

THE NEW MEANING OF RULE 68: *MAREK V. CHESNY* AND BEYOND

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INTRODUCTION

Napoleon reportedly once said of India, "She is a sleeping giant. But when she wakes, the earth will tremble." For nearly 50 years, rule 68 of the Federal Rules of Civil Procedure,¹ the only procedural rule devoted exclusively to encouraging settlement, has been a sleeping giant.² But last summer,

1. FED. R. CIV. P. 68 provides:

Offer of Judgment

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

2. Although rule 68 has been in the Federal Rules since their inception in 1938, it has apparently been used rather infrequently. See Kempf, *Rule 68 Offers of Judgment: An Underused Tool*, 7 LITIGATION No. 3, at 39 ("Rule 68 is largely unused."); Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 890 (observing that rule 68 has been little known and little used). Unfortunately, no empirical research has been done to determine how frequently rule 68 is used.

in *Marek v. Chesny*, the Supreme Court woke it up.³ This article will explore the implications of rule 68's revitalization.

Part I of this article will explain the basic operation of rule 68. Part II will suggest possible answers to major questions not expressly resolved by the *Marek* decision. Parts III and IV will give plaintiffs and defendants practical advice about using rule 68 in light of *Marek*. Part V will discuss some of the implications of the case on settlement negotiations outside the context of rule 68. Finally, Part VI will discuss *Marek's* implications for reform, both in the Judicial Conference and in Congress.

I

MAREK AND ITS BACKGROUND

Marek was a civil rights suit. The plaintiff was the father of a man who had been killed by police gunfire. The defendants were several police officers who had been at the scene of the shooting. The plaintiff sought damages, based on both state and federal claims.⁴

About 5½ months before trial, the defendants made an offer of judgment under rule 68. The offer stated that the defendants agreed to pay the plaintiff \$100,000, including attorneys' fees and other costs accrued as of the date of the offer.⁵ Plaintiff rejected the offer. At trial, however, the jury awarded the plaintiff only \$60,000.⁶ Even after adding in the costs and attorneys' fees that the plaintiff had accrued up to the date of the offer, which by stipulation came to \$32,000,⁷ the total (\$60,000 + \$32,000 = \$92,000) still fell slightly short of the \$100,000 offer.

This shortfall brought into play rule 68, which provides: "When the judgment obtained by the offeree is not more favorable than the offer, the offeree *must pay the costs* incurred after the making of the offer."⁸ Under rule 68 the plaintiff in *Marek* was clearly responsible for bearing "the costs" incurred after the date of the offer. The key question thus became what were "costs" under rule 68? This question shifted the focus to the Civil Rights Attorneys' Fees Awards Act of 1976 ("section 1988"),⁹ which gives district courts discretion to allow prevailing civil rights plaintiffs a "reasonable attorney's fee as part of the costs."¹⁰

When the defendants sought to enforce their rule 68 offer, they invoked the wording of section 1988. Since section 1988 defines a prevailing party's attorneys' fees as costs, the defendants argued that (1) the plaintiff was not entitled to any postoffer costs, including statutory attorneys' fees incurred af-

3. 105 S. Ct. 3012 (1985).

4. *Id.* at 3014.

5. *Id.*

6. *Id.*

7. *Id.* at 3014.

8. *See supra* note 1.

9. 42 U.S.C. § 1988 (1982).

10. *Id.* (emphasis added).

ter the date of the rule 68 offer,¹¹ and (2) the plaintiff was required to pay the defendants' costs, including attorneys' fees, incurred after the date of the rule 68 offer.¹² In short, the defendants argued that their rule 68 offer had effectively flipped section 1988 so that the defendants were entitled to reasonable attorneys' fees from the plaintiff after the date of the rule 68 offer.

The district court accepted half of the defendants' argument. The district court agreed that a successful rule 68 offer in a civil rights case relieved the defendants of the obligation to pay the plaintiff's attorneys' fees after the date of the offer.¹³ Since section 1988 defined attorneys' fees as part of the costs, the plaintiff had to bear his own postoffer attorney's fees under rule 68.¹⁴ The district court, however, refused to require the plaintiff to pay the defendants' postoffer attorneys' fees.¹⁵ Under the express language of section 1988, only the fees of the "prevailing party" are considered part of the costs. Since the plaintiff had won a judgment in *Marek*, the defendants were not prevailing parties, and their attorneys' fees were not costs under section 1988. The successful rule 68 offer, the district court therefore held, did not entitle the defendants to postoffer attorney's fees.¹⁶

The United States Court of Appeals for the Seventh Circuit reversed the holding that rule 68 costs included the plaintiff's attorneys' fees.¹⁷ Judge Posner, writing for the court, observed that when rule 68 was promulgated, it was the exception rather than the rule for the term "costs" to include attorneys' fees.¹⁸ Thus, it was unlikely that the drafters of rule 68 intended that a successful rule 68 offer would cut off a successful plaintiff's right to attorney's fees even in cases where the prevailing party's fees were defined as costs. Similarly, the court found that the drafters of section 1988 would not have wanted its force blunted by "a little known rule of court."¹⁹

11. See *Chesny v. Marek*, 547 F. Supp. 542, 545-46 (N.D. Ill. 1982), *aff'd in part, rev'd in part, and remanded*, 720 F.2d 474, 480 (7th Cir. 1983), *rev'd*, 105 S. Ct. 3012, 3018 (1985).

12. 547 F. Supp. at 547-48.

13. *Id.* at 545-47.

14. *Id.* at 546-47.

15. *Id.* at 547-48.

16. *Id.*

17. *Chesny v. Marek*, 720 F.2d 474, 476 (7th Cir. 1983). The Court of Appeals did not, however, accept all of the plaintiff's arguments. The plaintiff first argued that the offer was invalid under rule 68 because it lumped an amount for costs and for judgment on the merits together. *Id.* at 476. Judge Posner rejected this argument on the grounds that the express language of the rule appeared to allow a lump sum offer. *Id.* at 476-77. Moreover, he noted that, as a practical matter, many defendants would be unwilling to make rule 68 offers unless the limits of their liability were clear. *Id.* at 477.

The plaintiff also argued that the amount of the judgment to be compared against the rule 68 offer ought to include attorneys' fees accrued after the date of the rejected offer. *Id.* at 476. Plaintiff apparently based this argument on a theory that the judgment in a civil rights case included attorneys' fees, so the "judgment" for rule 68 purposes should also include attorneys' fees. *Id.* The Seventh Circuit rejected this argument with little discussion. *Id.*

18. *Id.* at 477. Judge Posner made this observation while analyzing the form of the rule 68 offer, but this historical perspective clearly contributed to his ultimate ruling.

19. *Id.* at 479.

The court also found that allowing a successful rule 68 offer to cut off the prevailing plaintiff's right to attorneys' fees would contradict the policy of section 1988, which was to "encourage the bringing of meritorious civil rights actions."²⁰ In particular, Judge Posner saw a potential dilemma for the plaintiffs' attorneys when defense attorneys made rule 68 offers shortly before trial. In such situations, the district court's reading of rule 68 might lead plaintiffs' attorneys to recommend inadequate settlements in order to protect their fees.²¹

Finally, the court held that the district court's reading of rule 68 would violate the "shall not abridge" clause of the Rules Enabling Act²² by abridging the plaintiff's substantive right to attorneys' fees under section 1988.²³ The court therefore remanded to the district court for a determination of the reasonable amount of the plaintiff's postoffer fees.²⁴

On appeal, the Supreme Court reversed.²⁵ In a terse opinion by Chief Justice Burger, the Court made three major holdings. First, the Court held that a lump sum offer could validly include attorneys' fees under rule 68.²⁶ Unless the rule was interpreted to allow lump sum offers, the Court explained, many defendants would not make rule 68 offers.²⁷

Second, after reviewing the sparse legislative history, the Court held that "costs" in rule 68 included attorneys' fees whenever the substantive statute underlying the litigation defined attorneys' fees as costs.²⁸ Since section 1988 did just that, rule 68 eliminated the plaintiff's right to attorneys' fees after the

20. *Id.* at 478.

21. *Id.* at 479 (plaintiffs' civil rights attorneys "should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at trial if they win"). Judge Posner also worried that a rule 68 offer made right after the complaint was filed "might deter the plaintiff's lawyers from conducting any pretrial discovery." *Id.*

22. 28 U.S.C. § 2072 (1982). The best known clause of the Rules Enabling Act provides that the Federal Rules of Civil Procedure prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." *Id.*

23. *Marek*, 720 F.2d at 479. In addition, the court expressly found that the right to attorneys' fees under § 1988 is substantive rather than procedural. According to Judge Posner, the right to attorneys' fees under § 1988 is "more like a right to receive punitive damages (universally regarded as a substantive right) than like a right to take depositions." *Id.*

24. *Id.* at 480. The Court of Appeals also affirmed the award of \$32,000 to the plaintiff for his pre-offer fees and costs, and reversed "insofar as the district court denied the plaintiff any award of fees for services beyond" the date of the rule 68 offer. *Id.*

25. *Marek v. Chesny*, 105 S. Ct. at 3018.

26. *Id.* at 3015-16. Justice Powell, who had argued that lump sum offers were invalid in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) (Powell, J., concurring), wrote a concurring opinion in *Marek* saying that he still thought it "the better practice" for an offer of judgment not to lump costs and fees together in a single amount, but he was joining the majority's opinion in *Marek* for the sake of uniformity. 105 S. Ct. at 3019.

27. *Id.* at 3016. The Supreme Court agreed with the Court of Appeals that if defendants were not allowed to make lump sum offers representing their total liability, "they would understandably be reluctant to make settlement offers." *Id.*

28. *Id.* at 3016-17.

date of the offer.²⁹

Third, without ever mentioning the Rules Enabling Act by name, the Court held that there was no conflict between the policies of rule 68 and the policies of section 1988.³⁰ The Court reasoned that section 1988 entitled the plaintiff only to a "reasonable" attorney's fee.³¹ Under the Court's prior holding in *Hensley v. Eckerhart*,³² the "most critical factor" in determining a reasonable fee was the "degree of success obtained."³³ Since a plaintiff who rejected a rule 68 offer and ultimately won a less favorable result at trial had not achieved any "success" after the rule 68 offer was received, she was not entitled to any attorney's fee for time spent on the case following the date of the offer.³⁴

The Chief Justice's majority opinion garnered the votes of five other justices, including two concurrences.³⁵ Justice Brennan, joined by Justices Marshall and Blackmun, filed a sharp dissent.³⁶

II

UNANSWERED QUESTIONS ABOUT RULE 68

The Supreme Court's decision in *Marek* left open several important questions. This section will articulate and address those questions.

A. *Must a Civil Rights Plaintiff Pay a Defendant's Fees as Part of Rule 68 Costs?*

The most burning unanswered question is whether a prevailing civil rights plaintiff must pay the losing defendant's postoffer attorneys' fees if the plaintiff obtains a judgment that is not more favorable than a rule 68 offer.³⁷

29. *Id.* at 3018.

30. *Id.* ("Rather than 'cutting against the grain' of § 1988, as the Court of Appeals held, we are convinced that applying Rule 68 in the context of a § 1983 action is consistent with the policies and objectives of § 1988").

31. *Id.*

32. 461 U.S. 424 (1983).

33. *Id.* at 436.

34. *Marek*, 105 S. Ct. at 3018.

35. The Chief Justice's opinion was joined by Justices White, Stevens, and O'Connor. Justices Powell and Rehnquist each concurred separately. The concurrences were unusually interesting because both of the concurring justices disavowed positions they had taken in *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981), the Supreme Court's only previous opinion construing rule 68.

36. 105 S. Ct. at 3019. The dissent is nearly four times as long as the majority's opinion and is consequently too long to be summarized meaningfully here. I will refer to the dissent frequently during the remainder of the article, however, because Justice Brennan raised many of the questions that were left unanswered by the majority opinion.

37. At least one district court has read *Marek* to require the plaintiff to pay the losing defendant fees in these circumstances. In *Crossman v. Marcoccio*, 108 F.R.D. 433, 434-37 (D.R.I. 1985), the court awarded a losing defendant more than \$10,000 in postoffer attorneys' fees when the plaintiff won \$5,000 at trial after rejecting a rule 68 offer for \$26,000 made only 22 days after the complaint was filed. *Id.* In making its award, the court said:

The effect of awarding counsel fees to defendants will encourage plaintiffs to give seri-

This question was addressed by the district court in *Marek*. The defendant argued that the plaintiff should be required to pay the defendants' postoffer attorneys' fees as part of the rule 68 costs that the plaintiff was required to bear.³⁸ The district court rejected that argument,³⁹ reasoning that section 1988 defines attorneys' fees as part of the costs only for the prevailing party. Since the jury rendered a judgment for the plaintiff, section 1988 costs did not include the defendants' attorneys' fees, and accordingly were not costs for purposes of rule 68.⁴⁰

The defendants did not appeal the district court's ruling that the defendants' attorneys' fees were not part of the costs, and the issue therefore was not presented to the Supreme Court.⁴¹ Justice Brennan's dissent, however, addressed the issue in cataloguing the potential dangers of the majority's holding. In a footnote, Justice Brennan stated:

It also might be argued that a defendant may not recover postoffer attorney's fees under the "plain language" of Rule 68 because he is not the "prevailing party" within the meaning of § 1988. We have made clear, however, that a party may "prevail" under § 1988 on some elements of the litigation but not on others. . . . Thus while the plaintiff would prevail for purposes of pre-offer fees, the defendants could be viewed as the prevailing party for purposes of the postoffer fees.⁴²

Unfortunately, Justice Brennan's fears have become a self-fulfilling prophecy. At least one court has cited Justice Brennan's dissent in holding that "the logical extension of the court's denying plaintiffs' fees under Rule 68

ous consideration to such offers. Although the Court has the benefit of having heard all the evidence and the jury verdict, on the basis of the information available to plaintiff at the time of the Offer of Judgment, rejection of the offer must be said to have been more the action of a "river boat gambler" than an objective evaluation of the possibilities. If anything, the offer was generous and its rejection whimsical.

Id. at 437. The Court relied blindly on *Marek's* holding that rule 68 costs include § 1988 attorneys' fees because § 1988 defines the prevailing party's fees as costs. *Id.* at 436. The *Crossman* court never discussed whether a losing defendant's fees could be counted as costs under § 1988, never discussed the Rules Enabling Act, never specified the "information available to plaintiff at the time of the offer," and never cited *Christiansburg Garment*, 434 U.S. 412 (1978), or any other case setting the standards for awarding civil rights attorneys' fees to defendants. The court's holding is plainly a distortion of *Marek* and should be reversed on appeal. *See infra* notes 45-46.

38. *Chesny v. Marek*, 547 F. Supp. at 547.

39. *Id.* The district court also refused to award the defendants their conventional costs. *Id.* at 547-48.

40. *Id.* at 547.

41. *Marek* 105 S. Ct. at 3014 n.1.

42. *Id.* at 3024 n.16 (citation omitted). Justice Brennan went on the say, "Shifting fees to the defendants in such circumstances would plainly violate Section 1988 . . . and the substantive standards of § 1988 must therefore override the otherwise "plain language" approach taken by the Court."

[in *Marek*] is to require plaintiffs to pay defendants' fees under the rule."⁴³ But for compelling reasons, this is not the logical extension of *Marek*.

Initially, using rule 68 to benefit a "prevailing" defendant would contradict the Supreme Court's own construction of rule 68. In *Delta Air Lines, Inc. v. August*, the Court held that rule 68 does not apply at all when the defendant obtains a judgment.⁴⁴ By extension, rule 68 should not apply to any issues or counts on which the defendant prevails.⁴⁵ Since rule 68 applies only when the plaintiff prevails, and since section 1988 defines the defendant's fees as costs only when the defendant prevails, an award of postoffer costs under rule 68 and an award of attorneys' fees to a defendant under section 1988 are mutually exclusive.⁴⁶

Moreover, an award of attorneys' fees to a non-prevailing defendant would violate section 1988. This would be inconsistent with *Marek* because

43. See *Crossman v. Marcoccio*, 108 F.R.D. 433, 436 (D.R.I. 1985), citing *Marek*, 105 S. Ct. at 3023 (Brennan, J., dissenting).

44. 450 U.S. 346, 352 (1981).

45. For example, suppose that a defendant offered \$5,000 plus costs to settle a three-count suit, and the plaintiff won \$4,000 by prevailing on two counts. The plaintiff is the prevailing party under § 1988 for those two counts, but must pay the postoffer costs because the final judgment of \$4,000 on the two successful counts is less favorable than the \$5,000 offer. Since the defendant is the prevailing party on the third count, rule 68 should not apply at all to that count. *Delta*, 450 U.S. at 352. The defendant is therefore entitled to fees on count three only if, as dictated under § 1988, the plaintiff's claim on count three was frivolous, groundless, or unreasonable, or unless the plaintiff continued to litigate count three after the claim clearly became so. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (setting standards for award of civil rights attorneys' fees to prevailing defendants). In no instance does the law provide for an award of postoffer attorneys' fees to a losing defendant unless the plaintiff has acted in bad faith or unless some other exception to the American Rule on attorneys' fees applies. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 241, 257-60 (1975) (endorsing American Rule and explaining exceptions).

This analysis follows directly from *Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983). In that case, the Supreme Court held that where a plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable attorney's fee under § 1988. In other words, *Hensley* held that a plaintiff may be a prevailing party for some claims but not for others.

46. Justice Brennan's dissent in *Marek* suggests a radically different approach to the concept of prevailing party. See 105 S. Ct. at 3024 n. 16 (quoted in text accompanying note 42 supra.) Justice Brennan suggests that litigation might be divided for § 1988 purposes not only according to successful and unsuccessful claims but also according to successful and unsuccessful time periods of the litigation. Under this view, a plaintiff might be the "prevailing party" up to the time of the rule 68 offer, but the defendant would be the prevailing party after the date of a successful offer. The majority may have intended to adopt this chronological division of litigation. Yet even a prevailing defendant cannot receive fees under § 1988 unless the plaintiff's action was "frivolous, unreasonable, or groundless," or unless the plaintiff continued to litigate after it clearly became so. *Christiansburg Garment*, 434 U.S. at 422. At best, therefore, a defendant could not "prevail" for purposes of postoffer attorneys' fees without showing that the plaintiff's rejection of the successful rule 68 offer was frivolous, unreasonable, or groundless—i.e., that the plaintiff continued to litigate after it clearly became frivolous, unreasonable, or groundless to do so. Even when the rejection is unreasonable, however, Justice Brennan believes the appropriate remedy is to deny the plaintiff her postoffer fees, not to shift those fees to the defendant. See *Marek*, 105 S. Ct. at 3028 ("Of course, a civil-rights plaintiff who *unreasonably* fails to accept a settlement offer, and who thereafter recovers less than the proffered amount

harmony between rule 68 and section 1988 was important to the Court. The *Marek* Court explained that it is consistent with section 1988 case law to deny fees to a plaintiff for time that proved to be unproductive.⁴⁷ It would conflict with section 1988 case law, however, to award fees to a nonprevailing defendant.⁴⁸ While a defendant who prevails completely can win fees under section 1988 if the plaintiff's action was frivolous, vexatious, groundless, or unreasonable, or if the plaintiff continued to litigate after it clearly became so,⁴⁹ a nonprevailing defendant can win fees only if the plaintiff has acted in bad faith.⁵⁰ The decision in *Marek* cannot be read to advocate such a radical break with established section 1988 case law⁵¹ because the decision in *Marek* emphasized harmony with section 1988 as a rationale for its holding.

B. Does the Holding in *Marek* Apply to Cases Other Than Civil Rights Cases?

The holding in *Marek*, beyond a doubt, applies to cases other than civil rights cases. Three pieces of evidence unequivocally support this conclusion.

First, the language and rationale of the majority opinion itself are applicable to many fee-shifting statutes. The fundamental holding of *Marek* is that "costs" under rule 68 include attorneys' fees whenever the substantive statute

in settlement, is barred under § 1988 itself from recovering fees for unproductive work performed in the wake of the rejection" (emphasis in original)).

Even if a court views the rejection of a rule 68 offer as "frivolous," see *Crossman*, *supra* note 43, 108 F.R.D. at 437 (labeling plaintiffs' rejection of a rule 68 offer "whimsical"), that is not enough to justify an award of fees to the defendant. Under *Christiansburg*, it is not the rejection of a settlement offer that must be frivolous; rather it is the suit itself. But if the plaintiff ultimately prevails—as she must if rule 68 is to apply at all (*Delta*)—then by definition the plaintiff's suit is not frivolous, unreasonable, or groundless. Thus, a prevailing plaintiff who acts in good faith can never be assessed fees under § 1988.

47. *Marek*, 105 S. Ct. at 3018.

48. In *Christiansburg Garment*, after stating the criteria for awarding fees to defendants, the Court continued:

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

434 U.S. at 421-22. The Court further cautioned that "assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." *Id.* at 422. If routine awards of attorneys fees to prevailing defendants under § 1988 are not permissible, they are all the more improper when the defendant does not prevail. Indeed, the Supreme Court has held that the practice must be exactly the opposite; a prevailing civil rights plaintiff is ordinarily entitled to attorneys' fees unless "special circumstances would render such an award of fees unjust." *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968).

49. *Christiansburg Garment*, 434 U.S. at 421-22.

50. See *Alyeska Pipeline*, 421 U.S. at 257-60 (listing bad faith as an established exception to the American Rule that each party bears its own attorneys fees in litigation).

51. Up to the time *Marek* was decided, no court had ever shifted fees to a losing defendant based on § 1988..

underlying the litigation defines the prevailing party's attorneys' fees as "costs."⁵² This holding obviously refers generally to federal statutes and not exclusively to section 1988.⁵³

Second, the dissent lists over sixty federal statutes that define attorneys' fees as costs, and thus fall within the majority's reading of "costs" under rule 68.⁵⁴ The majority made no comment at all on this list, implying that the dissent's interpretation of the majority's holding on this point was correct.⁵⁵

Third, although *Marek* focuses on section 1988 to shed light on the meaning of "costs" under rule 68, it also delineates the section 1988 right to attorneys' fees.⁵⁶ In the past, the Supreme Court has made it clear that its pronouncements about the scope of the right to fees under section 1988 apply to other fee-shifting statutes as well.⁵⁷ In *Hensley v. Eckerhart*, for example, the Court stated: "The standards set forth in this opinion [for section 1988] are generally applicable in all cases in which Congress has authorized an award of fees to a 'prevailing party.'"⁵⁸ Thus, the standards set forth in *Marek* for section 1988 should also apply to all other federal fee-shifting statutes that allow prevailing parties to collect fees as part of the costs.⁵⁹

52. *Marek*, 105 S. Ct. at 3017.

53. In arriving at its holding in *Marek*, the majority expressly referred to a number of federal fee-shifting statutes in addition to § 1988, including the communication laws, the railway labor laws, the antitrust laws, and the securities laws. *Id.* at 3016-17.

54. *Id.* at 3035-37 (appendix to dissenting opinion).

55. The majority opinion did not refer to the dissent except in footnote 2.

56. *See id.* at 3017-18. The Court also discussed § 1988 cases in which a rule 68 offer had not been made. In justifying the denial of postoffer fees under § 1988, the Court stated: "In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff . . . has not received any monetary benefits from the post-offer services of his attorney." *Id.* at 3018. This statement implies that a settlement offer made outside the context of rule 68 would also cut off further § 1988 fees to the plaintiff unless the plaintiff's final judgment was more favorable than the rejected offer. *See generally* Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CIN. L. REV. 889, 904 (1984) ("If a plaintiff rejects a formal written settlement offer and goes on to win less than the amount of the defendant's offer, the plaintiff is not ordinarily entitled to any attorney's fees for work done after the date of the offer") [hereinafter cited as Simon, *Crossroads*].

57. *See, e.g., Hensley*, 461 U.S. at 433 n.7 (applying § 1988 standards to all statutes authorizing a fee award to a "prevailing party"); *Hanrahan v. Hampton*, 446 U.S. 754, 758 n.4 (1980) (*per curiam*) (noting that § 1988 was patterned after fee-shifting provisions in Titles II and VII of the Civil Rights Act of 1964 and § 402 of the Voting Rights Act as amended in 1975).

58. *Hensley*, 461 U.S. at 433 n.7.

59. This conclusion does not address whether the majority opinion applies to statutes that allow the prevailing party an award of "costs and expenses, including a reasonable attorneys' fee". In the appendix to his dissent, Justice Brennan cites seven fee-shifting statutes which refer to "costs and expenses, including attorney's fees." *Marek*, 105 S. Ct. at 3039. Do these statutes define attorneys' fees as costs, thus coming within the purview of the majority's holding in *Marek*, or do they define attorneys' fees as "expenses," thereby escaping the reach of the majority holding?

Justice Brennan posed this question in essentially grammatical terms: does "including" modify costs or expenses? *Id.* If the question is answered on a purely grammatical basis, the answer ought to be that "including" modifies only expenses, not costs, since a modifier is generally construed to modify the word closest to it. *See* J. WARRINER, *ENGLISH GRAMMAR AND*

C. How Does Rule 68 Operate When a Plaintiff Seeks or Obtains Injunctive Relief?

Another open question concerns how and whether the holding in *Marek* applies in cases seeking injunctive relief.

1. Does Rule 68 Apply to Cases Seeking Injunctive or Declaratory Relief?

The initial question is whether rule 68 applies at all when the plaintiff seeks injunctive or declaratory relief.⁶⁰ Without doubt, it does. I offer three brief observations to support this conclusion.

First, the plaintiff in *Marek* itself sought injunctive relief.⁶¹ Although injunctive relief was only a small component of the relief sought in the case, *Marek* indicates that the mere presence of a prayer for injunctive relief does not invalidate a rule 68 offer.⁶²

Second, the Supreme Court in no way limited *Marek* to cases in which plaintiffs seek money damages. Rather, the Chief Justice's opinion for the majority was broadly phrased and would encompass even suits seeking only injunctive relief.⁶³

Finally, nothing in the language of rule 68 itself precludes offers of judgment in cases seeking injunctive relief. Although rule 68 does not expressly mention injunctive relief, the rule allows offers not only for money or property but also "to the effect specified."⁶⁴ This last phrase is broad enough to encompass offers for injunctive relief, and has been so construed by various courts.⁶⁵

COMPOSITION: COMPLETE COURSE 208 (1957) (urging writers to place modifiers "as near as possible to the words they modify"). Following this grammatical approach, Justice Brennan noted: "If 'including attorney's fees' is more naturally read as modifying only the preceding word, 'expenses,' fees awards under these statutes are not governed by rule 68." 105 S. Ct. at 3025 n.17.

60. Several cases and commentators have raised the question whether rule 68 applies to cases seeking injunctive or declaratory relief. See *Garrity v. Sununu*, 752 F.2d 727, 731 (1st Cir. 1984) ("The rule is silent and there is little authority on this issue."); Note, *The Federal Offer of Judgment Rule: A Look at Its Shortcomings and Proposals to Alleviate Them*, 1984 S. ILL. U.L.J. 619, 658-60 (discussing difficulties of applying rule 68 in cases involving injunctive relief); Note, *The "Offer of Judgment" Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 GOLDEN GATE 963, 969-72 (1980) (suggesting that rule 68 is ill-suited to cases involving nonmonetary relief)[hereinafter cited as Note, *The "Offer of Judgment" Rule*].

61. See Complaint in *Chesny v. Marek*, No. 7 C 4186 (filed Oct. 5, 1979) (seeking injunctive relief) (on file at the offices of the New York University Review of Law and Social Change).

62. It would be highly undesirable to construe rule 68 to exclude all cases seeking injunctive relief, since this would allow a plaintiff to negate rule 68 unilaterally in many cases simply by appending a good faith prayer for injunctive relief. Rule 68's settlement leverage would then be unavailable even if the primary relief sought was money damages and the injunctive relief was only a minor objective of the suit.

63. For example, the Chief Justice noted that rule 68 "expresses a clear policy of favoring settlement of *all* lawsuits." *Marek*, 105 S. Ct. at 3018 (emphasis added). Although the Chief Justice referred to "compensation" and to "monetary benefits," *id.*, nothing in the Court's opinion even hints that cases seeking nonmonetary relief would be beyond the reach of rule 68.

64. See *supra* note 1.

65. See, e.g., *Association for Retarded Citizens v. Olson*, 561 F. Supp. 495, 498 (D.N.D.

2. *How Should a Court Compare a Rule 68 Offer to the Final Judgment When Injunctive Relief Has Been Offered or Awarded?*

The more difficult question is how a court should compare the offer and the final judgment when injunctive relief is involved. Discussing this question requires consideration of several different possible situations.

One situation arises when the defendant makes a rule 68 offer including some injunctive relief, and the defendant ultimately prevails at trial.⁶⁶ Under the *Delta* doctrine, rule 68 does not apply when the defendant prevails.⁶⁷ Thus, we need not worry about this situation.⁶⁸

A second situation arises when the defendant's offer of judgment includes some but not all of the injunctive relief ultimately obtained by the plaintiff. The comparison here is easy. Since the plaintiff's final judgment includes everything the defendant offered and more, no penalty will be imposed against the plaintiff.

A third situation occurs when the defendant offers one type of injunctive relief but the plaintiff obtains another type.⁶⁹ In this situation, the judge will often have a fixed belief in her own mind as to whether the relief she ultimately awarded is more favorable to the plaintiff than the relief offered by the defendant. Thus, although the comparison between the offer and judgment might not be easily made by an outside observer,⁷⁰ the court may be able to make the comparison quite readily. If the court cannot make the comparison on its own, the defendant should have the burden of proving that the offer was more favorable to the plaintiff than the judgment finally obtained.⁷¹ If the

1982) (comparing offer proposing complex injunctive relief to judgment finally obtained), *modified on other grounds*, 713 F.2d 1384 (8th Cir. 1983); *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974) (approving offer of judgment proposing to pay \$25 and stop using certain features in making product at issue in patent infringement case).

66. When the defendant prevails, the rule 68 offer is of course always more favorable to the plaintiff than the judgment.

67. 450 U.S. 346, 352 (1981).

68. Even if rule 68 did apply, the comparison would be easy to make: the offer to the plaintiff is better than the judgment against her whenever the defendant wins.

69. *See, e.g., Garrity v. Sununu*, 752 F.2d 727, 731-33 (1st Cir. 1984) (holding that judgment awarding injunctive relief to mentally retarded plaintiffs was more favorable to plaintiffs than rejected rule 68 offer that included injunctive relief); *Association of Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 495, 498 (D.N.D. 1982), *modified on other grounds*, 713 F.2d 1384, 1387 (8th Cir. 1983)(same).

70. The problems might be especially acute in Title VII cases, with their many variables. For example, "[w]hat if plaintiff rejects an offer of promotion and then obtains an injunction to post job openings but receives no promotion?" Note, *The "Offer of Judgment" Rule*, *supra* note 60.

71. It is fair to allocate this burden to the defendant because it is the defendant who is seeking the benefit of rule 68. Since only defendants can make rule 68 offers, *see* FED. R. CIV. P. 68, *supra* note 1, only defendants can receive the benefit of rule 68 sanctions (i.e., postoffer costs). *See generally* Simon, *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, (1985) (explaining ways in which rule 68 is slanted toward defendants)[hereinafter cited as Simon, *Riddle*]. Even when rule 68 offers are accepted, economic analysis demonstrates that rule 68 benefits only defendants by forcing plaintiffs to settle at figures lower than they would absent the threat of rule 68 sanctions. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUDIES 93, 94

defendant fails to meet this burden, then rule 68 should not apply.⁷²

A fourth situation arises when the defendant makes an offer of judgment including both injunctive relief and money damages, and the plaintiff either wins more money but less injunctive relief than was offered, or less money but more injunctive relief than was offered. In this situation, the court must try to place dollar values on the injunctive relief awarded and the injunctive relief offered. Then, the court will factor in the amounts of cash offered and won in order to compare the total value of the offer to the total value of the judgment. In most instances, this calculation and comparison will be extremely difficult.

There are two options when the comparison is too difficult to make. Each is troublesome. One option is to hold that rule 68 does not apply at all in these cases. Yet, under this option rule 68 loses much of its force in injunctive cases because defendants will make fewer offers and plaintiffs will reject offers more often if they are frequently unenforceable.⁷³

A second option is to allow the defendant to present evidence that the offer was more favorable to the plaintiff than the judgment. But this option is counterproductive. Rule 68 is largely a rule of judicial efficiency.⁷⁴ To allow defendants to put on complex collateral evidence of the value of an offer and judgment after the merits of the case have been decided simply adds another layer to the litigation process.

The problem should be resolved pragmatically. When the court cannot determine whether an offer including injunctive relief is more favorable than the judgment, the court should ask the defendant what evidence she would submit to meet her burden under rule 68. If substantial collateral litigation would be required to decide whether the offer is more favorable than the judgment, the court should not allow the defendant to present the evidence and

(1986) ("Because plaintiffs are likely to settle for less, defendants are likely to offer less in settlement") [hereinafter cited as Miller].

72. I have previously suggested this solution, as have two other commentators. See generally Simon, *Riddle*, *supra* note 71, at 57-58, 81-89; 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, 836 (1984) ("Rule 68 should be held inapplicable only when a court concludes that the presence of injunctive and equitable issues makes the Rule 68 comparison too difficult.") [hereinafter cited as Varon]; Note, *Shortcomings and Proposals*, *supra* note 60, at 660 ("Should a judge feel that the offer and the judgment are incomparable, he could decline to award costs.").

73. Since plaintiffs may perceive a defendant's desire to settle as a sign of weakness, defendants will be reluctant to make rule 68 offers unless the offers carry the threat of potential sanctions. If rule 68 offers are frequently unenforceable, the potential sanctions will be severely discounted and may not provide a sufficient incentive for defendants to make offers. Conversely, plaintiffs will have far less incentive to accept rule 68 offers if they are unlikely to lead to sanctions.

74. In discussing the relationship between § 1988 and rule 68 the majority in *Marek* noted Congress's "concern that civil rights plaintiffs not be penalized for 'helping to lessen docket congestion' by settling their cases out of court." 105 S. Ct. at 3018. Justice Powell also had docket congestion on his mind when he quoted from his concurrence in *Delta*, 101 S. Ct. 1146, 1155, that "parties to litigation and the public as a whole have an interest—often an overriding one—in settlement rather than exhaustion of protracted court proceedings." 105 S. Ct. at 3019 (Powell, J., concurring).

should not award the defendant postoffer costs under rule 68. When the defendant can present her case quickly, the court should follow the pro-settlement policy of rule 68 and allow the defendant to put on its evidence.⁷⁵ In other words, the court should have discretion whether or not to allow the defendant to go forward with evidence showing that the rule 68 offer was more favorable than the plaintiff's judgment.⁷⁶

This discretionary solution will avoid significant collateral litigation. In cases not involving attorneys' fees, the postoffer costs at stake under rule 68 will be relatively small.⁷⁷ A defendant would not want to expend substantial resources proving an entitlement to those costs. When costs include the plaintiff's attorneys' fees, as in *Marek*, the defendant may find it worthwhile to litigate the applicability of her rule 68 offer.⁷⁸

In cases in which the court allows such litigation, it may obviate the need

75. For example, if the defendant in an employment discrimination case offered \$25,000 and no promotion but the plaintiff won \$5,000 with a promotion, the defendant might be able to establish the dollar value of the promotion (discounted to present value) by putting on a single expert witness. The plaintiff might very well not hire an opposing expert of its own, but might be content simply to cross-examine the defendant's expert. The testimony might take only an hour or two. Indeed, the court might be able to decide the issue on briefs accompanied by affidavits or deposition transcripts, without the need for live testimony in court. In those instances, the collateral litigation over rule 68 would not undermine the rule's policy of promoting judicial efficiency.

The same considerations will apply when the court has tentatively decided that a rule 68 offer is more favorable than the plaintiff's final judgment, but the plaintiff desires to contest the court's ruling by proving that the judgment was more favorable than the offer. Here, the court ought to be more liberal in allowing the evidence, since the burden of imposing sanctions on the plaintiff is likely to be heavier than the burden of denying sanctions to the defendant.

76. Under FED. R. EVID. 403, courts always have power to exclude relevant evidence "if its probative value is substantially outweighed by . . . considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The lengthy presentation of evidence regarding the value of a rule 68 offer might well be an "undue delay" and "waste of time" in the administration of justice that would substantially outweigh the probative value of the proposed evidence. Unfortunately, some of the time that might be saved by excluding evidence will be lost if the offering party makes an appropriate offer of proof under FED. R. EVID. 103(a)(2) to demonstrate the "substance" of the excluded evidence and preserve the point for appeal.

77. The Advisory Committee on Civil Rules has argued that the present sanction of postoffer costs, except when it includes attorneys' fees, is "too small a factor to motivate parties to use the rule." Advisory Committee note to proposed amendment to rule 68, *reprinted* in 102 F.R.D. 433-34 (1984). The Advisory Committee does not cite any empirical authority for this proposition, and my own examination of the Advisory Committee's files on rule 68 has not revealed any empirical study of costs, but I suspect most litigators would agree that postoffer costs excluding attorneys' fees are too small to make a significant difference in deciding whether to settle or go to trial. My own study of costs bears this out. *See* Simon, *Riddle*, *supra* note 71 at 55-61.

78. The plaintiff's attorneys' fees will often be even greater than the damage award. *See, e.g., Marek*, 105 S. Ct. at 3016 (after winning \$60,000 in damages, plaintiff petitioned for \$139,692.47 in postoffer fees); *Bitsouni v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 894, 899, 903 (D. Conn. Aug. 2, 1983) (after winning judgment of \$171.10, defendant claimed postoffer costs and fees of approximately \$4,700). The Supreme Court recently made clear that civil rights fee awards need not be in proportion to damage awards. *See City of Riverside v. Rivera*, 106 S. Ct. 2686 (\$33,000 damage award led to \$243,343 fee award in civil rights cases).

for collateral litigation over the plaintiff's postoffer attorneys' fees.⁷⁹ If the defendant proves that its rule 68 offer was more favorable than the plaintiff's judgment, the court will not need to review the plaintiff's petition for postoffer fees. Although the court will have to decide the rule 68 issue *and* review the plaintiff's fee petition if the defendant fails to meet its burden under rule 68, there will always be at least a possibility that allowing the defendant to present collateral evidence concerning the value of its rule 68 offer will result in a net gain in judicial efficiency.

Moreover, there are other benefits to this discretionary approach. First, allowing defendants to prove applicability of their rule 68 offers in cases involving injunctive relief will encourage defendants to make more generous offers; the more generous the offer, the easier it will be to prove that the offer was more favorable than the plaintiff's judgment.

Second, since plaintiffs in fee-shifting cases will receive attorneys' fees for successfully opposing defense motions for rule 68 sanctions, defendants will tend to move for rule 68 sanctions only in cases where they have a substantial possibility of proving that their offers were more favorable than the plaintiff's judgment. Conversely, since plaintiffs who lose on the rule 68 issue will not receive their attorneys' fees for contesting the applicability of the rule 68 offer, plaintiffs will have to think twice before contesting rule 68 sanctions.

3. *What Weight Should be Assigned to Declaratory and Injunctive Relief?*

There remains the troubling issue of how a court should weigh declaratory or injunctive relief when defendant's settlement offer included only money. Often, the judgment in a civil rights case carries with it a declaratory judgment that the defendant violated the plaintiff's rights.⁸⁰ The judgment may also include an injunction prohibiting the defendant from carrying out the unlawful policy or practice in the future. When the declaratory or injunctive relief has implications far beyond the particular parties before the court, the court should hold that the judgment outweighs any monetary relief offered

79. The calculus for the plaintiff is somewhat different from the calculus for the defendant. The defendant who loses a motion for rule 68 sanctions will have to pay in dollars for the fees accrued by the plaintiff in contesting the motion. A plaintiff's attorney, however, will have to pay only in the form of opportunity costs—the time the plaintiff's attorney spent contesting the rule 68 motion that she might otherwise have had the opportunity to spend on compensated work. Plaintiffs' attorneys are therefore likely to contest rule 68 sanctions frequently.

80. As the court stated in *Christiansburg Garment*, 434 U.S. at 418, a civil rights plaintiff is "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'" (quoting *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968)). The United States Court of Appeals for the Eighth Circuit recently made a similar pronouncement in *Bibbs v. Block*, 778 F.2d 1318, (8th Cir. 1985) (en banc). In that case, the plaintiff established a violation of Title VII by proving that race was a "discernable factor" in an employment decision. The plaintiff was not awarded any relief, however, because the employer proved that the same decision would have been made even in the absence of unlawful discrimination. The court nevertheless held that the plaintiff was a "prevailing party" for purposes of statutory attorneys' fees because the plaintiff's proof of unlawful discrimination "vindicated a major purpose of Title VII, the rooting out and deterrence of job discrimination." *Id.* at 1324.

under rule 68.⁸¹ When the declaratory or injunctive relief will have a minimal effect beyond the parties before the court, the court should place a low value on the declaratory and injunctive relief and should ordinarily impose postoffer costs on the plaintiff pursuant to rule 68.⁸² This solution gives the court discretion to determine whether rule 68 should or should not apply when plaintiffs obtain nonmonetary relief enforcing important national policies.⁸³ We must be careful, however, not to take this argument too far. *Marek*, after all, was a civil rights case.⁸⁴ Victory alone, without an express award of declaratory or injunctive relief, is clearly not enough to overcome rule 68. If victory itself were priceless, *Marek* would have been decided the other way. The Supreme Court would have decided that the judgment was more favorable than the rejected rule 68 offer or that rule 68 was inapplicable. But, because the judgment entered in the district court in *Marek* was for money damages only and did not include an express judgment of declaratory or injunctive relief, the issue of the value of declaratory and injunctive relief was not raised in *Marek*.⁸⁵ If the court were in the future to consider a case similar to *Marek* in

81. No bright line can be drawn between "public" and "private" disputes because "hidden in many seemingly private disputes are often difficult issues of public law." Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986). But Judge Edwards continues:

[T]here are a number of public law cases that are easily identifiable as such. These include constitutional issues, issues surrounding existing government regulation, and issues of great public concern. The latter category might include, for example, the development of a legal standard of strict liability in products liability cases.

Id. (footnote omitted).

A declaration that a particular policy of the defendant violates the constitution or a federal statute would be likely to have substantial effect on parties beyond the court, but a declaration that the policy was unlawful simply as applied to the particular plaintiff before the court probably would not have much effect beyond the courthouse walls. Similarly an injunction ordering the defendant not to apply a particular policy at all in the future would have a substantial impact beyond the particular case, but an order that the policy not be applied to the particular plaintiff would not. This will be a difficult judgment call, but most of the time the presence of injunctive relief will outweigh a monetary offer.

82. Whenever the plaintiff actually wins injunctive relief that was not offered by the defendant, the judgment finally obtained should presumably outweigh the offer. The public impact of the decree and the value of the court's power to enforce the decree are beyond measure, and we should not consider an offer for mere dollars to be superior, any more than we allow government to infringe first amendment liberties by paying a sufficient ransom to those whose rights are violated.

83. It is one thing to say that a prayer for injunctive relief does not nullify the operation of rule 68 when the plaintiff fails to obtain injunctive relief. It is, however, quite another thing to say that injunctive relief is ordinarily priceless and trumps all rule 68 offers that did not contain the injunctive relief. See generally Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-87 (1984) (explaining why litigation is often superior to settlement). But see *id.* at 1087-89 (rejecting a "two track" strategy of "[s]ettling automobile cases and leaving discrimination or antitrust cases for judgment . . .").

84. Of \$60,000 in damages awarded to the plaintiff in *Marek*, \$52,000 was based on the plaintiff's claim under 42 U.S.C. § 1983. *Marek*, 105 S. Ct. at 3014.

85. The respondent, who certainly could have argued that the public rebuke of the defendant police officer outweighed the mere \$8,000 difference in damages, failed to do so. Indeed, the respondent never suggested that an effort to obtain a judicial declaration of the defendants'

which the plaintiff received declaratory or injunctive relief, the court might well decide that the judgment was more favorable than the offer.

III

PRACTICAL ADVICE TO PLAINTIFFS

The plaintiffs' bar generally and the plaintiffs' civil rights bar in particular fought to have the Seventh Circuit's decision in *Marek* affirmed.⁸⁶ The Supreme Court's holding in the case does not, however, spell a total loss for plaintiffs' lawyers. In fact, they can get along quite well with *Marek* by following six basic principles. First, plaintiffs should conduct as much investigation and research as possible before filing suit. Second, plaintiffs should conduct all formal discovery as early in the case as possible. Third, when an unsatisfactory rule 68 offer is received, plaintiffs should immediately launch into intensive discovery before rejecting the offer. Fourth, when unable to evaluate an offer within ten days, plaintiffs should seek an extension of time to respond. Fifth, plaintiffs' attorneys should modify their fee arrangements in fee-shifting cases to account for the new situation created by *Marek*. Sixth, if a plaintiff ultimately obtains a judgment less favorable than a rejected settlement offer, the plaintiff should be prepared to argue vigorously that rule 68 does not apply. I will discuss each of these principles separately.

A. *Plaintiffs' Attorneys Should Investigate and Research as Much as Possible Before Filing*

The essential holding of *Marek* is that civil rights attorneys' fees are "costs" for rule 68 purposes.⁸⁷ A plaintiff who turns down a rule 68 offer and fails to obtain a more favorable judgment at trial is thus not entitled to an award of attorneys' fees accrued after the date of the offer.

This holding can be turned around to benefit plaintiffs. Rule 68 provides that an offer of judgment must include costs accrued to the date of the offer.⁸⁸

wrongdoing justified continuing the litigation. See *Marek*, No. 83-1437, Brief of the Respondent (on file at the offices of the New York University Review of Law and Social Change).

86. The American Civil Liberties Union filed an amicus brief on behalf of the respondent. A lawyer affiliated with the firm, that represented an employment discrimination plaintiff in a case similar to *Marek*, co-authored a law review article condemning the application of rule 68 in civil rights litigation. See Silverstein & Rosenblatt, *A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 CONN. L. REV. 949 (1984). (Mr. Rosenblatt is affiliated with Rogin, Nassau, Caplan, Lassman & Hirtle, which represented the plaintiff in *Bitsouni v. Sheraton Hartford Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 898 (D. Conn. 1983), in which the court held that the defendant's rule 68 offer cut off plaintiff's right to postoffer fees under Title VII because the plaintiff's judgment, which did not include any nonmonetary relief, failed to exceed the defendant's rule 68 offer, *id.* at 900-02.)

Conversely, amicus briefs on behalf of the petitioners in *Marek* (the three police officers who were involved in shooting respondent's son) were filed by the United States, the State of Florida, the City of New York, and the Equal Employment Advisory Council (an organization of employers and trade associations), all of whom are frequently sued for civil rights violations.

87. *Marek*, 105 S. Ct. at 3017.

88. FED. R. CIV. P. 68, *supra* note 1.

If costs include attorneys' fees for the purposes of the fourth sentence of rule 68—the sanctions provision of the rule—then they must also include costs for the purposes of the first sentence of rule 68—the offer provision.⁸⁹ As a consequence, a rule 68 offer is valid in a civil rights case only when the defendant agrees to pay all of the plaintiff's reasonable attorneys' fees accrued to the date of offer.⁹⁰ Rule 68 can never deprive a plaintiff of pre-offer attorneys' fees. Indeed, if the plaintiff accepts a rule 68, it offer guarantees that the plaintiff will receive her pre-offer attorneys' fees.⁹¹

If the defendant makes a rule 68 offer as soon as the complaint is served, the plaintiff's accrued pre-offer fees may not amount to much. But since a rule 68 offer cannot be made until the complaint is served, a plaintiff who does a substantial amount of investigation and research before serving the complaint can assure herself of recouping fees for that work under rule 68. In other words, pre-filing investigation and research shelters civil rights attorneys' fees against cutoff by a rule 68 offer. Thus, the first principle stated above: plaintiffs' attorneys should do as much planning, investigation and research as possible before filing a civil rights suit.

Intense pre-filing investigation should have several benefits for plaintiffs. First, since pre-filing investigation is good litigation strategy, it should strengthen plaintiffs' cases on the merits.⁹² Second, since plaintiffs' attorneys will know that rule 68 cannot deprive them of pre-filing fees, plaintiffs' lawyers may be more willing to take on civil rights cases.⁹³ If pre-filing investigation

89. According to established tenets of statutory construction, a word used twice in a particular statute must have the same meaning in both places. *See, e.g.,* *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (the term "filed" in Section 706(e) of the Civil Rights Act of 1964 must have the same meaning as the word "filed" in Section 706(c) of that Act); *Meyer v. United States*, 175 F.2d 45, 47 (2d Cir. 1949) (when the meaning of a word is clear when used one place in a statute, the word should be construed to have the same meaning in another place in the same statute). In any event, even before *Marek* there was independent authority that "costs" in the first sentence of rule 68 included attorneys' fees in civil rights cases. In *Fulps v. City of Springfield*, 715 F.2d 1088, 1092-93 (6th Cir. 1983), the court held that a rule 68 offer for \$2,500 plus "costs" accrued to the date of the offer, which was accepted by the plaintiff, obligated the defendant to pay civil rights attorneys' fees as part of the costs contained in the offer.

90. *See Marek*, 105 S. Ct. at 3016 ("As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid."); *Scheriff v. Beck*, 452 F. Supp. 1254, 1259-60 (D. Colo. 1978) (holding invalid a rule 68 offer that expressly excluded attorneys' fees from the offer in a civil rights case).

91. *Fulps v. City of Springfield*, 715 F.2d 1088, 1091-95 (6th Cir. 1983). The *Fulps* case was cited with approval by the Supreme Court in *Marek*, 105 S. Ct. at 3017. Considering the first and fourth sentences of rule 68 together without distinction, the Supreme Court stated: "Thus, absent congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorneys' fees, we are satisfied such fees are to be included as costs for purposes of Rule 68." 105 S. Ct. at 3017 (*citing Fulps*).

92. For a long list of reasons that pre-filing investigation is generally good litigation strategy, see R. SIMON, *TEACHER'S MANUAL FOR TRAINING THE ADVOCATE: THE PRETRIAL STAGE* 28-29 (1st ed. 1985) [hereinafter cited as SIMON, *MANUAL*]. For example, a lawyer who investigates before filing can evaluate the case before filing and will be in a much better position to respond to an early rule 68 offer if the defendant makes one.

93. *See Simon, Crossroads, supra* note 56, at 930 ("By promoting fair and early settlements in fee-shifting cases, Rule 68 will reduce the risks of civil rights litigation. Attorneys thus

reveals that the case is weak, a plaintiff's attorney can withdraw before the case is filed.⁹⁴ If the case has merit, the plaintiff's attorney can file knowing that if a rule 68 offer is made, it must include compensation to the attorney for all reasonable pre-offer work, including prefiling work.⁹⁵ Finally, by conducting intense prefiling investigation, the plaintiff's attorney will be prepared to evaluate a rule 68 offer if one is made shortly after the complaint is filed.⁹⁶

B. *Plaintiffs Should Take Discovery as Early as Possible*

The same sheltering principle applies to discovery. Since all attorneys' fees accumulated before a successful rule 68 offer must be paid to a prevailing plaintiff at a reasonable rate, early discovery is more likely to be compensated than later discovery. Consequently, a plaintiff's attorney should attempt to complete as much discovery as possible before a rule 68 offer is made. Specifically, a plaintiff's attorney should serve written discovery requests and deposition notices with the complaint.⁹⁷ Attorneys' fees incurred by a plaintiff in drafting these discovery requests will always be sheltered against a rule 68 fee cutoff. Unless a defendant serves a successful rule 68 offer before depositions commence, deposition costs will also be sheltered against rule 68. Since deposition costs are ordinarily the highest single component of taxable costs other than statutory attorneys' fees, sheltering deposition costs is important.⁹⁸ In

will be encouraged to accept civil rights cases. . . ."). My view is not generally shared by civil rights lawyers. See Macklin, *Promoting Settlement, Foregoing the Facts*, 14 N.Y.U. REV. L. & SOC. CHANGE 575 (1986).

94. The local rules of nearly every Federal court require lawyers to obtain court permission before withdrawing from a pending case. See, e.g., *Lowery v. Cardwell*, 575 F.2d 727, (9th Cir. 1978) (court denied defense counsel's motion to withdraw after client committed perjury). Moreover, ethical provisions sharply limit the circumstances under which a lawyer can seek to withdraw once a suit has been filed. See ABA Model Code of Professional Responsibility DR 2-110 (1979); ABA Model Rules of Professional Conduct Rule 1.16 (Final Draft 1983).

95. Indeed, a plaintiff's attorney takes a great chance for herself and her client if she fails to conduct a sufficient prefiling investigation, because § 1988 permits a defendant to win attorneys' fees after a voluntary dismissal if the plaintiff's claim was frivolous, unreasonable, or without foundation. See *Fields v. the City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983) (award of statutory attorneys' fees to defendants after the plaintiff's voluntary dismissal was not an abuse of discretion); *Interstate Underwriting Agencies, Inc. v. Gunther*, 624 F. Supp. 774, 775-76 (S.D. Fla. 1985) (awarding \$13,500 in fees to defendants after plaintiff voluntarily dismissed civil rights suit). See also FED. R. CIV. P. 11.

96. It must always be remembered that a defendant can file a rule 68 offer as soon as the complaint is filed. (The defendant need not even wait for service, which may take up to 120 days. See FED. R. CIV. P. 4(j)). Some formal discovery, especially, the depositions of the defendants themselves, will be necessary before a plaintiff can fully evaluate the case. But a plaintiff's attorney who has conducted a thorough prefiling investigation will be in a far better position to evaluate an early rule 68 offer than a plaintiff's attorney who has filed based on little or no investigation.

97. Although the Federal Rules do not require defendants to respond to written discovery requests until 45 days after service of the complaint and ordinarily do not permit plaintiffs to take depositions until at least 30 days after service of the complaint, the rules do allow the plaintiff to serve written discovery requests and deposition notices with the complaint. See FED. R. CIV. P. 30, 33, 34 & 36.

98. The general statutory definition of costs, 28 U.S.C. § 1920 (1982), allows a judge or a

addition, an aggressive posture in discovery may generate higher rule 68 offers, and a thorough knowledge of the facts will help a plaintiff to evaluate those offers. Finally, larger pre-filing fees mean that a smaller portion of any rule 68 offer will be allocated to the judgment, making it more likely that a plaintiff's rule 68 judgment will be more favorable than a defendant's rule 68 offer.⁹⁹

C. *Plaintiffs Should Respond Vigorously to Low Offers*

The sheltering concept also suggests that a plaintiff should respond vigorously to a low rule 68 offer. Civil rights lawyers fear that they will be coerced to accept rule 68 offers that are too low in order to avoid losing attorneys' fees.¹⁰⁰ If fees are rapidly mounting, however, many defendants may not have the determination to stick with a low rule 68 offer. If the offer is deliberately low, than it is of little value to the defendant unless the plaintiff accepts it. If a low offer is rejected, the defendant is likely to end up paying a heavy bill for the plaintiff's attorneys' fees (as well as his own fees and the plaintiff's judgment). Even if the judgment is more favorable to the defendant than the rule 68 offer, the defendant will still have to pay her own attorneys' fees to take the case through trial, and this may not be an economical trade-off.¹⁰¹ Therefore,

clerk to tax as costs "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." The costs of obtaining depositions that are introduced into evidence or used at trial for impeachment purposes are routinely taxed as costs under § 1920(2). See e.g., *Marcoin, Inc. v. Edwin K. Williams & Co.*, 88 F.R.D. 588, 592 (E.D. Va. 1980). A review of opinions itemizing awards of taxable costs under § 1920 and FED. R. CIV. P. 54(d) readily demonstrates that depositions are usually the largest single item of taxable costs. See, e.g., *Indep. Tube Corp.*, 543 F. Supp. at 717-23 (N.D. Ill. 1982). See generally Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 567-71 (1984).

99. Suppose, for example, that 30 days after the complaint is filed the defendant makes a rule 68 offer to settle for \$10,000, including accrued costs. If accrued costs (including statutory fees) amount to only \$1,000, then the plaintiff must win a judgment of more than \$9,000 to be eligible for postoffer fees. But if the plaintiff's attorney has done a substantial amount of pre-filing investigation and discovery, so that accrued costs are already \$6,000, then the plaintiff need win only \$4,000 at trial to be eligible for postoffer fees.

100. Judge Posner's opinion for the Seventh Circuit explained the basis for this fear. He said:

The effectiveness of Section 1988 would be reduced if the rejection of a Rule 68 offer that turned out to be more favorable than the judgment the plaintiff eventually received prevented the plaintiff from getting any award of legal fees that accrued after the date of the offer. That would mean in this case that the plaintiff's lawyers would have either to collect an additional fee from the plaintiff, thus reducing his net recovery from the jury's \$60,000 damage award, or to swallow the time they put in on the trial. Either way, the next time they are faced with a similar offer they will have to think very hard before rejecting it even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake.

720 F.2d 474, 478-79. Judge Posner also noted that a rule 68 offer made right after the complaint was filed "might deter the plaintiff's lawyers from conducting any pretrial discovery." *Id.* at 479.

101. For example, suppose a defendant makes a rule 68 offer for \$100,000, including \$25,000 in fees, in a case that will cost each side \$15,000 in fees (for a total of \$30,000 in fees) to take to trial. If the plaintiff rejects the offer and wins a judgment of \$75,000, the defendant will

the best situation for the defendant ordinarily occurs when the plaintiff accepts the rule 68 offer.¹⁰² An accepted offer saves the defendant all future fees, both her own and the plaintiff's. Thus, a defendant may be willing to raise her initial rule 68 offer if the plaintiff shows signs of putting up a vigorous fight.¹⁰³

A plaintiff faced with a rule 68 offer that is too low should therefore immediately engage in substantial discovery. The plaintiff should quickly take all necessary depositions,¹⁰⁴ and should ask for accelerated responses to any outstanding interrogatories, document requests, and requests for admissions. Courts ought to grant these requests because it would be unfair to require a plaintiff to respond to a rule 68 offer without having adequate information, especially in the high-stakes post-*Marek* era.¹⁰⁵

The defendant, of course, can make a later rule 68 offer without losing the benefit of the initial offer,¹⁰⁶ but every dollar of fees that accrues before the defendant makes a higher offer is likely to wind up in the plaintiff's pocket. In short, while it may be to a defendant's advantage to put in a low rule 68 offer as a bluff, it will not be worthwhile for the defendant to stick by that low offer if the plaintiff continues to run up fees at a rapid rate. The chance that the defendant will ultimately have to pay the plaintiff's fees will make it economically imperative to make another, more reasonable offer.

have spent a total of \$130,000 (consisting of \$75,000 judgment \$25,000 in pre-offer fees, and 30,000 in postoffer fees). If an offer of \$125,000 would have settled the suit, the defendant could have saved \$5,000 by making the higher offer and ending the suit. (However, if the savings from a lower judgment are likely to exceed the savings in attorneys' fees, it might not be worth the defendant's while to raise her offer.)

102. See Simon, *Crossroads*, *supra* note 56, at 917-18.

103. For a more extended discussion of this point, see *id.* at 925-27.

104. FED. R. CIV. P. 30(b)(1) allows a party to take a deposition upon "reasonable notice" in writing to other parties. Professor Moore considers five days to be reasonable notice. J. MOORE, J. LUCAS, & K. SINCLAIR, 4A MOORE'S FEDERAL PRACTICE ¶ 30.57 [3], at 30-89 (2d ed. 1986) ("five days will ordinarily be reasonable"). Thus, a plaintiff who has not already given notice of depositions should do so immediately upon receiving a rule 68 offer. This will enable the plaintiff to complete at least some of the depositions within the ten-day acceptance period allowed by rule 68. If the rule 68 offer is served less than 30 days after service of the summons and complaint, the plaintiff should seek leave of court to take early depositions. See FED. R. CIV. P. 30(a) (leave of court required only if plaintiff seeks to take depositions sooner than 30 days after service of complaint). If key witnesses are out of town, the plaintiff should consider taking depositions by telephone. See FED. R. CIV. P. 30(b)(7) (parties may stipulate or court may order that depositions be taken by telephone).

105. The standards for shortening the time to respond to written discovery are entirely within the court's discretion, but the need for immediate information to evaluate a rule 68 offer should qualify. Cf. *Whitkop v. Baldwin*, 1 F.R.D. 169 (D. Mass. 1939) (ordering answers to interrogatories within five days because case was about to go to trial). Of course, a court will be more likely to order accelerated responses if the requests have already been pending for some time so that the defendant has had a fair opportunity to begin gathering information and drafting a response. The plaintiff might consider moving for accelerated responses only to those written discovery requests critical to evaluating the case rather than seeking accelerated responses to all requests. However, this is best used as a fallback or compromise position since identifying the critical responses at the outset might tip the plaintiff's hand too much.

106. Rule 68 expressly provides: "The fact that an offer is made but not accepted does not preclude a subsequent offer." See *supra* note 1.

D. Plaintiffs Should Seek Extended Time to Respond to Rule 68 Offers

Another technique that a plaintiff can use to fend off a low offer is to ask for an extension of time to respond to the offer. An extension serves two purposes. First, it will give the plaintiff more time to evaluate the offer and decrease the possibility that she will unknowingly accept an inadequate offer. Second, an extension gives the plaintiff more time to take discovery and accrue costs that will ultimately be borne by the defendant if the offer is lower than the final judgment. Seeking an extension may, however, be a problem. Rule 68 does not expressly allow extensions to respond to offers.¹⁰⁷ Moreover, at least one court has held that a rule 68 offer cannot be kept open beyond ten days.¹⁰⁸

The theory behind prohibiting extensions is that defendants would not make rule 68 offers if making offers would obligate them to settle on the terms of the offer for an indefinite period—even after conditions change in the offeror's favor.¹⁰⁹ But this result can be avoided by simultaneously granting an extension of time to respond pursuant to rule 6(b) and allowing the offeror to withdraw the offer at any time after ten days have expired.¹¹⁰ (The offer should be irrevocable during the first ten days.)¹¹¹ If the offer is withdrawn before the expiration date set by the court, it will be void and of no effect, just as if it had never been made.¹¹² Several courts have already invoked rule 6(b) to allow plaintiffs more than ten days to respond to rule 68 offers. These cases are correct, since rule 6(b) applies to all litigation situations except those it expressly exempts. This solution accommodates both the plaintiff's interest in having ample time to consider an offer and the defendant's interest in being able to adjust to changes.

I am not suggesting that courts automatically grant every request by plaintiffs to extend the time for responding to rule 68 offers. A court faced with a request for an extension to respond to an offer ought to consider the

107. *But see* FED. R. CIV. P. 6(b) (providing that a court, "for cause shown," may in its discretion allow a party more time than the rules provide to perform a required act as long as the request is made before the time has expired). Some courts have invoked rule 6(b) in allowing plaintiffs more than ten days to respond to rule 68 offers. *See, e.g.,* Coleman v. McLaren, 92 F.R.D. 754 (N.D. Ill. 1981), *aff'd sub nom.* Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983).

108. Staffend v. Lake Central Airlines Inc., 47 F.R.D. 218, 220 (N.D. Ohio 1969) (denying plaintiff's motion to hold rule 68 offer open pending an important decision by the Ohio Supreme Court).

109. *Id.*

110. *See* Simon, *Crossroads*, *supra* note 56, at 922 n.140.

111. *See* 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001, at 59-60 (1973); Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401, 406 (1957) (concluding they may not be revoked).

112. Since rule 68 offers may not ordinarily be revoked before acceptance, *see supra* note 111, rule 68 says nothing about the legal effect of an offer withdrawn before acceptance. It is only logical, however, that an offer withdrawn before the expiration date can have no effect. Otherwise, the defendant would unilaterally be able to set the length of the acceptance period by withdrawing an offer without any notice to the plaintiff.

timing of the offer, the complexity of the case, the amount of discovery undertaken thus far, and any problems the offeree might encounter in obtaining authority to accept the offer.¹¹³ An extension should not be granted if the plaintiff has had ample opportunity to take discovery and evaluate the case but has not done so.

E. Plaintiffs' Attorneys Should Adjust Their Fee Agreements

Under *Marek*, a plaintiff's attorney will face problems regarding attorneys' fees in three situations: (1) when the lawyer believes that a pending rule 68 offer is reasonable but the client does not want to accept it; (2) when the rule 68 offer is reasonable but the attorneys' fees accrued to the date of the offer are very low; and (3) when a client who has rejected a rule 68 offer against the attorney's advice obtains a final judgment less favorable than the rejected offer. In this section I will briefly discuss how plaintiff's attorneys can adjust their fee agreements to account for each of these situations.

1. When the Client is Reluctant to Accept a Reasonable Offer

When the defendant makes a fair and reasonable rule 68 offer, the plaintiff's attorney may advise the plaintiff to accept it. If the plaintiff rejects this advice, the plaintiff's attorney will face a serious problem: the attorney will probably not receive any further fees in the case because the final judgment is unlikely to exceed the offer. If sweetening the offer might persuade the plaintiff to accept it, the plaintiff's attorney has two good reasons to consider increasing the plaintiff's settlement proceeds by giving up part of his fee to the plaintiff.¹¹⁴

First, to whatever extent there is a possibility that the plaintiff may lose the case altogether, accrued costs and attorneys' fees must be devalued proportionally.¹¹⁵ Since statutory attorneys' fees and other costs will be available

113. Situations meriting an extension of the ten-day period may be numerous, since the ten-day period has been widely criticized as too short. The Advisory Committee on Civil Rules, for example, made the following statement in support of its 1984 proposal to increase the acceptance period to 60 days:

The 10-day period was thought to be too short to enable many offerees to act upon offers made to them, particularly when authority from others (for example, insurers or the government) had to be obtained before action could be taken on an offer or when the offeree needed additional information to which it would be entitled by way of discovery under the rules to appraise the fairness of the offer.

Advisory Committee note to 1984 proposal to amend rule 68, *reprinted in* 102 F.R.D. at 433, 434-35 (1984).

114. Since the Supreme Court has held that a plaintiff's attorney may properly waive his entire statutory fee in order to achieve a favorable settlement, *see Evans v. Jeff D.*, 106 S. Ct. 1531, 1540 (1986), it follows that a plaintiff's attorney may waive part of his fee to achieve a settlement.

115. For example, if a plaintiff's attorney has accrued fees and costs of \$10,000 as of the date of a rule 68 offer, and if the plaintiff's attorney estimates only a 60% chance that the plaintiff will ultimately prevail, then the rough discounted value of the plaintiff's accrued costs and fees is only \$6,000.

only if the plaintiff is a prevailing party, the percentage likelihood of ultimately collecting accrued pre-offer fees and costs is the same as the percentage likelihood of winning on the merits.¹¹⁶

Second, even if there is a high probability that the plaintiff will prevail, the plaintiff's attorney must take into account the possibility that the plaintiff's judgment will be less favorable than the rule 68 offer. In that event, the plaintiff's attorney will not be compensated for any time spent after the offer. The plaintiff's attorney should therefore figure out how much she will be sacrificing if she works on the remainder of the case without compensation (*i.e.*, the opportunity cost of working on the remainder of this case for free rather than on another case for pay), then multiply that factor by the probability that the judgment finally obtained will be less favorable than the offer. The product is the amount of money the attorney should be willing to sacrifice out of her own accrued fees and costs in order to persuade her client to accept the offer.¹¹⁷

2. *When the Client Wants to Accept a Rule 68 Offer But Accrued Attorneys' Fees are Very Low*

When the defendant makes a rule 68 offer early in the case, the accrued attorneys' fees may be very low.¹¹⁸ If the client wants to accept the offer, the attorney may wind up making very little money on what ought to have been a highly profitable case. To protect against that possibility, the plaintiff's attorney should consider entering into a contingency fee arrangement at the outset of the case.¹¹⁹ The agreement should provide that if the attorney's statutory fee is less than a specified percentage of the plaintiff's final judgment, the

116. The rough value may have to be discounted even further in a multi-count case to account for the possibility that the plaintiff will prevail on some claims but not on others. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-37 (1983) (no fee may be awarded for services on unsuccessful claims that are unrelated to the successful claims).

117. For example, if there is a 40% chance that the plaintiff will not ultimately obtain a judgment more favorable than the rule 68 offer, and if the plaintiff's attorney will lose the opportunity to bill (or win) \$10,000 in fees on another case if she persists in litigating the rule 68 case, then she should be willing to share up to \$4,000 of her fee in the rule 68 case with her client if that will convince the client to accept the rule 68 offer.

Occasionally, this product may be even greater than the sum of the costs and fees accrued to the date of the offer. But if the plaintiff's attorney is convinced that continuing with the case is likely to be a losing proposition—that her client is likely to win less at trial than the amount of the rule 68 offer and the attorney is unlikely to obtain any postoffer fees—then the plaintiff's attorney should be willing to give up her entire accrued fee to her client in order to avoid later losses for both her client and herself.

118. A plaintiff's attorney who has followed my advice to do as much research, drafting, planning, and investigation as possible before filing suit will not face the problem of very low accrued fees and costs. *See supra* text accompanying notes 92-94. Moreover, an attorney who has accrued substantial fees before filing will greatly lessen the chances that the rule 68 offer will be successful, since accrued fees and costs must be subtracted from the total amount of a rule 68 offer to arrive at a figure to be compared to the final judgment. *See Marek* 105 S. Ct. at 3016 (describing proper calculus for comparing offer to judgment).

119. For legal aid societies and other not-for-profit legal organizations, unfortunately, contingency fee agreements may be prohibited by statute, by court rule, or by Internal Revenue

plaintiff will make up the deficiency out of her judgment.¹²⁰

Of course, contingent fee arrangements will not solve the problem when the rule 68 offer consists primarily of injunctive relief. But this problem is unrelated to rule 68; unless the plaintiff can afford a sizable flat fee, the plaintiff's attorney will have a problem getting a lucrative fee in the event of an early settlement for injunctive relief whether or not rule 68 is involved.

3. *When the Plaintiff Has Rejected a Successful Offer Against the Attorney's Advice*

Sometimes the plaintiff will act against the attorney's advice and reject a rule 68 offer that turns out, as the attorney predicted, to be more favorable than the plaintiff's final judgment. The plaintiff's rejection will deprive the attorney of all postoffer statutory fees, for rule 68 does not allow the court to take into account the fact that the attorney counseled acceptance.¹²¹ The attorney may thus receive only pre-offer fees for work on an entire case through trial.

Once again, a contingent fee arrangement can protect the attorney against misfortune. If the attorney has a contingent fee arrangement providing her with a specified percentage of the final judgment up to the total amount of any lost postoffer fees, the contingent fee may provide the attorney with at least some compensation for postoffer work.¹²²

Service Regulations. See *Evans v. Jeff D.*, 106 S. Ct. at 1552 n.10 (1986)(Brennan, J., dissenting).

120. Fee agreements of this type have survived challenges in the courts. See, e.g., *Thomas v. Booker*, 784 F.2d 299, 308 (8th Cir. 1986); *Sisco v. J.S. Alberici Const. Co.*, 733 F.2d 55, 57 (8th Cir. 1984); *Liverman-Melton v. British Aerospace, Inc.*, 628 F. Supp. 102, 105 (D.D.C. 1986).

121. In *Spero v. Abbott Laboratories*, 396 F. Supp. 321, 323 (N.D. Ill. 1975), a case not involving rule 68, the defendant's "very fair offer in settlement was rejected by plaintiff personally in the face of the contrary advice of his lawyer." Since the settlement offer was not made under rule 68, the court had discretion to adjust the fee pursuant to 42 U.S.C. § 2000e-5(k) (1982), the fee-shifting provision of Title VII. Although the court understood that the plaintiff's court-appointed attorney was "caught in between a reasonable offer and a recalcitrant client," the court was "reluctant to assess against [the defendant] the cost of additional services over which it had no control." *Id.* Accordingly, the court awarded only \$1,500 of the \$12,000 in fees requested by the plaintiff. *Id.* Even so, the plaintiff's attorney probably did better than he would have done had the offer been made under rule 68, since he was awarded \$900 in postoffer fees. Under rule 68, since the final judgment was not "more favorable" than the rejected offer, the rule of *Marek* would have deprived the plaintiff's attorney of all postoffer fees.

122. For example, suppose the plaintiff rejects a rule 68 offer for \$100,000 at a time when his pre-offer fees and costs are \$32,000 (the situation in *Marek*). Assuming a 1/3 contingency fee, a subsequent judgment for \$60,000 will at least entitle the plaintiff's attorney to an additional \$20,000 toward uncollectable postoffer fees. (The defendant will still be obligated to pay the \$32,000 in pre-offer fees.) It seems fair, however, that a contingent fee arrangement for postoffer fees should take effect only if the plaintiff rejects an offer against his attorney's *written* advice. Otherwise, too much collateral litigation might ensue over whether the attorney actually advised the client to accept the rule 68 offer.

F. When a Rule 68 Offer Works Harsh Consequences, Plaintiffs Should Argue That the Rule of Marek Does Not Apply

Occasionally, perhaps frequently, the application of *Marek* will have harsh consequences. An offeree may reject a rule 68 offer reasonably and in good faith, but by some quirk the plaintiff's judgment will be less favorable than the rejected offer.¹²³ In that instance, the rule of *Marek* will deprive the plaintiff's attorney of a substantial part of her fee award even though the plaintiff acted reasonably. Are there any exceptions that the plaintiff can invoke to escape the rule of *Marek*? This is, of course, an untested question, but I can suggest four colorable arguments to avoid or moderate *Marek*'s impact.

1. The Rule 68 Offer Is Unenforceable Because It Was Frivolous

The first argument the plaintiff can make is that the rule 68 offer in question was frivolous and unreasonably low when made and is thus invalid and unenforceable. This argument is unlikely to succeed, however, because the Supreme Court has already refused to endorse it. In *Delta Air Lines*,¹²⁴ the Court pointed out that a reasonableness requirement is unnecessary since rule 68 applies only when the plaintiff prevails.¹²⁵ However, the *Delta* Court stopped short of explicitly rejecting the reasonableness requirement. Rather, it skirted the issue by holding that rule 68 did not apply in the case before the Court because the defendant had prevailed.¹²⁶ In a case involving a prevailing plaintiff, as is postulated here, *Delta* left some room for courts to look at the issue afresh.¹²⁷

123. For example, a key plaintiff's witness may die, disappear, or change her story after the offer is rejected, or a persuasive judicial opinion damaging to the plaintiff's case may be handed down after a rule 68 offer is rejected. Indeed, in *Marek* itself a Seventh Circuit case came down *during trial* that had a significant effect on damages. See *Chesny v. Marek*, 547 F. Supp. at 544 n.1. However, since the new case benefitted rather than harmed the plaintiff, the problem addressed here did not arise.

124. 450 U.S. 346 (1981).

125. The *Delta* decision rested primarily on the "plain meaning" of rule 68. Rule 68 penalizes a plaintiff only when a judgment "finally obtained by" the plaintiff is not more favorable than the offer. When the defendant prevails, the Supreme Court explained, there is no judgment "obtained by" the plaintiff and rule 68 therefore does not apply. *Id.* at 351-52.

126. *Id.* at 352.

127. Immediately after explaining that a reasonableness requirement was unnecessary, the Court stated: "[I]t is hardly fair or even-handed to make the plaintiff's rejection of an utterly frivolous settlement offer a watershed event that transforms a prevailing defendant's right to costs in the discretion of the trial judge into an absolute right to recover the costs incurred after the offer was made." *Id.* at 356 (footnote omitted). In the same fashion, the plaintiff's rejection of an utterly frivolous rule 68 offer should not be a watershed event that transforms a prevailing plaintiff's right to costs "as of course" under rule 54(d) into an absolute right of the defendant to recover all postoffer costs.

In its opinion in *Delta*, the Seventh Circuit suggested a standard by which to judge the reasonableness of offers. To be reasonable when made a rule 68 offer would have to be high enough "to justify serious consideration by the plaintiff." *Delta Air Lines Inc. v. August*, 600 F.2d 699, 701 (7th Cir. 1979), *aff'd on other grounds*, 450 U.S. 346, 349-52 (1981).

Rejected rule 68 offers might be deemed to have been unreasonable when made, and thus

2. *The Offer Is Unenforceable Because It Violated Rule 11*

Closely related to the reasonableness argument is an argument that the rule 68 offer in question violated rule 11 of the Federal Rules of Civil Procedure. As amended in 1983, rule 11 requires that every pleading, motion, or "other paper"¹²⁸ be based on a "reasonable inquiry" into the facts and the law¹²⁹ and that it not be interposed "for any improper purpose."¹³⁰ If an offer was frivolously low at the time it was made but turned out to be more favorable than the plaintiff's final judgment due to some unforeseeable change in circumstances,¹³¹ the plaintiff could argue that the offer was not based on a reasonable inquiry into the facts and the law,¹³² or that the defendant's counsel did not reasonably analyze the fruits of his inquiry,¹³³ or that the rule 68

unenforceable, when there have been significant changes in the factual or legal circumstances surrounding the case. *See supra* note 123.

It is also conceivable that a plaintiff could prove that a vast preponderance of experts would have found the offer unreasonably low at the time it was made. But the extensive collateral litigation that would probably be necessary to prove such a claim might well not be permitted by the court. *See supra* notes 73-75 and accompanying text (discussing the problem of collateral litigation in rule 68 cases).

128. Rule 11 does not define the phrase "other paper," but the phrase is surely broad enough to encompass offers of judgment. Although rule 68 by its terms does not expressly require that an offer be in "writing," both the service requirements and the provision that an accepted offer be filed with the court make plain that rule 68 offers must be in writing. *See FED. R. Civ. P. 68, supra* note 1. Thus, rule 68 offers are governed by rule 11.

129. The relevant language of *FED. R. Civ. P. 11* provides:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

130. Neither the text of rule 11 nor its Advisory Committee note expressly define the phrase "improper purpose," but the text of the rule gives three examples of improper purpose: "to harass or to cause unnecessary delay or needless increase in the cost of litigation." These examples do not seem to cover a frivolous rule 68 offer, unless a low offer is viewed as a tool of harassment—an attempt to coerce the plaintiff into settling her case for an unreasonably low amount. However, since the "plain purpose of rule 68 is to encourage settlement and avoid litigation," *Marek*, 105 S. Ct. at 3015, using rule 68 as a free insurance policy against costs rather than as a good faith tool for encouraging settlement and avoiding litigation might well be considered an improper purpose, perhaps even counterproductive to the legitimate purposes of rule 68. *See Delta*, 600 F.2d at 701 ("Unrealistic use of the rule would not encourage settlements, avoid protracted litigation or relieve courts of vexatious litigation.").

131. Some changes in circumstances might be foreseeable and would not relieve the plaintiff of rule 68 sanctions. For example, a plaintiff's key 80 year-old witness could die, on the eve of trial after a long illness, after the plaintiff had neglected to take her deposition to preserve her testimony for use at trial. The purpose of mitigating the consequences of rule 68 is to protect against manifest injustice in unpredictable circumstances, not to cushion the plaintiff against her attorney's litigation blunders.

132. In *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986), the court stated that a reasonable inquiry was the amount of factual investigation and legal research that is "reasonable under the circumstances." The court also noted that rule 11 sanctions must be assessed if a paper signed by an attorney is frivolous, legally unreasonable, or without factual foundation, even though the paper was not in subjective bad faith.

133. In a leading case, *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d

offer was submitted for the improper purpose of obtaining cheap insurance against costs.¹³⁴

Once a court finds a violation of rule 11, the court must impose "an appropriate sanction" on the offending party or her attorney.¹³⁵ In the case of a rule 68 offer made in violation of rule 11, an appropriate sanction might be either voiding the offer¹³⁶ or enforcing the offer but assessing separate monetary sanctions against the defendant or his attorney.¹³⁷ If the offer is voided, rule 68 sanctions will not be imposed. If the offer is enforced but rule 11 sanctions are imposed against the defendant, the rule 11 sanctions may completely or partially offset the rule 68 sanctions.¹³⁸

Unfortunately for plaintiffs, the rule 11 argument has two serious problems. First, it implies a federal common law of negotiation ethics. Specifically, the argument implies that a defendant cannot make a rule 68 offer until

Cir. 1985), the court parsed rule 11 into a two-part objective test. This two part test takes into account not only the reasonableness of the inquiry conducted by the lawyer before filing a pleading or motion, but also the reasonableness of the lawyer's analysis of the fruits of that inquiry. In the rule 68 context, a defense lawyer who performed a sufficient inquiry to evaluate her case but served the plaintiff with a frivolous rule 68 offer might arguably violate the second prong of the *Eastway* test.

134. In *Delta*, the Court of Appeals had invalidated the defendant's low rule 68 offer partly out of fear that "a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs." 600 F.2d at 701. Although the Supreme Court did not endorse the Seventh Circuit's view that rule 68 itself embodied a prohibition against unreasonably low offers, 450 U.S. at 355, the amended version of rule 11 does arguably prohibit rule 68 offers that do nothing to further rule 68's legitimate purpose.

135. FED. R. CIV. P. 11 provides, in pertinent part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorneys' fee.

Although a rule 68 offer is not filed at the time it is made, *see* FED. R. CIV. P. 68, *supra* note 1, the offer is ordinarily filed when the defendant seeks sanctions under rule 68.

136. The former version of rule 11 provided that a pleading signed in violation of the rule could be "stricken as sham and false and the action may proceed as though the pleading had not been served." The Advisory Committee note to the amended rule 11 points out that a court using the amended rule "retains the necessary flexibility to deal appropriately with violations of the rule. It has discretion to tailor sanctions to the particular facts of the case, with which it should be well acquainted."

137. *See* FED. R. CIV. P. 11 (expressly providing for the sanction of payment of reasonable attorneys' fees incurred in connection with the improper paper). Unlike rule 68, which imposes sanctions only upon a party, rule 11 also allows the court to impose sanctions on an attorney who counseled serving a frivolous rule 68 offer.

138. For example, the court might invoke rule 68 to deny all postoffer statutory attorneys' fees to the plaintiff's attorney, but then assess those same postoffer fees against the defendant or her attorney under rule 11 on the theory that a reasonable rule 68 offer would have terminated the litigation and made it unnecessary for the plaintiff to incur any postoffer fees in the first place. Since even a reasonable rule 68 offer might not actually have terminated the litigation, however, the court may assess against the defendant or her attorney only part of the postoffer attorneys' fees incurred by the plaintiff. In that instance, rule 11 sanctions would only partially offset rule 68 sanctions.

she has carefully evaluated the case, and that if she has evaluated the case she cannot make an offer substantially below her valuation.¹³⁹ This is contrary to common practice, which permits both low offers and blind offers.¹⁴⁰ However, common practice in settlement negotiations does not entail any sanctions under the Rules; rejecting an ordinary settlement offer does not carry with it the possibility that a prevailing plaintiff will lose all postoffer statutory fees and be required to pay postoffer costs.¹⁴¹ Thus, the fact that federal courts do not prohibit certain common practices in negotiation does not mean that federal courts should endorse those practices by awarding rule 68 sanctions based on unreasonably low rule 68 offers.

A second problem with the rule 11 argument is that it is closely related to the reasonableness argument that the Supreme Court refused to adopt in *Delta*. Nevertheless, the rule 11 argument is worth making. *Delta* was decided before rule 11 was amended and before *Marek* was decided; *Delta* involved a losing plaintiff rather than a prevailing one; *Delta* did not expressly hold that unreasonably low rule 68 offers are enforceable; and several passages

139. Defense attorneys might agree on an objectively reasonable method of evaluating cases, just as courts have found standards for objectively evaluating the reasonableness of a pretrial investigation. For example, defense attorneys might take discovery concerning the plaintiff's damages, undertake a basic investigation of other facts, and check court records and published surveys to determine the range of jury verdicts in comparable cases. But once that evaluation is made, how far below it can the defense attorney go without making an offer that will be considered frivolous? Answering that question might require the courts to import some sophisticated mathematical concepts—probability, summing, decision trees, standard deviations, and the like—into the calculus of deciding whether a rule 68 offer is proper. More likely, courts would simply take a gut instinct approach to deciding whether the defendant could reasonably have believed that the plaintiff would accept the rule 68 offer. If the defendant could not reasonably have believed that the plaintiff would accept the offer, then the only purpose of the offer would be to provide insurance against costs. Yet that purpose by itself cannot be improper; the legislative history of rule 68 suggests that the original purpose of the rule was "stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance." *Delta*, 450 U.S. 346, 360 & n.25 (citation omitted). Rather, the evil to be avoided is allowing defendants to use rule 68 to buy "cheap" insurance against costs. Does this mean that an offer under rule 68 is proper if it agrees to pay an amount that 3 juries in 10 would return, but not if it agrees to pay an amount that only 3 juries in 100 would return? These are very nettlesome questions that have no easy answers.

140. Consider this excerpt from a recent book on negotiations: "While there are basic strategies, principals, techniques, and tactics that give form to the negotiation process, there are no rules by which the game is played—except the rules you make, or the ones your adversary makes." X. FRASCOGNA, JR. & H. HETHERINGTON, *NEGOTIATION STRATEGY FOR LAWYERS* 7 (1984). Later in the book the author advises defendants: "Open low but be willing to adjust upward in a realistic manner." *Id.* at 222.

141. Of course, a plaintiff who turns down a non-rule 68 settlement offer in a fee-shifting case risks losing postoffer fees under *Marek's* construction of § 1988. *Marek*, 105 S. Ct. at 3018 ("In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff . . . has not received any monetary benefits from the postoffer services of his attorney," and the denial of postoffer fees is thus "consistent with the policies and objectives of section 1988."). See generally Simon, *Crossroads*, *supra* note 56, at 898-905 (discussing cases denying postoffer fees outside the rule 68 context and developing general rule that a plaintiff who rejects a formal written settlement offer and goes on to win less than the amount of the defendant's offer is ordinarily not entitled to postoffer fees). However, the courts still retain discretion under section 1988, whereas rule 68 is mandatory.

in *Delta* indicate that the court never intended unreasonably low offers to have any effect under rule 68.¹⁴² These distinctions make the rule 11 argument a good faith argument for the modification or reversal of existing law.¹⁴³

3. Bonus for Pre-offer Work

Even when a defendant's rule 68 offer is successful, the plaintiff's attorney in a fee-shifting case is still entitled to reasonable attorneys' fees for work performed before the offer was made. The plaintiff should therefore petition the court for a bonus or multiplier for this pre-offer work.¹⁴⁴ The attorney should argue that she performed unusually well up to the time of the offer, as demonstrated by the fact that her efforts generated a settlement offer even better than the final judgment.¹⁴⁵ In addition, especially if the low final judgment was due to some unexpected event, the plaintiff could emphasize the risk in litigating civil rights cases.¹⁴⁶ If a court is sympathetic, it may award a

142. See *supra* note 127.

143. See FED. R. CIV. P. 11.

144. Both the standards for calculating a multiplier and the difficulty of obtaining a multiplier are illustrated by the Supreme Court's decision in *Blum v. Stenson*, 104 S. Ct. 1541 (1984). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate," the Court stated. "Adjustments to that fee then may be made as necessary in the particular case." *Id.* at 1543-44 (citing *Hensley v. Eckerhart*, 461 U.S. 424 (1983)). An upward adjustment is usually called a multiplier or bonus. The burden of proving that an upward adjustment is necessary to the determination of a reasonable fee is on the fee applicant. *Id.* at 1548. In *Blum*, the Court held that the fee applicant, who was a prevailing plaintiff in a civil rights case, had "introduced no evidence that enhancement was necessary to provide fair and reasonable compensation. They therefore have failed to carry their burden of justifying entitlement to an upward adjustment." *Id.* at 1550 (footnote omitted). Accordingly, the Supreme Court reversed a 50% bonus that had been awarded by the district court and affirmed by the Second Circuit.

145. The Supreme Court held in *Blum* that "in some cases of exceptional success an enhanced award may be justified." 104 S. Ct. at 1548, (quoting *Hensley*, 461 U.S. at 435). The Court has also indicated that one need not triumph on every facet of a case in order to qualify for an upward adjustment of fees. In *Hensley*, 461 U.S. at 430-31, the Supreme Court approved the fee award in *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547 (1978), in which the district court awarded plaintiffs a fee with an upward adjustment for time spent pursuing an unsuccessful motion for a preliminary injunction. The district court awarded fees for time spent pursuing the unsuccessful motion because the lawyers "substantially advanced their clients' interests" by obtaining "a significant concession from defendants as a result of their motion." *Stanford Daily*, 64 F.R.D. at 684 (quoted in *Hensley*, 461 U.S. at 431). Of course, there is a significant distinction between the concession obtained in *Stanford Daily* and the receipt of a favorable rule 68 offer that is rejected. In *Stanford Daily*, the plaintiffs reaped the benefit of the defendant's concession (a promise not to violate an earlier declaratory judgment in the case), but when a rule 68 offer is rejected, the plaintiff never reaps its benefit, and in fact may do worse at trial. Yet since pre-offer fees under rule 68 are calculated as of the date of the offer, not as of the date of the rejection, the attorney's blunder in rejecting a rule 68 offer should not completely negate her pre-offer success in obtaining the significant concession represented by a high rule 68 offer.

146. In *Blum*, the Court reversed the 50% bonus partly because the plaintiffs' attorneys did not "identify any risks associated with the litigation or claim that the risks of nonpayment required an upward adjustment to provide a reasonable fee." 104 S. Ct. at 1550. The Court added in footnote: "We have no occasion in this case to consider whether the risk of not being the prevailing party in a section 1983 case, and therefore not being entitled to an award of

substantial bonus for pre-offer work.

When the difference between the offer and the final judgment is small, the effect of a pre-offer multiplier may be remarkable. The combination of pre-offer fees and the judgment¹⁴⁷ might even exceed the amount of a lump sum rule 68 offer.¹⁴⁸ In that lucky event, the rule 68 offer would be less favorable to the plaintiff than the rejected offer, so the plaintiff's attorney would be entitled to postoffer fees.

4. *Avoiding Manifest Injustice*

If all else fails, the plaintiff should invoke rule 1, which provides that all rules of civil procedure shall be construed to achieve the "just" resolution of every case.¹⁴⁹ The plaintiff may attempt to persuade the court to suspend or mitigate the operation of rule 68 to avoid manifest injustice.

None of the four arguments I have suggested is very good. In a case in which *Marek* has drastic and totally unexpected consequences, however, the plaintiff can make these arguments to attempt to stave off disaster. The strong holding of *Marek* has left little room for maneuver, but even after *Marek* the arguments I have suggested can be made in good faith. If a court believes the

attorney's fees from one's adversary, may ever justify an upward fee adjustment." *Id.* at 1550 n.17. Justices Brennan and Marshall, however, concurred separately to reaffirm their views that "Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee." *Id.* at 1550 (citation omitted). The concurring opinion quoted *Stanford Daily*, 64 F.R.D. at 685-86, to the effect that a court may "increase the fees award obtained by multiplying the number of hours by the average billing rate to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature."

An analogous argument could be made in the context of rule 68. After *Marek*, the "lode-star" (reasonable hours times reasonable hourly rate) for pre-offer work may often have to be adjusted upward to account for the risk of nonpayment for postoffer work.

147. In *Marek*, for example, a multiplier of 30% on pre-offer fees of about \$32,000 (i.e., a bonus of \$9,600) would have made the judgment finally obtained, together with pre-offer costs (including fees), more favorable than the rejected \$100,000 rule 68 offer (\$60,000 + \$32,000 + \$9,600 = \$101,600). Since the calculus for comparing judgments to rule 68 offers includes pre-offer fees, see *Marek*, 105 S. Ct. at 3016, a bonus for pre-offer work ought to be included in the calculus.

148. It is a bit of a bootstrap to award the plaintiff's attorney a pre-offer bonus because of the risk that *Marek* would deprive him of all postoffer fees, and then to award the attorney all of his postoffer fees with a bonus on top. Indeed, a court awarding a pre-offer bonus might well deny all postoffer fees under § 1988, even if the combination of the judgment plus pre-offer fees with a bonus exceeded the rule 68 offer, because "the plaintiff—although technically the prevailing party—has not received any monetary benefits from the postoffer services of his attorney." *Marek*, 105 S. Ct. at 3018. But the idea of a pre-offer and postoffer bonus is not so perverse when we consider that the gap between the offer and the judgment can seldom be bridged by a multiplier on pre-offer fees. Thus, if the risk of nonpayment is a legitimate basis for a multiplier, see *supra* note 146, then a multiplier in a case where a rule 68 offer was rejected may be necessary to compensate for the risk of nonpayment in other civil rights cases, including the risk that postoffer fees will not be paid in those other cases if a rule 68 offer has been made.

149. FED. R. CIV. P. 1. provides that the Federal Rules of Civil Procedure "shall be construed to secure the just, speedy, and inexpensive determination of every action."

operation of the rule would be manifestly unjust, these arguments may give it the tools it needs to moderate the impact of rule 68.

IV

PRACTICAL ADVICE TO DEFENDANTS

Marek has generally been viewed as a defendants' decision,¹⁵⁰ but it will not help defendants much unless they use rule 68 skillfully. Using rule 68 skillfully means making rule 68 offers at the right time, in the right form, and in the right amount.

A. *Timing an Offer of Judgment*

Rule 68 allows a defendant to make an offer of judgment as soon as the complaint is filed. Defendants should take advantage of this right by making rule 68 offers as soon as possible,¹⁵¹ meaning as soon as the case can be roughly evaluated.¹⁵² If a defendant anticipates suit, then she should evaluate the anticipated suit and prepare a rule 68 offer to be served on the plaintiff immediately after the complaint is filed.¹⁵³

Early offers have several advantages. First, if an offer is successful (i.e., if the offer equals or exceeds the judgment finally obtained by the plaintiff), it stops costs from accruing at the earliest possible point. Especially in fee-shift-

150. Miller, *supra* note 71, at 120 ("Plaintiff will be worse off, and defendant better off, under this regimen [the rule of *Marek*] than under a one-way fee-shifting statute without Rule 68."); Silverstein & Rosenblatt, *A Square Peg in a Round Hole: The Application of Rule 68 to Awards of Attorney's Fees in Civil Rights Litigation*, 16 CONN. L. REV. 949, 961-62 (1984); see, e.g., Stephenson & Kurnick, *Rule 68 Offers of Judgment in Actions Arising Under 42 U.S.C. Section 1983*, 724 ILL. B.J. 346, 352 (1986) ("The Supreme Court's interpretation of Rule 68 costs as including Section 1988 attorney's fees provided defendants in civil rights suits an effective means of curtailing their liability for fees.") [hereinafter cited as Stephenson & Kurnick]; Justice Brennan's dissent in *Marek*, 105 S. Ct. at 3019, amply explains why the majority's opinion in *Marek* will favor defendants more than plaintiffs.

151. Stephenson & Kurnick, *supra* note 150, at 352 ("Defendants will recognize that most offers of judgment, if they are to be made, should be made at the early stage of litigation, before substantial fees have been accumulated by plaintiff's counsel."); Varon, *supra* note 72, at 843 ("A sensible defendant should make an offer of judgment at the beginning of the case, before opposing counsel has logged many hours").

152. Obviously, a defendant will not usually be able to evaluate a case thoroughly until after some discovery has been taken. However, by looking at jury awards (and settlement figures, if available) in similar types of cases, and by talking to the plaintiff's attorney about the plaintiff's damages, the defendant's attorneys should be able to reach a rough estimate of the likely range of jury verdicts.

153. In civil rights and employment discrimination litigation, for example, the defendant will often have considerable warning that a suit is coming. In employment discrimination litigation, the plaintiff cannot even file a complaint in federal court until she has filed a complaint with the appropriate state human rights agency and/or the Equal Employment Opportunity Commission. See 42 U.S.C. §§ 2000e-5(c), (e). Thus, an employment discrimination defendant will not only have warning that a suit is coming but will also have fairly extensive knowledge of the plaintiff's claim based on the investigation and conciliation efforts by the EEOC or the state agency.

ing suits, cutting off costs at the earliest possible moment will make a substantial economic difference.

Second, an early offer may catch the plaintiff by surprise, before the plaintiff has had an opportunity to evaluate the case. The plaintiff may then either accept an offer that is too low or reject one that is too high, saving the defendant money in either instance. More specifically, since the plaintiff is not ordinarily entitled to responses to interrogatories or document requests until forty-five days after the complaint is served,¹⁵⁴ and since the plaintiff has only ten days to respond to the offer,¹⁵⁵ an early offer may force the plaintiff to accept or reject the offer before taking any discovery.

Third, if the plaintiff rejects it, the rule 68 offer will hang over the litigation like a guillotine, influencing the plaintiff's behavior in several ways. The plaintiff may, for example, be overly cautious in prosecuting her case because she risks not being reimbursed for her costs after the date of the offer.¹⁵⁶ The rejected rule 68 offer may thus influence the plaintiff to cut back on discovery¹⁵⁷ and may discourage the plaintiff's attorney from doing thorough legal research, conducting informal investigation, and otherwise spending adequate time on the case.¹⁵⁸ Moreover, since the plaintiff may have to pay the defendant's postoffer costs, the defendant's discovery will give the defendant more leverage than usual in forcing a settlement.¹⁵⁹ The chilling effect of the original offer remains even if the defendant later makes other offers because rule 68

154. FED. R. CIV. P. 33(a) & 34(a). The 45-day period can be shortened, but this will not be done unless the plaintiff files a motion.

155. See FED. R. CIV. P. 68, *supra* note 1. Of course, plaintiff's attorneys who read this article may take my advice to move for an extension of time to respond, which may be available under FED. R. CIV. P. (6)(b). See *supra* text accompanying notes 126-131.

156. This was Judge Posner's worry in *Marek*. He noted that "if [a rule 68 offer] were made right after the complaint was filed it might deter the plaintiff's lawyers from conducting any pretrial discovery." 720 F.2d at 474.

157. Discovery, especially deposition transcripts and photocopies of documents, typically contributes substantially to taxable costs, for which the plaintiff's attorney may not be reimbursed if the rejected rule 68 offer exceeds the judgment. See 28 U.S.C. § 1920 (1982) (defining taxable costs). See generally Bartell, *Taxation of Costs and Awards of Expenses in Federal Court*, 105 F.R.D. 553 (1984).

158. Research and informal investigation may account for a significant percentage of the hours that the plaintiff's attorney spends on the case. By cutting down on research and investigation, the plaintiff's attorney can minimize the hours that will not be compensated if the rejected offer turns out to be as favorable as the plaintiff's judgment.

159. As I have noted, deposition costs are frequently the largest single item of taxable costs. See *supra* note 98, and accompanying text. Although there is still some controversy as to whether a successful rule 68 offer requires the plaintiff to pay the defendant's postoffer taxable costs, the possibility that the court will require the plaintiff to pay the defendant's postoffer costs undoubtedly exists. Moreover, if rule 68 is interpreted so that a successful rule 68 offer requires the plaintiff to pay the defendant's postoffer attorneys' fees, see *Crossman v. Marcoccio*, 108 F.R.D. 433, 435-37 (D.R.I. 1985) (awarding defendants \$10,902.50 in fees and costs under § 1988 because plaintiffs rejected a more favorable rule 68 offer made only 22 days after the complaint was filed)—a result with which I strenuously disagree, see *supra* note 37—the leverage a defendant can gain by taking intensive and expensive discovery will increase manifold.

allows defendants to make as many offers as they wish¹⁶⁰ without losing the benefit of the earlier offers.¹⁶¹

B. *The Form of the Offer*

Offers can take any of three basic forms. The first form is to track the language of rule 68 by offering a specified dollar amount plus "costs accrued to the date of the offer."¹⁶² An offer in this form is unquestionably valid, but will obligate the defendant to pay the plaintiff's pre-offer costs in whatever amount the court deems correct.¹⁶³ If an applicable fee-shifting statute defines attorneys' fees as costs, an offer to pay accrued costs will obligate the defendant to pay the plaintiff's pre-offer attorneys' fees.¹⁶⁴ If the plaintiff's attorney has spent a substantial amount of time on the case before filing suit, or has spent substantial time in informal investigation, legal research, and other activities hidden from the view of the defendant's attorney, the attorneys' fees may be a much larger amount than the defendant estimated. The defendant may be unpleasantly surprised by this high amount.¹⁶⁵

A second form of offer is a fixed dollar sum including (rather than in addition to) attorneys' fees accrued to date. This form of offer was expressly approved by the Supreme Court in *Marek*.¹⁶⁶ An offer in this form has the advantage of capping the defendant's total liability if the offer is accepted. If an offer in this form is accepted, the defendant will not be surprised by having to pay unusually high attorneys' fees or other costs. If an offer in this form is

160. FED. R. CIV. P. 68, *supra* note 1. The fifth sentence of the rule provides, "The fact that an offer is made but not accepted does not preclude a subsequent offer."

161. In his *Marek* dissent, Justice Brennan observed that "because Rule 68 offers may be made recurrently without limitation, defendants will be well advised to make ever-slightly larger offers throughout the discovery process and before plaintiffs have conducted all reasonably necessary discovery." 105 S. Ct. at 3029. I shall discuss the timing of such offers below, in the section discussing the amount of the offer. See *supra* text accompanying notes 195-201.

162. FED. R. CIV. P. 68, *supra* note 1, provides that the defendant may serve "an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued."

163. See *Fulps v. City of Springfield*, 715 F.2d 1088, 1090-91 (6th Cir. 1983) (holding that a rule 68 offer in a civil rights case to pay \$2,500 plus accrued "costs" obligated the defendant of error to pay the plaintiff's accrued pre-offer attorneys' fees, even though the offer did not mention fees), *cited with approval* in *Marek*, 105 S. Ct. at 3017.

164. Under rule 68, when an offer has been accepted and the proper papers have been filed with the court, "the clerk shall enter judgment." See *supra* note 1. Once the judgment is entered, costs will ordinarily be "taxed by the clerk on one day's notice." FED. R. CIV. P. 54(d). The clerk's taxation of costs will not be reviewed by the court unless one of the parties serves a motion within five days after the clerk's action. See *id.*

165. Because of the possibility of surprise, "many a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff." *Marek*, 105 S. Ct. at 3016, *citing* 720 F.2d at 477. In a case not involving fee-shifting, the defendant is unlikely to be surprised by a high bill of costs because most costs accrue only through discovery or trial. See 28 U.S.C. § 1920.

166. 105 S. Ct. at 3015-16. The offer expressly approved in *Marek* was "for a sum, including costs now accrued and attorney's fees, of One-Hundred Thousand (\$100,000) Dollars." *Id.* at 3014.

rejected, however, the defendant's position is ambiguous. In *Marek*, the Supreme Court explained that the portion of the rule 68 offer to be compared to the final judgment is the total amount of the offer minus accrued costs as of the date of the offer.¹⁶⁷ Because the defendant in such situations will not know the amount of pre-offer costs the court will eventually find, she will not know the exact portion of the rule 68 offer that will be compared against the final judgment, and thus will not know whether to make another rule 68 offer.¹⁶⁸

A third form of rule 68 offer is a specified sum of money for damages plus a specified sum of money for costs accrued to the date of the offer. For two reasons, an offer in this form is not advisable. On the one hand, if the amount specified for costs accrued to the date of the offer is less than the amount actually accrued, the offer is not "with costs then accrued."¹⁶⁹ In *Marek*, the Supreme Court indicated that a rule 68 offer excluding accrued costs is invalid.¹⁷⁰ On the other hand, if the amount specified for costs is substantially higher than the amount actually accrued, then the defendant is paying money she is not obligated to pay. Worse, if costs include attorneys' fees, an excessively high cost component may be viewed as an unethical (and hence invalid) attempt to buy the attorney's recommendation that the client accept the offer. An offer to pay a high figure for attorneys' fees would create for the plaintiff's attorney a sharp conflict of interest between her own interest in earning a high fee and her client's interest in rejecting the offer in order to obtain a more favorable result at trial.¹⁷¹ This conflict can have damaging consequences whether the client accepts or rejects the offer.¹⁷²

167. *Id.* at 3016. The calculation was explained in somewhat more detail by the Court of Appeals in *Marek*, 720 F.2d at 476.

168. See Stephenson & Kurnik, *supra* note 150, at 350 ("The drawback of an unaccepted lump-sum offer is apparent; it lacks certainty").

169. FED. R. CIV. P. 68, *supra* note 1, requires that an offer be "with costs then accrued."

170. See *Marek*, 105 S. Ct. at 3016 ("As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.") (emphasis in original); Scheriff v. Beck 452 F. Supp. 1254, 1259-60 (D. Colo. 1978)(invalidating rule 68 offer that excluded civil rights attorneys' fees).

171. ABA Model Rules of Professional Conduct Rule 1.7(b) (Final Draft 1983), part of the general rule on conflict of interests, provides that a lawyer "shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, *or by the lawyer's own interests . . .*" (emphasis added). The Comment offers the example that "a lawyer's possible need for income should not lead the lawyer to undertake matters that cannot be handled competently at a reasonable fee." *Id.* Thus, the lawyer's desire for fees can plainly lead to a conflict. Similarly, DR 5-101(A) of the ABA Model Code of Professional Responsibility provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." Of course, if the judgment portion of the offer itself is extremely generous, the client may also have an interest in accepting the offer.

172. No court has faced the problem of an offer to pay excessive fees in the context of rule 68, but it is easy to imagine the problems it might cause. If the client accepts the offer and later becomes dissatisfied, perhaps feeling that his attorney pressured him into accepting an offer that was too low, then client may try to unravel the settlement and continue the litigation. *Cf.*

An offeror should therefore avoid an offer specifying a particular sum for costs accrued to the date of the offer. An offeror wishing to cap her maximum total liability under a rule 68 offer should make an offer specifying a total sum including costs accrued, like that approved in *Marek*.

C. *The Amount of the Offer*

As with an ordinary settlement offer, the most difficult problem in making a rule 68 offer is determining the amount of the offer. Initially, the defendant should be guided by considerations used in normal settlement negotiations. The defendant should make a low opening offer under rule 68—an offer to settle on the best terms the defendant can get at trial short of complete victory.¹⁷³ This low offer may catch a plaintiff who has an unexpectedly weak case; tempt a timid plaintiff to abandon litigation at the earliest opportunity; dampen the plaintiff's plans for extensive discovery; or lower the plaintiff's sights regarding the value of the case.

If the plaintiff rejects the offer and does not take the offensive, the defendant may wish to leave her low offer in place until intensive discovery begins. However, if the plaintiff reacts to the low offer by litigating aggressively, the defendant may wish to make a second offer immediately in order to cut off further accrual of fees.

The defendant's second offer should usually be just inside the lower range of likely jury verdicts. This will create a dilemma for the plaintiff's attorney. If the attorney recommends that the plaintiff accept the offer, she will be advising her client to take the minimum judgment the client is likely to win at trial. But if the attorney counsels the plaintiff to reject the offer, she risks a reasonable possibility that no attorneys' fees will be awarded for any work on the case after the date of the offer. Moreover, since the plaintiff cannot compel the defendant to make another offer,¹⁷⁴ the low offer will influence all settlement negotiations that take place later in the litigation. Therefore, if the defendant makes a later offer, the plaintiff's attorney may pressure her client into accepting the offer even if it is still too low, or may feel compelled to give up a substantial portion of her fee to the client in order to make the settlement

"Coerced" Divorce Settlement Vacated, Chi. Daily L. Bull., Sept. 11, 1985, at 1, col. 2 (settlement vacated because trial judge and woman's lawyer pressured her into unfair settlement). If the plaintiff rejects the offer and goes on to win a less favorable judgment at trial, the court may refuse to enforce the offer because of the excessive provision for costs. Indeed, although this would not be detrimental to the defendant, the court might even order the plaintiff's lawyer to turn over his fee to the plaintiff. See *Charged With Pressuring His Client, Lawyer is Ordered to Return His Fee*, Legal Times of Washington, Feb. 24, 1986, at 11-12.

173. The best result the defendant can get is, of course, complete victory, but rule 68 does not apply when the defendant wins. *Delta*, 450 U.S. at 352. An offer for the best conceivable result short of victory might be an offer, for example, to pay the plaintiff the lowest jury award likely to be returned if the same case were tried simultaneously to one hundred different panels.

174. Rule 68 permits only defendants to make rule 68 offers, because the rule allows offers only by "a party defending against a claim." See *Delta*, 450 U.S. at 350 ("The Rule has no application to offers made by the plaintiff.")

proposal acceptable. Thus, an offer that is low but still within the range of likely jury verdicts gives the defendant significant settlement leverage.

Whether the defendant should make a still higher offer after the first two offers have been rejected depends largely on the actions of the plaintiff's attorney. A bold plaintiff's attorney, confident that she is likely to do better than the offer at trial, may respond to the rule 68 offers by litigating aggressively and taking intense discovery. A timid plaintiff's attorney may slow down the pace of her work on the case, which ironically may turn the low offer into a successful one for the defendant.

If the plaintiff appears determined to press forward with the suit vigorously, the defendant must consider the probability that she will have to pay double attorneys' fees for the remainder of the litigation—both her own and the plaintiff's. If the double fees would be substantial, the defendant ought to contemplate raising her offer considerably. By raising her offer to a point at or above the most likely jury verdict, the defendant can buy "insurance" against paying the plaintiff's postoffer fees. Moreover, if the offer is high enough to persuade the plaintiff to accept it, then the rule 68 offer will terminate the litigation and the defendant will also save her own potential attorneys' fees.¹⁷⁵ If the plaintiff accepts this offer, the total savings in attorneys' fees may outweigh the increase in the high amount of the new offer. If the plaintiff rejects this offer, the defendant will be insured against paying the plaintiff's postoffer attorneys' fees for at least half the range of potential verdicts.¹⁷⁶

If the plaintiff has not accepted an offer at or above the most likely jury verdict, the defendant may wish to make one final offer shortly before trial. The purpose of the final offer would be twofold: to increase the likelihood of settlement, and, if the offer is rejected, to increase the amount of the defendant's rule 68 "insurance" against having to pay the plaintiff's fees and costs for going to trial. The amount of the final offer depends on a number of factors, including the intrinsic value of a settlement to the defendant, the amount the plaintiff may spend going to trial, the amount the defendant will have to spend

175. Relief from attorneys' fees is especially important for defendants because most defendants (except governmental defendants) pay their lawyers by the hour; contingent fee agreements are not possible for defendants because even a prevailing defendant does not win any recovery out of which the lawyers can obtain a fee. Even in fee-shifting cases, prevailing defendants ordinarily cannot recover their fees unless the plaintiff's action was "frivolous, unreasonable, or groundless, or the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment*, 434 U.S. at 422.

176. To illustrate, suppose the defendant's previous rule 68 offer was for \$10,000 (including negligible accrued fees); the most likely verdict in the case is \$50,000 accrued fees are now \$25,000; and the defendant's counsel estimates that the combined attorneys' fees for the plaintiff and defendant through trial will be \$75,000. If the defendant fails to make a new, higher rule 68 offer, the defendant is likely to end up paying a \$50,000 additional judgment, plus \$25,000 in fees to date, plus an additional \$75,000 in fees through trial, for a total of \$150,000. If the defendant instead makes a rule 68 offer to pay \$50,000 plus accrued fees then acceptance of the offer will save the defendant \$75,000 (the combined amount of all postoffer fees). Indeed, the defendant could save money by making any offer up to \$150,000, assuming the case cannot settle on more favorable terms before trial.

going to trial, the probability that the judgment will exceed the defendant's highest pending offer, and the amount by which the defendant would have to raise her offer to gain significantly more security against paying the plaintiff's postoffer costs.¹⁷⁷ If the defendant does make a final offer before trial, it is likely to put intense pressure on the plaintiff's attorney to settle.¹⁷⁸

V

THE EFFECT OF *MAREK V. CHESNY* ON SETTLEMENT NEGOTIATIONS OUTSIDE THE CONTEXT OF RULE 68

Marek will naturally have its greatest impact on fee-shifting cases involving rule 68 offers. But for two reasons, *Marek* will also have a substantial impact on settlement negotiations in fee-shifting cases outside the context of rule 68.

First, the Court's opinion in *Marek* was based not only on rule 68 but also on a construction of section 1988.¹⁷⁹ The opinion will thus affect cases involving section 1988 regardless of whether a rule 68 offer is made.

Second, the Supreme Court recently held that defendants may condition non-rule 68 offers of settlement on a waiver of fees by the plaintiff.¹⁸⁰ Since the Court held in *Marek* that rule 68 offers of judgment must include reasonable attorneys' fees,¹⁸¹ whenever an underlying fee-shifting statute defines attorneys' fees as costs, *Marek* may drive defendants away from rule 68. I will discuss these two points separately.

177. As in ordinary settlement negotiations, some defendants will have special reasons for wanting to avoid trial. For example, some defendants are highly risk averse; others may want to avoid the publicity of trial; others may have intense anxiety about testifying in trial; others may not want to devote the corporate resources, including executive time, necessary to prepare for trial; some defendants might be thrown into bankruptcy by a high jury verdict; and still others may worry that a trial will reveal sensitive information that the defendant desires to keep secret. These defendants may be willing to offer a high "premium" to settle the case (if the offer is accepted) or buy "insurance" against having to pay the plaintiff's postoffer fees (if the offer is rejected). As with other types of insurance, the amount of rule 68 "fee insurance" that a defendant needs will depend on all of the defendant's circumstances at the time of the offer, including the adverse consequences the defendant may suffer if the offer is rejected and does not turn out to be more favorable than the plaintiff's final judgment. I have listed some of the relevant factors, but each lawyer and client will have to weigh these factors in light of the circumstances of each case.

178. As Judge Posner pointed out in the Court of Appeals' opinion: plaintiffs "will have to think very hard before rejecting [a rule 68 offer] even if they consider it inadequate, knowing that rejection could cost themselves or their client a lot if it turned out to be a mistake." 720 F.2d at 479.

179. Section 1988 provides fees to prevailing parties in actions grounded on 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 (1982), the principal civil rights laws in this country. The other major civil rights fee-shifting statute is 42 U.S.C. 2000e-5(k) (1982), which provides fees to prevailing plaintiffs in employment discrimination actions brought under Title VII of the Civil Rights Act of 1964. Section 2000e-5(k) uses language virtually identical to § 1988 and has been interpreted in exactly the same manner. See *Hensley v. Eckerhart*, 461 U.S. at 433 n.7.

180. See *supra* note 170.

181. *Evans v. Jeff D.*, 106 S. Ct. 1531 (1986). The Court's holding is not unrestricted, however. Local bar associations may apparently rule, as some have already done, that settlement offers demanding fee waivers are unethical. See *id.* at 1544.

A. Marek's Construction of Section 1988

Under section 1988, a prevailing party's reasonable attorneys' fees are normally calculated by determining the "lodestar"—the product of reasonable hours times a reasonable hourly rate.¹⁸² The court then looks to a number of other factors, including the degree of success obtained, to determine whether the lodestar requires an upward or downward adjustment.¹⁸³ In *Hensley v. Eckerhart*,¹⁸⁴ the Supreme Court stated that the "most critical factor" in determining whether an adjustment should be made is "the degree of success obtained."¹⁸⁵

In *Marek*, the Supreme Court gave the factor of success dispositive weight in rule 68 cases.¹⁸⁶ The Court also stated that the law under section 1988 was not in conflict with the law under rule 68.¹⁸⁷ The Court thus implied that a plaintiff who rejects any written settlement offer and fails to obtain a more favorable result at trial is not entitled to further fees, whether or not the settlement offer was made under rule 68. For the plaintiff, then, there may be little difference between a rule 68 offer and a written settlement offer not made under rule 68.¹⁸⁸

For the defendant, however, there is a major difference. An offer under rule 68 must offer to pay the plaintiff's accrued costs to the date of the offer.¹⁸⁹ In most fee-shifting cases, this means the defendant must offer to pay the plaintiff's attorneys' fees to the date of the offer.¹⁹⁰ If the defendant does not

182. *Blum v. Stenson*, 104 S. Ct. at 1548.

183. *Id.* Some of the factors were developed in *Johnson v. Georgia Hwy. Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974), which was cited by the Senate report on § 1988. See S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 5908, 5913. For a thoughtful discussion on how the lodestar method has worked out in practice, see generally *Court Awarded Attorneys' Fees*, 108 F.R.D. 237 (1985) (Report of the Third Circuit Task Force).

184. 461 U.S. 424 (1983).

185. *Id.* at 436.

186. See *Marek*, 105 S. Ct. at 3018 (citing *Hensley*). Justice Brennan, in dissent, bitterly criticized the majority's "wooden application of Rule 68" which gave dispositive weight to "success" as measured by a comparison of the rule 68 offer and the rejected judgment. *Id.* at 3028.

187. *Id.* at 3018 (majority opinion) ("applying Rule 68 in the context of a § 1983 action is consistent with the policies and objective of § 1988").

188. See *Simon, Crossroads*, *supra* note 56, at 903-04 (arguing that the standard of *Hensley* by itself would deprive a plaintiff of postoffer fees if the plaintiff failed to beat a rejected settlement offer at trial, even if the offer was not made under rule 68).

189. FED. R. CIV. P. 68, *supra* note 1; see *Marek*, 105 S. Ct. at 3016 ("As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.").

190. See *Marek*, 105 S. Ct. at 3017 ("absent Congressional expressions to the contrary, where the underlying statute defines 'costs' to include attorney's fees, we are satisfied that such fees are to be included as costs for purposes of Rule 68"); *Fulps v. City of Springfield*, 715 F.2d at 1090-91 (holding that a rule 68 offer to pay \$2,500 plus costs in a civil rights case entitles the plaintiff to all pre-offer fees under § 1988 if the offer is accepted). Lawyers using rule 68 must keep in mind that the word "costs" appears not only in the fourth sentence of rule 68, which governs sanctions for rejected offers, but also in the first sentence of rule 68, which governs the validity of offers and explains what the defendant must offer.

want to pay the plaintiff's attorneys' fees, the defendant may be forced to make an offer outside the context of rule 68. If an offer excluding fees is permissible, then a plaintiff may be deprived not only of postoffer fees if he rejects the offer, but also of pre-offer fees if he accepts the offer. The critical question, then, is whether a defendant is permitted to make a non-rule 68 offer that excludes attorneys' fees. I now turn to that issue.

B. *Non-rule 68 Offers Conditioned on Fee Waivers*

As this article was being written, the Supreme Court held that a defendant may condition settlement of the merits on the plaintiffs' waiver of statutory fees.¹⁹¹ Demands for fee waivers have obvious advantages for defendants: they allow defendants to offer more money to plaintiffs personally, making it more likely that the plaintiffs will settle; they save defendants money on statutory attorneys' fees; and they discourage future suits by making it unprofitable for attorneys to bring suits under fee-shifting statutes.¹⁹²

Obviously, given a choice between making settlement offers including fees (as required under rule 68) and settlement offers excluding fees, defense attorneys will often choose to make offers excluding fees.¹⁹³ Since non-rule 68 offers excluding fees are now clearly permissible, and since rule 68 offers excluding fees are generally impermissible, I predict that defendants will seldom make substantial rule 68 offers in fee-shifting cases until after plaintiffs have turned down non-rule 68 offers conditioned on fee waivers.

191. *Evans v. Jeff D.* 106 S. Ct. 1531 (1986). The *Evans* majority relied heavily on *Marek*. See *id.* at 1540-42.

192. From the perspective of plaintiff's attorney, however, an offer excluding fees presents an intolerable conflict of interest. On the one hand, the offer on the merits may be very generous, so the attorney may feel obligated to recommend settlement. On the other hand, the loss of fees may influence the plaintiff's attorney to recommend against the settlement. Moreover, the plaintiff's attorney may realize that though the proposed settlement in this case may be good for her client, it is likely to be bad for similar clients in the long run, since they will have more difficulty obtaining attorneys. See *Evans*, 106 S. Ct. at 1551-54 (Brennan, J., dissenting). See generally Fitzhugh, *To Win Your Case, Waive Your Fees*, 71 A.B.A. J. 44 (Dec. 1985); Kraus, *Ethical and Legal Concerns in Compelling the Waiver of Attorney's Fees by Civil Rights Litigants in Exchange for Favorable Settlement of Cases Under the Civil Rights Attorney's Fees Awards Act of 1976*, 29 VILL. L. REV. 597 (1984); Note, *Settlement Negotiations: Ethical and Legal Dilemmas in Simultaneously Negotiating the Merits and Statutorily Authorized Attorneys' Fees*, 1984 UTAH L. REV. 651 (1984).

193. Although the Supreme Court has held that § 1988 does not generally prohibit offers conditioned on fee waivers, such offers may still be impermissible in certain specific circumstances, as when the defendant has no "realistic defense on the merits," or when the demand for a fee waiver is part of a "vindictive effort . . . to teach counsel they had better not bring such cases." *Evans* 106 S. Ct. at 1544 (citations omitted). Moreover, some local bar associations have declared that settlement offers seeking fee waivers are unethical. See *Evans*, 106 S. Ct. at 1544 (citing similar opinions by New York City and District of Columbia ethics committees). As Justice Brennan notes in his dissent in *Evans*, these ethical restrictions are still effective because the majority's decision in *Evans* "in no way limits the power of state and local bar associations to regulate the ethical conduct of lawyers." *Id.* at 1557.

VI
IMPLICATIONS FOR REFORM

The decision in *Marek* was handed down in the midst of a vigorous debate over rule 68.¹⁹⁴ The debate was initially sparked by the Supreme Court's 1981 decision in *Delta*¹⁹⁵ in which the Supreme Court held that rule 68 applied only when the plaintiff, not the defendant, prevailed at trial.¹⁹⁶ That decision provoked harsh criticism by commentators,¹⁹⁷ and may have given impetus to the Advisory Committee on Civil Rules' to reexamine of rule 68.¹⁹⁸

Whatever the impetus, in 1983 the Advisory Committee proposed a sweeping and radical revision of rule 68.¹⁹⁹ The 1983 proposal would have allowed both plaintiffs and defendants to make rule 68 offers.²⁰⁰ It would also have increased the stakes by automatically shifting postoffer attorneys' fees—subject to limited court discretion—if an offeree failed to obtain a more favorable result at trial than a rejected rule 68 offer.²⁰¹ This fee-shifting proposal was widely criticized and was withdrawn in May of 1984.²⁰²

In the fall of 1984, the ill-fated 1983 proposal was replaced by a new proposal that would have allowed courts to impose "an appropriate sanction" whenever a rule 68 offer had been "rejected unreasonably."²⁰³ The 1984 pro-

194. I give a thorough account of this debate in Simon, *Riddle*, *supra* note 71. The debate is still very much alive.

195. 450 U.S. 346 (1981).

196. *Id.* at 352.

197. See, e.g., Note, *Delta Air Lines, Inc. v. August, The Agony of Victory and the Thrill of Defeat*, 35 ARK. L. REV. 604 (1982); Note, *Civil Procedure — Federal Rule of Civil Procedure 68 — When It Comes Down to Costs, It's Not How You Play the Game, It's Whether You Win or Lose (Delta Air Lines, Inc. v. August, 1981)*, 9 FLA. ST. L. REV. 671 (1981).

198. The Advisory Committee has specifically referred to "the problem of construction that was involved in *Delta* . . ." Advisory Comm. Note to 1984 proposal to amend rule 68, reprinted in 102 F.R.D. 433, 436 (1984). Since *Delta* was the Supreme Court's first decision construing rule 68, it seems plausible that the case drew the Advisory Committee's attention to the rule.

199. See 98 F.R.D. 337, 361-67 (1983) [hereinafter cited as 1983 Proposal].

200. *Id.* at 361. The Advisory Committee Note commented that the existing rule's "past failure" was due in part to the fact that the current rule "is a 'one-way street,' available only to those defending against claims and not to claimants." *Id.* at 363.

201. *Id.* at 362-63. Specifically, the proposed rule provided:

If the judgment finally entered is not more favorable to the offeree than an unaccepted offer . . . the offeree must pay the costs and expenses, including reasonable attorneys' fees, incurred by the offeror after the making of the offer, and interest thereon from the date of the offer on any amount of money that a claimant offered to accept The amount of the expenses and interest may be reduced to the extent expressly found by the court . . . to be excessive or unjustified under all of the circumstances.

Id. The proposal also provided that sanctions "shall not be awarded to an offeror found by the court to have made an offer in bad faith." *Id.* at 362-63.

202. See *Fee-Shifting Plan Sent Back to Drawing Board*, Legal Times of Washington, May 25, 1984, at 2, col. 1. For examples of the criticism, see, e.g., Oesterle, *Proposed Rule 68 on Offers of Settlement*, 10 CORNELL L.F. 11 (Feb. 1984); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984); Note, *The Proposed Amendment to Federal Rule of Civil Procedure 68: Toughening the Sanctions*, 70 IOWA L. REV. 237 (1984).

203. See 102 F.R.D. 432, 433 (1984) [hereinafter cited as 1984 Proposal]. The heart of the

posal was also encountered stiff criticism. Not only did it appear to permit fee-shifting as a rule 68 sanction, but its standard of unreasonable rejection appeared likely to cause enormous collateral litigation over rule 68 sanctions.²⁰⁴

At the time *Marek* was decided, the Advisory Committee's 1984 proposal to amend rule 68 was still pending.²⁰⁵ In his dissent, Justice Brennan took note of the Advisory Committee's proposals.²⁰⁶ He also noted lack of enthusiasm in Congress for several bills that would have produced essentially the same result that the majority reached in *Marek*.²⁰⁷ Noting the complexity of the policy issues, Justice Brennan said it was "imperative" that Congress or the Judicial Conference resolve the problem of rule 68 "with dispatch."²⁰⁸ This section will briefly examine the implications of *Marek* for reform, both in Congress and in the Judicial Conference.

A. Reform Efforts in the Judicial Conference

The decision in *Marek* directly affects reform efforts in the Judicial Conference's Advisory Committee on Civil Rules.²⁰⁹ The Advisory Committee's 1983 and 1984 proposals to amend rule 68 were attacked as violating the Rules Enabling Act because both proposals allowed fee-shifting against civil rights plaintiffs.²¹⁰ Both proposals raised the prospect of routinely awarding

proposal provided: "If . . . the court determines that an offer was rejected unreasonably, resulting in unnecessary delay and needless increase in the cost of the litigation, it may impose an appropriate sanction upon the offeree." *Id.* Unlike both the existing rule and the 1983 proposal, the 1984 proposal made no reference to a comparison between the offer and the judgment finally entered. Rather, in determining whether an offer was rejected unreasonably, a court was to "consider all of the relevant circumstances at the time of the rejection," including six specific factors enumerated in the rule. *Id.* If the court found that an offer had been rejected unreasonably, the court was instructed to examine at least four additional factors, including the amount of "reasonable attorney's fees incurred by the offeror as a result of the offeree's rejection," before deciding the amount of any sanction to be imposed. *Id.*

204. See Simon, *Riddle*, *supra* note 71; Burbank, *Proposals to Amend Rule 68 — Time to Abandon Ship?*, 19 MICH. J. L. REFORM 425, (1986) [hereinafter cited as Burbank]; Note, *Rule 68: An Offer You Can't Afford to Refuse*, 37 RUTGERS L. REV. 373, 395-98 (1985); Varon, *Proposed Rule Amendments Go Too Far*, Legal Times of Washington, March 5, 1985, at 11, col. 1.

205. Technically, the 1984 Proposal is still pending, but at its April 21, 1986 meeting the Advisory Committee on Civil Rules voted to table the 1984 Proposal indefinitely. Those who attended the April 21st meeting report that the committee is extremely concerned about violating the Rules Enabling Act and desires to defer to Congress, where bills to amend rule 68 have been introduced in both the House and Senate. See *infra* at notes 227-36.

206. *Marek*, 105 S.Ct. at 3032-34 (noting "extensive reexamination of Rule 68").

207. *Id.* at 3034.

208. *Id.* at 3035.

209. For a concise explanation of the rulemaking process, see Spaniol, *Making Federal Rules: The Inside Story*, 69 A.B.A. J. 1645 (1983). For an excellent criticism of the rulemaking process, see generally Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982).

210. See, e.g., Simon, *Riddle*, *supra* note 71, at 10-19; Burbank, *supra* note 204; Note, *The Conflict Between Rule 68 and the Civil Rights Attorneys' Fees Statute: Reinterpreting the Rules Enabling Act*, 98 HARV. L. REV. 828 (1985).

attorneys' fees to prevailing defendants in civil rights cases whenever plaintiffs rejected rule 68 offers and ultimately lost.²¹¹ Routinely shifting attorneys' fees to prevailing defendants cut directly against the grain of both the legislative history and Supreme Court case law under civil rights fee-shifting statutes.²¹²

Moreover, both the 1983 and 1984 proposals would have permitted fee-shifting against a prevailing plaintiff whose judgment was less favorable than a rule 68 offer that had been rejected in good faith.²¹³ Requiring a prevailing plaintiff who had acted in good faith to pay a defendant's attorneys' fees is unprecedented and would seem to take away with a federal rule what had been granted by a federal statute.²¹⁴ Critics, from many corners, said that using

211. See Simon, *Riddle*, *supra* note 71, at 10-19. Neither the 1983 nor 1984 proposal required a court to find that a plaintiff had rejected an offer frivolously, in bad faith, vexatiously, or for any improper purpose.

212. See, e.g., *Christiansburg Garment*, 434 U.S. at 422 ("a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so"); S. Rep. No. 1011, 94th Cong., 2d Sess. 4 (1976); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (under § 1988 a prevailing defendant may recover attorneys' fees only if the plaintiff's suit was vexatious, frivolous, or brought to harass or embarrass the defendant).

213. See 1984 Proposal, 102 F.R.D. at 433; 1983 Proposal, 98 F.R.D. at 362. The proposals thus went even further than the "English Rule" on attorneys' fees. The English Rule typically requires the loser in litigation to pay the winner's fees. Under the Advisory Committee's proposals, the winner could be required to pay part of the *loser's* fees. See *City Bar Panel's Report: Rule 68 "Drastic Remedy"*, N.Y.L.J., Apr. 2, 1984, at 1, col. 3 (summarizing a New York City Bar Committee's report on 1983 Proposal to amend rule 68).

214. See Larson & Neuborne, *Comments of the American Civil Liberties Union 10-15* (Feb. 1, 1985) (commenting on 1984 Proposal to amend rule 68) [hereinafter cited as Larson & Neuborne]; Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 727-33 (1984) (commenting on 1983 Proposal to amend rule 68). The right of a prevailing plaintiff to reasonable attorneys' fees in a civil rights case is "substantive," *Chesny v. Marek*, 720 F.2d at 479, *rev'd on other grounds*, 105 S.Ct. 3012 (1985), and is virtually absolute. The Supreme Court has said that a prevailing civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render an award unjust." *Hensley v. Eckert*, 461 U.S. at 429 (construing § 1988) (*quoting* *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (construing fee-shifting provision of Title VII)). Many courts have thus recognized that prevailing civil rights plaintiffs are entitled to fees "as a matter of course." *Gates v. Collier*, 616 F.2d 1268, 1275 (5th Cir. 1980); *Davis v. Murphy*, 587 F.2d 362, 364 (7th Cir. 1978). Unlike *Marek*, the 1983 and 1984 Proposals to amend rule 68 did not directly cut off the right to attorney's fees after the date of a successful rule 68 offer. Rather, the proposals purportedly allowed a court to make a full award of attorneys' fees to a prevailing plaintiff, and then to make an offsetting award of fees to the defendant based on rule 68. In the words of the Advisory Committee:

Nothing in the [proposed] rule affects the court's statutory authority to award attorneys' fees to a prevailing party in certain types of cases. [citations omitted.] Nor does the rule prevent the court, in determining the reasonable value of the attorney's services, from taking into consideration the prevailing party's refusal to accept a reasonable offer that was more favorable to him than the judgment entered and that, if accepted, would have eliminated the necessity for further legal services from the date of the offer. Conversely, statutory authority to award attorney's fees to the prevailing party does not preclude or relieve the court from making an award under Rule 68 when it is otherwise appropriate to do so. In these cases the awards, each of which implements a different policy, would both be effective and might wholly or partially offset each other. . . .

98 F.R.D. at 366 (Committee Note to 1983 Proposal). Almost as an afterthought, the Commit-

rule 68 to shift fees against civil rights plaintiffs in this manner would exceed the powers of the Advisory Committee and stretch the Rules Enabling Act to the breaking point.²¹⁵

The Advisory Committee disagreed. It justified shifting fees as a way of curbing abuses of the litigation process, concluding that "sanctions" to curb litigation abuses did not violate the Rules Enabling Act.²¹⁶ Apparently, the Advisory Committee hoped that *Marek* would discuss the Rules Enabling Act and endorse its view.²¹⁷

The *Marek* decision did not explicitly quash these hopes, but neither did it expressly endorse the Advisory Committee's views. Without mentioning the

tee added that the courts' discretion to deny awards under rule 68 that were unjustified under all of the circumstances "should assure that awards under this rule do not frustrate the various policies of the fee statutes." *Id.* The Committee Note did not articulate any of these policies.

215. See, e.g., Association of the Bar of the City of N.Y., Comm. on Fed. Courts, *Comments on Proposed 1984 Amendment to Rule 68 (Offer of Settlement) of the Federal Rules of Civil Procedure* 13-15 (Jan. 21, 1985); Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 729-31 (1984) (arguing that even "offsetting" awards under the 1983 Proposal would violate the Rules Enabling Act). Critics conceded, however, that the proposed amendments to rule 68 would be consistent with judicial power under 28 U.S.C. § 1927 to assess fees against attorneys who had multiplied judicial proceedings "unreasonably and vexatiously," even if the sanctioned attorney represented the prevailing party. Larson & Neuborne, *supra* note 214, at 17 n.10.

216. See Mansfield & Miller, Proposed Amendment of Rule 68: Background Memo 7-8 (Apr. 15, 1984), which states:

In response to the contention that the proposed amendments conflict with Congress' intention to encourage private enforcement of certain laws by providing for an award of attorney's fees to the "prevailing party," it should be noted that the Supreme Court has construed such laws as permitting an award of attorney's fees in favor of a defendant against a plaintiff who prosecutes an action that is "frivolous, unreasonable, or without foundation." [Citations omitted.] Although rejection of an offer of settlement cannot be so characterized, Congress might well view promotion of settlement by award of fees as something to be encouraged, particularly when the rejection is unreasonable under the circumstances.

(At the time this internal memo was written, Judge Mansfield was the Chairman of the Advisory Committee and Professor Miller was its reporter. Both have since left those positions.)

The Advisory Committee Note to the 1984 Proposal, which was written primarily by Professor Miller, addressed the Rules Enabling Act question by stating that the proposed rule "applies the principle that a court may impose a reasonable sanction, including an award of attorneys' fees, as a means of facilitating the efficient operation of the litigative process . . ." 102 F.R.D. at 436. Judge Mansfield responded to objections based on the Rules Enabling Act by writing:

Our Committee, without taking any position regarding the validity of these objections, believes that they are met by the present [1984] proposal, which is clearly procedural and does not provide for attorney's fee shifting but authorizes imposition of a sanction based on the creation of unnecessary delay and needless increase in the cost of litigation.

Letter from Hon. Walter Mansfield (Chairman of the Advisory Committee on Civil Rules) to Hon. Edward Gignoux (Chairman of the Standing Committee on Rules of Practice and Procedure) (August 1984), *reprinted in* 102 F.R.D. at 423-24.

217. See Letter from Maurice Rosenberg to Roy D. Simon, Jr., (June 11, 1985) (on file in the offices of the New York University Review of Law and Social Change) (A "chief reason" for postponing the Advisory Committee's formal consideration of the 1984 Proposal from June, 1985 to November, 1985 was "the untimeliness of taking definitive action while the Supreme Court is chewing on possibly related issues in *Marek* . . .").

Rules Enabling Act by name, the majority opinion in *Marek* simply said there was no conflict between rule 68 and the civil rights fee-shifting statutes.²¹⁸ *Marek* made no sweeping pronouncements about the powers of the rulemakers under the Rules Enabling Act, and did not suggest that civil rights plaintiffs who acted in good faith could be required to pay attorneys' fees to defendants.²¹⁹ Nor did the Court hold, as it well might have, that rule 68 superceded all prior statutes in conflict with it.²²⁰

The implications of *Marek* for the Judicial Conference are thus mixed. On the one hand, the Advisory Committee unquestionably could circulate a proposal that would deny postoffer attorneys' fees to a plaintiff whose judgment at trial is less favorable than a rejected rule 68 offer. This would be precisely in accord with *Marek* and would certainly be immune to challenges under the Rules Enabling Act. On the other hand, any proposal to shift attorneys' fees against plaintiffs who have acted in good faith would be fair game for a Rules Enabling Act challenge and would receive little or no support from *Marek*. If the Advisory Committee wants to use rule 68 as a fee-shifting device, therefore, it will proceed at its own risk. Even if a fee-shifting version of rule 68 could survive political opposition—which would be fierce—the proposal might well be nullified under the Rules Enabling Act. If rule 68 is to become a fee-shifting rule, Congress rather than the Judicial Conference ought to take the lead.

B. Reform Efforts in Congress

The decision in *Marek* has generated considerable interest in rule 68 on Capitol Hill. As this article is being written, bills to amend rule 68 are already pending in both the Senate and the House.

On the Senate side, Senator McConnell has introduced a bill entitled the Alternative Dispute Resolution Promotion Act of 1986.²²¹ The bill would essentially ask Congress to enact into law the Advisory Committee's dormant

218. *Marek*, 105 S.Ct. at 3018-19. The Court's failure to mention the Rules Enabling Act was surprising because rule 68's supposed violation of the Act was the dispositive ground for the reversed holding of the Court of Appeals. See 720 F.2d at 479.

219. See *Marek*, 105 S.Ct. at 3018. The Court believed that denying statutory fees to a prevailing plaintiff's attorney who achieved no monetary success on behalf of his client after rejecting a rule 68 offer was "consistent with the policies and objectives of § 1988." *Id.*

220. The Rules Enabling Act, 28 U.S.C. § 2072 (1982), forbids courts from interpreting procedural rules in a way that would "abridge, enlarge, or modify any substantive right" or that would infringe upon the right to trial by jury. The Act also provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." This "supersession clause" of the Rules Enabling Act has been roundly criticized. See H.R. Rep. No. 99-422, 99th Cong., 1st Sess. 13 (1985) ("the 1984 proposal to amend Rule 68 . . . illustrates why the supersession provisions in the Enabling Acts should not be perpetuated"). Legislation is now pending in Congress that would abolish suppression clause. See H.R. 3550, 99th Cong., 1st Sess. (1985).

221. S. 2038, 99th Cong., 2d Sess. (1986), was introduced by Senator McConnell on February 3, 1986 and is reprinted in its entirety in the Congressional Record—132 CONG. REC. S 949-50 (daily ed., Feb. 4, 1986). Senator McConnell is a Republican from Kentucky. He is a member of the Senate Judiciary Committee, to which the bill was referred.

1984 proposal to amend rule 68,²²² with one difference. The new version of rule 68 would allow an offeror (plaintiff or defendant) to serve an opposing party with "an offer to engage in such extra-judicial alternative dispute resolution techniques as the offeror may desire, or such judicially supervised alternative dispute resolution techniques as are available in the court in which the action is pending."²²³ In introducing the bill, Senator McConnell cited *Marek* and made it clear that the sanction for rejecting a rule 68 offer under his proposal could include fee-shifting.²²⁴ He said:

The Supreme Court has recently acknowledged, in *Marek* versus Chesney [sic], decided June 27, 1985, that a party who unreasonably refuses a settlement offer is liable for the additional court costs that resulted, and that this amount should include the extra attorney fees. This bill will make it clear that those fees are available in all litigation.²²⁵

While this imaginative description of *Marek* goes considerably beyond the holding of the case, it indicates at least one senator's support for transforming rule 68 into a powerful fee-shifting device across the board.

Enthusiasm for *Marek* is by no means universal. In the House, Representative Conyers²²⁶ has introduced a bill that would effectively overturn *Marek* by defining rule 68 costs pursuant to 28 U.S.C. section 1920.²²⁷ Since section 1920 excludes attorneys' fees from its definition of costs, this bill would make rule 68 the same as it was before *Marek*.²²⁸ Rule 68 would have equal impact

222. Compare 1984 Proposal, 102 F.R.D. at 432-33, with S. 2038, 99th Cong., 2d Sess. (1986) (proposing amendments to rule 68).

223. S. 2038, 99th Cong., 2d Sess. (1986). There is a close link between rule 68 and alternative dispute resolution techniques. See Simon, *Riddle*, *supra* note 71, at 75-81 (arguing that rule 68 will be far more effective if courts have power to order parties to engage in alternative dispute resolution proceedings, since these proceedings will bridge the gap between the parties and will give parties an objective view of the value of their cases). My specific proposal to amend rule 68 contains a subparagraph that expressly authorizes a court, whenever it would be in the interest of justice, to order the parties to engage in some form of alternative dispute resolution proceeding. *Id.* My provision is thus more explicit than FED. R. CIV. P. 16(c)(7), which allows the participants at any pretrial conference to "consider and take action with respect to . . . the possibility of settlement or the use of extrajudicial procedures to resolve disputes."

224. 132 CONG. REC. 949 (daily ed., Feb. 4, 1986).

225. *Id.* Senator McConnell's summary of *Marek* is not quite accurate. The Court did not even address the question of whether rule 68 required a plaintiff who failed to better a rule 68 offer at trial to pay a defendant's fees, since the petitioners had not appealed the district court's refusal to award postoffer costs to the defendants. See *Marek*, 105 S.Ct. at 3014 n.1.

226. Representative Conyers (D. Mich.) is Chairman of the House Committee on the Judiciary's Subcommittee on Criminal Justice, which (despite its name) has jurisdiction over amendments to the Federal Rules of Civil Procedure.

227. See H.R. 3998, 99th Cong., 1st Sess. (1985). The full text of the bill provides: "That the fourth sentence of rule 68 of the Federal Rules of Civil Procedure is amended by inserting 'as defined in section 1920 of title 28, United States Code)' after 'costs.'"

228. Before the Supreme Court's decision in *Marek*, only a few courts had addressed the issue posed in *Marek*. These courts were roughly split—although the more persuasive opinions agreed with the Supreme Court's ultimate resolution in *Marek*. Compare *Bitsouni v. Sheraton*

in non-fee-shifting and fee-shifting cases. The sole penalty for obtaining a judgment less favorable than a rejected rule 68 offer would be the prevailing plaintiff's loss of postoffer costs under rule 54(d)²²⁹ and the requirement that she pay the defendant's rule 54(d) postoffer costs.²³⁰

Although the House bill is short and simple, it could well set off a substantial ripple effect. If Congress is specifically defining costs for rule 68, it may also wish to do so for rule 54(d). The rules do not contain an express definition of "costs," and it would be useful to have a reliable definition.²³¹ The most logical candidate is the definition already used by most courts, 28 U.S.C. section 1920.²³² Yet, since that statute is itself ambiguous, Congress might also find it necessary to amend section 1920.

The potential for such a ripple effect arises at least in part because Congress is taking the initiative in amending rule 68. This situation is unique. Congress has in the past reacted to proposed changes in the federal rules,²³³ but it has never before enacted a change in the rules on its own initiative. If Congress becomes embroiled in a debate over rule 68, it may turn its attention to other rules as well. The result could be a radical departure from the established system of rules revision.

Hartford Corp., 33 Fair Empl. Prac. Cas. (BNA) 898, 900-02 (D. Conn. 1983); and *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 114-16 (N.D. Cal. 1979) (both denying postoffer attorneys' fees to plaintiffs based on rule 68), with *Pigeaud v. McLaren*, 699 F.2d 401, 403 (7th Cir. 1983); *Association for Retarded Citizens v. Olson*, 561 F. Supp. 495, 498 (D.N.D. 1982), *modified on other grounds*, 713 F.2d 1384 (8th Cir. 1983) (both stating that rule 68 costs do not include civil rights attorneys' fees). The paucity of cases on the issue before *Marek* suggests that most litigants did not think rule 68 could be used to cut off the plaintiff's statutory fees.

229. FED. R. CIV. P. 54(d) provides in pertinent part: "Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

230. There is even some confusion as to whether rule 68 will require the plaintiff to pay the defendant's postoffer costs excluding fees. If it does not, rule 68 will be extremely weak in most cases. A prevailing plaintiff's postoffer costs are likely to be relatively small, and the plaintiff will nearly always be able to pay them out of his judgment. Moreover, if the suit involves a federal fee-shifting statute, then the plaintiff, in conjunction with his statutory fee award, will usually be entitled to an award of "expenses" not covered by rule 54(d) or § 1920. See, e.g., *Dowdell v. Apopka*, 698 F.2d 1181, 1190 (11th Cir. 1983) ("Reasonable attorneys' fees under the Act [42 U.S.C. § 1988] must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined."); *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir. 1983) ("out-of-pocket costs not normally absorbed as part of law firm overhead may be reimbursed under 42 U.S.C. § 1988"); *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 623-24 (4th Cir. 1978) (fee-shifting statute "was intended to include litigation expenses").

231. Congress could also respond to *Marek* by amending various fee-shifting statutes. If a majority of the Congress approves of the decision in *Marek*, Congress could amend all federal fee-shifting statutes to make it clear that statutory attorneys' fees are always to be considered as "costs" for the purpose of rule 68.

232. Courts awarding costs other than attorney's fees to a prevailing party pursuant to rule 54(d) typically define costs pursuant to 28 U.S.C. 1920 (1982). See generally *Bartell, Taxation of Costs and Awards of Expenses in Federal Court*, 101 F.R.D. 553, 567-88 (1984); *Peck, Taxation of Costs in United States District Courts*, 37 F.R.D. 481 (1965).

233. Obviously Congress is reacting to the Advisory Committee proposals and *Marek*. The difference is that in the past Congress has waited for formal proposals to be transmitted to it by the Supreme Court before reacting.

CONCLUSION

The decision in *Marek* gave new vitality to rule 68. Although the construction and effect of rule 68 in many cases is not directly affected, the operation of rule 68 in most federal fee-shifting cases has been dramatically altered. Defendants in fee-shifting cases can now use rule 68 as a hedge against paying a prevailing plaintiff's full attorneys' fees for an entire case, and plaintiffs may find that rule 68 allows them to exit from weak cases on reasonable terms with full fees. Although rule 68 offers apparently need not be reasonable, the inexorable bell curve of jury verdicts assures that in the long run plaintiffs will not usually be penalized for rejecting low offers and that defendants will not usually be required to pay plaintiffs' attorneys' fees after plaintiffs reject reasonable offers.

Although rule 68 will undoubtedly have harsh consequences in some cases, and although *Marek* has given more leverage to defendants than to plaintiffs, the Supreme Court's construction of the rule ought to encourage defendants to make generous rule 68 offers relatively early in litigation and encourage plaintiffs to accept these offers. If that happens, the judicial system as a whole and civil rights litigants in particular will benefit.

Nevertheless, rule 68 remains fraught with problems. Even if the result in *Marek* turns out to be beneficial, the scope of that result is limited. *Marek* has done nothing to make rule 68 into a two-way street, allowing both plaintiffs and defendants to make offers, and it has not expressly provided courts with any discretion to moderate sanctions when they would be manifestly unjust. In cases not involving federal fee-shifting statutes, moreover, *Marek* has had no effect on rule 68. Consequently, much work remains to be done on rule 68. Whether this work is done by Congress or by the Judicial Conference, Justice Brennan's warning should be heeded and the work of amending rule 68 should be done "with dispatch."²³⁴

234. *Marek*, 105 S.Ct. at 3035 (dissenting opinion).