, inquisitorial style. *Id.* Even if a successful plaintiff does decide to retain counsel, he or she will not be able to recover legal costs and will be limited to court fees plus limited expenses. *Id.*

25. *Id.* Industrial tribunals, often referred to as employment tribunals, are independent judicial bodies that settle disputes between employers and employees over issues such as unfair dismissal, redundancy payments, and discrimination. See, e.g., *Employment Tribunals Guidance*, MINISTRY OF JUSTICE, <http://www.justice.gov.uk/tribunals/employment/> (last updated Sept. 21, 2012) (describing jurisdiction and procedure of U.K. employment tribunals).

26. Woodroffe, *supra* note 23, at 347.

27. *Id.*

28. Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 37, 47 (1984).

29. *Id.* at 49–54.

30. *Id.* at 49.

31. *Id.* The Swedish code permits the costs to be split among the parties in this situation. *Id.*

32. *Id.* at 49–50. A disagreement about the interpretation of a contract is often mentioned in this context. *Id.* at 50.

- 4) “Doubts about the law”: if the law is unclear or changes during the trial, the reimbursement of legal fees can be waived.<sup>33</sup>
- 5) “Appeals”: if a party prevails in a lower court and subsequently loses an appeal, the victor in the lower court may not be able to recover his or her fees.<sup>34</sup>
- 6) “Vexatious actions”: if the court cannot dismiss an action on legal grounds, but it finds the case to be oppressive or vexatious, it will often award only token damages and deny reimbursement of costs.<sup>35</sup>
- 7) “Unnecessary procedures”: where one party imposes costs on another party “by unnecessary or uneconomical procedural acts or motions, it is not only barred from demanding reimbursement for its own costs, but also must reimburse the other party, regardless of the outcome.”<sup>36</sup>
- 8) “Actions among relatives”: this exception recognizes the “special economic and social ties and dependencies” that exist among relatives.<sup>37</sup>
- 9) “Matters not subject to party disposition”: where the law, for public policy reasons, requires a formal decision by the court and does not recognize private agreements or settlements among the parties.<sup>38</sup>

### 3. Advocates of the English Rule

Proponents of the English Rule assert that its main benefit is that it fully compensates successful parties.<sup>39</sup> Defendants who have not committed a legal wrong are not forced to incur expenses to exonerate themselves, and plaintiffs who prevail collect the entirety of the award without having to sacrifice a substantial portion to pay their attorneys.<sup>40</sup>

Another justification for the English Rule is that it deters frivolous litigation.<sup>41</sup> England is less litigious than the United States<sup>42</sup> because the threat of losing and paying a defendant’s legal costs forces plaintiffs to more carefully assess their cases.<sup>43</sup> Along

---

33. *Id.* at 50. Italian courts have recognized this as an exception, whereas Austrian and German courts are divided on the issue. *Id.*

34. *Id.* “[T]he general rule is that all costs incurred at all levels follow the eventual outcome of the case.” *Id.*

35. *Id.* at 51.

36. *Id.* An example of this is when a defendant fails to appear at the first hearing and loses by default judgment but later presents a good defense and wins reinstatement and dismissal. *Id.*

37. *Id.* at 53.

38. *Id.* An example of this is a no-fault divorce.

39. Davis, *supra* note 3, at 405. This comes from the Roman perspective that the loser of a lawsuit had committed a wrong against the winner by insisting on a position that was invalid. *Id.* at 404.

40. Pfennigstorff, *supra* note 28, at 66–67. “[A] claimant who is forced to resort to court action to enforce his claim again[st] a reluctant debtor is entitled to recover the full value of the claim and should not be expected to be satisfied with a lesser amount because of the necessity of suing. Likewise, one who successfully defends himself against an unjustified claim raised by another person should come out of the experience without financial loss.” *Id.*

41. Root, *supra* note 22, at 605.

42. *Id.* (citing Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always be an England?*, 9 CONN J. INT’L L. 185, 214 (1994)).

43. A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82

the same lines, “[p]unishment for unjustified or undesirable behavior—sometimes in the transaction giving rise to litigation and sometimes in connection with the bringing or conduct of the litigation itself”—is a punitive rationale that supports the rule.<sup>44</sup>

At times, litigation produces benefits beyond those obtained by the successful party by furthering a public interest;<sup>45</sup> yet, under the American Rule, the costs of litigating for any private party may exceed the gains a party may expect.<sup>46</sup> This could deter some plaintiffs from asserting potentially socially beneficial claims.<sup>47</sup> The English Rule, however, helps to solve this problem under the “private attorney general theory” by allowing plaintiffs to recoup their attorneys’ fees, which are at times substantial.<sup>48</sup>

A final, highly contested benefit of the English Rule is that it encourages settlement.<sup>49</sup> Judge Posner argued that the English Rule raises the stakes for the parties involved in litigation, and, in turn, “the expected value of litigation [is] less for risk-averse litigants, which will encourage settlements if risk aversion is more common than risk preference.”<sup>50</sup> Proponents of this view assume that a party is likely to be risk averse rather than risk preferred.<sup>51</sup> Since most litigants are risk averse, “adding the possibility of a fee shift against individual litigants relying on their own resources might well result in a greater tendency to settle claims once pursued than exists under the American rule.”<sup>52</sup>

#### 4. Criticisms of the English Rule

A major criticism of the English Rule is that it treats distinct classes of legal participants differently by deterring frivolous litigation at the expense of plaintiffs of modest financial means that bring meritorious claims.<sup>53</sup> The English Rule can turn out to be financially callous to unsuccessful middle-class plaintiffs who bring meritorious suits.<sup>54</sup> These individuals are at risk because they do not qualify for subsidized assistance, leaving them to cover the cost of an unfavorable result.<sup>55</sup> Many tort

---

GEO. L.J. 397, 402 (1993). “[I]f frivolous plaintiffs have a higher probability of losing than legitimate plaintiffs, making a losing plaintiff pay the winning defendant’s legal costs imposes a higher expected cost on frivolous plaintiffs than on legitimate plaintiffs.” *Id.*

44. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 660.

45. *Id.* at 662.

46. *Id.*

47. *Id.*

48. Davis, *supra* note 3, at 408.

49. Root, *supra* note 22, at 606.

50. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 428 (1973).

51. *Id.*; Root, *supra* note 22, at 606–07.

52. Root, *supra* note 22, at 607 (quoting Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 159 (1984)).

53. Philip Havers, Comment, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 621, 633 (2000); Root, *supra* note 22, at 607.

54. Root, *supra* note 22, at 6072–08.

55. *Id.* at 608.

defendants are corporations and insurance companies with the assets and budgets to pay the costs if they lose;<sup>56</sup> however, “[a]n individual or small business with limited means . . . is likely to be more severely affected by the risk than a well-heeled opponent, especially one who is a repeat player . . . capable of spreading risk over a large number of cases.”<sup>57</sup>

The other major criticism of the English Rule is that it actually decreases the chance of settlement.<sup>58</sup> Critics argue that litigants are overly optimistic about their chances at trial and in order to incur no legal costs, will proceed to trial assuming victory.<sup>59</sup> This is in stark contrast to the theory that litigants are risk averse, asserted by the proponents of the English rule.<sup>60</sup> An additional critique points to the American Rule, where if both parties expect success,

they will still settle in cases where the cost of victory at trial is more than the cost of settling; whereas, the “English Rule” would encourage litigants to proceed to trial in order to have a full recovery in the case of the plaintiff, or no loss in the case of the defendant.<sup>61</sup>

Even when parties are not certain about victory, under the English Rule their viewpoints regarding the outcome of the case will still affect their willingness to offer or accept a settlement.<sup>62</sup> If each party believes it has a better than fifty percent chance of winning, the likelihood of indemnity from the other side will cause the plaintiff to demand more and the defendant to offer less, thereby reducing the possibility of settlement.<sup>63</sup>

#### B. *The American Rule*

Under the American Rule, parties to litigation will bear the cost of their own attorneys’ fees, whether or not they prevail in the dispute.<sup>64</sup> Originally, the United States adopted the English Rule, and allowed a prevailing party to collect the cost of attorneys’ fees from the party’s opponent.<sup>65</sup> However, in 1796 the Supreme Court determined the English Rule was not an appropriate manner in which to allocate

---

56. Havers, *supra* note 53, at 633.

57. Sherman, *supra* note 4, at 1871. An example of a repeat player is an insurance company. *Id.*

58. Root, *supra* note 22, at 609.

59. *Id.*

60. Posner, *supra* note 50, at 428.

61. Root, *supra* note 22, at 609. Judge Schwarzer explained this assertion by saying:

[U]nder the American [R]ule, if the plaintiff firmly believed he or she would recover \$10,000, and the defendant firmly believed there would be no recovery, but each anticipated having to spend \$6,000 to take the case through trial, the parties might enter settlement discussions anyway, because even a \$5,000 settlement would leave each party in better financial shape than a trial. Yet under the loser-pays rule, the argument goes, litigants might dig in since each anticipates no net loss following a verdict.

William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 153 (1992).

62. Root, *supra* note 22, at 609-10.

63. *Id.* at 610.

64. Sherman, *supra* note 4, at 1863.

65. McLennan, *supra* note 18, at 365-66; Root, *supra* note 22, at 584.

attorneys' fees.<sup>66</sup>

### 1. Exceptions to the American Rule

Statutory exceptions began to emerge to the American Rule in the twentieth century.<sup>67</sup> The exceptions grew in number and were mainly based on the desire to incentivize meritorious litigation and disincentivize frivolous litigation.<sup>68</sup> The general categories to the exceptions are (1) contracts, (2) bad faith, (3) common fund, (4) substantial benefit doctrine, (5) contempt, and (6) fee shifting statutes.

#### a. Contracts

A contract between parties may allow for the shifting of attorneys' fees if litigation arises from a dispute over the contract.<sup>69</sup> This exception arose due to the prevalence of the laissez-faire doctrine in the nineteenth century.<sup>70</sup> Courts were initially hesitant to uphold these provisions;<sup>71</sup> however, they usually conceded to the wishes of the parties.<sup>72</sup> Some typical contractual agreements that use fee-shifting provisions include promissory notes,<sup>73</sup> bills of sale,<sup>74</sup> mortgage instruments,<sup>75</sup> and insurance contracts.<sup>76</sup> However, courts disfavor contractual clauses that stipulate the payment of attorneys' fees and may refuse to enforce the provisions that are contrary to public policy, for example, when the more powerful party drafts the document.<sup>77</sup>

---

66. See *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (insisting that attorneys' fees could not be recovered as a part of costs because "[t]he general practice of the United States is in opposition to it" and deviations from that general practice should be initiated by the legislature).

67. Lindsey Simmons-Gonzalez, Comment, *Abandoning the American Rule: Imposing Sanctions on an Empty Head Despite a Pure Heart*, 34 OKLA. CITY U. L. REV. 307, 308 (2009).

68. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 29 (1984).

69. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1578 (1993).

70. *Id.* The laissez-faire doctrine advocated a hands-off approach by the government in which business was left free to adjust itself. See Francis Wharton, Note, in 11 FEDERAL REPORTER 201, 201 (1882) (suggesting that government interference in valid contracts creates greater evil than cure sought).

71. Leubsdorf, *supra* note 68, at 24. For example, lenders and landlords often write attorneys' fees clauses into standardized contracts to protect themselves. *Id.*

72. *Id.*

73. See, e.g., *Alland v. Consumers Credit Corp.*, 476 F.2d 951, 955-56 (2d Cir. 1973) (finding that the contract clause in a promissory note permitting "costs of suit" included all costs incurred in pursuing the suit, including attorneys' fees).

74. See, e.g., *Rabon v. Automatic Fasteners, Inc.*, 672 F.2d 1231, 1239 (5th Cir. 1982) (awarding attorneys' fees for bill of sale and noting that prevailing party in indemnity claim is entitled, as a matter of law, to attorneys' fees incurred in defending the principal claim).

75. See, e.g., *United States v. Pioneer Am. Ins. Co.*, 374 U.S. 84, 92 (1963) (holding that while a lien for attorneys' fees was enforceable in a mortgage contract, it was subordinate to a federal tax lien).

76. See, e.g., *Leslie Salt Co. v. St. Paul Mercury Ins. Co.*, 637 F.2d 657, 662 (9th Cir. 1981) (awarding attorneys' fees for services attributable to the amount due under the insurance policy, but denying award for bad faith or its results).

77. See Vargo, *supra* note 69, at 1579 (giving fee shifting provision drafted by insurance company as example of type of fee shifting provision which courts will strike on public policy grounds). For example, courts disfavor insurance agreements where the insurance company makes the insured individual liable for

*b. Bad Faith*

Courts frequently award attorneys' fees for filing a lawsuit in bad faith or when parties, or their counsel, act in bad faith at any point in the course of the proceedings.<sup>78</sup> The Supreme Court expanded this exception to permit both plaintiffs and defendants to recover attorneys' fees when their opponent engages in bad faith conduct.<sup>79</sup> The courts reasoned that equity justifies awarding a successful party attorneys' fees "when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons."<sup>80</sup>

Bad faith can occur in any stage of the proceedings.<sup>81</sup> At the prelitigation stage, courts have awarded attorneys' fees for conduct such as fraud,<sup>82</sup> failure to abide by an arbitration award,<sup>83</sup> breach of a fiduciary duty,<sup>84</sup> failure to abide by the clear dictates of a law,<sup>85</sup> and conscious and continuous attempts to litigate actions barred by res judicata.<sup>86</sup> After a claim is filed, a court may award attorneys' fees to punish parties that unnecessarily prolong or delay the litigation.<sup>87</sup> These actions can include: filing nonmeritorious motions, submitting falsified records, misrepresenting evidence, failing to cooperate in discovery, failing to appear in court, concealing witnesses, and asserting blatantly frivolous defenses.<sup>88</sup>

---

attorneys' fees in suits where the insurance company is successful. *Cf.* *New Market Acquisitions, Ltd. v. Powerhouse Gym*, 154 F. Supp. 2d 1213, 1227 (S.D. Ohio 2001) (stating that attorneys' fees provisions in contracts are more likely to be enforced where parties have equal bargaining power).

78. *Root*, *supra* note 22, at 586. This includes a government party. *Vargo*, *supra* note 69, at 1584.

79. *Vargo*, *supra* note 69, at 1584; *see* *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (stating that the Court has long recognized the award of attorneys' fees to a successful litigant whose opponent has acted in bad faith).

80. *F.D. Rich Co.*, 417 U.S. at 129.

81. *Vargo*, *supra* note 69, at 1585.

82. *Id.*; *see, e.g., Hutto v. Finney*, 437 U.S. 678, 691 (1978) (stating that an award of attorneys' fees against the State Department of Correction in its official capacity was appropriate and served the same purpose as a remedial fine in light of its failure to cure constitutional violations in a prison identified earlier by the district court).

83. *Vargo*, *supra* note 69, at 1585-86; *see, e.g., Int'l Union of Dist. 50 v. Bowman Transp., Inc.*, 421 F.2d 934, 936 (5th Cir. 1970) (awarding attorneys' fees based on "unmistakable national policy" to encourage arbitration and to direct companies to abide by arbitration decisions).

84. *Vargo*, *supra* note 69, at 1585; *see, e.g., Rolax v. Atl. Coast Line R.R. Co.*, 186 F.2d 473, 481 (4th Cir. 1951) (justifying awarding attorneys' fees when union members "of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests").

85. *Vargo*, *supra* note 69, at 1585; *see, e.g., Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 772 (9th Cir. 1986) (holding that the appellant's lawsuit was plainly frivolous and brought only to harass in an action challenging federal tax withholdings in appellant's paycheck).

86. *Vargo*, *supra* note 69, at 1585; *see, e.g., Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 388 (2d Cir. 1985) (declaring that the district court properly awarded attorneys' fees based on the defendant's repeated assertions of baseless positions during two previous hearings), *cert. denied*, 475 U.S. 1084 (1986).

87. *Vargo*, *supra* note 69, at 1586.

88. *Id.* Federal Rule of Civil Procedure 11 imposes sanctions on a party that files a meritless claim. FED. R. CIV. P. 11(c)(1). Rule 37 imposes sanctions when a party fails to abide by discovery or disclosure rules of the court. FED. R. CIV. P. 37(b).

c. *Common Fund Doctrine*

The common fund doctrine provides an exception to the American Rule by “dispersing the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund being drawn from through court order.”<sup>89</sup> In 1882, the Supreme Court in *Trustees v. Greenough*<sup>90</sup> held the Common Fund doctrine to be a valid exception.<sup>91</sup> As recent scholars have explained the holding, three reasons supported the Court’s decision:

1) it would be unjust for the plaintiff to bear all the costs of the litigation when there are other beneficiaries of the same class or group; 2) nonparticipating beneficiaries would have an unfair advantage; and 3) courts of equity historically have awarded attorneys fees from court-controlled funds when the suit of one creditor would benefit other creditors in a bankruptcy proceeding, with the legal fees coming out of the bankrupt assets.<sup>92</sup>

Courts apply the doctrine to an array of situations including antitrust litigation,<sup>93</sup> mass disaster torts,<sup>94</sup> and class actions.<sup>95</sup> In order to apply the doctrine, the litigant must satisfy three requirements: a fund must exist, a court must be capable of exercising control over the fund, and those aided by the litigation must be identifiable.<sup>96</sup>

d. *Substantial Benefit Doctrine*

The substantial benefit doctrine and the common fund doctrine are closely related, because they are both based on the equitable principle that the court should avoid unjustly enriching absent beneficiaries.<sup>97</sup> The key difference is the substantial benefit doctrine usually applies to nonpecuniary benefits.<sup>98</sup> Corporate shareholder suits, in

---

89. Root, *supra* note 22, at 586.

90. 105 U.S. 527 (1881). This case involved the Internal Improvement Fund of Florida, which used proceeds from the sale of state holdings to provide security for railroad bonds. *Greenough*, 105 U.S. at 528. A bondholder for a defunct railroad sued the fund trustees for fraudulent conveyances which wasted the fund’s assets. *Id.* at 528-29. The Supreme Court affirmed the trial court’s award of attorneys’ fees to the successful bondholder and spread the litigation fees and costs among the remaining beneficiaries. *Id.* at 536-37; Vargo, *supra* note 69, at 1580.

91. *Greenough*, 105 U.S. at 537.

92. Root, *supra* note 22, at 586-87 (citing Vargo, *supra* note 69, at 1580).

93. Vargo, *supra* note 69, at 1581; see also Kevin F. Kelly, Comment, *Attorneys’ Fees in Individual and Class Action Antitrust Litigation*, 60 CALIF. L. REV. 1656, 1656 (1972) (discussing the Clayton Act which allows attorneys’ fees to be awarded in antitrust suits because they benefit “the great mass of the people”).

94. See, e.g., *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 758 (E.D. La. August 9, 2011) (discussing the court’s ability to assess common benefit attorneys’ fees in complex tort litigation).

95. See, e.g., *Se. Legal Def. Grp. v. Adams*, 657 F.2d 1118, 1122 (9th Cir. 1981) (discussing that for attorneys’ fees to be awarded under the common fund doctrine there must be an identifiable class benefitting from the litigation) (citing *Hall v. Cole*, 412 U.S. 1 (1973); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970)).

96. Vargo, *supra* note 69, at 1581.

97. *Id.*

98. *Id.*; e.g., *Mills*, 396 U.S. at 396 (holding that an ultimate monetary recovery was not necessary if litigation conferred a substantial benefit to members of an identifiable class); cf. *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 n. 7 (9th Cir. 1977) (explaining that the substantial benefit doctrine, as opposed to the

which shareholders force the corporation to declare a dividend, or attack stock acquisition plans, are typical types of cases that apply the substantial benefit doctrine.<sup>99</sup> Additionally, the substantial benefit doctrine applies in union member actions that usually fall under the Labor-Management Reporting and Disclosure Act of 1959.<sup>100</sup> Suits under this act are similar to shareholder suits because they do not usually result in monetary awards, but rather remedy corrupt or oppressive practices of union officials.<sup>101</sup>

*e. Contempt*

Contempt proceedings are a rarely used exception to the American Rule.<sup>102</sup> In *Toledo Scale Co. v. Computing Scale Co.*,<sup>103</sup> the Supreme Court held that when a party seeks to enforce judgment through contempt proceedings, the moving party can collect attorneys' fees for the enforcement of the contempt order.<sup>104</sup> Courts determine the amount of fee awards and whether the fees should be awarded by considering the willfulness of the contempt.<sup>105</sup> Additionally, courts limit fees to the amount incurred in prosecuting the contempt, but can include time spent investigating the extent of the contempt and time spent on appeal.<sup>106</sup>

*f. Fee-Shifting Statutes*

The final and possibly most significant exception to the American Rule is the statutory shifting of attorneys' fees.<sup>107</sup> There are more than 200 federal and close to 2,000 state statutes that allow the shifting of attorneys' fees,<sup>108</sup> which may be divided into four categories: "(1) civil rights suits,"<sup>109</sup> "(2) consumer protection suits,"<sup>110</sup> "(3)

---

common fund doctrine, applies in cases where funds are not established).

99. Vargo, *supra* note 69, at 1582; *see, e.g.*, *Altman v. Cent. of Ga. Ry. Co.*, 540 F.2d 1105, 1106 (D.C. Cir. 1976) (holding that plaintiff shareholders were entitled to attorneys' fees because the plaintiffs' actions benefitted all shareholders by forcing the railroad to pay a dividend); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1194 (6th Cir. 1974) (holding that plaintiffs benefitted shareholders by filing a derivative suit and delaying the company's risky repurchase plan and thus were entitled to attorneys' fees).

100. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 401-531 (2006)) (providing procedures for reporting and disclosing information between labor union and management to prevent improper practices by labor organizations, employers, labor relations consultants, and labor representatives).

101. Vargo, *supra* note 69, at 1583.

102. Root, *supra* note 22, at 587.

103. 261 U.S. 399 (1923).

104. *Toledo Scale Co.*, 261 U.S. at 427-28. The Supreme Court upheld the sanction of reasonable attorneys' fees against a defeated party who filed suit in another jurisdiction in an attempt to enjoin the sureties on its supersedeas bond. *Id.* at 426.

105. Vargo, *supra* note 69, at 1583-84; *see, e.g.*, *Crane v. Gas Screw Happy Pappy*, 367 F.2d 771, 775 (7th Cir. 1966) (awarding attorneys' fees to appellee based on "flagrant and contumacious character of appellant's defiance" of prior court orders).

106. Vargo, *supra* note 69, at 1584; *e.g.*, *Crane*, 367 F.2d at 776.

107. Root, *supra* note 22, at 588.

108. *Id.*

109. *Id.*; *see, e.g.*, 42 U.S.C. § 3613(c)(2) (2006).

110. Root, *supra* note 22, at 588; *see, e.g.*, 15 U.S.C. § 1692k(a)(3) (stating that when any debt collector

employment suits,”<sup>111</sup> and “(4) environmental protection suits.”<sup>112</sup> Congress has authorized these statutes because “they compel a higher public purpose, and therefore, successful lobbying litigants should not shoulder the cost of advancing American public policy, particularly when their victory does not result in a monetary award.”<sup>113</sup>

## 2. The Contingency Fee System

As a response to the concerns with the American Rule about an individual plaintiff’s limited funds competing against an institutional or corporate defendant, the contingency fee system developed.<sup>114</sup> In a contingency fee system, the plaintiff’s attorney provides financing and insurance for the plaintiff’s lawsuit in exchange for a percentage of the plaintiff’s recovery.<sup>115</sup> Under the traditional hourly rate structure, the plaintiff is responsible for his own attorneys’ fees; however, under the contingency fee system, if the plaintiff does not collect anything, he is not obligated to pay the attorney.<sup>116</sup> The attorney finances the case for the client while it is pending and, if the plaintiff wins, this assumed risk generally entitles the attorney to a larger percentage of the judgment than under a normal hourly rate system.<sup>117</sup>

Critics of the contingency fee system contend that because of the personal financial risk, attorneys cannot devote themselves entirely to achieving justice without accounting for monetary concerns.<sup>118</sup> In fact, the work of contingency fee lawyers is often described as “the management of a *portfolio* of cases.”<sup>119</sup> This means that while the lawyer aims to win each case and gain a positive return on each individual investment, realistically, he only seeks a positive return on the broader portfolio.<sup>120</sup>

---

who fails to comply with any provision of the subchapter and there is a successful action to enforce liability, the debt collector will be liable for “the costs of the action, together with a reasonable attorney’s fee as determined by the court”).

111. Root, *supra* note 22, at 588; *see, e.g.*, 29 U.S.C. § 216(b) (stating that “[t]he court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action”).

112. Root, *supra* note 22, at 588; *see, e.g.*, 42 U.S.C. § 7604(d) (stating that “[t]he court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate”).

113. Root, *supra* note 22, at 588 (footnote omitted) (citing Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers*, 7 WASH. U. J.L. & POL’Y 1, 8 (2001); Leubsdorf, *supra* note 68, at 30).

114. Havers, *supra* note 53, at 624; McLennan, *supra* note 18, 366–67.

115. McLennan, *supra* note 18, at 367.

116. Havers, *supra* note 53, at 624.

117. *Id.* at 624–25. The contingency rates are usually one-third for pretrial settlement, forty percent if the case goes to trial, and up to fifty percent if appeals are required. *Id.*; *see also* LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 13 (1994) (noting that many accident victims gain access to the courts through the contingency fee system where they otherwise would not).

118. *See, e.g.*, Havers, *supra* note 53, at 625 (stating that an attorney gains a personal stake in the litigation due to his or her own motivations arising out of the strong financial interest in the claim).

119. Rosen-Zvi, *supra* note 2, at 729 (quoting HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 11 (2004)).

120. *Id.*; *see also* Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691, 704–05 (2006) (“By pooling the fortunes of plaintiff-clients, contingent fee lawyers aggregate their risks and justify investment of their time and various out-of-pocket expenditures.”).

Contingency fee lawyers diversify their caseloads so that when one plaintiff receives a substantial recovery, the lawyer can offset losses.<sup>121</sup>

The lawyer's incentives may change and his personal stake in the outcome may increase, depending on the time and money invested in a particular case.<sup>122</sup> This is especially true when a case is certain to have a favorable outcome or the financial gain guaranteed is substantially higher than the amount of work to be done on a case.<sup>123</sup> If a defendant offers to settle early in the process, when the plaintiff's attorney has invested little money and effort into the matter, the attorney may be tempted to accept the offer and receive a large fee even though he knows the client is likely to receive a larger payment at the end of a trial.<sup>124</sup> As a result, the attorney receives an extremely high rate at the expense of the client's right to recovery.<sup>125</sup>

Also, the contingency fee system can negatively affect the attorney-client relationship, as the client often ends up recovering less than he originally expected.<sup>126</sup> Often, the client may not be fully aware of the effect a contingency fee agreement has on his judgment due to the complicated nature of contingency fee agreements.<sup>127</sup> These arrangements involve fee structures based on the various stages of the proceedings.<sup>128</sup> Frequently, the attorney receives a sizeable amount for legal costs on top of one-third of the damages.<sup>129</sup> "The net effect of this combined amount for the attorney is that the plaintiff receives only about fifty-percent of the total damages recovered; an amount not properly understood by most plaintiffs when entering into the agreement with the attorney."<sup>130</sup>

### 3. Advocates of the American Rule

Proponents of the American Rule claim the strongest justification for the rule is

---

121. McLennan, *supra* note 18, at 368; Root, *supra* note 22, at 596. *But see* Allison F. Aranson, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT'L L.J. 755, 762 (1992) (noting that contingent fees from successful cases also fund baseless litigation by the same attorneys).

122. Havers, *supra* note 53, at 625–26.

123. *Id.* at 627; *see also* BRICKMAN ET AL., *supra* note 117, at 55 n.24 (noting a case in Texas which compensated each attorney at approximate rate of \$25,000 per hour despite minimal participation).

124. Havers, *supra* note 53, at 626; McLennan, *supra* note 18, at 368. *But see* MODEL RULES OF PROF'L. CONDUCT R. 1.5(a)(6) (2002) (requiring that attorneys' fees should be reasonable, with reasonableness based in part on amount of time attorney invested in case).

125. Havers, *supra* note 53, at 630. As an example, if the attorney puts in 100 hours of work and receives one-third of a \$500,000 settlement, he has, effectively earned \$1,500 an hour for his services. However, had the attorney negotiated harder and taken the case to trial where the payout was \$750,000, but he worked 400 hours in preparing the case for trial, the hourly return would only be approximately \$550.

126. *Id.* at 626.

127. *Id.*; *see also* JOHN STREBY, LET'S TALK MONEY 46 (1987) (describing complex hybrid agreements combining hourly and contingency fees). The Model Rules of Professional Conduct require attorneys to clearly disclose all terms of the contingency fee agreement to the client at the outset of representation. MODEL RULES OF PROF'L. CONDUCT R. 1.5(c).

128. Havers, *supra* note 53, at 626.

129. *Id.*

130. *Id.*

the “American faith in liberal access to the courts for righting wrongs.”<sup>131</sup> This pro-litigation and pro-plaintiff rationale reflects the view that claimants should not be discouraged to pursue meritorious claims through the courts because of the threat of potential substantial penalties for losing.<sup>132</sup> Defendants in lawsuits have increasingly been corporations, business entities, institutions, and governmental bodies that can better budget and sustain the risk of penalties for losing than individual plaintiffs.<sup>133</sup> A “loser pays” rule disproportionately impacts plaintiffs’ access to the courts, because a financially limited individual with a valid, yet not guaranteed, claim may never file a lawsuit because he cannot afford to lose.<sup>134</sup>

#### 4. Critics of the American Rule

Critics of the American Rule argue that the rule is just as likely to deter financially disadvantaged claimants from bringing possible meritorious claims, while also providing a bargaining advantage to parties with superior resources as the English Rule.<sup>135</sup> Considering the price of legal fees today, some see the American Rule as a mechanism for the rich to seek remedies in the courts, while leaving out the poor and middle class who cannot afford to file the suits.<sup>136</sup> Additionally, the rule fails to fully compensate prevailing parties because lawsuits force litigants to spend substantial sums of money to receive what they are legally entitled to.<sup>137</sup> Furthermore, the rule denies prevailing defendants compensation, even when they are victorious in a judgment or receive a favorable settlement.<sup>138</sup> In many cases, individuals with modest means, non-monetary claims, or claims with a small expected payoff cannot retain a high-quality lawyer.<sup>139</sup> The government and big businesses deter low- and average-income individuals from filing suit, as well as coerce them to accept low settlements by “threatening to draw out the litigation indefinitely,” which forces the poorer claimants “to spend huge sums of money” to pursue an indefinite and unguaranteed return.<sup>140</sup>

#### 5. Proposals to Amend the American Rule

As a result of the criticism of the American Rule, several scholars have proposed

---

131. Sherman, *supra* note 4, at 1863.

132. *Id.* at 1864. There are statutes and court rules that shift certain court costs to the losing party; however, these costs are usually much less than attorneys’ fees. *See, e.g.*, 28 U.S.C. § 1920 (2006 & Supp. II 2008) (including filing fees and certain out-of-pocket expenditures as elements of a judgment); FED. R. CIV. P. 54(d)(1) (“Unless a federal statute, these rules, or a court provides otherwise, costs—other than attorneys’ fees—should be allowed to the prevailing party.”).

133. Sherman, *supra* note 4, at 1864.

134. McLennan, *supra* note 18, at 366–67.

135. *Id.*; Havers, *supra* note 53, at 622.

136. Havers, *supra* note 53, at 622.

137. Rosen-Zvi, *supra* note 2, at 741.

138. *Id.*; *see also* Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney’s Fees: Expanding the “Loser Pays” Rule in Texas*, 30 HOUS. L. REV. 1915, 1936 (1994) (stating that attorneys’ fees can severely lessen judgments won by plaintiffs).

139. Rosen-Zvi, *supra* note 2, at 741.

140. *Id.*

amendments to the rule.<sup>141</sup> The first proposal, suggested by Professor Issachar Rosen-Zvi, directs courts to award attorneys' fees to low- and middle-income litigants who prevail against moneyed litigants.<sup>142</sup> However, when the wealthy party prevails, each side is required to pay its own attorneys' fees.<sup>143</sup> The rule covers all civil actions, regardless of the underlying substantive issues or the nature and size of sought-after relief.<sup>144</sup>

Under a second proposal by David Root, when a case is dismissed in the pretrial stage, the losing party is responsible for paying the opponent's costs.<sup>145</sup> The "loser pays" rule would also apply to cases resolved on directed verdicts.<sup>146</sup> Cases that proceed to trial break down into two outcomes.<sup>147</sup> The first outcome, which is the default rule, is that each side must pay its own costs.<sup>148</sup> The second outcome requires the losing party to pay a certain percentage of the winning party's costs, under the discretion of the judge.<sup>149</sup>

A final proposal by Philip Havers utilizes a two-tiered approach to fee shifting.<sup>150</sup> Cases that settle in the discovery or pre-discovery phase are subject to hourly rate billing.<sup>151</sup> However, if settlement discussion fails and the case goes to trial, the lawyer forfeits collection of the hourly rate and the case becomes subject to a contingency fee.<sup>152</sup>

### C. Offer of Judgment

#### 1. Explanation of Federal Rule of Civil Procedure 68

Offer of judgment rules are a form of fee shifting recognized in the United States and serve "as a hybrid of the English and American [R]ules."<sup>153</sup> Under Rule 68, a defendant may make an offer to the plaintiff for judgment to be taken against the defendant.<sup>154</sup> If the plaintiff accepts the offer, judgment is entered for the amount of the

---

141. *E.g., id.* at 739; Havers, *supra* note 53, at 644-45; Root, *supra* note 22, at 611.

142. Rosen-Zvi, *supra* note 2, at 739. A concern with this proposal is that it does not explain who decides if a plaintiff qualifies as lower- or middle-class, nor does it describe the factors that go into making the decision.

143. *Id.*

144. *Id.*

145. Root, *supra* note 22, at 611.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* This portion of the proposal is analogized to the imposition of attorneys' fees in Tax Court where the sanction is only imposed in frivolous or unreasonable claims. *Id.* at 611 n.228. Therefore, the author explains that parties in meritorious cases would likely not be subject to sanctions. *Id.*

150. Havers, *supra* note 53, at 644.

151. *Id.*

152. *Id.* at 645 (suggesting that even if settlement occurs at this stage, case should still be subject to traditional contingency fee system).

153. Yoon & Baker, *supra* note 6, at 162.

154. FED. R. CIV. P. 68.

offer.<sup>155</sup> If the plaintiff rejects the offer, and recovers less at trial than the amount offered, the plaintiff must pay for the defendant's post-offer costs and cannot recover his own post-offer costs.<sup>156</sup> Generally, only defendants can serve an offer of judgment because plaintiffs are not defending against a claim.<sup>157</sup> However, some courts have allowed plaintiffs to make Rule 68 offers against counterclaims.<sup>158</sup> Rule 68 is the offer of judgment rule that has received the most attention and criticism from practitioners and scholars.<sup>159</sup> Rule 68 is the only federal rule that deals with penalties for an unreasonable refusal to settle.<sup>160</sup>

According to the Supreme Court, "[t]he plain purpose of Rule 68 is to encourage

155. *Id.*

156. *Id.* The "costs" referenced to in Rule 68 are costs awarded pursuant to FED. R. CIV. P. 54(d)(1) and are itemized in 28 U.S.C. § 1920:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2006 & Supp. II 2008),

157. Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 382 (1997). In *Klawes v. Firestone Tire & Rubber Co.*, a plaintiff in a diversity suit filed an offer and demand for settlement. 572 F. Supp. 116 (E.D. Wis. 1983). The defendant argued that Rule 68 only permits defendants to make offers in diversity suits. *Id.* at 118. The court agreed and granted the defendant's motion to strike the offer of judgment. *Id.* at 119.

158. Bonney et al., *supra* note 157, at 383; *see, e.g.*, *Agola v. Hagner*, 678 F. Supp. 988, 995 (E.D.N.Y. 1987) ("It is undisputed that plaintiffs are entitled to costs . . . under Rule 68 based on an offer of judgment on defendants' counterclaims made by plaintiffs.").

159. *See, e.g.*, Horowitz, *supra* note 10, at 485–86 (stating there is no incentive for settling when a party who refuses to settle is only threatened with the possibility of paying the prevailing party's court costs which often amount to \$1,000 or less).

160. Danielle M. Shelton, *supra* note 11, at 869. Rule 68 reads in full:

- (a) Making an Offer; Judgment on an Accepted Offer. At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
- (b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
- (c) Offer After Liability is Determined. When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
- (d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

FED. R. CIV. P. 68.

settlement and avoid litigation.”<sup>161</sup> The Supreme Court in *Delta Air Lines, Inc. v. August*<sup>162</sup> explained this object by stating:

Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.<sup>163</sup>

The theory is that the rule will persuade both parties to carefully consider the risks and costs associated with litigation, and hopefully force plaintiffs to “think very hard” before rejecting a settlement offer.<sup>164</sup> Additionally, the rule is said to be neutral in that it favors neither plaintiffs nor defendants.<sup>165</sup>

The Supreme Court has issued two major decisions that have significant effects on Rule 68.<sup>166</sup> In the first case, *Delta Air Lines*,<sup>167</sup> the Court addressed whether the words “the judgment that the offeree finally obtains”<sup>168</sup> found in Rule 68, “should be construed to encompass a judgment *against* the offeree as well as a judgment *in favor* of the offeree.”<sup>169</sup> In *Delta Air Lines*, the defendant made an offer of judgment under Rule 68 in a nominal amount to the plaintiff, who refused the offer.<sup>170</sup> At trial, the defendant prevailed on the merits, which the defendant believed triggered the application of the Rule and forced the plaintiff to pay post-offer costs.<sup>171</sup> The Supreme Court held that the defendant was not entitled to post-offer costs pursuant to Rule 68, even though the defendant had been cleared of all liability.<sup>172</sup> The Court stated that the denial of the defendant’s application for post-offer costs was supported by the “interpretation of the language of the Rule and its clear purpose.”<sup>173</sup>

The second important case is *Marek v. Chesny*,<sup>174</sup> in which the Supreme Court was faced with the question of whether attorneys’ fees incurred after an offer of judgment under Rule 68 must be paid by the defendant in a claim under a civil rights

---

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

162. 450 U.S. 346 (1981).

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

164. Bone, *supra* note 13, at 1566 (quoting *Marek*, 473 U.S. at 11). Such a rule should implicitly favor efficiency of the judiciary. See *Marek*, 473 U.S. at 10 (stating that Rule 68 “serve[s] as a disincentive for the plaintiff’s attorney to continue litigation after the defendant makes a settlement offer”).

165. *Marek*, 473 U.S. at 10. The rule should be fair to the plaintiff because it should encourage defendants to make reasonable offers as they will not free themselves of costs if the judgment recovered is more than the offer. WRIGHT ET AL., *supra* note 12, § 3001 at 66–67. It is also fair to the defendant because it allows the defendant to avoid court costs by offering to settle. *Id.* at 67.

166. Horowitz, *supra* note 10, at 495.

167. 450 U.S. 346 (1981).

168. FED. R. CIV. P. 68(d).

169. *Delta Air Lines*, 450 U.S. at 348.

170. *Id.*

171. *Id.* at 348–49.

172. *Id.* at 352.

173. *Id.* at 356.

174. 473 U.S. 1 (1985).

statute, when the plaintiff recovered a judgment less than the offer.<sup>175</sup> Pursuant to Rule 68, the defendant made an offer of \$100,000.<sup>176</sup> The plaintiff rejected the offer and recovered less than \$100,000 at trial.<sup>177</sup> The defendant argued that Rule 68 barred the plaintiff from recovering post-offer attorneys' fees that the plaintiff would have otherwise been entitled to recover under the fee-shifting provisions of the underlying civil rights statute.<sup>178</sup> The Court agreed, reasoning that

the most reasonable inference is that the term "costs" in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all 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 statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.<sup>179</sup>

This interpretation meant that the plaintiff forfeited all of his post-offer costs, including attorneys' fees.<sup>180</sup>

## 2. Criticism of Rule 68

Despite its theoretical goals, Rule 68 has proven to have a minimal effect on encouraging settlement.<sup>181</sup> The major criticism of the Rule is that the penalty for rejecting an offer is too weak, as Rule 68 only includes minimal taxable court costs.<sup>182</sup> Attorneys' fees, the most expensive item in litigation, are noticeably absent from inclusion in these costs.<sup>183</sup> A second issue with the Rule is that only defendants are able to take advantage of the Rule.<sup>184</sup> The Rule does not give plaintiffs the opportunity to pressure defendants with the cost-shifting threat.<sup>185</sup> Third, Rule 68 requires a defendant to accept formal judgment against him, rather than agree to a settlement.<sup>186</sup>

There is a significant difference between offers of settlement and offers of judgment.<sup>187</sup> Settlements often contain a confidentiality clause to prevent public disclosure, whereas judgments do not.<sup>188</sup> Defendants may fear that accepting an

---

175. *Marek*, 473 U.S. at 3.

176. *Id.* at 3–4.

177. *Id.* at 4.

178. *Id.* The statute in this case was the § 1983 civil rights statute. 42 U.S.C. § 1983 (2006).

179. *Marek*, 473 U.S. at 9.

180. *Id.*

181. WRIGHT ET AL., *supra* note 12, § 3001 at 67.

182. Bone, *supra* note 13, at 1566.

183. *Id.* at 1567. Attorneys' fees are recoverable in some instances but only when a statute or contract defines attorneys' fees as a cost and allows for the shifting of these fees in favor of the prevailing party. Philip Michael Thompson, *Sanctioning Hard Bargaining: A Critique of State Offer-of-Settlement Rules*, 44 GA. L. REV. 1133, 1141 (2010).

184. Bone, *supra* note 13, at 1567.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 1567–68.

adverse judgment could negatively affect their public perceptions and marketability.<sup>189</sup> Additionally, some defendants are concerned that making a public declaration of wrongdoing might encourage others to sue.<sup>190</sup> Finally, Rule 68 offers must be made at least fourteen days before trial, but “looking purely at the policies embodied in the Rule, one wonders why there should be any restriction on when offers of judgment can be made.”<sup>191</sup> Parties could have more incentive to make and accept offers just before trial or after trial has begun, because, at that point, the parties will likely have a better assessment of the case’s realities.<sup>192</sup>

### 3. Proposals to Amend Rule 68

As a result of the vast amount of criticism directed at Rule 68, scholars have asserted proposals in order to address some of these concerns.<sup>193</sup> These proposals deal with issues including: the unilateral nature of Rule 68,<sup>194</sup> imposing attorneys’ fees as sanctions,<sup>195</sup> allowing for a margin of error when determining when sanctions are necessary,<sup>196</sup> a cap on the reasonable amount of attorneys’ fees allowed,<sup>197</sup> and the fairness of imposing fees on an underprivileged losing party.<sup>198</sup>

Judge William W. Schwarzer proposed an amendment to Rule 68 that would allow both plaintiffs and defendants to make offers, would extend the time period for acceptance of the offer, and would include reasonable attorneys’ fees in the recovery of costs.<sup>199</sup> Additionally, recoverable costs would be limited to the amount of the judgment and “limited to what is needed to make the offeror whole.”<sup>200</sup> The proposal

189. *Id.* at 1568.

190. Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 350 (2007).

191. Bone, *supra* note 13, at 1568 (quoting *Greenwood v. Stevenson*, 88 F.R.D. 225, 228 (D.R.I. 1980)).

192. Anna Aven Sumner, *Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified*, 52 DUKE L.J. 1055, 1059 (2003).

193. Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, 579-82 (2009); Richard Mincer, *Rule 68 Offer of Judgment: Sharpen the Sword for Swift Settlement*, 25 U. MEM. L. REV. 1401, 1430-33 (1995); Schwarzer, *supra* note 61, at 149; Sherman, *supra* note 4, at 1885 (citing A.B.A. Sec. Torts & Ins. Prac., *Offer of Judgment Procedure*, 121 NO. 1 ANNU. REP. A.B.A. 527, 529 (1996)); Thompson, *supra* note 183, at 1160-61.

194. *See, e.g.*, Schwarzer, *supra* note 61, at 149 (allowing plaintiffs, as well as defendants, to make offers of judgment).

195. Lewis & Eaton, *supra* note 193, at 574-75; Mincer, *supra* note 193, at 1431; Schwarzer, *supra* note 61, at 149; Thompson, *supra* note 183, at 1161; Sherman, *supra* note 4, at 1885 (citing A.B.A. Sec. Torts & Ins. Prac., *supra* note 196, at 529).

196. Sherman, *supra* note 4, at 1885 (citing A.B.A. Sec. Torts & Ins. Prac., *supra* note 193, at 529).

197. Lewis & Eaton, *supra* note 193, at 574-75; Mincer, *supra* note 193, at 1431; Schwarzer, *supra* note 61, at 149; Thompson, *supra* note 183, at 1161.

198. Schwarzer, *supra* note 61, at 149; Sherman, *supra* note 4, at 1890 (citing A.B.A. Sec. Torts & Ins. Prac., *supra* note 193, at 529).

199. Schwarzer, *supra* note 61, at 149.

200. *Id.* The proposed rule works like this: assume a defendant offers to settle for \$50,000, but the plaintiff rejects the offer and obtains a judgment for \$40,000. The defendant has reasonable post-offer costs of \$20,000. Since the judgment was not more favorable to the plaintiff than the defendant’s offer, the defendant would be entitled to recover post-offer costs from the plaintiff. However, the defendant is \$10,000 better off

also gives the court discretion to reduce costs where necessary to avoid undue hardship on a party.<sup>201</sup>

The American Bar Association also proposed an adjusted Rule 68 that made the Rule available to both parties and allowed shifting of attorneys' fees.<sup>202</sup> The proposal required that an offer not be made prior to sixty days after the service of the complaint and that the offer must remain open for at least sixty days.<sup>203</sup> The plan also allowed a twenty five percent margin of error for determining whether a judgment is less favorable than the offer.<sup>204</sup> Finally, the proposal gave courts discretion to reduce or eliminate cost shifting to avoid undue hardship, promote justice, or for any other compelling reason to seek judicial resolution.<sup>205</sup>

A third proposal by Philip Thompson insists that if a plaintiff serves an offer of judgment upon a defendant, the plaintiff must also file a statement of the total damages the plaintiff seeks at trial with the offer within ten days of the defendant's offer.<sup>206</sup> The rule stipulates that if an offeree obtains a less favorable judgment at trial, the award of reasonable attorneys' fees to the offeror cannot exceed forty percent of the total amount of recovery sought by the plaintiff.<sup>207</sup> If the offer is made after trial begins, the offeror is limited to twenty percent of the amount originally sought by the plaintiff.<sup>208</sup> Additionally, the offeror can elect to recover double the reasonable costs incurred after the most recent offer in lieu of attorneys' fees.<sup>209</sup>

A fourth proposal by Professors Harold Lewis and Thomas Eaton precludes parties from submitting offers of judgment until after the defendant files an answer to the complaint.<sup>210</sup> The plan allows prevailing plaintiffs to receive a presumptive, but discretionary, twelve percent multiplier on fees if they recover more at trial than what they offered.<sup>211</sup> Additionally, defendants are awarded mandatory double costs, excluding attorneys' fees, when the plaintiff recovers less at trial than the defendant's

---

under the \$40,000 judgment than the \$50,000 offer. Therefore, the amount by which the offeror is actually better off after trial than had the offer been accepted, \$10,000, is subtracted from the defendant's costs of \$20,000 and the defendant is left to recover \$10,000 in costs. Additionally, if the defendant's post-offer costs were \$60,000, the defendant could not recover more than \$40,000, the amount of the judgment.

201. *Id.* at 149–150.

202. Sherman, *supra* note 4, at 1885 (citing A.B.A. Sec. Torts & Ins. Prac., *supra* note 193, at 529).

203. *Id.* at 1886–87.

204. *Id.* at 1888. For example, if the defendant makes an offer of \$100,000 and the plaintiff refuses, the plaintiff must recover at least \$75,000.01 to avoid sanctions. By contrast, if the plaintiff makes an offer of \$100,000 and the defendant refuses the offer, the plaintiff must recover at least \$125,000.01 to impose sanctions on the defendant.

205. *Id.* at 1890.

206. Thompson, *supra* note 183, at 1161.

207. *Id.* For example, if the plaintiff sought damages of \$100,000 and recovered less at trial than the pre-trial offer made by the defendant, the defendant's recovery of attorneys' fees would be limited to \$40,000.

208. *Id.* If the plaintiff sought \$100,000 in damages and recovered less at trial than the offer made by the defendant during trial, the defendant's recovery of attorneys' fees would be capped at \$20,000.

209. *Id.* These costs are not limited by the percentage scheme. *Id.*

210. Lewis & Eaton, *supra* note 193, at 579.

211. *Id.* at 574–75. The hope is to motivate plaintiffs to initiate the offer process. *Id.* For example, if a plaintiff receives a post-offer fee award of \$100,000, he would be entitled to an additional \$12,000 award.

offer.<sup>212</sup> When defendants prevail on the merits, they are entitled to triple costs, excluding attorneys' fees.<sup>213</sup> Finally, when an offer and counteroffer are made, the rule takes the average of the two offers and applies a ten percent margin of error to either side to determine if the rule is triggered.<sup>214</sup>

A final proposal by Richard Mincer prevents parties from submitting offers of judgment until sixty days after service of the summons and complaint.<sup>215</sup> The rule allows shifting of reasonable attorneys' fees; however, the award of fees and costs cannot exceed the middle value of: the amount of the judgment, the difference between the judgment and the offeror's final offer, and the gap between the offeror's final offer and the offeree's final offer.<sup>216</sup> Additionally, in a case in which the defendant prevails on the merits, the plan limits the amount of recoverable costs and fees to one-half of the amount of the plaintiff's most recent offer, or one-half of the total amount sought in the complaint if the plaintiff fails to make such an offer.<sup>217</sup>

#### 4. State Offer of Judgment Rules

Most states have their own versions of an offer of judgment rule. States that have offer of judgment rules generally fit into one of five categories: (1) those that operate very similarly to Rule 68 with only time-limit variations, (2) those that are modeled after Rule 68, but are available to any party, (3) those that allow a margin of error between the offer and recovery at trial, (4) those that allow the shifting of attorneys' fees, and (5) those with various differences to Rule 68 that do not fall into a single category. Currently, there are six states that do not recognize the offer of judgment rule.<sup>218</sup>

##### *a. States with Rules Similar to Rule 68*

There are twenty-four states with offer of judgment rules that operate in nearly the same manner as Rule 68, except for different deadlines as to when a defendant can submit an offer of judgment.<sup>219</sup> Arkansas, California, Delaware, the District of Columbia, Indiana, Kentucky, Maine, Massachusetts, Montana, New York, North Carolina, Rhode Island, South Dakota, Utah, Vermont, Washington, and West Virginia

---

212. *Id.* at 576-77.

213. *Id.* at 577-78.

214. *Id.* at 572-74. Suppose a plaintiff makes an offer of judgment of \$200,000 and a defendant counters with an offer of \$100,000. The court would then apply the 10% margin of error to either side of the average of the two offers, \$150,000. A judgment of \$165,000.01 or more in favor of the plaintiff would impose costs on the defendant. A judgment of \$134,999.99 or less in favor of the plaintiff would impose costs on the plaintiff.

215. Mincer, *supra* note 193, at 1430.

216. *Id.* at 1431. For example, suppose the defendant offered \$50,000, the plaintiff made a counteroffer of \$80,000, and the judgment for the plaintiff was \$35,000. The gap between the offeror's final offer and the offeree's final offer is \$30,000 and the difference between the judgment and the offeror's final offer is \$15,000. Therefore, \$30,000 is the middle of the three factors and represents the maximum amount of costs and fees that could be shifted to the defendant.

217. *Id.*

218. See *infra* Appendix for a chart displaying the state offer of judgment rules.

219. See, e.g., ARK. R. CIV. P. 68 (allowing defendants to submit an offer of judgment up to ten days before trial whereas Rule 68 allows defendants to submit an offer of judgment up to fourteen days before trial).

allow the defendant to submit an offer up to ten days before the trial begins.<sup>220</sup> Alabama and Mississippi cut the defendant off at fifteen days prior to the commencement of the trial,<sup>221</sup> and Kansas permits the defendant to submit an offer up to twenty-one days before trial.<sup>222</sup> In contrast, Missouri allows defendants to submit an offer of judgment up to thirty days before the trial begins.<sup>223</sup> In Iowa, Nebraska, and Oklahoma, a defendant can submit an offer of judgment at any time before the trial begins.<sup>224</sup> Finally, Idaho and Oregon impose the same time limit, fourteen days, as Rule 68.<sup>225</sup>

*b. Rule Available to Any Party*

One of the main criticisms of Rule 68 is that it is only available to defendants.<sup>226</sup> Colorado, Hawaii, North Dakota, South Carolina, Tennessee, and Wyoming solve this problem by instituting rules that are similar to Rule 68, yet are available to both the plaintiff and defendant.<sup>227</sup> For example, Wyoming's rule states that "[a]t any time more than 60 days after service of the complaint and more than 30 days before the trial begins, any party may serve upon the adverse party an offer."<sup>228</sup>

*c. Rules Allowing a Margin of Error*

Another major criticism of Rule 68 is that it compels offerors and offerees to predict the exact results of a trial in order to avoid sanctions.<sup>229</sup> However, some states ease the burden on the parties by allowing a certain margin of error.<sup>230</sup> Florida, Georgia, and Louisiana each have offer of judgment rules that set the margin of error at 25%, meaning that if a plaintiff rejects a defendant's offer, his recovery must exceed 75% of the rejected offer to avoid sanctions; and if a defendant rejects a plaintiff's offer, the plaintiff's recovery must exceed 125% of the plaintiff's offer in order to warrant sanctions.<sup>231</sup> New Jersey and Texas set the margin of error at 20%, meaning

220. ARK. R. CIV. P. 68; CAL. CIV. PROC. CODE § 998; DEL. R. CIV. P. 68; D.C. R. CIV. P. 68; IND. R. CIV. P. 68; KY. R. CIV. P. 68; ME. R. CIV. P. 68; MASS. R. CIV. P. 68; MONT. R. CIV. P. 68; N.Y. C.P.L.R. 3220 (McKinney 2012) (allowed only in a cause of action based on contract); N.C. R. CIV. P. 68; R.I. R. CIV. P. 68; S.D. CODIFIED LAWS § 15-6-68 (2012); UTAH R. CIV. P. 68; VT. R. CIV. P. 68; WASH. R. CIV. P. 68; W. VA. R. CIV. P. 68.

221. ALA. R. CIV. P. 68; MISS. R. CIV. P. 68.

222. KAN. STAT. ANN. § 60-2002(b) (West 2011).

223. MO. ANN. STAT. § 77.04 (West 2011).

224. IOWA CODE ANN. § 677.7-.10 (West 2011); NEB. REV. STAT. § 25-901 (2012); OKLA. STAT. tit. 12, § 1101 (West 2012).

225. IDAHO R. CIV. P. 68; OR. R. CIV. P. 54.

226. FED. R. CIV. P. 68. See *supra* Part II.C.2 for criticisms of Rule 68.

227. COLO. REV. STAT. ANN. § 13-17-202 (West 2012); HAW. R. CIV. P. 68; N.D. R. CIV. P. 68; S.C. R. CIV. P. 68 (also allows 8% interest to be added to the judgment from the date of the offer to the entry to judgment if the offeror is a plaintiff and reduces the plaintiff's recovery by 8% interest if the offeror is the defendant); TENN. R. CIV. P. 68; WYO. R. CIV. P. 68.

228. WYO. R. CIV. P. 68.

229. Lewis & Eaton, *supra* note 193, at 572.

230. *Id.*

231. FLA. STAT. ANN. § 768.79 (West 2012); GA. CODE ANN. § 9-11-68 (West 2012); LA. CODE CIV.

the plaintiff's recovery must exceed 80% of the defendant's rejected offer to avoid penalties, or the plaintiff must recover less than 120% of the rejected defendant's offer in order for the defendant to avoid sanctions.<sup>232</sup> Alaska offers the most restrictive margin of error rule by imposing a 5% margin of error in suits involving one defendant and a 10% margin of error in suits involving multiple defendants.<sup>233</sup>

*d. Allowing Attorneys' fees to be Shifted*

The most widespread criticism regarding the current ineffectiveness of Rule 68 is that the costs to be shifted do not include reasonable attorneys' fees.<sup>234</sup> There are a handful of states, however, that allow the shifting of attorneys' fees in their offer of judgment rules.<sup>235</sup> Connecticut is the most forgiving of these states, as it allows only the defendant to make an offer of judgment and if the plaintiff declines and recovers less at trial, the defendant is entitled to reasonable post-offer attorneys' fees, not to exceed \$350.<sup>236</sup> Idaho also allows the recovery of reasonable attorneys' fees.<sup>237</sup>

Under Nevada's offer of judgment rule, when either party rejects an offer and receives a less favorable judgment, that party is required to pay post-offer costs and reasonable attorneys' fees incurred since the time of the offer.<sup>238</sup> In *Beattie v. Thomas*,<sup>239</sup> the Nevada Supreme Court adopted four factors to guide the trial court in the discretion of awarding attorneys' fees:

(1) whether the plaintiff's claim was brought in good faith; (2) whether the defendant's offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.<sup>240</sup>

In clarifying the fourth *Beattie* factor, the Nevada Supreme Court adopted four additional factors that should be considered to determine an appropriate amount of attorneys' fees:

(1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the

---

PROC. ANN. art. 970 (2012).

232. N.J. STAT. ANN. §§ 4:58-1 to 4:58-4 (West 2012); TEX. CIV. PRAC. & REM. CODE ANN. § 42.004 (West 2011).

233. ALASKA STAT. ANN. § 09.30.065 (West 2012).

234. Bone, *supra* note 13, at 1566-67; Lewis & Eaton, *supra* note 193, at 562; Schwarzer, *supra* note 61, at 149; Thompson, *supra* note 183, at 1154-55.

235. ALASKA STAT. ANN. § 09.30.065; CONN. GEN. STAT. ANN. §§ 52-193 to 52-195 (West 2012); GA. CODE ANN. § 9-11-68; IDAHO R. CIV. PRO. 68; NEV. R. CIV. P. 68; N.J. STAT. ANN. § 4:58-2; TEX. CIV. PRAC. & REM. CODE ANN. § 42.001.

236. CONN. GEN. STAT. ANN. § 52-193, -195.

237. IDAHO R. CIV. P. 68.

238. NEV. R. CIV. P. 68.

239. 668 P.2d 268 (Nev. 1983).

240. *Beattie*, 668 P.2d at 274. In *Yamaha Motor Co., U.S.A. v. Arnoult*, the Nevada Supreme Court clarified that the first *Beattie* factor applies only when the defendant makes the offer. 955 P.2d 661, 673 (Nev. 1998). When the plaintiff is the offeror, the first factor should instead be whether the defendant's defenses were litigated in good faith. *Id.*

responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.<sup>241</sup>

Georgia, New Jersey, and Texas are three margin-of-error states that also allow attorneys' fees to be shifted.<sup>242</sup> Alaska, another margin-of-error state, takes a slightly different approach and limits the amount of reasonable attorneys' fees awarded based on when the offer was made.<sup>243</sup> If the offer was made within sixty days of the close of discovery, the offeror is entitled to receive seventy five percent of his attorneys' fees.<sup>244</sup> If the offer was made more than sixty days after discovery, but more than ninety days prior to the commencement of trial, the offeror is entitled to receive fifty percent of his attorneys' fees.<sup>245</sup> Finally, if the offer was served ninety days or less after discovery but at least ten days before the trial begins, the offeror is entitled to receive thirty percent of his attorneys' fees.<sup>246</sup>

*e. Miscellaneous State Rules*

There are a few states that have statutes that deviate from Rule 68 but do not specifically fall into one of the above-mentioned categories. Arizona's offer of judgment rule is available to either party, and if the offeree rejects an offer and does not obtain a more favorable judgment at trial, he must pay the offeror's reasonable expert witness fees and double the taxable costs.<sup>247</sup> New Mexico has a similar rule that is available to either party; however, it does not include reasonable expert witness fees, and double costs are only assessed when the defendant refuses the plaintiff's offer and the plaintiff obtains a more favorable judgment at trial.<sup>248</sup> Costs do not include attorneys' fees in both Arizona and New Mexico.<sup>249</sup> Wisconsin is another state that allows the recovery of double costs; however, it also allows plaintiffs who receive a more favorable judgment than their rejected offer to recover interest on the amount recovered from the date of the offer until the judgment is paid.<sup>250</sup>

Michigan takes a somewhat different approach by allowing either party to make an offer and then allowing the offeree to make a counteroffer.<sup>251</sup> The court will then come up with an average offer by adding the offer and counteroffer together and

---

241. *Schouweiler v. Yancey Co.*, 712 P.2d 786, 790 (Nev. 1985). The court also stated that the amount of the offer itself was not relevant to the reasonable amount of attorneys' fees. *Id.*

242. GA. CODE ANN. § 9-11-68; N.J. STAT. ANN. § 4:58-2; TEX. CIV. PRAC. & REM. CODE ANN. § 42.004.

243. ALASKA STAT. ANN. § 09.30.065 (West 2012).

244. *Id.*

245. *Id.*

246. *Id.*

247. ARIZ. R. CIV. P. 68.

248. N.M. STAT. ANN. § 1-068 (West 2012).

249. ARIZ. REV. STAT. ANN. § 12-332 (West 2012); N.M. STAT. ANN. § 1-608(A).

250. WIS. STAT. ANN. § 807.01 (West 2011).

251. MICH. COMP. LAWS ANN. § 2.405(A)(2) (West 2012).

dividing by two.<sup>252</sup> The court uses the average offer to determine whether the judgment was more favorable and to impose sanctions, which can include attorneys' fees.<sup>253</sup> Additionally, the court has discretion in awarding attorneys' fees and may refuse to do so in the interest of justice.<sup>254</sup> Minnesota also has a two-way offer of judgment rule that allows the court to reduce the costs imposed on a party if it would inflict undue hardship or prove inequitable.<sup>255</sup>

*f. States Without Offer of Judgment Statutes*

Pennsylvania, Illinois, Maryland, New Hampshire, Ohio, and Virginia do not have state offer of judgment statutes.

### III. DISCUSSION

A good offer of judgment rule promotes judicial economy by encouraging settlement and avoiding litigation.<sup>256</sup> The federal offer of judgment rule, Rule 68, is aimed at achieving this goal, but in practice it is rarely used.<sup>257</sup> State provisions,<sup>258</sup> as well as scholarly proposals,<sup>259</sup> have attempted to address the concerns associated with Rule 68.<sup>260</sup>

The Pennsylvania Rules of Civil Procedure do not contain an offer of judgment provision. Part III.A will propose a rule for Pennsylvania, Part III.B will discuss the most contentious provisions contained in the rule, and Part III.C will respond to the potential criticisms of the proposal.

*A. Proposed Offer of Judgment Rule for Pennsylvania*

Proposed Pennsylvania Rule of Civil Procedure 68 (Proposed Rule 68)<sup>261</sup>

**(A) Offer.** At least ninety days after the service of summons and a complaint, but not less than ten days before the trial or arbitration begins, any party may serve upon the adverse party an offer to settle the claim for the money specified, exclusive of costs and attorneys' fees, and to enter into an agreement dismissing the claim or to allow judgment to be entered accordingly.

**(B) Counteroffer.** If a counteroffer is made, the court will take the sum of an offer and a counteroffer to determine an average offer for purposes of this rule.

---

252. *Id.* § 2.405(A)(3). If there is no counteroffer, then the offer serves as the average offer. *Id.*

253. *Id.* § 2.405(D).

254. *Id.* § 2.405(D)(3).

255. MINN. STAT. ANN. § 68.01-.04 (West 2012).

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

257. *E.g.*, Bone, *supra* note 13, at 1566-69.

258. See *supra* Part II.C.4 for state offer of judgment rules and *infra* Appendix for a summary of all fifty states.

259. See *supra* Part II.C.3 for scholarly proposals to amend Rule 68.

260. FED. R. CIV. P. 68.

261. All future citations to this proposed rule within this Comment will be to Proposed Pa. R. Civ. P. 68.

**(C) Acceptance or Judicial Conference Request.** If within ten days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service and the clerk shall enter judgment. Additionally, both parties must sign an agreement to keep the judgment entered confidential. Alternatively, within ten days of receiving an offer, the offeree may request the court to schedule a judicial conference with all parties in the matter to discuss the offer and any discovery in aid of settlement issues that may be present. If an offeree requests such a conference, the time to accept the offer will not lapse before the conference takes place and the judge will allow the offeree a reasonable amount of time after the conference to accept or decline the offer.

**(D) Nonacceptance.** An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except to determine sanctions under this rule.

**(E) Subsequent Offers.** The fact that an offer is made but not accepted does not preclude subsequent counteroffers.

**(F) Sanctions.** If the judgment finally obtained by the plaintiff offeree is not equal to at least 85% of the defendant's latest offer, or there is a judgment for the defendant, then the plaintiff will not be able to recover post-offer costs and must pay the reasonable court costs, expert witness fees, and attorney's fees incurred by the defendant after the making of the offer. In cases where the offeree is entitled to a statutory award of attorney's fees, the offeree will be barred from recovering fees for work performed after the offer. If there is a judgment for the plaintiff offeror greater than 115% of the plaintiff's most recent offer, then the defendant must pay the reasonable court costs, expert witness fees, and attorney's fees incurred by the plaintiff after the making of the offer. Reasonable attorney's fees will be paid as follows:

- (1) If the offeree requests a judicial conference and declines the offer after the conference's conclusion, the offeree shall pay 30% of the offeror's reasonable post-offer attorney's fees.
- (2) If the offeree does not request a judicial conference:
  - (a) and the offer was served no later than sixty days after both parties made the disclosures required by the Pennsylvania Rules of Civil Procedure, the offeree shall pay 40% of the offeror's reasonable post-offer attorney's fees; and
  - (b) the offer was served more than sixty days after both parties made the disclosures required by the Pennsylvania Rules of Civil Procedure, but more than ninety days before the trial begins, the offeree shall pay 60% of the offeror's reasonable post-offer attorney's fees; and
  - (c) the offer was served ninety days or less but more than ten days before the trial or arbitration begins, the offeree shall pay 80% of the offeror's reasonable post-offer attorney's fees.

**(G) Offer After Judgment.** When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, either party

may make an offer of settlement, which shall have the same effect as an offer made before trial or arbitration if it is served within a reasonable time prior to the commencement of hearings to determine the amount or extent of liability.

**(H) Exceptions.** This rule does not apply in class actions, shareholder derivative suits, family law and divorce actions, or claims involving only injunctive relief.

*B. Defense of the Proposal*

1. Encouraging Negotiation and Settlement

This proposed offer of settlement Rule for Pennsylvania will encourage negotiation and settlement, reward the party who makes the most reasonable offer, and not stifle a party's desire to bring a meritorious suit or advance a valid defense. The first difference between Proposed Rule 68 and the Federal Rule 68 is that Proposed Rule 68 requires that parties keep the judgment entered confidential.<sup>262</sup> This will encourage individual defendants who are concerned about insurability, creditworthiness, or potential employment to use the Rule, as well as corporate defendants, who are more concerned with adverse public attention and "copycat litigation."<sup>263</sup> Proposed Rule 68 is also available to both parties, thus allowing and encouraging more offers by giving plaintiffs a new method and incentive to settle.

This proposal responds to the Supreme Court's decision in *Delta Air Lines*,<sup>264</sup> in which the Court decided that Rule 68 did not apply when the plaintiff offeree obtained no judgment at all.<sup>265</sup> While the Supreme Court based its decision on the plain language of Rule 68,<sup>266</sup> its decision is not consistent with the goal of encouraging litigants to use the Rule. The interpretation creates a paradox in that when a defendant makes a Rule 68 offer that is not accepted by the plaintiff, the defendant will likely be in a better financial position if he loses a nominal judgment to the plaintiff than if the defendant wins the judgment outright.<sup>267</sup> This is due to the likelihood that attorneys' fees will be significantly more expensive to a defendant than a nominal judgment in most cases. Proposed Rule 68 sanctions explicitly apply to a plaintiff offeree if there is a judgment for the defendant.<sup>268</sup> Clearly, settlement promotion would be accomplished by awarding the defendant who was completely successful in the litigation at least as much as the defendant who was only partially successful.<sup>269</sup>

---

262. Proposed Pa. R. Civ. P. 68(C).

263. Thompson, *supra* note 183, at 1154.

264. 450 U.S. 346, 348 (1981).

265. *Id.* at 352.

266. *Id.* at 355-56.

267. For example, if a defendant makes an offer of \$50,000 and the plaintiff recovers \$10,000 at trial, the defendant will be entitled to recover costs from the plaintiff under Rule 68. However, if the plaintiff loses at trial, Rule 68 is inapplicable and the defendant is responsible for his own costs.

268. Proposed Pa. R. Civ. P. 68(F).

269. Horowitz, *supra* note 10, at 497.

## 2. Inclusion of Attorneys' fees

Proposed Rule 68 also addresses the main criticism of Federal Rule 68—that the costs awarded do not include attorneys' fees, the most costly item in litigation.<sup>270</sup> Proposed Rule 68 awards reasonable post-offer attorneys' fees, which are based on the customary hourly rate for the specific locality in which each case is tried.<sup>271</sup> The proposal awards not only costs and attorneys' fees, but also expert witness fees.<sup>272</sup> This is necessary to distinguish an offer of judgment from any other settlement offer, because the only threat under Federal Rule 68 is trivial court costs, which parties are unlikely to pursue after the case is resolved.<sup>273</sup> By including expert witness fees, which can be significant, and attorneys' fees in awardable costs, the parties have a much greater incentive to come to the bargaining table. Parties will have motivation to make realistic offers that reflect a fair assessment of the claim and accept reasonable offers since more is at stake.<sup>274</sup>

The proposal also encourages more litigants to use Proposed Rule 68, because it explicitly codifies the Supreme Court's decision in *Marek v. Chesny*.<sup>275</sup> In that case, the Court concluded Rule 68 costs referred to all costs under the relevant substantive statute.<sup>276</sup> When a plaintiff rejects an offer of judgment, and receives a judgment that is lower than the rejected offer, he forfeits post-offer attorneys' fees under a statute that awards them.<sup>277</sup> However, this case was decided over a quarter century ago, and a lawyer today reading Federal Rule 68 may potentially be uninformed of this consequence.<sup>278</sup> Proposed Rule 68 states, "[i]n cases where the offeree is entitled to a statutory award of attorneys' fees, the offeree will be barred from recovering fees for work performed after the offer."<sup>279</sup> This is especially attractive to defendants who are being sued under a statute that explicitly allows the recovery of attorneys' fees. The Rule notifies defendants that if they utilize it, they may be able to relieve themselves of paying a significant amount of the plaintiff's attorneys' fees, even if the plaintiff recovers damages at judgment. Additionally, the inherent risk of declining an offer increases for plaintiffs, which may cause them to be more willing to settle.

---

270. *E.g.*, Bone, *supra* note 13, at 1567. See *supra* Part II.C.2 for criticisms of Rule 68.

271. Proposed Pa. R. Civ. P. 68(F). The customary hourly rate for the locality is based on one of the factors for considering the reasonableness of attorneys' fees in the Pennsylvania Model Rules of Professional Conduct. PA. MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(4) (2008).

272. Proposed Pa. R. Civ. P. 68(F).

273. See Sumner, *supra* note 192, at 1059 (arguing that costs payable under Federal Rule 68 are inconsequential and unlikely to be pursued following case resolution).

274. See *id.* (suggesting that including attorneys' fees will raise stakes to level where parties have incentives to use offers).

275. 473 U.S. 1, 9 (1985). Proposed Pa. R. Civ. P. 68(F).

276. *Marek*, 473 U.S. at 9.

277. *Id.* at 10. One such civil rights statute states, "[i]n a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs." 42 U.S.C. § 3613(c)(2) (2006).

278. See Lewis & Eaton, *supra* note 190 at 360 (noting multiple defense lawyers at large firms who claimed not to realize that Rule 68 could potentially reduce fee burdens on clients).

279. Proposed Pa. R. Civ. P. 68(F).

### 3. Predicting the Legitimacy of Offers

Cases can be difficult to accurately evaluate early on, and rules that allow an offer of judgment to be made at any time following the service of a complaint can significantly handicap both parties.<sup>280</sup> If a plaintiff makes an offer immediately after or very close to filing a complaint, the Federal Rule and most of the state rules give the defendant almost no opportunity to assess the case or conduct discovery before the defendant's time to accept the offer lapses and the possibility of sanctions kicks in.<sup>281</sup> Also, if a defendant makes an offer of judgment immediately after the litigation has commenced, the time for a plaintiff to accept may run out before the plaintiff has had a full opportunity to review the defendant's answer to the complaint.<sup>282</sup> Proposed Rule 68 does not allow an offer to be made until ninety days after service of the complaint, which gives both parties a reasonable amount of time to evaluate the claim.<sup>283</sup> Offerees are also afforded an extra safeguard with the option to request a judicial conference after receiving an offer.<sup>284</sup>

Although Federal Rule 68 cuts off the time a defendant can make an offer at fourteen days, twenty-three states currently set the deadline at ten days.<sup>285</sup> This proposal also sets the deadline at ten days, which is a reasonable amount of time from the commencement of a trial.<sup>286</sup> While a difference of four days may not seem significant, the longer litigants have to consider making an offer, the more information they can obtain in order to gain a better understanding of the odds of winning and the potential costs of continuing. This will likely result in increased use of the proposed rule.

Proposed Rule 68 also makes it easier for parties to accurately create offers, examine offers, and estimate whether they will be subject to sanctions if they decline an offer. The proposal stipulates that offers are to be made for a monetary amount, exclusive of costs and attorneys' fees.<sup>287</sup> This is a deviation from the Federal Rule, many of the state statutes,<sup>288</sup> and some of the scholarly proposals.<sup>289</sup> Absent a rule requiring parties to disclose their attorneys' fees, offerees may have difficulty predicting the fees of the adverse party when deciding whether to accept an offer. For example, a prevailing plaintiff may be entitled to attorneys' fees under a statute or contract, and the defendant may be willing to make an offer on the merits, but may be

---

280. See Lewis & Eaton, *supra* note 190, at 353.

281. In this situation, a defendant may be required to decide whether to accept an offer of judgment before he is even required to answer the complaint. Compare FED. R. CIV. P. 68 (allowing offerees fourteen days to accept or decline an offer of judgment), with FED. R. CIV. P. 12(a)(1)(A)(i) (allowing defendants twenty-one days to serve an answer to the complaint). See *infra* Appendix for a list of state offer of judgment rules.

282. See FED. R. CIV. P. 68 (giving offerees fourteen days to accept or decline offer of judgment).

283. Proposed Pa. R. Civ. P. 68(A).

284. See *infra* Part III.B.6 for a discussion of judicial conferences to facilitate settlement.

285. See *infra* Appendix for a list of state offer of judgment rules.

286. Proposed Pa. R. Civ. P. 68(C).

287. Proposed Pa. R. Civ. P. 68(A).

288. *E.g.*, DEL. R. CIV. P. 68; N.J. STAT. ANN. § 4:58-1 (West 2012).

289. See *supra* Part II.C.3 for proposals to amend Rule 68 where the offer of judgment included costs.

uncertain about the amount of plaintiff's attorneys' fees or disagree on the amount.<sup>290</sup> This may force defendants to have "prophetic powers to estimate the amount of fees to be awarded for his adversary's services."<sup>291</sup> Also, offerors, when trying to formulate a valid offer, may have trouble adding an appropriate amount to their estimate of liability and damages to arrive at a reasonable offer.<sup>292</sup> With the stipulation that Proposed Rule 68 offers of settlement do not include costs and fees,<sup>293</sup> lawyers for both sides are only charged with estimating the amount of damages if liability is present.

#### 4. Margin of Error Provision

Thirty-nine of the forty-six states that have adopted offer of judgment rules require parties to predict the exact results of the trial.<sup>294</sup> If a plaintiff offeree's judgment is one dollar less than the offer he rejected, he will be subjected to sanctions.<sup>295</sup> Similarly, if a plaintiff offeror's judgment is one dollar more than the offer he rejected, the defendant offeror will be subject to sanctions.<sup>296</sup> Proposed Rule 68 adds a cushion of 15% to either side of the equation.<sup>297</sup> Therefore, plaintiffs who recover at least 85% of an offer they previously rejected will avoid sanctions.<sup>298</sup> Similarly, defendants who reject plaintiffs' offers will avoid sanctions if the plaintiffs' recovery does not exceed 115% of the offer.<sup>299</sup>

Including a margin-of-error provision should encourage litigants to utilize the rule. The cushion could alleviate some of the speculation inherent in Federal Rule 68 and decrease the amount of precision parties must use in deciding whether to make an offer, accept an opponent's offer, or reject the offer and risk sanctions.<sup>300</sup> Litigation is innately unpredictable and contains many factors that could deviate from what either party expects such as the chances the plaintiff's action survives summary judgment, the strength of the parties' evidence at a trial that can be held months or even years down the road, the performance of witnesses, the fickle nature of juries, and the amount of pre-offer attorneys' fees the court may award a prevailing plaintiff.<sup>301</sup>

---

290. Jeffrey B. Crockett, *Statutory Offers of Settlement in Florida Practice: Uses, Problems, and Solutions*, 80 FLA. B.J. 24, 26 (2006).

291. *Id.* (quoting *Wis. Life Ins. Co. v. Sills*, 368 So. 2d 920, 922 (Fla. Dist. Ct. App. 1979)).

292. *Id.*

293. Proposed Pa. R. Civ. P. 68(A).

294. *E.g.*, DEL. R. CIV. P. 68. See *infra* Appendix for a full catalogue of states.

295. *E.g.*, DEL. R. CIV. P. 68. (stating that if judgment obtained by offeree is less favorable than offer made, offeror must bear costs incurred after offer was made).

296. *E.g.*, *id.*

297. Proposed Pa. R. Civ. P. 68(F).

298. See *id.* (imposing sanctions based on final judgment). For example, if the defendant makes an offer of \$100,000 and the plaintiff rejects the offer, the plaintiff needs to recover at least \$85,000 to avoid sanctions.

299. *Id.* For example, if the plaintiff makes an offer of \$100,000 and the defendant rejects the offer, the defendant will avoid sanctions if the plaintiff does not recover at least \$115,000.

300. See Lewis & Eaton, *supra* note 193, at 572 (stating that some offer of judgment rules "require parties to predict trial results to the penny").

301. See *id.* (describing some of the imponderables of litigation). The amount of attorneys' fees is irrelevant for purposes of PA Rule 68 since offers are made exclusive of costs and fees, therefore, making a legitimate offer is even easier.

States that use a greater margin-of-error standard allow too much of a cushion and undermine the purpose of the rule.<sup>302</sup> Under one of these provisions, a plaintiff in a high-stakes case seeking a large verdict, and a lawyer looking for a large contingency fee could safely reject a defendant's offer without serious concern of incurring sanctions.<sup>303</sup> For example, a plaintiff offered \$1,000,000 by a defendant under a twenty five percent margin of error rule would only have to recover \$750,000.01 to avoid sanctions. This leaves the plaintiff almost \$250,000 of room to gamble, a substantial sum that is likely to dissuade some litigants from accepting offers. On the other hand, Alaska's five percent margin of error makes the rule susceptible to many of the same shortcomings as Federal Rule 68.<sup>304</sup> In the above example, a plaintiff offered \$1,000,000 by a defendant under a five percent margin of error rule would have to recover \$950,000.01 to avoid sanctions. This leaves the plaintiff only \$50,000 of room for miscalculation, which is essentially insignificant in a case of such magnitude. Proposed Rule 68's fifteen percent margin of error strikes a reasonable balance between the two extremes. A plaintiff offered \$1,000,000 by a defendant under the fifteen percent margin of error rule must recover \$850,000.01 to avoid sanctions. This leaves the plaintiff around \$150,000 of room to misjudge. The fifteen percent margin of error affords litigants some protection against miscalculations and encourages them to make and accept reasonable offers, without undermining the purpose of the rule.

##### 5. Counteroffer Provision

Proposed Rule 68 compares the average of the offer and the counteroffer with the actual amount recovered in order to calculate the recovery<sup>305</sup> in a manner similar to that used by Michigan.<sup>306</sup> This method further promotes the purpose of settlement, as the following example demonstrates. Suppose a plaintiff makes an offer of \$400,000 and a defendant counters with an offer of \$200,000. Under the current Federal Rule 68, each offer would be considered separately for purposes of the rule. If the plaintiff recovers any amount between \$200,000.01 and \$400,000, no sanctions would be triggered. Additionally, the defendant would not be sanctioned because the plaintiff's recovery did not exceed \$400,000. This result leaves a wide range in which the plaintiff can recover and neither side feels pressure to come to an agreement.

However, if the average of the two offers, \$300,000, along with the 15% margin of error, is used as the benchmark, the likelihood of sanctions increases. Under these circumstances, any plaintiff's trial recovery of \$345,000.01 or more will impose sanctions on the defendant and any recovery of \$254,999.99 or less will impose sanctions on the plaintiff. As a result, sanctions will be imposed on the rejecting party in 77.5% of the \$200,000.01 to \$400,000 range, whereas no sanctions are enforced in that range under Federal Rule 68. If trial results trigger sanctions more often, parties

---

302. Lewis & Eaton, *supra* note 193, at 573. See *infra* Appendix for examples of states that use a margin-of-error provision.

303. *Id.*

304. ALASKA STAT. ANN. § 09.30.065 (West 2012). See *supra* Part II.C.2 for criticisms of Federal Rule 68.

305. Proposed Pa. R. Civ. P. 68(B).

306. MICH. COMP. LAWS ANN. § 2.405 (West 2012).

will be more likely to compromise and settle, which advances the goal of the rule.

#### 6. Judicial Conference to Encourage Satisfactory Offers

Proposed Rule 68, if adopted, would be unique in that it gives offerees the option to request a judicial conference before making a decision on whether to accept or reject an offer.<sup>307</sup> The rationale for placing this provision in the rule is that it encourages communication not only between the parties, but also between the judge and the parties. If the goal of an offer of judgment rule is to promote negotiation in the hope of agreeing on a settlement, the judge can be a valuable asset in furtherance of this objective.<sup>308</sup>

Proposed Rule 68 attempts to minimize one of the impediments to settlement: offerors making offers too early in the process, before the offeree has had the ability to adequately analyze the case and make the necessary discovery requests, by requiring offerors to wait ninety days after service of the complaint to make an offer.<sup>309</sup> However, even with this buffer zone, parties often fail to comply with discovery requests to the satisfaction of the opposing party.<sup>310</sup> These conferences allow the offeree to assemble the litigants before the judge to discuss any discovery issues that relate to the offeree's ability to sufficiently assess an offer. This would prevent offerors from purposely ignoring discovery requests, making an offer, and then allowing the time period for acceptance to lapse. For example, if the offeree plans to depose ten people in a case, he can request to be allowed to depose two or three of those individuals. Then, the offeree can choose to accept the offer, decline the offer, or request another conference in which the offeree is armed with more information than in the initial meeting. This gives the judge the opportunity to determine whether the offeree should be allowed to obtain more information or take more depositions. When the judge feels the disclosure is sufficient, he or she can then use discretion to allow the offeree a reasonable amount of time to make a decision on the offer.

Additionally, a judicial conference will allow the offeree to seek the judge's input on the adequacy of the offer. Judges already have the discretion to compel the parties to appear at a pretrial conference and discuss settlement.<sup>311</sup> When Federal Rule of Civil Procedure 16 was amended in 1983, the advisory committee noted that when a judge intervenes early in the process and facilitates communication between the parties, "the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices."<sup>312</sup>

Once the parties are together in this conference, the judge can inform the parties about his perceptions of the issues involved in the case.<sup>313</sup> The judge can determine

---

307. Proposed Pa. R. Civ. P. 68(C).

308. The judge would act as a moderator with no power to compel settlement, but rather to encourage it.

309. Proposed Pa. R. Civ. P. 68(A).

310. *See, e.g., Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863, 870 (3d Cir. 1984) (stating that the district court did not abuse its discretion in dismissing the plaintiff's claim for failure to comply with discovery deadlines).

311. FED. R. CIV. P. 16(a).

312. FED. R. CIV. P. 16 advisory committee's note (1981).

313. James A. Wall, Jr. et. al., *Judicial Participation in Settlement*, 1984 MO. J. DISP. RESOL. 25, 30

how complex the issues are, assess the previous efforts by the parties to reach a compromise, notify the lawyers how similar cases have been settled in the past, and determine how far apart the litigants are in the negotiations.<sup>314</sup> Additionally, the judge can suggest procedures for how the continuing settlement negotiations are to be conducted.<sup>315</sup> He can encourage the parties to concentrate on the most important and relevant issues, require the parties not to stall, and tell them to “avoid sham arguments.”<sup>316</sup> Finally, the judge can steer initial discussions toward the areas of the case that seem to have the best chance of settlement with the hope that agreement upon these issues will promote productive communication between the parties moving forward.<sup>317</sup>

Judge Wayne Brazil, with the support of the American Bar Association, conducted a study to determine whether lawyers approved of and wanted judicial involvement in settlement discussions.<sup>318</sup> Judge Brazil interviewed roughly 1,900 lawyers who practiced in United States federal courts.<sup>319</sup> He found that eighty five percent of respondents believed settlement was more likely with judicial involvement, and seventy two percent believed settlement conferences with judges should be mandatory.<sup>320</sup> Additionally, seventy percent of respondents wanted judges to become involved in settlement negotiations without an invitation.<sup>321</sup> These results suggest that litigators have confidence in judges’ abilities to take an objective look at the merits of the case and render valuable opinions in settlement discussions.<sup>322</sup>

Litigants are inherently biased towards their position given their posture in an adversarial proceeding, and often therefore have an unrealistic view of their chances of success. The judge is in a better position to take a neutral look at the offer and assess its sufficiency without any emotional ties to the case.<sup>323</sup> If the judge believes the offer is fair and that the offeree will not recover more at trial, he can urge the offeree to accept the offer at that time. This is especially useful for an offer made late in the litigation process when most of the information has been made available, yet the offeree remains firm in his position that the offer is insufficient. Also, if the judge believes the offer is not fair, he can encourage the offeror to make a subsequent offer that better reflects the merits of the case. Either way, open communication between the judge and parties is healthy to the litigation process. Even if requested late in the game, these conferences

---

(1984).

314. *Id.*

315. Lawrence F. Schiller & James A. Wall, Jr., *Judicial Settlement Techniques*, 5 AM. J. TRIAL ADVOC. 39, 46 (1981).

316. *Id.*

317. *Id.*

318. DAVID SPENCER & MICHAEL BROGAN, *MEDIATION LAW AND PRACTICE* 400 (2006).

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. Judges do this with regularity and courts have held that it is appropriate for judges to comment on the merits of the case for purposes of facilitating settlement. *See, e.g., Sloan v. State Farm Mut. Auto. Ins. Co.*, 360 F.3d 1220, 1227 (10th Cir. 2004) (stating that the district court’s expressions that the parties should settle the case did not render the trial unfair because it was done outside the presence of the jury).

can be an effective way to get parties to negotiate sincerely, and to avoid the ever-increasing expenses of trial.

#### 7. Sliding Scale of Attorneys' Fees.

Proposed Rule 68 uses a sliding percentage scale to determine the amount of post-offer attorneys' fees to be awarded,<sup>324</sup> similar to the Alaska statute.<sup>325</sup> However, this proposal reverses the progression of attorneys' fees imposed under the Alaska statute.<sup>326</sup> In Alaska, the earlier in the litigation process the offer is made, the higher percentage of attorneys' fees the offeree is required to pay.<sup>327</sup> Conversely, Proposed Rule 68 compels offerees to pay a higher percentage of reasonable attorneys' fees the closer to trial that the offer is made and rejected.<sup>328</sup>

Suppose the defendant makes an offer to the plaintiff of \$500,000. If the plaintiff rejects the offer and recovers less than \$425,000 at trial, the rule will be triggered. Now suppose the defendant made the offer thirty days after the close of discovery. According to Proposed Rule 68(F)(2)(a), the plaintiff would be required to pay forty percent of the defendant's reasonable post-offer attorneys' fees.<sup>329</sup> As stated above, the reasonableness of the fees will be based on the normal hourly rate of the forum in which the trial takes place.<sup>330</sup> If the defendant incurs \$200,000 of post-offer attorneys' fees, the plaintiff will be required to pay \$80,000.

Now suppose the defendant makes the same offer more than sixty days after the close of discovery but 100 days before trial. If the plaintiff rejects the offer and recovers less than \$425,000 at trial, Proposed Rule 68(F)(2)(b) will be triggered, and the plaintiff will be required to pay sixty percent of the defendant's post-offer attorneys' fees.<sup>331</sup> If the defendant spends \$175,000 in post-offer fees, the plaintiff must pay \$105,000.

Next suppose the defendant makes the offer thirty days before trial. If the plaintiff rejects the offer and recovers less than \$425,000 at trial, Proposed Rule 68(F)(2)(c) will be triggered, and the plaintiff will be required to pay eighty percent of the defendant's post-offer attorneys' fees.<sup>332</sup> If the plaintiff compiles \$150,000 in post-offer fees, the plaintiff must pay \$120,000.

Finally, suppose the plaintiff, upon receiving the defendant's offer, requested a judicial conference. If, subsequent to that meeting, the plaintiff decides to reject the

---

324. Proposed Pa. R. Civ. P. 68(F)(2).

325. ALASKA STAT. ANN. § 09.30.065 (West 2012).

326. *Id.*

327. *Id.* If the offer is made within sixty days of the close of discovery, the offeree is entitled to pay 75% of the offeror's attorneys' fees. If the offer is made more than sixty days after the close of discovery, but more than ninety days before trial begins, the offeree is required to pay 50% of the offeror's attorneys' fees. If the offer is served ninety days or less, but more than ten days prior to trial, the offeree is required to pay 30% of the offeror's attorneys' fees. *Id.*

328. Proposed Pa. R. Civ. P. 68(F).

329. *Id.* 68(F)(2)(a).

330. See *supra* Part III.B.2 for an explanation of how the appropriate rate is determined.

331. Proposed Pa. R. Civ. P. 68(F)(2)(b).

332. *Id.* 68(F)(2)(c).

offer of \$500,000 and recovers less than \$425,000 at trial, Proposed Rule 68(F)(1) would be in effect.<sup>333</sup> Regardless of when the offer was made, the plaintiff would be liable for thirty percent of the defendant's post-offer attorneys' fees. If the defendant incurs \$200,000 of post-offer fees, the plaintiff will be required to pay \$60,000. If the defendant incurs \$175,000 of post-offer fees, the plaintiff will be required to pay \$52,500. If the defendant incurs \$150,000 of post-offer fees, the plaintiff will be required to pay \$45,000. Table 1 describes these the various combinations under each of these circumstances in tabular form.

**Table 1.** Example of the Sliding Scale of Attorneys' Fees Under PA Rule 68

	<b>Amount of Post-Offer Attorneys' Fees Incurred</b>	<b>No Judicial Conference Requested: Amount of Post-Offer Attorneys' Fees Imposed</b>	<b>Judicial Conference Requested: Amount of Post-Offer Attorneys' Fees Imposed</b>
PA Rule 68(F)(2)(a)	\$200,000	\$80,000	\$60,000
PA Rule 68(F)(2)(b)	\$175,000	\$105,000	\$52,000
PA Rule 68(F)(2)(c)	\$150,000	\$120,000	\$45,000

As Table 1 demonstrates, under the proposed rule, the plaintiff will always pay less in attorneys' fees if he requests a conference than if he does not.

The percentage scale of Proposed Rule 68 more accurately reflects the goal of encouraging negotiation and punishing litigants who unreasonably refuse to settle than the Alaska scale.<sup>334</sup> It is safe to assume that in a case that goes to trial, an offer made early will result in greater post-offer legal fees than an offer made late. Therefore, it makes sense that as the monetary amount of legal fees decreases, the percentage an offeree is required to pay increases.<sup>335</sup> Additionally, late in the litigation process is when parties presumably have most, if not all, of the necessary information to make an informed and rational decision on whether to accept an offer. It stands to reason that these are the litigants who should be penalized most severely by the rule, and the above-mentioned example demonstrates this with the court imposing \$120,000 on the plaintiff who rejected an offer made thirty days before trial, which represented the highest amount in the example.<sup>336</sup>

Additionally, the flat rate of thirty percent of attorneys' fees imposed on all offerees who request a judicial conference furthers the goal of opening the lines of communication between the parties and the judge.<sup>337</sup> These conferences will give the offeree an opportunity to make requests for necessary discovery, hear the judge's opinion on the merits of the case, and presumably compel the offeree to accept fair and

333. *Id.* 68(F)(1).

334. ALASKA STAT. ANN. § 09.30.065 (West 2012); Proposed Pa. R. Civ. P. 68(F).

335. In Alaska, as the monetary amount of legal fees decreases, the percentage an offeree is required to pay also decreases. ALASKA STAT. ANN. § 09.30.065.

336. See *supra* Table 1 for a chart display of the sliding scale of attorneys' fees imposed under Proposed Rule 68(F)(1)–(2).

337. Proposed Pa. R. Civ. P. 68(F)(1).

sensible offers. There is a better chance to avoid trial if an offeree requests a conference than if he does not.<sup>338</sup> Proposed Rule 68 adds an incentive for parties to engage in these discussions, because they know that even if they do not ultimately accept an offer, they will never pay more in attorneys' fees than if they do not request a judicial conference.<sup>339</sup>

C. *Inadequacy of Criticisms to the Rule*

One possible criticism of Proposed Rule 68 is that it conflicts with the American Rule because it allows attorneys' fees to be shifted under any circumstance, as opposed to the traditional shifting allowed only through statutes or well-defined exceptions.<sup>340</sup> The shifting of attorneys' fees could limit access to the courts for certain litigants who cannot risk being subjected to this sanction.<sup>341</sup> Additionally, some plaintiffs may not be able to pay these attorneys' fees, meaning that this addition to the rule would have little or no impact in these cases.

An offer of judgment rule, however, cannot promote its goal of encouraging settlement and avoiding litigation without imposing significant enough sanctions to force the parties to make a realistic assessment of the case and seriously consider an offer. The goal of encouraging settlement "does not take place in a vacuum."<sup>342</sup> Part of the encouragement is the threat of a penalty if the offeree does not rationally consider an offer.<sup>343</sup> Therefore, the shifting of attorneys' fees, in addition to court costs and expert witness fees, is a necessary element.

A second potential criticism of Proposed Rule 68 is that it does not permit the judge discretion to disallow the shifting of attorneys' fees to avoid undue hardship. Some of the other proposals to amend Federal Rule 68,<sup>344</sup> as well as statutory authority in Minnesota,<sup>345</sup> give judges this discretion. In addition, Nevada's statute contains tests to determine if attorneys' fees will be awarded and to what extent.<sup>346</sup> While it may seem fair in some instances to exempt underprivileged litigants from the imposition of attorneys' fees, a provision such as this is not feasible or consistent with the goals of offer-of-judgment rules. Each judge will have his own interpretation of this discretion, and the inherent arbitrary nature of this judgment may cause a lack of uniformity for litigants to rely on. Therefore, if parties are unsure of whether attorneys' fees will be imposed, they may be less tempted to take advantage of the rule or seriously consider offers.

Additionally, Proposed Rule 68 compels parties to pay only a certain percentage

---

338. See *supra* Part III.B.6 for an explanation of the importance of the judicial conference on settlement negotiations.

339. Proposed Pa. R. Civ. P. 68(F).

340. *Id.* See *supra* Part II.B.1 for exceptions to the American Rule.

341. Sherman, *supra* note 4, at 1863-64.

342. Sumner, *supra* note 192, at 1061.

343. *Id.*

344. See *supra* Part II.C.3 for proposals that give judges discretion as to whether to allow attorneys' fees to be shifted.

345. MINN. R. CIV. P. 68.01-.04.

346. *Beattie v. Thomas*, 668 P.2d 268, 274 (Nev. 1983).

of fees, depending on when the offer was made in the litigation, and an even smaller percentage if an offeree requests a judicial conference.<sup>347</sup> The rule also bases the reasonable attorneys' fees on the customary hourly rate of the locality in which the case takes place. This alleviates the concern of contingency fee lawyers needlessly drawing out the litigation and recovering an unexpectedly enormous amount of fees. One of the main objectives of the rule is to punish parties who unreasonably reject offers and unnecessarily draw out the litigation process.<sup>348</sup> In order to discourage this, it is necessary to impose a certain amount of hardship on parties. The fact that attorneys' fees under Proposed Rule 68 are imposed upon parties on a sliding scale, which never reaches one hundred percent, alleviates most of the concern of enforcing extreme hardship on parties.<sup>349</sup>

A third potential criticism deals with the flat thirty percent rate of attorneys' fees an offeree is responsible for if he requests a judicial conference.<sup>350</sup> Some may argue that the percentage should vary with the timing of the offer in the same way the percentage does if the offeree does not request a judicial conference. As stated above, it is reasonable to presume that in a case that goes to trial, an offer made early will result in greater post-offer legal fees than an offer made late.<sup>351</sup> If the goal is to punish irrational litigants who refuse offers based on the amount of information they have obtained and the amount of attorneys' fees they are liable for, a flat rate may not adequately handle this issue.

The reason for the creation of the request for judicial conferences in this rule addresses this concern. The flat rate, which is always lower than the rate if the offeree does not request a conference, encourages offerees to open the lines of communication between their opponents and the judges at any point in the litigation, which can be a very valuable step in the process. There is the extra incentive in that if an offeree requests a judicial conference, he will never have to pay more than thirty percent of the reasonable attorneys' fees, regardless of the outcome.<sup>352</sup>

A fourth potential criticism is that Proposed Rule 68 imposes a thirty percent rate of attorneys' fees on an offeree if he requests a judicial conference, which is lower than any percentage of sanctions the offeree could be subject to if he does not request a conference. The divergence in attorneys' fees can vary significantly, especially if the offer is served close to trial where the difference between requesting a judicial conference or not could result in fifty percent higher sanctions.<sup>353</sup> It can be argued that

---

347. Proposed Pa. R. Civ. P. 68(F)(1)-(2).

348. See John E. Sprizzo, *Unjustifiable Refusals to Settle and Rule 68*, 62 ST. JOHN'S L. REV. 443, 443 (1988) (describing Rule 68 as "[t]he only rule that deals directly with an unreasonable refusal to settle").

349. Proposed Pa. R. Civ. P. 68(F)(1)-(2).

350. *Id.* 68(F)(1).

351. See *supra* Part III.B.7 for an explanation on why a higher percentage of attorneys' fees is imposed on an offeree when the offer is made close to the start of trial.

352. Proposed Pa. R. Civ. P. 68(F).

353. See Proposed Rule 68(F)(1)-(2), which seeks to codify the percentage of attorneys' fees to be imposed on the offeree if sanctions are appropriate. If the offer is served 90 days or less before trial and the offeree rejects the offer and is subject to sanctions, he will be charged with paying eighty percent of the offeror's post-offer fees. However, if he requests a judicial conference and still rejects the offer, he will only be liable for thirty percent of the offeror's post-offer fees.

a party is even more culpable if they engage in these types of discussions, gain input and advice from the judge, and still refuse an offer.

While this may be true, the potential benefits of the rule outweigh this concern. More often than not, when presented with credible evidence from a judge that it is in the party's best interest to accept an offer, he will do so.<sup>354</sup> Despite the fact that parties are often biased toward their position in the case, when the person who will ultimately decide the outcome and impose sanctions provides them with strong encouragement as to what they should do, it is likely they will listen. This promotion of judicial economy and prevention of monetary waste at trial is worth the few instances in which this particular criticism is viable.

A final potential criticism is that Proposed Rule 68 increases litigiousness in that the rule only comes into effect after judgment is entered, and a second round of litigation is necessary to determine a reasonable amount of attorneys' fees to impose. If one goal of the rule is to decrease litigation, the concern is that in reality more litigation, which has little to do with the merits of the case, will result in situations where a hearing on attorneys' fees is not generally necessary. This criticism fails to account for the full picture; judges already hold hearings to determine fees in cases where fees are shifted so this rule will not impose a novel and unreasonable burden on courts.<sup>355</sup> Additionally, requiring extra litigation to determine reasonable attorneys' fees will actually further promote a central purpose of the rule, encouraging settlement.<sup>356</sup> The prospect of facing further litigation after judgment is entered will act as a further deterrent to decline reasonable offers and the benefit of cases settling will outweigh the concern of increased litigation.

#### IV. CONCLUSION

Attorneys' fees are a major concern for litigants in the judicial system.<sup>357</sup> The English Rule, where the loser pays both sides' attorneys' fees, and the American Rule, where each party is responsible for paying their own attorneys' fees, are the two major systems used in courts today.<sup>358</sup> The federal offer of judgment rule, Rule 68, acts as a combination of the two rules in that fees will be shifted to a losing party only when they unreasonably refuse to accept a settlement offer.<sup>359</sup>

The English Rule fully compensates successful parties and deters frivolous

---

354. See Root, *supra* note 22, at 606–07 (stating that litigants are more likely to be risk averse than risk preferred).

355. See Perkins v. Standard Oil Co. of Cal., 399 U.S. 222, 223 (1970) (stating that an award for attorneys' fees should be determined by the court after "hearing evidence as to the extent and nature of the services rendered").

356. Marek v. Chesny, 473 U.S. 1, 5 (1985). See *supra* Part II.C.1 for an explanation of the purpose of Rule 68.

357. See Rosen-Zvi, *supra* note 2, at 717 (stating attorneys' fees are a central factor prohibiting many Americans from accessing the civil justice system).

358. See Deborah S. Breen, Note, *Baja: An Aberration or a Catalyst?*, 37 BAYLOR L. REV. 829, 829 (1985) (noting that the United States uses the American Rule and most foreign jurisdictions use the English Rule).

359. See Yoon & Baker, *supra* note 6, at 162 (stating that Rule 68 "serves as a hybrid of the English and American rules").

litigation;<sup>360</sup> however, it dissuades plaintiffs of modest financial means from bringing meritorious claims.<sup>361</sup> The American Rule and its contingency fee counterpart provides access to the courts for all litigants,<sup>362</sup> yet, it fails to fully compensate prevailing parties who are forced to spend substantial amounts of money to receive what they are legally entitled to and denies prevailing defendants any compensation.<sup>363</sup> Despite espousing the purpose of encouraging settlement and avoiding litigation, Federal Rule 68 has been unable to fulfill its mission.<sup>364</sup> A viable offer of judgment rule must impose sanctions that truly threaten a party who unreasonably refuses to settle.<sup>365</sup> Additionally, it should maintain access to the courts for litigants with meritorious claims, minimize expenses required to pursue or defend a legally justified position, discourage exploitation of the litigation process, and provide clear guidelines that allow parties to retain a level of certainty in results.<sup>366</sup>

This Comment has addressed the concerns with the English Rule,<sup>367</sup> the American Rule,<sup>368</sup> and Federal Rule 68.<sup>369</sup> Additionally, this Comment has proposed an offer of judgment rule for Pennsylvania, a state that does not currently have one, which responds to the criticism of scholars of Rule 68 and considers the terms of the vast array of state offer of judgment rules in the United States.<sup>370</sup>

Proposed Rule 68 addresses the main criticism of Federal Rule 68: that the costs awarded do not include attorneys' fees, the most costly item in litigation.<sup>371</sup> The proposal includes both attorneys' fees and expert witness fees, which is necessary to encourage litigants to use the rule because the trivial court costs imposed by Federal Rule 68 have not been effective.<sup>372</sup> Additionally, attorneys' fees are imposed on a sliding scale, which accurately reflects the goal of encouraging negotiation and punishing litigants who unreasonably refuse to settle.

The proposal will encourage more litigants to use it because it requires that the parties keep the judgment entered confidential and allows both parties to utilize the rule. Proposed Rule 68 also responds to the Supreme Court's decision in *Delta Air Lines* by imposing sanctions on a plaintiff offeree if there is a judgment for the defendant.

Proposed Rule 68 also has provisions that make the rule easier to use and more

---

360. Root, *supra* note 22, at 604–05.

361. See Havers, *supra* note 53, at 633 (stating that negative effects of English Rule are “limited to the middle and lower classes who do not qualify for legal aid”).

362. McLennan, *supra* note 18, at 386.

363. Rosen-Zvi, *supra* note 2, at 741.

364. Shelton, *supra* note 11, at 867.

365. *Id.* at 869 (stating that Federal Rule 68's operation in practice is unclear because of its many nuances and cursory nature).

366. McLennan, *supra* note 18, at 386.

367. See *supra* Part II.A.4 for criticisms of the English Rule.

368. See *supra* Part II.B.4 for criticisms of the American Rule.

369. See *supra* Part II.C.2 for criticisms of Rule 68.

370. See *supra* Part III.A for a discussion of Proposed Rule 68.

371. *E.g.*, Bone, *supra* note 13, at 1567. See *supra* Part II.C.2 for a discussion of the criticism that Rule 68 does not include attorneys' fees.

372. See Sumner, *supra* note 192, at 1059 (describing costs imposed by Rule 68 as inconsequential).

accessible to litigants. Proposed Rule 68 does not allow an offer to be made until ninety days after service of the complaint, which gives both parties a reasonable amount of time to evaluate the claim and eliminates the concern that a party will be forced into making an unreasonably hasty decision. Proposed Rule 68 also makes it easier for parties to accurately create and examine offers because the proposal stipulates that offers are to be made for a monetary amount, exclusive of costs and attorneys' fees. This alleviates the need for litigants to predict the fees of the adverse party since they are often not provided with this information voluntarily.<sup>373</sup> Additionally, the margin of error provision should alleviate some of the speculation inherent in Federal Rule 68 and decrease the amount of precision parties are required to use in deciding whether to make an offer, accept an opponent's offer, or reject the offer and risk sanctions.<sup>374</sup>

Finally, Proposed Rule 68 is unique in that it gives offerees the option to request a judicial conference before making a decision on whether to accept or reject an offer. These conferences allow the offeree to assemble the litigants before the judge to discuss any discovery issues that relate to the offeree's ability to sufficiently assess an offer. Open communication between the judge and the parties is healthy to the litigation process and the judge is in the best position to take an objective look at the offer and render an unbiased opinion as to whether it is sufficient or not.

Due to its many shortcomings, Federal Rule 68 has failed to accomplish the objective for which it was created.<sup>375</sup> However, Proposed Rule 68 will achieve "[t]he plain purpose of Rule 68 [which] is to encourage settlement and avoid litigation."<sup>376</sup>

---

373. See Lewis & Eaton, *supra* note 190, at 357 (discussing addition of requirement that plaintiffs disclose their accrued fees at the time defendant makes Rule 68 offer).

374. See Lewis & Eaton, *supra* note 193, at 572 (stating that some offer of judgment rules "require offerors and offerees to forecast trial results to the penny").

375. See WRIGHT ET AL., *supra* note 12, § 3001, at 66 (stating that "Rule 68 was intended to encourage settlements and avoid protracted litigation").

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

## APPENDIX

## State Offer of Judgment Rules

State	Citation	Party Availability	Filing Deadline	Response Deadline	Significant Differences From Federal Rule 68
Alabama	ALA. R. CIV. P. 68	Defendant	15 days prior to trial	10 days after service	
Alaska	ALASKA STAT. § 09.30.065	Both	10 days prior to trial	10 days after service	Five percent margin of error in suits involving one defendant and ten percent margin of error in suits involving multiple defendants. Limits the amount of recoverable attorneys' fees based on when the offer was made.
Arizona	ARIZ. R. CIV. P. 68	Both	30 days prior to trial	Anytime	Allows recovery of reasonable expert witness fees and double costs.
Arkansas	ARK. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
California	CAL. CIV. PROC. CODE § 998	Both	10 days prior to trial	Prior to trial or 30 days after service, whichever comes first	
Colorado	COLO. REV. STAT. § 13-17-202	Both	14 days prior to trial	14 days after service	
Connecticut	CONN. GEN. STAT. §§ 52-192a, 193	Both	30 days before trial	Plaintiff- 60 days after service Defendant- 30 days after service	Allows recovery of attorneys' fees up to \$350.
Delaware	DEL. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
District of Columbia	D.C. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Florida	FLA. STAT. § 768.79	Both	Anytime before trial	30 days after service	Twenty five percent margin of error.

State	Citation	Party Availability	Filing Deadline	Response Deadline	Significant Differences From Federal Rule 68
Georgia	GA. CODE ANN. § 9-11-68	Both	30 days prior to trial	30 days after service	Twenty five percent margin of error. Costs include reasonable attorneys' fees.
Hawaii	HAW. R. CIV. P. 68	Both	10 days prior to trial	10 days after service	
Idaho	IDAHO R. CIV. PRO. 68	Defendant	14 days before trial	14 days after service	Costs include reasonable attorneys' fees.
Illinois	None				
Indiana	IND. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Iowa	IOWA CODE § 677	Defendant	Anytime before trial	5 days after service	
Kansas	KAN. STAT. ANN. § 60-2002	Defendant	21 days prior to trial	14 days after service	
Kentucky	KY. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Louisiana	LA. REV. STAT. ANN. § 970	Both	30 days prior to trial	10 days after service	Twenty five percent margin of error.
Maine	ME. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Maryland	None				
Massachusetts	MASS. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Michigan	MICH. COMP. LAWS § 2.405	Both	28 days prior to trial	21 days after service	Allows counteroffers and then takes average of offer and counteroffer to determine whether judgment was more favorable. Costs include reasonable attorneys' fees.
Minnesota	MINN. STAT. § 68.01-04	Both	10 days prior to trial	10 days after service	Allows courts to reduce the amount of costs imposed on a party if it would inflict undue hardship or prove inequitable.
Mississippi	MISS. R. CIV. P. 68	Defendant	15 days prior to trial	10 days after service	

State	Citation	Party Availability	Filing Deadline	Response Deadline	Significant Differences From Federal Rule 68
Missouri	MO. REV. STAT. § 77.04	Defendant	30 days prior to trial	10 days after service	
Montana	MONT. R. CIV. P. 68	Defendant	14 days prior to trial	14 days after service	
Nebraska	NEB. REV. STAT. § 25-901	Defendant	Anytime before trial	5 days after service	
Nevada	NEV. R. CIV. P. 68	Both	10 days prior to trial	10 days after service	Costs include reasonable attorneys' fees.
New Hampshire	None				
New Jersey	N.J. REV. STAT. § 4:58	Both	20 days prior to trial	10 days prior to trial or 90 days after service, whichever comes first	Twenty percent margin of error. Costs include reasonable attorneys' fees.
New Mexico	N.M. STAT. ANN. § 1-068	Both	10 days prior to trial	10 days after service	Only allows plaintiffs to receive double costs.
New York	N.Y. C.P.L.R. LAW § 3220	Defendant	10 days prior to trial	10 days after service	
North Carolina	N.C. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
North Dakota	N.D. R. CIV. P. 68	Both	14 days prior to trial	14 days after service	
Ohio	NONE				
Oklahoma	OKLA. STAT. tit. 12, § 1101	Defendant	Anytime before trial	5 days after service	
Oregon	OR. R. CIV. P. 54	Defendant	14 days prior to trial	7 days after service	
Pennsylvania	None				
Rhode Island	R.I. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	

State	Citation	Party Availability	Filing Deadline	Response Deadline	Significant Differences From Federal Rule 68
South Carolina	S.C. R. CIV. P. 68	Both	20 days prior to trial	20 days after service or 10 days prior to trial, whichever comes first	A plaintiff who receives a more favorable judgment is entitled to eight percent interest on the amount recovered. A defendant is entitled to a reduction of eight percent interest on the amount recovered if the plaintiff receives a less favorable judgment.
South Dakota	S.D. CODIFIED LAWS § 15-6-68	Both	10 days prior to trial	10 days after service	
Tennessee	TENN. R. CIV. P. 68	Both	10 days prior to trial	10 days after service	
Texas	TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001, .004	Both	Anytime	Anytime	Twenty percent margin of error. Costs include reasonable attorneys' fees.
Utah	UTAH R. CIV. P. 68	Both	10 days prior to trial	Anytime	
Vermont	VT. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Virginia	None				
Washington	WASH. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
West Virginia	W. VA. R. CIV. P. 68	Defendant	10 days prior to trial	10 days after service	
Wisconsin	WIS. STAT. § 807.01	Both	20 days prior to trial	10 days after service	Allows recovery of double costs. A plaintiff who receives a more favorable judgment is entitled to one percent plus prime on amount recovered until judgment is paid.
Wyoming	WYO. R. CIV. P. 68	Both	30 days before trial begins	10 days after service	