

# Articles

## “TO ENCOURAGE SETTLEMENT”: RULE 68, OFFERS OF JUDGMENT, AND THE HISTORY OF THE FEDERAL RULES OF CIVIL PROCEDURE

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### INTRODUCTION

The Federal Rules of Civil Procedure (FRCP) are celebrating their seventieth anniversary, yet one of those rules, Rule 68—the Offer of Judgment rule—is still a mystery. Rule 68 has been referred to as a “riddle”<sup>1</sup> and described as “among the most enigmatic of the Federal Rules of Civil Proce-

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<sup>1</sup> Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 1 (1985).

dure.”<sup>2</sup> The Rule allows a defendant to serve an offer of judgment on the plaintiff and makes the plaintiff who rejects the offer liable for post-offer costs if she fails to improve on the offer at trial. It is universally accepted that Rule 68 is meant to encourage settlements by forcing plaintiffs to think hard before rejecting an offer. What is puzzling is how a rule with that purpose could possibly have been drafted the way Rule 68 was. The Rule operates only one-way—in favor of defendants; the penalty is too small to be meaningful; the requirement of a judgment rather than a settlement discourages its use; and the Rule’s timing requirements are puzzling.<sup>3</sup> The 1938 FRCP drafters were intelligent and accomplished lawyers and judges, and it is extremely surprising that they could have made such a serious and obvious drafting mistake.

This Article explains the mystery of Rule 68 and why the Rule has been so difficult to understand. The conclusion is simple but surprising: the conventional view of Rule 68 is wrong. The original FRCP drafters did not adopt Rule 68 for the purpose of promoting settlement in the way we understand settlement promotion today. In fact, they did not give much thought at all to Rule 68’s purpose, but simply adopted the offer of judgment rule that existed in state codes. Those state rules were not designed to promote settlement as such. Insofar as one can determine from the historical record, they were designed to prevent plaintiffs from imposing costs unfairly when the defendant offered what the plaintiff was entitled to receive from trial, and to enable defendants to avoid paying those costs when the plaintiff persisted with the suit. The text of Rule 68 makes much more sense when it is viewed in these fairness terms. The current interpretation of Rule 68 as a settlement promotion tool became entrenched in the 1970s and 1980s when concerns about litigation costs, case backlogs, and litigation delays produced an intense interest in settling cases.

My explanation for Rule 68 is intimately connected to the history of federal civil procedure in the twentieth century and, in particular, to two important changes that have affected and will continue to affect how the FRCP are interpreted and how new FRCP are made: the rise of settlement promotion as an explicit objective of procedural rules and the politicization of the rulemaking process. The story of how Rule 68 came to be conceived as a settlement promotion tool is the story of how settlement has become the centerpiece of federal civil adjudication over the past twenty-five years. Understanding this history in light of Rule 68’s origins can help guide efforts to craft sensible settlement rules in the future. As far as politicization

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<sup>2</sup> *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986) (referring to the ambiguity in the text concerning whether Rule 68 merely cancels the plaintiff’s entitlement to costs or also requires the plaintiff to pay the defendant’s costs).

<sup>3</sup> See discussion *infra* Part I. Indeed, the economic literature suggests the Rule might even be counterproductive for settlement. See Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 94, 110, 121–22 (1986).

of rulemaking is concerned, the battle over revision of Rule 68 in the 1980s played a significant role in the reassertion of congressional control over procedure during the 1980s and 1990s, triggering concerns about the future viability of the court rulemaking process, one of the cornerstones of the original FRCP vision.<sup>4</sup> This Article, then, is about Rule 68, but it is also about the history of federal civil procedure in the twentieth century.

The time is ripe to unravel the mysteries of Rule 68. Although Rule 68 is not a core Federal Rule and is not used as much as other rules, its importance has increased markedly over the past three decades.<sup>5</sup> If the conventional view is correct, Rule 68 is the *only* Federal Rule devoted exclusively to encouraging settlement. As such, it has attracted close attention since the late 1970s, when enthusiasm for settling cases began to rise sharply, and interest in improving the Rule as a settlement device remains strong today.<sup>6</sup> For example, scholars have recently studied the empirical effects of Rule 68,<sup>7</sup> and the Advisory Committee on Federal Rules of Civil Procedure recently declared its intention to take another look at the Rule in the future.<sup>8</sup> Any effort to improve Rule 68 should be guided by a clear understanding of the Rule's history and its original purpose. It would be a mistake, for example, to assume that the Rule's seventy-year history supports a presumption in its favor as a settlement promotion device if the Rule was never meant to promote settlement bargaining in the way we understand it today. On a more general level, it is appropriate during the FRCP's seventieth anniversary to take stock of major changes in federal procedure over the past seven decades. Rule 68 is a particularly good vehicle for examining these changes because it is a rule in large part transformed by that history.

Part I of this Article describes Rule 68 and highlights four of its puzzling features: its small penalty, asymmetric application, requirement of a formal judgment, and timing limitation. These features are puzzling because they undermine the Rule's effectiveness as a settlement promotion device. This discussion frames the central questions: Why did the original drafters of the FRCP adopt Rule 68, and why did they draft the Rule the way they did?

Part II answers those questions. It begins by contrasting the prevailing settlement promotion model of Rule 68 with an alternative model based on fairness. It then turns the clock back to the 1930s to explore the genesis of

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<sup>4</sup> See discussion *infra* Part III.C–D.

<sup>5</sup> See discussion *infra* Part III.

<sup>6</sup> See *id.*

<sup>7</sup> See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (2007); Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006).

<sup>8</sup> See LEE H. ROSENTHAL, ADVISORY COMM. ON FED. RULES OF CIVIL PROCEDURE, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 169–70 (2007), available at <http://www.uscourts.gov/rules/Reports/CV05-2007.pdf> (reporting on the April 19–20, 2007 Advisory Committee meeting).

the Rule in light of these two models. This requires a close look at records of the 1938 Advisory Committee proceedings, including original archival material.<sup>9</sup> Part II then examines the state offer of judgment rules on which Rule 68 was based and the nineteenth century antecedents to those state rules. The result of this analysis calls into question the standard settlement promotion model of Rule 68 and points toward a more plausible grounding for the original Rule based in fairness.

Part III traces the history of Rule 68 since 1938. It explains how the powerful shift toward settlement sparked new interest in the Rule and firmly entrenched its current interpretation in settlement promotion terms. It also explains how efforts to perfect the Rule as a settlement device contributed to the politicization of the rulemaking process, which has had a profound impact on the integrity of court rulemaking and the role of Congress in designing federal procedure.

Although this Article is largely historical and analytic, Part IV touches briefly on prescriptive implications. This Part suggests how the Advisory Committee should approach revising Rule 68 in light of the current enthusiasm for settlement promotion and how judges should interpret the Rule if the committee chooses to leave it intact. In particular, I argue that it is misguided for judges to create a settlement promotion tool by interpreting Rule 68 to do work it was never meant to do. If it is desirable for the FRCP to include a rule that relies on fee or cost shifting to promote settlement, that rule should be constructed from scratch rather than pieced together by revising Rule 68 and should be adopted through a process that considers global effects and invites public input. Part IV offers four principles to guide the rulemaking task.

The Article concludes with some general observations on the future of procedural rulemaking as seen through the history of Rule 68.

## I. RULE 68 TODAY

Rule 68 was adopted in 1938 as part of the original FRCP. The Rule has been amended four times, though with only a minor substantive change. After the recent style amendments,<sup>10</sup> it now reads as follows:

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<sup>9</sup> The archival materials I reviewed include transcripts of the original Advisory Committee meetings, early drafts of the original Rules, suggestions received from the public, and original correspondence. These papers are located in the Judicial Conference microformed records of Advisory Committee activities, the Edmund Morgan Papers at Harvard Law School Special Collections, and the Charles Clark Papers at Yale University Manuscripts and Archives.

<sup>10</sup> The style amendments, which went into effect on December 1, 2007, are not intended to make any substantive changes. See COMM. ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE U.S., REPORT OF JUDICIAL CONFERENCE 19 (2006), available at <http://www.uscourts.gov/rules/Reports/ST09-2006.pdf>. Before the style amendments reorganized the Rule and rewrote some of its text, Rule 68 tracked the original version even more closely:

Rule 68  
Offer of Judgment

(a) Making an Offer; Judgment on an Accepted Offer. More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

(b) Unaccepted Offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(c) Offer After Liability Is Determined. When one party’s liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 10 days—before a hearing to determine the extent of liability.

(d) Paying Costs After an Unaccepted Offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.<sup>11</sup>

To understand how the Rule works, suppose John sues Mary for breach of contract seeking \$100,000 in damages. Suppose that Mary serves a written offer of judgment on John agreeing to accept a final judgment in the amount of \$30,000.<sup>12</sup> Rule 68 gives John ten days to consider the offer.<sup>13</sup> If he accepts, judgment is entered for \$30,000. If he rejects and recovers a judgment “not more favorable than the unaccepted offer” (i.e., not greater than \$30,000), John must pay “the costs incurred after the offer was

Rule 68  
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 the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party 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 hearing to determine the amount or extent of liability.

<sup>12</sup> CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE 65–66 (2d ed. 1997).

<sup>11</sup> FED. R. CIV. P. 68.

<sup>12</sup> The Rule requires that the offer of judgment include “costs then accrued,” so Mary’s offer must cover both substantive relief and the costs that John has accrued to that date. FED. R. CIV. P. 68(a); see 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3002, at 89.

<sup>13</sup> FED. R. CIV. P. 68(a).

made.”<sup>14</sup> This means he must pay Mary’s post-offer costs as well as his own.<sup>15</sup>

The universally accepted view today is that Rule 68 was included in the FRCP “to encourage settlement and avoid litigation.”<sup>16</sup> The cost-shifting penalty imposed on a plaintiff who fails to improve on an offer at trial is supposed to make the plaintiff “think very hard” before rejecting the settlement offer.<sup>17</sup> However, there is a serious problem with this view of Rule 68. The Rule is written in a way that makes it an extremely poor tool for settlement promotion.<sup>18</sup> Four aspects are particularly noteworthy: its small penalty, asymmetric application, requirement of a formal judgment, and timing limitations.

First, the penalty for rejecting an offer is too small in most cases to be taken seriously. Rule 68 only affects liability for “costs,” and costs normally include only the relatively small items of taxable cost covered by 28 U.S.C. § 1920 and routinely paid to prevailing parties under Rule 54(d)(1).<sup>19</sup>

<sup>14</sup> FED. R. CIV. P. 68(d). Determining whether a judgment is more favorable than an offer can sometimes be tricky, especially when injunctive relief is involved. See 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3006.1, at 127 n.17.

<sup>15</sup> Rule 68 “costs” do not include fees unless a statute so provides. See *infra* notes 19–20 and accompanying text. If John improves on the offer at trial, then Rule 68 has no application. 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3006.1, at 122. This means that as a prevailing party, he can recover his costs from Mary subject to the court’s discretion under Rule 54(d)(1). *Id.* § 3006, at 118.

<sup>16</sup> *Marek v. Chesny*, 473 U.S. 1, 5 (1985); *accord* *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (noting that the purpose of Rule 68 is “to encourage the settlement of litigation”); *id.* at 379 n.5 (Rehnquist, J., dissenting) (“The nearly 100 Rules of Federal Civil Procedure have numerous and often differing purposes, but it bears repeating that the purpose behind Rule 68 . . . is to promote *settlement* and thereby diminish the number of trials necessary to resolve the cases which are filed in the federal courts.”); 13 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 68App.101[1][b] (3d ed. 1997) (quoting the 1983 Advisory Committee notes to proposed Rule 68 amendments for the proposition that “[t]he purpose of Rule 68 as adopted in 1938 was to encourage settlements and avoid protracted litigation by taxing a claimant with costs”); 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3001, at 66 (“Rule 68 was intended to encourage settlements and avoid protracted litigation.”); Christopher Carmichael, *Encouraging Settlements Using Federal Rule 68*, 48 WAYNE L. REV. 1449, 1460–61 (2003); Simon, *supra* note 1, at 1–2 & n.2 (arguing that Rule 68 is “the only procedural rule devoted exclusively to settlement” and it has “no purpose apart from encouraging settlement”).

<sup>17</sup> *Marek*, 473 U.S. at 11.

<sup>18</sup> See 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3001, at 68–69 (discussing the practical and theoretical weaknesses of the Rule).

<sup>19</sup> *Id.* Section 1920 provides as taxable costs:

(1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under section 1923 of this title; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920 (2000). Thus, taxable costs do not even include all the nonfee expenses incurred in litigating a case.

Most importantly, costs do not usually include the most expensive item in litigation—attorney fees.<sup>20</sup>

Second, the Rule applies asymmetrically. Only a defendant can take advantage of its cost-shifting threat.<sup>21</sup> To be sure, a plaintiff who prevails at trial already gets costs paid by the defendant under Rule 54(d)(1), so adding plaintiffs to Rule 68 would not seem to make much of a difference. However, payment of costs under Rule 54(d) is a discretionary decision for the court, while payment of costs under Rule 68 is mandatory.<sup>22</sup> Thus, adding plaintiffs to Rule 68 would marginally increase the incentive to settle. The difference is not likely to be large, but the fact that the Rule was not drafted symmetrically is at least a bit puzzling if the Rule was meant to encourage settlement. Moreover, one would also expect a committee bent on encouraging settlement to have crafted a Rule that worked both ways *and* imposed a penalty greater than taxable costs to give plaintiffs the ability to pressure defendants too.<sup>23</sup>

Third, the settlement interpretation of Rule 68 does not explain why the Rule requires an offer of judgment rather than just an offer of settlement. There is a critical difference between the two. To use Rule 68, a defendant must agree to accept the entry of a formal judgment against him.<sup>24</sup> By contrast, settlements are usually concluded without a judgment (other than a judgment of dismissal) and are often coupled with a confidentiality

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<sup>20</sup> There is an exception when a fee-shifting statute applies and awards fees as part of costs. However, even then, the effect is to deny post-offer fees to the plaintiff and not to require the plaintiff to pay the defendant’s fees. *See Marek*, 473 U.S. at 9–11; *see also infra* notes 208–213 and accompanying text.

<sup>21</sup> This follows from the fact that Rule 68 applies only to an offer made by “a party defending against a claim.” FED. R. CIV. P. 68(a); *see also* 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3002, at 89. However, a plaintiff can use Rule 68 if the defendant files a counterclaim, because the plaintiff is a “party defending against” a counterclaim.

<sup>22</sup> 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3006, at 120 (“Once a plaintiff has rejected an offer of judgment and obtained a less favorable judgment, the court retains no discretion to disregard the rule’s cost-shifting consequences.”).

<sup>23</sup> There might be a Rules Enabling Act problem with using Rule 68 to shift fees as well as costs, *see infra* notes 198–203 and accompanying text, but this is far from clear. Moreover, if fee-shifting were a problem, it might be possible instead to set the penalty at a small multiple of costs. For example, Arizona amended its version of Rule 68 in 1990 to make it work both ways and to award expert witness fees and double taxable costs (but not attorney fees) when the offeree does not improve on the offer. *See* ARIZ. R. CIV. P. 68.

<sup>24</sup> *See* 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3002, at 90. However, while there is some dispute, the majority rule appears to be that the defendant need not admit liability as long as it expressly disclaims it in its written Rule 68 offer. *See id.* at 93–94 (stating that the defendant’s offer of judgment can disclaim liability but that doing so may be problematic if the offer provides for injunctive relief); Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of Federal Settlement Rules by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 881–83 (2007) (finding that although an offer which either disclaims liability or fails to mention liability is almost universally found valid, parties still litigate the issue, and some courts have found these offers invalid).

limitation to prevent public disclosure.<sup>25</sup> In fact, the requirement of a formal judgment appears to be a major deterrent to the use of Rule 68 today: defendants fear that an adverse judgment with attendant publicity will affect their reputations and have other potentially serious consequences.<sup>26</sup>

Fourth, Rule 68 offers must be made at least ten days before trial. As one judge noted after characterizing Rule 68 in settlement promotion terms, “looking purely to the policies embodied in the Rule, one wonders why there should be any restriction on when offers of judgment can be made.”<sup>27</sup> To be sure, there might be tactical reasons why a defendant would not want to make the offer at trial, since the plaintiff would then have some time to assess the actual trial evidence before deciding what to do with the offer,<sup>28</sup> but this is no reason to deny the option.

Because of these limitations—particularly the weak penalty—Rule 68 was rarely used and largely ignored for nearly half a century.<sup>29</sup> Then in the late 1970s, courts and commentators began to focus on the Rule as a potentially powerful tool for settlement. As I describe more fully in Part III below, this interest intensified in the early 1980s with a flurry of activity aimed at amending the Rule, which triggered strong opposition that eventually doomed the reform efforts.<sup>30</sup> The Supreme Court entered the fray in 1985 with a highly controversial decision, *Marek v. Chesny*, which

<sup>25</sup> This assumes that the settlement agreement does not have to be filed with the court, which is normally the case. Filed settlement agreements are rarely put under seal. See ROBERT TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT (2004).

<sup>26</sup> See Lewis & Eaton, *supra* note 7, at 350. Moreover, because Rule 68 contemplates a final judgment, a defendant cannot use it to settle only part of a case; the defendant’s offer must dispose of the entire case. See 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3002. It would have been easy to write Rule 68 to apply to settlement offers that targeted only part of a case, such as settling only one of several claims or settling damages but not injunctive relief, and doing so would likely have improved the Rule’s effectiveness as a settlement tool. It is true that there would have been practical difficulties comparing a partial offer with the trial judgment, but similar difficulties exist for injunctive relief and those did not stop the 1938 Advisory Committee from extending the Rule to equitable remedies as well. See *infra* notes 78–79 and accompanying text.

<sup>27</sup> *Greenwood v. Stevenson*, 88 F.R.D. 225, 228 (D.R.I. 1980). It is possible to argue that requiring early offers encourages earlier settlements. If that was the goal, however, one would expect the Rule to require that offers be made much earlier than ten days before trial. Moreover, there is already a built-in incentive to make early offers: the earlier the offer, the greater the post-offer costs the defendant can shift.

<sup>28</sup> See *id.* at 228–29 (noting that if the defendant committed himself to a Rule 68 offer, the plaintiff could sit on the offer while observing how the trial was going and accept if it was going poorly for the plaintiff or reject if it was going well).

<sup>29</sup> See *Chesny v. Marek*, 720 F.2d 474, 474 (7th Cir. 1983) (Posner, J.) (noting that as of 1983, Rule 68 is “little known and little used”).

<sup>30</sup> See *infra* notes 192–207 and accompanying text for a discussion of the Advisory Committee’s efforts.

strengthened the Rule 68 penalty by putting plaintiffs at risk of losing fees in certain types of cases.<sup>31</sup>

These developments not only produced a marked increase in caselaw focusing on Rule 68 as a settlement promotion device,<sup>32</sup> but also inspired an extensive scholarly literature analyzing the settlement effects of different versions of the Rule.<sup>33</sup> Since the early 1980s, many states have amended their own offer of judgment rules by, for example, making them bilateral and strengthening the penalty.<sup>34</sup> Interest in the offer of judgment device as a settlement tool continues today, with activity taking place on both the federal and the state level.<sup>35</sup>

Yet Rule 68 still puzzles and frustrates courts and commentators. Its gross deficiencies as a settlement tool are striking. Moreover, amendment is difficult because the substantial changes needed to improve the Rule also elicit strong opposition from interest groups. For decades, people have wondered why the original Rule was so poorly drafted. Part II provides the surprising answer: Rule 68 was never meant to be an omnibus settlement device.

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<sup>31</sup> 473 U.S. 1 (1985). The Court held that "costs" in Rule 68 include fees when a fee-shifting statute applies and the statute awards fees "as a part of costs." *Id.* at 9. For example, a prevailing civil rights plaintiff who does not improve on a Rule 68 offer cannot obtain post-offer fees otherwise recoverable under § 1988. *See infra* notes 208–214 and accompanying text for a discussion of *Marek*.

<sup>32</sup> A Westlaw search revealed 293 published Rule 68 opinions from 1985 to 2006 (inclusive). This compares with a total of forty-seven before 1985. *See generally* Shelton, *supra* note 24, at 877–915 (reviewing much of the post-1980 case law).

<sup>33</sup> *See, e.g.*, David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225 (1994); Amy Farmer & Paul Pecorino, *Conditional Cost Shifting and the Incidence of Trial: Pretrial Bargaining in the Face of a Rule 68 Offer*, 2 AM. L. & ECON. REV. 318 (2000); Keith N. Hylton, *Rule 68, the Modified British Rule, and Civil Litigation Reform*, 1 MICH. L. & POL'Y REV. 73 (1996); Miller, *supra* note 3; Kathryn E. Spier, *Pretrial Bargaining and the Design of Fee-Shifting Rules*, 25 RAND J. ECON. 197 (1994); Yoon & Baker, *supra* note 7.

<sup>34</sup> *See* AM. COLL. OF TRIAL LAWYERS, SURVEY OF STATE OFFER OF JUDGMENT PROVISIONS 3–6 (2004).

<sup>35</sup> *See* Symposium, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?*, 57 MERCER L. REV. 717 (2006). States continue to experiment with different offer of judgment rules. For example, since 2004, Texas has been working with a rather complicated rule. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 42.004 (Vernon 2006). Recently there has been a spurt of empirical work on settlement effects. *See, e.g.*, Lewis & Eaton, *supra* note 7; Yoon & Baker, *supra* note 7. In addition, commentators continue to propose revisions to Rule 68 to empower its settlement potential. *See, e.g.*, Shelton, *supra* note 24; Daniel Glimcher, Note, *Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes*, 27 CARDOZO L. REV. 1449 (2006).

## II. RULE 68 IN 1938

A. *Setting the Stage: Two Models of Rule 68*

At the outset, it is useful to distinguish between two different ways of viewing Rule 68. I call one the “settlement promotion model” and the other the “unreasonable plaintiff model.” These two models frame the historical analysis in Parts II.B, II.C and III. The state offer of judgment rules on which Rule 68 was based better fit an unreasonable plaintiff model than a settlement promotion model. However, Rule 68 became strongly linked with settlement promotion in the 1980s, as judicial enthusiasm for settlement increased markedly. The following discussion first describes the settlement promotion model and then the unreasonable plaintiff model.

1. *The Settlement Promotion Model.*—The settlement promotion model assumes that settlement of litigation is desirable and ought to be encouraged because it saves litigation costs and produces a mutually agreeable resolution. Parties are not always able to settle on their own, however, because of asymmetric information, hard bargaining, irrational optimism, and other obstacles. Rule 68 is supposed to give an extra nudge that helps to overcome some of these bargaining problems.<sup>36</sup>

In negotiating a settlement, neither side offers or demands the entire judgment. Instead, each side makes its offers and counteroffers in light of its best estimate of the *expected gain* (for the plaintiff) and *expected loss* (for the defendant) from going to trial. To determine the expected gain and expected loss, each party first calculates the expected trial award—the likely judgment discounted by the plaintiff’s probability of obtaining it. The plaintiff subtracts her anticipated litigation cost from her estimate of the expected trial award to yield the expected gain from trial, and the defendant adds his anticipated litigation cost to the expected trial award to yield the expected loss from trial. Settlement is possible when the defendant’s expected loss exceeds the plaintiff’s expected gain.

Consider the following simple numerical example. Suppose that the plaintiff and the defendant both estimate the plaintiff’s probability of trial success at 60% and the likely judgment at \$100,000. Also, suppose that the plaintiff and the defendant each anticipate incurring \$10,000 in litigation costs through trial. Finally, suppose that the plaintiff knows the defendant’s estimates, and vice versa.

The plaintiff’s expected gain from trial is \$100,000 (judgment) discounted by 60% (probability of success) minus \$10,000 (litigation costs she must pay to get the judgment), which is \$50,000.<sup>37</sup> The same analysis gives

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<sup>36</sup> The account of settlement in this text is the standard account from the settlement literature. See ROBERT G. BONE, *THE ECONOMICS OF CIVIL PROCEDURE* 69–78 (2003).

<sup>37</sup>  $\$100,000 \times 0.6 - \$10,000 = \$50,000$ .

an expected loss for the defendant of \$70,000.<sup>38</sup> This creates a range of feasible settlements between the plaintiff’s minimum demand of \$50,000 and the defendant’s maximum offer of \$70,000. Both parties are better off settling in this range than going to trial.

The defendant, eager to pay as little as possible, might start off with an offer close to the plaintiff’s minimum of \$50,000. The plaintiff, on the other hand, is likely to start with a demand close to the defendant’s maximum of \$70,000. The parties will continue to bargain by making offers and counteroffers. If they have equal bargaining power and skill, they are likely to end up somewhere in the middle—near \$60,000.

It is not clear what role Rule 68 could possibly play in this example. Pure self-interest should drive the parties to a mutually beneficial bargain without any extra nudge. It is tempting to think that a penalty will make the plaintiff more willing to accept the defendant’s offer because it makes rejection more costly,<sup>39</sup> but this is a mistake. As Professor Geoffrey Miller showed in an important early analysis of Rule 68, this intuition ignores the the defendant’s incentives to reduce his offer to reflect the additional benefit he obtains when the plaintiff does not improve on the offer at trial.<sup>40</sup>

We know, however, that parties in the real world can have difficulty settling.<sup>41</sup> If both sides use hard bargaining strategies, for example, they are unlikely to reach an agreement even when settlement is otherwise feasible.<sup>42</sup> Also, one side might have private information about the case, and private information can lead to divergent valuations that drive offers and demands too far apart to make settlement possible.<sup>43</sup> And, of course, people are not perfectly rational. Cognitive limitations, such as the natural tendency to be irrationally optimistic, can impede successful settlement.<sup>44</sup>

Rule 68 is justified in the settlement promotion model if it reduces bargaining obstacles and thereby increases the settlement rate or makes earlier settlement more likely. A fairly large theoretical and empirical literature has developed over the past twenty years evaluating Rule 68 along these lines. The results are mixed. Some studies predict little effect on the settlement rate,<sup>45</sup> while others find more significant effects, although not nec-

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<sup>38</sup>  $\$100,000 \times 0.6 + \$10,000 = \$70,000$ .

<sup>39</sup> For an example of the Supreme Court accepting this argument, see *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981).

<sup>40</sup> Miller, *supra* note 3, at 111–12. The defendant will expect to have his costs paid if the plaintiff does not improve on the offer, so the defendant should reduce his offer to reflect the amount of his anticipated costs discounted by the probability that the plaintiff will not improve on the offer. And the plaintiff will reduce her demand to reflect her increased risk from going to trial. *Id.*

<sup>41</sup> See BONE, *supra* note 36, at 78–91, 108–11 (explaining typical bargaining obstacles).

<sup>42</sup> *Id.* at 75–81.

<sup>43</sup> *Id.* at 86.

<sup>44</sup> *Id.* at 106–07 (describing and applying the overconfidence bias).

<sup>45</sup> See, e.g., Miller, *supra* note 3, at 112–17 (but predicting that the one-way Rule 68 will skew settlement amount in favor of defendants); George L. Priest, *Regulating the Content and Volume of Litiga-*

essarily positive ones.<sup>46</sup> For example, one scholar's formal analysis predicts that Rule 68 will increase the number of settlements in cases of asymmetric information about damages, but reduce the number of settlements in cases of asymmetric information about liability.<sup>47</sup> In the end, most commentators find serious fault with the current Rule.<sup>48</sup> Yet despite these flaws, Rule 68 is nearly universally understood today as implementing the settlement promotion model.

2. *The Unreasonable Plaintiff Model.*—The unreasonable plaintiff model is not primarily concerned with increasing the settlement rate or improving the parties' bargaining incentives *ex ante*. Its primary focus is on compensating the defendant for costs incurred when the plaintiff insists on continuing to litigate a suit unreasonably.<sup>49</sup>

The unreasonable plaintiff model must include an account of what makes the plaintiff's decision to litigate unreasonable. It is tempting to think that the plaintiff acts unreasonably whenever she rejects a reasonable offer. But this simply begs the question of what is a "reasonable offer." An offer is not reasonable just because it falls in the range of feasible settlements. If this were so and we were prepared to condemn the rejection of any such offer as unreasonable, we would also be committed to condemning ordinary bargaining as unreasonable. Parties routinely reject offers falling in the settlement range, and no one considers this practice unreasonable on its face.

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*tion: An Economic Analysis*, 1 SUP. CT. ECON. REV. 163, 168–73 (1982) (same); *cf.* David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519, 531–32, 534–35 (1995) (testing a two-way Rule 68 with fee-shifting and finding a statistically significant increase in the number of cases that can be settled, although the magnitude of the effect is unclear and might be quite small); Brian G.M. Main & Andrew Park, *The Impact of Defendant Offers into Court on Negotiation in the Shadow of the Law: Experimental Evidence*, 22 INT'L REV. L. & ECON. 177 (2002) (analyzing the device under the British rule and concluding that it has little impact on the settlement rate but skews the amount in favor of the defendant).

<sup>46</sup> See, e.g., Spier, *supra* note 33, at 198 (arguing that Rule 68 can increase the settlement rate in cases of asymmetric information about damages but can reduce the settlement rate in cases of asymmetric information about liability). *But see* Farmer & Pecorino, *supra* note 33, at 336 (arguing that Rule 68 might increase the settlement rate under certain bargaining conditions even in cases of asymmetric information about liability).

<sup>47</sup> See Spier, *supra* note 33, at 198 (using a screening game-theoretic model to analyze the strategic interaction).

<sup>48</sup> See sources cited *supra* notes 45–46.

<sup>49</sup> See, e.g., Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108, 110 (Larry Kramer ed., 1996) (positing a "duty to engage in reasonable settlement behavior" and suggesting that a party "who fails to accept the trial-vindicated offer should compensate for the harm caused by the rejection"). The settlement promotion model, like an efficiency-based tort theory, justifies the result—damages in the case of tort and the cost-shifting penalty in the case of Rule 68—as a way to affect *ex ante* incentives—incentives to use optimal care in tort and incentives to settle optimally in Rule 68. By contrast, the unreasonable plaintiff model, like a fairness-based tort theory, justifies the result as a way to correct for wrongful conduct—intentional or negligent injury in tort and unreasonable imposition of costs in Rule 68.

One might try to define a reasonable offer as one that splits the difference between the parties equally. To return to our example in the previous section, an offer of \$60,000—halfway between the parties’ ideal points of \$50,000 and \$70,000—would be considered reasonable by this definition, and the plaintiff therefore would act unreasonably by rejecting it. There is, however, a serious problem with this line of thinking. Why is it unreasonable for the plaintiff to try to get a settlement as close as possible to her ideal point of \$70,000? To be sure, an offer at the midpoint of the settlement range gives each side an equal share of the surplus and for that reason might appear to be intuitively fair. But that does not mean it is the only fair result or that rejection of any midpoint offer is unreasonable. If it were, then much of bargaining would also be unreasonable because bargaining involves trying to capture as much as possible for oneself.<sup>50</sup>

Alternatively, one might analogize to efficiency theories in tort law and argue that a plaintiff’s choice to reject an offer and litigate is unreasonable whenever it produces more social costs than benefits. But this does not fit our ordinary understandings of unreasonableness in this context. For example, it might condemn as unreasonable a party’s rejection of an offer even when the offer is less than what the party rationally expects to gain from trial—in the ordinary sense of likely judgment discounted by probability of success and net of costs. The reason is that the party’s private decision to litigate creates external costs, such as those associated with public subsidy of the court system and delays for other cases. Those external costs might tip the social balance in favor of acceptance even when acceptance makes the party individually worse off.<sup>51</sup> However, we do not normally treat rejection as unreasonable under these circumstances, and there is no reason to think that the nineteenth- and early twentieth-century jurists who developed the offer of judgment and adopted Rule 68 looked at the matter any differently.<sup>52</sup>

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<sup>50</sup> There are also some normative questions one can ask about fairness as equal shares, such as how it is compatible with freedom to bargain as a matter of personal liberty. I need not explore those issues here.

<sup>51</sup> As a simple and rough illustration, suppose the defendant offers the plaintiff a settlement of \$10,000 when the plaintiff expects to gain \$15,000 from going to trial. The plaintiff, if rational, would reject the defendant’s offer and go to trial. But the plaintiff’s decision is not necessarily efficient from a social point of view. Suppose a trial costs the public \$6000, which includes a portion of the judge’s salary, the cost of using the courthouse, the value of the time that jurors spend at trial rather than in their regular activities, and so on. Also, suppose that the plaintiff’s decision to go to trial means that another case must wait a bit longer before it can be tried and that the additional delay imposes a marginal cost of \$2000 on the parties to the other case. The total of \$8000 is an external cost that the plaintiff, who makes the decision whether to go to trial, does not bear. If the plaintiff bore the full social cost of her decision, she would accept the defendant’s offer. In that case, her expected gain from trial would be reduced by the additional \$8000 cost it creates. So instead of \$15,000, the plaintiff’s expected gain would be \$7000, which is less than the defendant’s \$10,000 offer.

<sup>52</sup> See generally *infra* Part II.B–D (describing how these jurists viewed the offer of judgment and Rule 68).

The unreasonable plaintiff model instead focuses on special circumstances that make a plaintiff's rejection of an offer unreasonable in the sense of being *unfair*. In other words, the unreasonable plaintiff model needs a theory of fairness in settlement. Specifying such a theory is complicated by the strong value placed on individual freedom to make litigation choices in our adversarial system. If parties are free to choose how to litigate, why are they not also free to choose whether to litigate rather than settle?

There is, however, a situation where it makes sense to treat the plaintiff's decision to reject a settlement as unreasonable. Suppose that liability and judgment are both relatively clear and the defendant is willing to concede and be done with the case. The defendant offers the plaintiff the maximum judgment she is legally entitled to receive from trial. The plaintiff might know that the defendant's offer is for the maximum but still reject it and litigate for reasons unrelated to the merits of the case, such as spite or a desire to gamble on trial in the hope that she can convince the jury to award even more. Alternatively, the plaintiff might believe that she is entitled to more than the offer and reject for that reason under circumstances where she should have known the defendant was correct had she used reasonable care in evaluating the case. In both situations, it is sensible to treat rejection as unreasonable and a decision to continue litigating as unfair to the defendant.<sup>53</sup>

Without the offer of judgment in these situations, the defendant would have to rely on an ordinary settlement offer, but in that case he runs the risk that the plaintiff will reject the offer, insist on more, and take the case to trial. Given our assumptions, the plaintiff will almost certainly win at trial and receive an award somewhere in the neighborhood of the defendant's offer. In that case, because the plaintiff prevailed, the defendant will have to pay the plaintiff's costs as well as his own. This is an example of an unreasonable plaintiff, and the offer of judgment rule gives the defendant a way to shield himself from having to pay for this unreasonable and unfair litigation.

Of course, it might not be possible at the time of the offer to know for sure that this is what the plaintiff can legitimately receive. The offer of judgment device uses the actual trial outcome to verify that the earlier offer was in fact what it purported to be. If the plaintiff receives a judgment

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<sup>53</sup> Some of this conduct might be subject to Rule 11 sanction today. See FED. R. CIV. P. 11. Although rejection of a settlement offer is not in itself grounds for sanction, pursuing litigation out of spite and failing to conduct a reasonable investigation before filing are, in general, the sort of things covered by the current version of Rule 11. However, the original version enacted in 1938 did not require a pre-filing investigation, nor did it sanction lawyers or parties who held a subjective good faith belief that what they were doing was well grounded in law and fact. As I argue later in this Article, there is good reason to believe that the original Rule drafters thought very little about Rule 68, let alone its relationship to Rule 11.

greater than the offer, this is taken to mean that the defendant’s offer was not sufficient and therefore the plaintiff’s rejection was not unreasonable.

Thus, the unreasonable plaintiff model envisions a relatively narrow set of paradigmatic cases. All such cases must involve some form of unfairness. In our example, unfairness would be particularly strong if the evidence was relatively clear and equally available to both sides, liability was certain, and the trial judgment—or at least the maximum trial judgment—could be readily predicted. It is possible under these circumstances to assign blame to a plaintiff who rejects the offer because she is aware of the facts and therefore should know that the offer covers the amount to which she is entitled.<sup>54</sup> By contrast, the settlement promotion model supports a much larger set of paradigmatic cases, including any case where the application of Rule 68 might reduce bargaining obstacles.

It might be tempting to think that a plaintiff’s rejection is always unreasonable whenever—and simply because—the plaintiff does not recover more than the offer at trial. The intuition is that the post-offer investments are a complete waste, but this is a mistake. It is a classic example of hindsight bias.<sup>55</sup> Litigation is a gamble, and perfectly reasonable gambling choices do not always succeed. When the party does her best to predict the outcome but the outcome turns out differently from her prediction, the resulting litigation costs may become unnecessary *ex post*, but that does not make them unnecessary *ex ante*, nor does it make the party’s rejection of the offer unreasonable in any meaningful sense.

This example is not meant to exhaust all possible situations in which the plaintiff’s rejection might be deemed unreasonable. One might say the same thing, for instance, of an offer very close to what the plaintiff would receive from trial, although one would have to be prepared to explain why

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<sup>54</sup> This conclusion assumes that it is not morally acceptable in such cases to insist on litigating just to receive the vindication of a formal judgment. This is a reasonable assumption for most cases, given that the main purpose of adjudication is to produce outcomes conforming to the substantive law and not to satisfy the personal preferences of individual litigants. I am grateful to Ed Cooper for pointing out this wrinkle. There is another point that should be mentioned. A careful reader might argue that there is a moral distinction between the defendant having to pay the plaintiff’s costs and the plaintiff having to pay the defendant’s costs. It seems clear that a defendant should not be forced to subsidize a plaintiff’s offensive or negligent litigation behavior, but it is less clear that the plaintiff should have to pay the defendant’s costs. One might argue that parties engage in lots of undesirable strategic behavior that imposes costs on other parties when the latter have to bear the costs. However, the paradigmatic example in the text is different. The defendant surrendered completely by offering everything the plaintiff could legitimately receive at trial. Under those special circumstances, it is unfair to keep fighting and impose additional harm if the plaintiff should know that the offer covers everything. Furthermore, our litigation system is not a state of nature; litigants are not permitted to think only of themselves and disregard burdens they visit on others. I have argued elsewhere that our procedural rules and practices reflect an embedded norm of fair regard for other litigants. See Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 643–44 (1993).

<sup>55</sup> See Russell B. Korobkin & Thomas S. Ulen, *Law, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1095–1100 (2000) (explaining hindsight bias).

rejecting such an offer is unreasonable. I argue later in this Article that the example of the defendant who concedes everything served as a paradigm for the nineteenth-century offer of judgment rules in the states.<sup>56</sup> But the key to the unreasonable plaintiff model is the idea that the defendant will be compensated for losses incurred by the plaintiff's unreasonable action, whatever theory of unreasonableness applies.

It is easy to confuse the unreasonable plaintiff model with the settlement promotion model. After all, an offer of judgment in the unreasonable plaintiff model is still an offer inviting acceptance, and that offer contemplates the end of litigation by mutual consent. But there are at least two major differences. First, the type of offer differs. The offer in the unreasonable plaintiff model is not merely for some amount within the feasible settlement range. The offer is not an invitation to further negotiation or a way to frame the bargaining game. Instead, it is an offer that creates a moral obligation in the plaintiff to accept, leaving nothing more to bargain about.

Second, payment of costs follows more naturally from the unreasonable plaintiff model. In the settlement promotion model, the cost-shift is justified indirectly as a way to induce optimal settlement incentives *ex ante*. In the unreasonable plaintiff model, however, the cost-shift is a direct consequence of the compensation focus. Payment of costs compensates for the loss that the defendant incurs as a result of the plaintiff's unreasonable and thus unjustified litigation conduct.<sup>57</sup>

### *B. The 1938 Drafting Process*

Now that we have the necessary analytical tools in place, we can turn to explaining Rule 68's puzzling features. My claim is that the text and history of Rule 68 better fit the unreasonable plaintiff model than the settlement promotion model. In this and the following two sections, I focus on four aspects of Rule 68's history: (1) the original Advisory Committee drafting process; (2) the origin, application, and function of the state offer of judgment rules on which Rule 68 was based; (3) the purpose of the parallel rules developed in equity; and (4) the record of how the Advisory Committee described Rule 68 to the practicing bar immediately after the FRCP were adopted. My method is interpretive; I argue that an unreasonable plaintiff model coheres with these four historical factors much better than a settlement promotion model. This section discusses the drafting process, and sections C and D below discuss the other three factors.

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<sup>56</sup> See *infra* notes 140–141 and accompanying text.

<sup>57</sup> This does not explain why current Rule 68 does not compensate for the defendant's fees as well as costs. That explanation has to do with the history of the American rule on attorney's fees. See *infra* notes 144–146 and accompanying text.

The original version of the Rule adopted in 1938 was virtually identical to the modern Rule before the recent style amendments.<sup>58</sup> It read as follows:

Rule 68. 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. If the offer is not so accepted it shall be deemed withdrawn and evidence thereof is not admissible. If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time.<sup>59</sup>

One of the most remarkable things about the original Rule is the utterly unremarkable way in which it became part of the FRCP. The Rule was not included in the initial FRCP draft.<sup>60</sup> It appeared rather as an afterthought, midway through the drafting process, as a second paragraph added to a rule dealing with how to deposit money or property in court.<sup>61</sup> And it moved smoothly to adoption without any serious opposition or debate.<sup>62</sup> This should be quite surprising to those who accept the settlement promotion model of Rule 68.

Today we take for granted that settlement is a central feature of civil adjudication,<sup>63</sup> but this was not the case in 1938. Early twentieth-century

<sup>58</sup> For the version of Rule 68 in effect before the style amendments, see *supra* note 10.

<sup>59</sup> FED. R. CIV. P. 68 (1938).

<sup>60</sup> See Tentative Draft I (Oct. 15, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-803-66 to -804-97 (Cong. Info. Serv.); see also Tentative Draft II (Dec. 23, 1935–Jan. 16, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-805-25 to -807-29 (Cong. Info. Serv.).

<sup>61</sup> See Tentative Draft III R. A33 (Mar. 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-807-30, CI-810-90 to -92 (Cong. Info. Serv.) (Rule A33, Deposit in Court—Offer of Judgment).

<sup>62</sup> See *infra* notes 69–89 and accompanying text.

<sup>63</sup> The vast majority of filed cases settle before trial. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 77 (1997) (reporting that 90%–95% of cases not dismissed in the early stages of litigation end in settlement before trial); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 928 & nn.10–11 (2000) (noting that about 70% of filed cases settle and only about 6% reach trial, with the balance disposed of in other ways). Moreover, federal district judges are actively involved in facilitating and encouraging settlement, and local rules in some districts even mandate settlement discussions and judicial involvement at an early stage. See MANUAL FOR COMPLEX LITIGATION (THIRD) §§ 23.11–.13 (1995); D. MARIE PROVINE, FED. JUDICIAL CTR., SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 23 (1986). Indeed, many federal judges today would agree with the assessment of the judge who proclaimed, with only a little hyperbole, “a bad settlement is al-

jurists vigorously debated the merits of settlement promotion in formal adjudication, especially the proper role of the judge in the process.<sup>64</sup> For example, Charles Clark, the reporter to the 1938 Advisory Committee and chief architect of the FRCP, strongly opposed listing settlement in Rule 16 as one of the topics that a judge could discuss at a pretrial conference.<sup>65</sup> His opposition was shared by several other committee members, and it ultimately prevailed.<sup>66</sup>

One should be careful, however, not to infer too much from the opposition to including settlement promotion in Rule 16. Committee members worried mainly about judges getting involved in mediating or otherwise encouraging settlements.<sup>67</sup> It is not clear that they would have been as concerned about a rule that acted directly on party incentives without judicial involvement. Still, if the conventional view is correct, Rule 68 would have been the *only* rule in the FRCP designed to promote settlement—an oddity in a rule scheme otherwise aimed at preparing cases for trial.<sup>68</sup> Given Rule 68's awkward fit and the general reluctance to embrace settlement promotion wholeheartedly, it seems reasonable to suppose that there would have been significant discussion of Rule 68's merits. Indeed, even if the com-

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most always better than a good trial." *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

<sup>64</sup> Many cases settled, of course, though not nearly as many as do today. See Stephen C. Yeazell, *Refinancing Civil Litigation*, 51 DEPAUL L. REV. 183, 185 & n.9 (2001) (reporting that 19% of all civil filings went to trial in 1936, while 19.9% did in 1938). Most lawyers and judges favored settlement, and some even supported judicial involvement in the settlement process, especially for cases with small stakes. See Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 257–59 (1985) (reviewing the history of attitudes toward judicial involvement in settlement); Herbert Harley, *Justice or Litigation?*, 6 VA. L. REV. 143 (1919) (advocating conciliation courts for small claims). However, many jurists believed that judges should focus on preparing cases for trial, and in particular should not participate actively in settlement promotion as part of the formal adjudicative process. See Galanter, *supra*, at 258–59.

<sup>65</sup> See David Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980–81 (1989) (summarizing the 1938 committee's deliberations over Rule 16).

<sup>66</sup> See Galanter, *supra* note 64, at 258 (“[A]ccording to the dominant view [at the time], pre-trial would sharpen cases for trial, making litigation more effective.”); Judith Resnik, *Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging*, 49 ALA. L. REV. 133, 163–65 (1998) (describing the debate over Rule 16 and noting Clark's assertion that the Advisory Committee specifically chose not to include settlement in Rule 16). The original Rule 16 contained no mention of settlement at all. It was not until a 1983 amendment that settlement was explicitly added as a possible pretrial conference topic. See Shapiro, *supra* note 65, at 1986–87. It is also important to note that Clark was not hostile to settlement in general. He understood its necessity as a way to limit the burden on the courts, and he expected that it would occur as a useful *byproduct* of clarifying the facts and sharpening the issues for trial. *Id.* at 1980; see also Galanter, *supra* note 64, at 259 (explaining the byproduct theory of settlement).

<sup>67</sup> Clark, for example, feared the potential adverse effects on pretrial of judicial involvement that forced settlements. Charles E. Clark, *Objectives of Pre-Trial Procedure*, 17 OHIO ST. L.J. 163, 166–67 (1956).

<sup>68</sup> Indeed, the original FRCP as a whole were designed primarily for trying cases. See 1 JAMES WM. MOORE & JOSEPH FRIEDMAN, *MOORE'S FEDERAL PRACTICE* § 0.01, at 4–5 (1st ed. 1938) (listing the “salient features of the Rules,” all of which focus on preparing cases for trial).

mittee had no major objection to including a settlement-focused rule, one might have expected serious criticism of Rule 68’s obvious deficiencies. But no such discussion took place.

What eventually became Rule 68 first appeared as part of Rule A33 in the third Tentative Draft, which was circulated in March 1936, roughly nine months after the committee began its deliberations and after it had already considered two previous drafts.<sup>69</sup> Rule A33 was entitled “Deposit in Court—Offer of Judgment.”<sup>70</sup> It was added in response to a suggestion at the February 1936 meeting that there should be a separate rule addressing how to deposit property or funds in court.<sup>71</sup> The offer of judgment provision was included—without any committee prompting<sup>72</sup>—as a second paragraph to Rule A33, the first paragraph of which dealt with the matter of deposit.

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<sup>69</sup> The original committee was appointed on June 3, 1935, roughly one year after Congress passed the Rules Enabling Act. *See* Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774–75 (1935). It held its first meeting on June 20, 1935. *See* Report of Proceedings of the First Meeting of the Advisory Committee to the Supreme Court of the United States (June 20, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-101-1 to -103-29 (Cong. Info. Serv.). It met again in November 1935 to discuss the first Tentative Draft circulated in October, and yet again in February 1936 to discuss Tentative Draft II circulated in December. *See* Proceedings of Conference of Advisory Committee to Draft Uniform Rules of Civil Procedure of the Supreme Court of the United States (Nov. 14–20, 1935), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-103-61 to -125-2 (Cong. Info. Serv.); Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States (Feb. 20–25, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-201-1 to -215-4 (Feb. 20–23, 25), CI-125-95 to -129-26 (Feb. 24) (Cong. Info. Serv.). The offer of judgment rule did not appear until Tentative Draft III circulated after the February meeting. *See* Letter from Charles E. Clark to William D. Mitchell (Apr. 20, 1936) [hereinafter Clark to Mitchell Letter], in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-6001-1, CI-6002-18 (Cong. Info. Serv.) (“Rule A33, T.D. III, was a new rule requested by the Committee in February.”).

<sup>70</sup> Tentative Draft III, *supra* note 61, R. A33.

<sup>71</sup> *See* Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States 602 (Feb. 20–23, 25, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-201-1, CI-208-21 (Cong. Info. Serv.). This suggestion was made in the course of discussing Rule 25 of Tentative Draft II, which dealt with interpleader. The discussion turned to the distinction between an interpleading plaintiff who admits liability and one who contests liability. Committee member Warren Olney, Jr. noted that if interpleading plaintiffs paid the money into court, “they should be discharged without further costs.” *Id.* at 601–02, *microformed on* CIS Nos. CI-208-20 to -21. This prompted the Chairman to wonder about inserting a “provision for paying the money into court and being discharged.” *Id.* at 602. Charles Clark then responded that it might be a good idea to draft a separate rule dealing with deposit. *Id.*

<sup>72</sup> As Charles Clark explained in a letter to William Mitchell: “The Committee’s request was in terms only for a deposit rule, but when I came to work upon it, it seemed so closely tied up to the other branch of the rules on Offer of Judgment, so far as the codes generally are concerned, that we included it.” Clark to Mitchell Letter, *supra* note 69.

After receiving committee comments on Tentative Draft III, Charles Clark prepared the Preliminary Draft, which was published in May 1936 as the first version of the Federal Rules circulated for public comment.<sup>73</sup> The Preliminary Draft split the two paragraphs of Rule A33 into two distinct rules: Rule 81 (Deposit in Court) and Rule 82 (Offer of Judgment).<sup>74</sup> Rule 82 and its accompanying one-sentence note—citing state offer of judgment rules in Minnesota, Montana, and New York—kept the language of Rule A33 intact.<sup>75</sup>

The committee received numerous comments on the Preliminary Draft.<sup>76</sup> A few of these comments addressed Rule 82, but none questioned the propriety of the Rule or suggested that there was anything unusual about including it in the FRCP.<sup>77</sup> One suggestion worth noting, made by Harold

<sup>73</sup> See Preliminary Draft of Rules of Civil Procedure for the District Courts of the United States and the Supreme Court of the District of Columbia (May 1936) [hereinafter Preliminary Draft], in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-816-19 to -818-32 (Cong. Info. Serv.).

<sup>74</sup> This was the Style Committee's decision, so one should not infer too much about substance from it. See *id.* at 147–48, *microformed on* CIS Nos. CI-817-95 to -96.

<sup>75</sup> *Id.* at 148, *microformed on* CIS No. CI-817-96. One publication reporting on the Preliminary Draft did not consider Rule 82 remarkable or significant enough to warrant comment. Werner Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 ST. JOHN'S L. REV. 212, 266 (1937) (“Proposed Rules 81 and 82 deal with the matter of deposit in court and offer of judgment and require no comment.”).

<sup>76</sup> Charles Clark prepared at least three additional versions of the Preliminary Draft, none of which made any significant change to Rule 82. See Preliminary Draft II (Oct. 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-821-14, CI-822-95 (Cong. Info. Serv.); Preliminary Draft III (Feb. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-824-1, CI-826-65 (Cong. Info. Serv.); Preliminary Draft IV (Feb. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-827-1, CI-829-6 (Cong. Info. Serv.) (transferring Rule 82 to Rule 16).

<sup>77</sup> Among the Judicial Conference records and in the Charles Clark Papers at Yale, there is a summary list of four suggestions received for the offer of judgment rule. See Rule 73 Suggestions, in Abstract of Suggestions Regarding the April 1937 Draft of the Rules of Civil Procedure (Edgar B. Tolman's copy), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-4107-35, CI-4109-40 to -41 (Cong. Info. Serv.). In addition, the Department of Justice recommended exempting the United States, its agencies, and its officers from the Rule, and this recommendation was implemented. See Memorandum of Alexander Holtzoff, Special Assistant to the Attorney Gen., Dep't of Justice, to the Advisory Comm. on Rules for Civil Procedure (Nov. 17, 1936), in Memoranda of Alexander Holtzoff and Committee Member Responses (Nov.–Dec. 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-4502-01, CI-4502-27 (Cong. Info. Serv.). And several people suggested adding language that would have allowed the offer to be admitted against the offeree, but this suggestion was rejected. See, e.g., Memorandum of E.M. Morgan Concerning the Suggestions for Changes in Tentative Draft of Federal Rules of Civil Procedure 6 (Aug. 20, 1936), in Comments Summaries for Preliminary Draft of May 1936, in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-5402-69, CI-5402-74 (Cong. Info. Serv.); Memorandum Concerning Preliminary Draft of Rules of Civil Procedure by John D. Miller 2 (May 1936), in Correspondence Files (June–Dec.

Davis, a lawyer who worked with committee member Robert Dodge, proposed that the Rule be applied only to suits for damages. Davis’s rationale was that it would be too difficult to determine whether the plaintiff improved on the offer when the judgment involved equitable relief.<sup>78</sup> Charles Clark dismissed the suggestion by noting that the state offer of judgment rules applied to cases in equity as well as at law, and he also downplayed proposed Rule 82’s importance.<sup>79</sup> Minimizing the Rule’s significance in this way was an odd thing to do if the Rule was meant as a device designed explicitly to encourage settlements, given the focus of the FRCP on preparing cases for trial and the concern at the time about explicitly incorporating settlement into Rule 16.<sup>80</sup>

In April 1937, the committee circulated a second published draft, which it called a “report” rather than a “draft” because it functioned as a model for the committee’s eventual report to the United States Supreme Court.<sup>81</sup> The offer of judgment rule was renumbered Rule 73 but otherwise remained the same.<sup>82</sup> Comments were solicited over a six-month period before the final report was prepared and submitted to the Supreme Court in

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1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-5104-22, CI-5104-23 (Cong. Info. Serv.).

<sup>78</sup> See Letter from R.G. Dodge to Charles E. Clark, with Memorandum of Harold Davis (Mar. 8, 1937), [hereinafter Dodge to Clark Letter], in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-5008-01, CI-5011-64 to -68 (Cong. Info. Serv.). Davis’s memorandum also criticizes proposed Rule 81, the rule on deposit in court, which he interpreted as attempting, unsuccessfully, to incorporate a tender procedure. His reading of the rule makes sense given the combination of deposit and offer of judgment in the same original Rule A33 and the close historical link between tender and offer of judgment in state procedure. See *infra* Part II.C for a discussion of the relationship between tender and offer of judgment. Davis’s criticism is significant for our purposes because it further confirms how little Charles Clark and the committee actually understood about the offer of judgment and what it was meant to do. Anyone with knowledge of state tender and offer of judgment rules would have immediately understood Davis’s criticism and readily accepted it. He argued, in effect, that proposed Rule 81 implemented the usual tender or payment-into-court procedure very poorly, and insofar as it meant to go beyond that procedure, it was too vague and far too broad in scope. Dodge in his transmittal letter admitted his ignorance: “I may add that Davis knows a great deal more about matters of this sort than I ever knew.” Dodge to Clark Letter, *supra*.

<sup>79</sup> See Charles E. Clark & J.M. Friedman, Comments for the Style Committee by Mr. Clark and Mr. Friedman on P. D. Feb. 1937, Federal Rules of Civil Procedure Rule 81 Through Rule A (Feb. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS No. CI-3301-22, CI-3301-24 (Cong. Info. Serv.) (“Perhaps [Rules 81 and 82] are not important, but since they do not go beyond state models and have apparently been found somewhat useful in the states, there seems some argument at least for their retention.”). In fact, as we shall see, the offer of judgment rule was a common feature of late nineteenth-century code procedure and many of those state rules applied to suits for equitable relief as well as for damages. See *infra* notes 90–91, 115 and accompanying text.

<sup>80</sup> See *supra* notes 63–68 and accompanying text.

<sup>81</sup> Report of the Advisory Committee on Rules for Civil Procedure (Apr. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935–1988, *microformed on* CIS Nos. CI-902-92 to -905-71 (Cong. Info. Serv.).

<sup>82</sup> See *id.* at 183, *microformed on* CIS No. CI-905-03.

November 1937.<sup>83</sup> The only interesting suggestion made during the comment period that I have seen proposed that both parties be allowed to make an offer of judgment, a suggestion that was never adopted.<sup>84</sup> The final version of the Rule, which was renumbered as Rule 68 and submitted to the Supreme Court as part of the committee's final report, was substantively identical to the original version in Tentative Draft III, the only differences being minor stylistic changes.<sup>85</sup>

After the FRCP went into effect, the American Bar Association's Institute on Federal Rules convened several conferences to familiarize practitioners with the new Rules.<sup>86</sup> One conference was held in Cleveland, Ohio, in

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<sup>83</sup> See, e.g., Abstract of Suggestions Regarding the April 1937 Draft of the Rules of Civil Procedure (Edgar B. Tolman's copy) (Oct. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS No. CI-4107-35 (Cong. Info. Serv.).

<sup>84</sup> See Suggestions as to the Report on Rules for Civil Procedure (Apr. 1937), in Abstract of Suggestions Regarding the April 1937 Draft of the Rules of Civil Procedure (Edgar B. Tolman's copy) (Oct. 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS No. CI-4107-35, CI-4109-40 (Cong. Info. Serv.) (noting the suggestion of Charles Henry Howard of Baltimore, Maryland).

<sup>85</sup> The committee met several times between March 1936, when the offer of judgment rule first appeared, and April 30, 1937, when the final report was submitted to the Supreme Court. There are transcripts for three of these meetings in the Judicial Conference records (and the Charles Clark Papers at Yale): August 28-September 2, 1936, October 22-27, 1936, and February 1-4, 1937. The offer of judgment rule was mentioned at the first meeting only to propose a minor change in wording that met with no discussion. Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States (Aug. 28-Sept. 2, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS No. CI-130-59, CI-131-19 (Cong. Info. Serv.). The offer of judgment rule was not discussed at all at the October meeting. Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States (Oct. 22-27, 1936), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS Nos. CI-131-23 to -132-67 (Cong. Info. Serv.). The only mention of the rule at the February 1937 meeting consisted of a statement that it would not be changed and a reminder that a note was required and that Charles Clark would draft it. Proceedings of Meeting of Advisory Committee on Rules of Civil Procedure of the Supreme Court of the United States 7, 42 (Feb. 1-4, 1937), in RECORDS OF THE U.S. JUDICIAL CONFERENCE: COMMITTEES ON RULES OF PRACTICE AND PROCEDURES, 1935-1988, *microformed on* CIS Nos. CI-132-69, CI-132-81, -133-19. (Cong. Info. Serv.). However, it appears that the rule was discussed at a meeting of the Style Committee, which raised a concern about "whether adding the rule on Offer of Judgment was within our mandate." Clark to Mitchell Letter, *supra* note 69. This might have been a reference to the possibility that Rule 68 cost-shifting was too substantive under the Rules Enabling Act. Cf. Letter from William D. Mitchell to Charles E. Clark (Oct. 13, 1937), [hereinafter Mitchell to Clark Letter] (on file with author) ("We have not in these rules attempted to state what the amount of the costs shall be, or what items are taxable, having proceeded on the assumption that that is a matter of substantive law rather than practice."). I am grateful to Professor Steve Burbank for drawing the Mitchell to Clark letter to my attention and for providing me with a copy. Unfortunately, however, I was not able to find anything more definite to illuminate this intriguing comment.

<sup>86</sup> See AM. BAR ASS'N, FEDERAL RULES OF CIVIL PROCEDURE: PROCEEDINGS OF THE INSTITUTE AT WASHINGTON, D.C., OCTOBER 6, 7, 8, 1938 AND OF THE SYMPOSIUM AT NEW YORK CITY, OCTOBER 17, 18, 19, 1938 (1939) [hereinafter ABA WASHINGTON, D.C. AND NEW YORK CITY PROCEEDINGS]; AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS

July of 1938. Members of the Advisory Committee explained each of the Federal Rules and answered questions.<sup>87</sup> The discussion of some Rules was extensive and took up multiple pages of the conference transcript.<sup>88</sup> The discussion of Rule 68, by contrast, consumed only two paragraphs. Committee member Robert Dodge described the Rule briefly, and no one asked any questions.<sup>89</sup>

### C. *The Nineteenth-Century Background*

It is clear from the previous discussion that the committee thought Rule 68 was an uncontroversial—even relatively unimportant—addition to the FRCP and that this view was shared by many judges and lawyers at the time. How could a rule designed to promote settlement receive such a neutral response? The reason, I believe, is that the original Rule was not thought of as a settlement promotion tool in the way Rule 68 is understood today. In fact, it appears that the Advisory Committee added the Rule without a clear idea of what it was supposed to do. The committee simply assumed that Rule 68 would serve the same function that the code offer of judgment rules served in the states. The following discussion explores the function of those state rules.

The offer of judgment device that became Rule 68 first appeared in the New York Field Code in the middle of the nineteenth century<sup>90</sup> and was

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OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE, CLEVELAND, OHIO, JULY 21, 22, 23, 1938, at 176 (1938) [hereinafter ABA CLEVELAND PROCEEDINGS]; PROCEEDINGS OF THE ATLANTA INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE (1938) [hereinafter PROCEEDINGS OF THE ATLANTA INSTITUTE].

<sup>87</sup> See ABA CLEVELAND PROCEEDINGS, *supra* note 86, at 176.

<sup>88</sup> See, e.g., *id.* at 237–47 (discussing Rule 12).

<sup>89</sup> See *id.* at 337–38 (remarking on Rule 68); *id.* at 339–58 (discussing various Rules without mentioning Rule 68). The response was similar for the conferences held in Atlanta and Washington, D.C. and for the symposium held in New York City. In Atlanta, Charles Clark described Rule 68 very briefly and received only one question regarding whether the cost of a deposition would be recoverable. See PROCEEDINGS OF THE ATLANTA INSTITUTE, *supra* note 86, at 105, 111. George Donworth, also a committee member, handled Rule 68 at the Washington, D.C. conference and the New York symposium. ABA WASHINGTON, D.C. AND NEW YORK CITY PROCEEDINGS, *supra* note 86, at 192, 291. He was asked only one question at each proceeding. *Id.* at 201, 299. In D.C., he was asked whether Rules 67 and 68 replaced tender, and he answered that they did not. *Id.* at 201. In New York, he was asked whether a Rule 68 offer could be withdrawn within the ten-day window, and he answered no. *Id.* at 299.

<sup>90</sup> THE CODE OF PROCEDURE OF THE STATE OF NEW YORK FROM 1848 TO 1871: COMPROMISING THE ACT AS ORIGINALLY ENACTED AND THE VARIOUS AMENDMENTS MADE THERETO, TO THE CLOSE OF THE SESSION OF 1870 § 385, at 274 (Albany, Banks & Bros. 1870). The original offer of judgment statute, which was labeled “offer of compromise,” was enacted in 1848 as § 338 and read as follows:

In an action arising on contract, the defendant may at any time before trial or judgment, serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum, or to the effect, therein specified. If the plaintiff accept the offer, and give notice thereof within ten days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer

later incorporated into most state codes.<sup>91</sup> Although it was new with the codes, the device was based on earlier procedures. By tracing this history, it is possible to piece together a plausible account of what the offer of judgment was meant to do. I should mention at the outset that the historical evidence does not unequivocally and definitively reveal a clear purpose for the offer of judgment rule. That evidence must be interpreted, and my claim is that the most plausible interpretation aligns the state rules much more closely with the unreasonable plaintiff model than the settlement promotion model.

This history begins with the right of tender at common law.<sup>92</sup> I focus on tender because it illuminates what the offer of judgment was meant to do more clearly than some of the other nineteenth-century devices.<sup>93</sup> The common law right of tender applied to actions for debt or *indebitatus assumpsit*.<sup>94</sup> The defendant had to tender the amount due at least once before

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shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment he shall pay the defendant's costs from the time of the offer.

*Id.* The statute was amended in 1851 (and renumbered § 385) to remove the limitation to contract actions and clarify that the plaintiff who fails to improve on the offer at trial not only must pay the defendant's costs, but also "cannot recover [his own] costs." *Id.* at 274–75 (emphasis omitted).

<sup>91</sup> Most state codes were modeled on the New York Field Code and included the offer of judgment provision. *See, e.g.*, JOHN C. FITNAM, TRIAL PROCEDURE: A TREATISE ON PROCEDURE IN CIVIL ACTIONS AND PROCEEDINGS IN TRIAL COURTS OF RECORD UNDER THE CIVIL CODES OF ALL THE STATES AND TERRITORIES § 521, at 622 (St. Paul, West Publ'g Co. 1894) ("The codes all provide for an offer of judgment . . ."). Like Rule 68, the state rules applied only one way, affected liability for costs but not for fees, and required a judgment, not just a settlement.

<sup>92</sup> The offer of judgment was also closely related in operation and name to another nineteenth-century device: the offer to confess judgment. This device applied to actions to recover a debt or money damages, and it allowed a defendant who "has no available defense to the action" to make a written offer to confess to a judgment. 1 JOHN A. DUNLAP, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF NEW YORK IN CIVIL ACTIONS 356–69 (Albany, E.F. Backus 1821) (discussing judgment by confession and its implementation through *cognovit* and warrant of attorney); 1 FRANCIS J. TROUBAT & WILLIAM W. HALY, THE PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN THE SUPREME COURT OF PENNSYLVANIA AND IN THE DISTRICT COURT AND COURT OF COMMON PLEAS FOR THE CITY AND COUNTY OF PHILADELPHIA AND ALSO IN THE COURTS OF THE UNITED STATES 236–41 (Philadelphia, R.H. Small 1837) (same). If the plaintiff refused to accept the defendant's offer, the plaintiff could litigate the suit, but if the plaintiff failed to improve on the offered judgment at trial, the plaintiff could not recover costs from the defendant and had to pay the defendant's costs incurred after the offer. TROUBAT & HALY, *supra*, at 238; *accord* GEORGE A. BICKNELL, THE PRACTICE OF THE SUPREME AND CIRCUIT COURTS OF THE STATE OF INDIANA IN CIVIL CASES 311, 317–19 (Cincinnati, R. Clarke 1864).

<sup>93</sup> In addition to the offer to confess judgment, *see supra* note 92, there were other devices that allowed a defendant to limit his liability for costs. For example, the offer to liquidate damages allowed a defendant, in a case where the defendant believed the total damages were clear, to make an offer to take a judgment in the amount of those damages conditional on the plaintiff proving liability. If the damages the plaintiff actually proved at trial did not exceed the defendant's offer, the plaintiff could not recover post-offer costs and had to pay the defendant's post-offer costs attributable to proving damages. *See* EDWIN BAYLIES, TRIAL PRACTICE, OR THE RULES OF PRACTICE APPLICABLE TO THE TRIALS OF CIVIL ACTIONS IN COURTS OF RECORD UNDER THE CODE OF CIVIL PROCEDURE 112 (2d ed., Rochester, N.Y., Williamson Law Book Co. 1899).

<sup>94</sup> *See, e.g.*, 1 ISAAC ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS 158–60 (2d Am. ed., Walpole, N.H., Thomas & Thomas 1801); GEORGE WHARTON PEPPER, PLEADING

the plaintiff filed suit. He then entered a plea of tender and deposited the amount due with the court. If the plaintiff rejected the tender and insisted on litigating, the deposit stopped the accumulation of interest on the debt and forced the plaintiff to pay the defendant’s costs if the plaintiff failed to prove that the defendant owed more than the tendered amount.<sup>95</sup>

The purpose of the common law right of tender was not to encourage settlement generally. The right applied to a very limited class of cases—those in which the debt was clear and the plaintiff insisted on litigating despite the defendant’s genuine efforts to pay the amount in full.<sup>96</sup> Under these circumstances, the plaintiff had no legitimate basis for suing the defendant because the defendant was prepared to satisfy the entire claim. Thus, the purpose of the common law procedure was to give the defendant some control over an obviously frivolous suit, and it did so by relieving the defendant of the burden of paying litigation costs and interest from the time of the tender.

The next step in this line of development was statutory. In the early nineteenth century, states adopted statutes that expanded tender at common law in two ways: first, by making it available even when the defendant tendered for the first time after the suit was filed, and second, by extending it to common law actions other than those to recover debts.<sup>97</sup> In many states, the statutory offer of tender coexisted with the common law right—the former applying to tenders made after filing and the latter applying, as it always had, to tenders made before filing.<sup>98</sup>

A statutory tender was deemed to carry with it an admission of liability. The defendant, in effect, sought to conclude the suit up to the amount of the tender. If the plaintiff rejected the tender, the defendant accomplished the same thing by depositing the money in court. The deposit was treated as the equivalent of an actual payment to and acceptance by the plaintiff,<sup>99</sup> and the tender was the equivalent of an admission “that the plain-

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AT COMMON LAW AND UNDER THE CODES 89–90 (Northport, Long Island, N.Y., Edward Thompson Co. 1891).

<sup>95</sup> As one commentator described the result under English procedure, “if [the plaintiff] does not prove more due than is so paid into court, he shall be nonsuited, and the defendant have his costs; for a tender and refusal discharges costs.” 1 ESPINASSE, *supra* note 94, at 160.

<sup>96</sup> Indeed, if the common law right had been about encouraging settlement, one would have expected it to apply even when the defendant made a tender for the first time only after suit was filed. But it did not.

<sup>97</sup> See *Taylor v. Brooklyn Elevated R.R. Co.*, 23 N.E. 1106, 1107 (N.Y. 1890) (“The Revised Statutes and the Code have extended the common-law right of tender so as to permit a tender of moneys, or their payment into court where the tender is refused, during the pendency of an action.”); *Patrick v. Ilwaco Oyster Co.*, 63 P.2d 520, 521 (Wash. 1937) (holding an offer of tender statute to “extend[] the common-law [tender] rule” to tort as well as contract actions).

<sup>98</sup> See, e.g., H. GERALD CHAPIN, CODE PRACTICE IN NEW YORK 164 (1918).

<sup>99</sup> See *Taylor*, 23 N.E. at 1107 (“[A deposit] is deemed in law a payment to the plaintiff . . . of a conceded liability for the injury.”).

tiff is entitled to recover the amount tendered, but no more.”<sup>100</sup> The money became the plaintiff’s property as soon as it was deposited and remained the plaintiff’s property even if the defendant won at trial. As one commentator put it, “the defendant bids his money an eternal farewell.”<sup>101</sup>

Thus, a defendant used the statutory offer of tender to force an intransigent plaintiff to take an offer that was likely to equal the amount recovered at trial. If the plaintiff failed to recover more than the amount deposited, the plaintiff had to pay all costs accruing after the tender and deposit—its own costs as well as the defendant’s. However, the plaintiff still kept the deposited amount. This made sense given the way the device was conceived. Because the lawsuit was in effect concluded up to the amount deposited, the plaintiff took that amount no matter what, and then he had no legitimate basis for continuing to litigate unless he could recover more.<sup>102</sup>

While it is very likely that the statutory offer of tender had some effect on settlement—a plaintiff would have had to think twice before continuing with a lawsuit after a deposit—this does not mean that the purpose of statutory tender was to promote settlement. Instead, it appears to have had more to do with giving the defendant some control over the costs imposed by the plaintiff’s litigating decisions. If the plaintiff insisted on dragging the defendant through a lawsuit when the defendant admitted liability and was willing to pay the full amount, the defendant was at the plaintiff’s mercy, and the offer of tender made sure the defendant did not have to pay the additional costs.<sup>103</sup>

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<sup>100</sup> 1 WILLIAM RUMSEY, *THE PRACTICE IN ACTIONS AND SPECIAL PROCEEDINGS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE* 619 (Albany, Banks & Bros. 1887). Therefore, if the plaintiff continued to litigate notwithstanding the tender and did not recover more than the tendered amount, a verdict and judgment was entered for the defendant. *Id.*

<sup>101</sup> CHAPIN, *supra* note 98, at 164. Another commentator described it in the following way:

Payment into court [under the Code provision] is equivalent to an acceptance by the plaintiff of the amount tendered. The money deposited is deemed in law a payment to the plaintiff on account of the contract obligation, or of a conceded liability for the injury. When the moneys are brought into court they become the plaintiff’s and it is immaterial as to the question of their ownership what the result of the trial may be.

BAYLIES, *supra* note 93, at 112.

<sup>102</sup> In some states, such as New York, the plaintiff could accept the tender and still litigate for a larger recovery. CHAPIN, *supra* note 98, at 165. If the plaintiff actually recovered more than the tendered amount, “the sum tendered must be deducted from the recovery and judgment rendered for the residue.” *Id.* Some of the code provisions pegged the award of costs to the amount recovered, and in a case of tender where the judgment was rendered for the residue, the “[p]laintiff’s right to recover costs is then determined by the amount of such residue.” *Id.*

<sup>103</sup> One commentator described the procedure in the following suggestive passage:

Cases frequently occur in which it is apparent from the commencement of the action that the plaintiff will recover some judgment against the defendant. In such cases it is incumbent upon the defendant to take such steps as the law authorizes to reduce the amount of the recovery, and to avoid, if possible, liability for the future costs of the action. The Code provides several remedies by which a defendant, in a proper case, may throw the responsibility of further litigating the action upon the plaintiff, and subject him to liability for the subsequently accruing costs therein. One of the remedies is by a tender after suit.

At least two features of the statutory offer of tender are inconsistent with it serving a settlement promotion goal. First, tender and deposit were equivalent to a complete surrender to the plaintiff's demands up to the amount tendered, and the plaintiff had to pay costs not as a settlement incentive, but as a matter of fairness given the defendant's willingness to concede.<sup>104</sup> Second, the device, though more broadly applicable than the common law right, was still mostly limited to cases in which the scope of liability was relatively clear, although there were some exceptions.<sup>105</sup> There would have been no reason to limit its application in this way had settlement promotion been the goal; a deposit should prod negotiations in any type of case. However, the limitation makes sense with fairness as the goal. It would have made it possible to view rejection of the tender and insistence on litigating as unjustified, because a plaintiff with knowledge of the facts bearing on liability should have known better.<sup>106</sup>

It is also significant that similar offer-contingent, cost-shifting rules existed on the equity side before merger.<sup>107</sup> Although these rules did not lead directly to the offer of judgment, which instead developed from the com-

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BAYLIES, *supra* note 93, at 109–10; *see also* Rosenberger v. Harper, 83 Mo. App. 169, 172–73 (1900) (noting that in cases of tender, it is equitable to require the plaintiff to pay all costs after tender and deposit because “the plaintiff’s debt is always available to him, and he runs no risk in finally losing it” at trial); EDGAR B. KINKEAD, PROCEDURE IN CIVIL TRIALS AND ON APPEAL AND ERROR (UNDER THE OHIO CODE) § 207, at 191 (1915) (“[The tendering party] is entitled to be protected, or relieved from the payment of any costs, should it be found finally in the trial of the controversy that he is right.”).

<sup>104</sup> As one commentator described the principle behind a tender:

When a party has entered into an obligation either to pay money or to deliver goods, or to perform services, and by some outward expression or act in effect tenders or offers to perform the obligation in the manner agreed upon, the law considers that he has, in fact, substantially performed it.

KINKEAD, *supra* note 103, § 207, at 190.

<sup>105</sup> The precise range of application seems to have varied from state to state. Some states, such as Ohio, limited the statutory offer of tender to cases likely to have relatively clear stakes. *See id.* § 209, at 192 (“[In Ohio, t]he code provides that a tender may be made in the case of a contract for the payment of money, or upon a contract for the payment of any article or thing other than money, or for the performance of any work or labor.”); *id.* § 212, at 193–94, § 217, at 196–98 (describing that in a case with non-monetary stakes, the defendant tendered by offering to perform in the way contracted for and providing assurances to the court that he stood ready to do so). Other states, such as New York, extended the device to cover some cases where the stakes might not have been so clear. *See* CHAPIN, *supra* note 98, at 164 (explaining that the statutory offer of tender in New York applies to cases where “the action is brought to recover a sum certain or which may be reduced to certainty by calculation or to recover damages for a casual or involuntary injury to person or property” and that inclusion of the last category means that “in certain cases the damages need not be liquidated”).

<sup>106</sup> Such a normative judgment seems implicit in the way the procedure worked. It was not applicable to every type of case and how far it extended to cases without clearly ascertainable liability was a disputed issue worthy of litigation and discussion. *Cf.* Atkins v. Ost, 86 S.W. 903, 903–04 (Mo. 1905) (holding that statutory tender applies to cases with unliquidated as well as liquidated damages); Patrick v. Ilwaco Oyster Co., 63 P.2d 520, 521 (Wash. 1937) (holding that statutory tender applies to tort suits, not just contract actions).

<sup>107</sup> *See* WILLIAM MEADE FLETCHER, A TREATISE ON EQUITY PLEADING AND PRACTICE § 742, at 770–73 (1902).

mon law rules,<sup>108</sup> it is worth noting that equity courts clearly envisioned these cost-shifting rules as fairness devices, not settlement promotion tools.<sup>109</sup> For example, one of the leading treatises on equity procedure observed that “[t]he rule that costs follow the result of the suit, and are awarded to the prevailing party, is departed from when the failing party can show to the court any circumstance which would render unjust that he should pay the costs of proceeding” and followed that general statement with a list of specific examples, including a failure to improve on the offer after tender and “unnecessary litigation.”<sup>110</sup> Another earlier treatise writer was even more succinct: “Where a party has been guilty of vexation, it is usual to charge him with costs, especially if he ‘refuse a fair offer of accommodation, and obstinately persist in his suit.’”<sup>111</sup>

The offer of judgment, also sometimes referred to as “offer of compromise,”<sup>112</sup> is the final stage in this line of development. The device was related to the statutory offer of tender<sup>113</sup> and had the same effect on costs: the plaintiff had to pay all the defendant’s post-offer costs as well as its own if the plaintiff failed to obtain a judgment better than the offer.<sup>114</sup> However, the offer of judgment had a broader range of application than the offer of

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<sup>108</sup> Although a few commentators have suggested that Rule 68 grew out of this equity practice, *see, e.g.*, 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3001, at 66–67 & n.5 (citing *Crutcher v. Joyce*, 146 F.2d 518, 520 (1945)) (tracing Rule 68 to equity), the foregoing discussion of the offer of tender doctrine shows this to be incorrect. Nevertheless, the existence of a parallel set of rules in equity aimed at preventing unfairness is probative of what the common law rules were trying to do.

<sup>109</sup> *See Lewis v. Yale*, 4 Fla. 441, 442 (1852) (noting that the usual rule is that costs “follow the result,” but in equity the rule “is departed from in those cases where the failing party can show to the Court any circumstances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceedings,” and further stating that in considering this, “a Court of Equity is very much governed by its desire to discourage and repress unnecessary litigation”). Perhaps because the equity rules were flexible, courts and commentators had a bit more to say about the underlying reasons.

<sup>110</sup> FLETCHER, *supra* note 107, § 742, at 770–73.

<sup>111</sup> JOHN BEAMES, A SUMMARY OF THE DOCTRINE OF COURTS OF EQUITY WITH RESPECT TO COSTS, DEDUCED FROM THE LEADING CASES 56–57 (Philadelphia, John S. Littell 1838) (emphasis omitted); *see Frisby v. Ballance*, 5 Ill. (4 Scam.) 287, 311–12 (1843) (awarding costs to defendant because defendant had conceded everything and there was no reason for the plaintiff to sue); *McCloskey v. Bowden*, 89 A. 528, 529 (N.J. Ch. 1914) (“[A] complainant who has received a bona fide offer of a proper settlement before bringing suit, but who brings suit more or less vexatiously, will not, in a court of conscience, where the matter is discretionary, be allowed either costs or counsel fee against a defendant who is adjudged to pay practically the sum which, before the bringing of suit, he had accounted for and offered to pay.”).

<sup>112</sup> Compromise meant the same thing as settlement, *see Galanter, supra* note 64, at 257, and the offer of judgment, whatever its purpose, clearly contemplated a settlement in the sense of a consensual resolution of the dispute.

<sup>113</sup> Offer of judgment is also linked to the offer to confess judgment. *See supra* note 92.

<sup>114</sup> The offer of tender remained in most codes alongside the offer of judgment, and parties could choose between the two. *See, e.g., Rosenberger v. Harper*, 83 Mo. App. 169, 172–73 (1900) (contrasting the effects of tender and offer of compromise under Missouri law); CHAPIN, *supra* note 98, at 165 (noting that if the defendant “does not wish to make a tender,” he may use the offer of compromise).

tender. In New York, for example, it applied to all lawsuits for equitable relief as well as for damages.<sup>115</sup>

An offer of judgment, like a tender, was an admission of liability and a way to end a lawsuit by giving the plaintiff the judgment she was likely to receive at trial. Still, there were differences. A tender followed by a deposit actually concluded the case up to the amount of the deposit even if the plaintiff rejected the tender, and the defendant forfeited the deposit no matter the result of trial. The offer of judgment, by contrast, did not require a deposit and posed no risk of loss unless the plaintiff accepted the offer.

While the dependence of the offer of judgment on acceptance may make it appear more similar to a settlement offer than a tender, the dominant view seems to have been that the offer of judgment was an extension of tender applicable to a broader range of cases and serving a similar purpose. All of the nineteenth- and early twentieth-century treatise accounts I have read—and there are many—group the offer of judgment with tender and treat the two devices as if they served a similar function.<sup>116</sup> None of these sources mentions settlement promotion as a goal. Moreover, while most treatises simply describe the mechanics of the rule, a few mention

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<sup>115</sup> See JACOB HOLMES, PRACTICE IN THE SUPREME COURT OF THE STATE OF NEW YORK IN COMMON LAW ACTIONS UPON CONTRACTS 156 (New York, George S. Diossy 1859). It is significant to note that the original 1848 New York Field Code limited the offer of compromise to contract actions, suggesting once again that the device was not conceived originally as an omnibus settlement promotion tool. This restriction was removed by an 1851 amendment. See *supra* note 90. Not all states applied the offer of judgment as broadly as New York. See FITNAM, *supra* note 91, § 529, at 627 (noting that some state codes, such as the Kansas Code, limited the offer of judgment to cases of money demands only).

<sup>116</sup> See, e.g., URIEL H. CROCKER, NOTES ON COMMON FORMS: A BOOK OF MASSACHUSETTS LAW 178 (Boston, Little, Brown, & Co. 1867) (“The importance of the law upon the subject of tender is in a great degree destroyed by the statute provisions relative to ‘offer of judgment.’”); 1 CLAUDIUS L. MONELL, A TREATISE ON THE PRACTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK 508–09 (2d ed., Albany, Gould, Banks & Co. 1853) (noting that the new code offer of judgment provision is an extension of tender with a change “in the mode of attaining a somewhat similar end”); 1 RUMSEY, *supra* note 100, at 622 (noting that “as a matter of practice” the offer of judgment “superseded” tender). The treatises typically discuss the code offer of judgment procedure together with tender, offer to confess judgment, offer to liquidate damages, and the like in the same general part of the treatise. See, e.g., 1 SANFORD M. GREEN, GREEN’S MICHIGAN PRACTICE: A TREATISE ON THE PRACTICE OF THE COURTS OF COMMON LAW OF THE STATE OF MICHIGAN §§ 793–820, at 693–719 (3d ed. 1911) (covering confession of judgment, cognovits, offer of judgment, tender, and the like *seriatim* in Part VI, entitled “Termination of Action Without Trial”); 2 CLARK A. NICHOLS, A TREATISE ON PLEADING AND PRACTICE IN THE COURTS OF RECORD OF NEW YORK §§ 1546–68, at 1989–2023 (1904) (covering in sequence offer to allow judgment, offer to liquidate damages, tender, and payment of money into court); 1 WILLIAM RUMSEY, THE PRACTICE IN CIVIL ACTIONS IN THE COURTS OF RECORD OF THE STATE OF NEW YORK UNDER THE CODE OF CIVIL PROCEDURE 754–75 (William Rumsey & John S. Sheppard, Jr. eds., 2d ed. 1902) (describing tender, offer to liquidate damages, and offer to compromise *seriatim* in Chapter XVIII, entitled “Tender and Other Offers”); 1 WILLIAM WAIT, THE PRACTICE AT LAW, IN EQUITY, AND IN SPECIAL PROCEEDINGS, IN ALL THE COURTS OF RECORD IN THE STATE OF NEW YORK 584–85 (Albany, William Gould & Son 1872) (discussing tender, paying money into court, and offer of judgment *seriatim* in a chapter detailing defendant’s options after receipt of summons and complaint).

something about its purpose, and virtually all of those focus on giving the defendant a way to deal with a plaintiff who insists on continuing with “unnecessary and fruitless litigation.”<sup>117</sup>

As one treatise writer put it: “The object of this provision [is] to prevent the accumulating of unnecessary costs to the defendant in actions which are indefensible, or which the defendant does not desire to litigate.”<sup>118</sup> And the same writer described the typical case in the following way:

It will frequently happen that the defendant, conscious that the plaintiff on a trial will recover a judgment in the action against him, and knowing that he is justly indebted to the plaintiff in a sum less than that claimed by the complaint, for which sum he is willing to confess judgment, will make an offer of compromise.<sup>119</sup>

This language is not what one would expect from someone focused on promoting settlement. The descriptions are not written in terms of influencing the bargaining process. Instead, they characterize the offer of judgment as a way for defendants to avoid litigation costs when they know they are liable and stand willing to give the plaintiff everything the plaintiff is “justly” entitled to obtain from trial.<sup>120</sup> Costs are shifted to the plaintiff not because it might induce a settlement, but because it is fair: the costs are the

<sup>117</sup> See, e.g., 1 EDWIN E. BRYANT, A TREATISE ON JUSTICES OF THE PEACE IN WISCONSIN § 206, at 205 (9th ed. 1924). In his 1853 treatise on New York practice, Claudius Monell argued for allowing the defendant to make an offer directed to only part of the plaintiff’s case. 1 MONELL, *supra* note 116, at 510. Monell described the part of the case that the defendant would target with an offer as a “cause of action which [the defendant] knows to be just.” *Id.* And he described the part that would not be targeted as a cause of action “unjust or doubtful.” *Id.* The inclusion of “doubtful” is significant. A “doubtful” cause of action is perfectly suitable for settlement but does not easily fit the idea of surrender. *But see* BAYLIES, *supra* note 93, at 113 (citing *Bathgate v. Haskins*, 63 N.Y. 261 (1875), for the proposition that the offer of judgment was meant to “circumscribe and arrest litigation by preventing trials”).

<sup>118</sup> FITNAM, *supra* note 91, § 522, at 623; see also JAMES L. BISHOP, CODE PRACTICE IN PERSONAL ACTIONS: AN ELEMENTARY TREATISE UPON THE PRACTICE IN A CIVIL ACTION, AS GOVERNED BY THE PROVISIONS OF THE NEW YORK CODE OF CIVIL PROCEDURE 304 (New York, Baker, Voorhis & Co. 1893) (“The purpose of these [offer of judgment and related provisions] is to enable a defendant against whom an excessive claim is made, to offer that such judgment be taken against him as he deems to be right while leaving himself free to contest the remainder of the claim upon equal terms with his adversary as to costs.”); 2 NICHOLS, *supra* note 116, § 1546 (“The purpose of the [code offer of judgment provision] seems to be to avoid unnecessary litigation by allowing a party who deems the claim of the opposing party to be just in part to offer to allow a judgment for a certain sum to be entered, and thereby escape liability for any subsequently accruing costs, if the opposing party fails to recover a more favorable judgment.”).

<sup>119</sup> FITNAM, *supra* note 91, § 521, at 622.

<sup>120</sup> See 2 WAIT, *supra* note 116, at 405 (1873) (noting that the “offer of judgment, under section 385 of the Code, furnishes a broad remedy for the saving of costs, in *indefensible actions*, of which the prudent practitioner will avail himself” and that the remedy “should be resorted to whenever the defendant is satisfied that *no defense can be made* to the whole or a part of the plaintiff’s claim” (emphasis added)).

result of plaintiff’s “unnecessary and fruitless litigation” and should in fairness be borne by him.<sup>121</sup>

The case law is consistent with this view of the rule.<sup>122</sup> Most courts simply applied the offer of judgment rule without discussing its purpose.<sup>123</sup> My research uncovered only one offer of judgment case decided between January 1, 1848 and January 1, 1939 that referred explicitly to a settlement purpose: *Rosenberger v. Harper*.<sup>124</sup> However, the only reference to settlement came in dissent, and the majority treated the offer of judgment in the conventional way.

In *Rosenberger*, the Missouri offer of judgment statute expressly required the plaintiff to pay the defendant’s post-offer costs, but unlike other

<sup>121</sup> William Wait drove this point home particularly clearly in his treatise on procedure for the New York Justices’ Courts, and it is worth quoting at some length from his discussion of the applicable offer of judgment rule:

The costs in actions in justices’ courts are not large when compared with those in actions in the Supreme Court, and yet the amount is sometimes such that it is an object to avoid their payment, especially when the action itself is a mere vexatious proceeding on the part of the plaintiff. In actions for a tort . . . the offer made ought to be such as is quite certain to be equal to any amount that a fair jury or an intelligent and candid justice would be likely to give from the evidence in the particular case. By pursuing this course, a jury or the justice cannot fail to see that the continuance of the litigation is not the fault or the wish of the defendant . . . . In such a case, the offer will be fair toward the plaintiff, and if he rejects it, that will be his own fault or his own folly.

3 WILLIAM WAIT, THE LAW AND PRACTICE IN CIVIL ACTIONS AND PROCEEDINGS IN JUSTICES’ COURTS AND ON APPEALS TO THE COUNTY COURTS IN THE STATE OF NEW YORK 263–64 (Edwin Baylies ed., 5th ed., Albany, William Gould, Jr., & Co. 1885).

<sup>122</sup> In addition, the articles, comments, and notes published between 1850 and 1938 and available by searching for “offer of judgment” or “offer of compromise” in the HeinOnline database follow the same pattern as the cases and treatises. Most of these sources merely summarize recent decisions or discuss some technical point, and only one describes the rationale of the rule in settlement terms. See *infra* note 134.

<sup>123</sup> For examples of judges applying the offer of judgment rule mechanically, see *Basler v. Sacramento Gas & Electric Co.*, 111 P. 530, 533 (Cal. 1910); *Friedman v. Blauner*, 125 N.E. 443, 444 (N.Y. 1919); *Singleton v. Home Insurance Co. of New York*, 24 N.E. 1021, 1022 (N.Y. 1890); *Beards v. Wheeler*, 76 N.Y. 213, 214–15 (1879); and *Kiernan v. Agricultural Insurance Co.*, 37 N.Y.S. 1070, 1072–73 (N.Y. App. Div. 1896). One interesting case from the period turns on distinguishing an offer of judgment from a settlement offer. In *Parr v. Chicago, Burlington & Quincy Railroad Co.*, the court held that an offer of judgment was effective to shift costs even though there was doubt as to whether the defendant’s attorney had his client’s authority to make the offer. 194 Mo. App. 416, 422–23 (1916). The court reasoned that the offer of judgment was more like a confession of judgment than a compromise or release, and while attorneys had no implied authority to compromise or release a claim, they did have implied authority to confess judgment. *Id.* at 421–22.

<sup>124</sup> 83 Mo. App. 169 (1900). Although I have not read every offer of judgment opinion from the period, I have read many. Moreover, I have done multiple Westlaw and Lexis searches with “offer of judgment” and variations of “encouraging settlement,” “encouraging compromise,” and “promoting settlement” over the period from January 1, 1848 to January 1, 1939. Other than *Pierano*, which is not relevant because it deals with a special offer of judgment procedure for de novo appeals, see *infra* note 133, these searches uncovered only *Rosenberger* as referring to settlement explicitly. See also *infra* note 142 and accompanying text (discussing *Bathgate v. Haskins*, 63 N.Y. 261, 264 (1875)). For example, the Westlaw search described *infra* note 132 turned up no references to encouraging or promoting settlement or compromise among the ninety-four opinions in the eight states searched.

statutes, it was silent about who should pay the plaintiff's post-offer costs.<sup>125</sup> The plaintiff, who had not improved on the offer at trial, argued that the statute's silence meant that ordinary rules on costs should apply and therefore that the defendant should pay the costs of the plaintiff, who was the prevailing party.<sup>126</sup> The majority disagreed. It held that the plaintiff had to pay its own costs too, just as for tender, because the costs incurred by a plaintiff who did not improve on an offer were "useless or unnecessary" and therefore "properly taxed against him under the general statute regulating costs."<sup>127</sup>

In dissent, Judge Biggs argued that the statute assigned liability for costs only as a policy instrument to accomplish a legislatively desired result, which was "to induce litigants to compromise their differences."<sup>128</sup> Because the statute was based on policy rather than justice, Judge Biggs reasoned, it should be construed strictly. And because it was silent about plaintiff's costs, the ordinary rule on cost allocation should apply and the plaintiff should recover its costs as a prevailing party.<sup>129</sup>

Although one should be careful about inferring too much from these brief passages, the majority's rationale is consistent with a view of the offer of judgment that aligns it with the right of tender and the statutory offer of tender, and assigns it a similar purpose. The plaintiff's decision to continue litigating in the face of the defendant's offer of judgment was "useless or unnecessary" because the defendant stood ready to give the plaintiff a judgment for what the plaintiff could legally obtain from trial.<sup>130</sup> Judge Biggs viewed the offer of judgment as a settlement device, but he was a dissenter and the majority disagreed with his view.<sup>131</sup>

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<sup>125</sup> The relevant statutory language reads: "[I]f the plaintiff fail [sic] to obtain a more favorable judgment, he shall pay the defendant's costs from the time of the offer." *Rosenberger*, 83 Mo. App. at 172.

<sup>126</sup> *Id.* at 170–71.

<sup>127</sup> *Id.* at 172. The only reported opinion is the separate dissenting opinion of Judge Biggs, so the quotation is actually the dissent's characterization of the majority's reasoning.

<sup>128</sup> *Id.* at 173. More precisely, he argued that a plaintiff who kept litigating despite the tender assumed no risk for the amount of the tender since it belonged to the plaintiff from the moment of deposit, and it was therefore just to deny costs to a party who bore no risk. By contrast, a plaintiff who rejected an offer of compromise continued to bear all the lawsuit risk and therefore in fairness should recover costs, unless the legislature provides otherwise. *Id.*

<sup>129</sup> *Id.* at 173 ("This modification of the general statutes (which declares the general legislative policy of the state) should be administered according to the strict language of the section.")

<sup>130</sup> *Id.* at 172.

<sup>131</sup> I do not mean to make a lot of Judge Biggs's status as a dissenter. The majority might have agreed with his reading of the statute's purpose but disagreed with his conclusion that the statute should be construed strictly. Nevertheless, the majority's reference to "useless or unnecessary" litigation and its application of an exception to the general cost-shifting statute for such litigation strongly suggest that those judges made an ex post evaluation of the plaintiff's conduct more consistent with the unreasonable plaintiff model than the settlement promotion model. Also, it is worth noting that Biggs's reasoning does not necessarily mean he viewed the offer of judgment as an omnibus settlement promotion tool.

It is also worth mentioning that the published offer of judgment opinions up to 1939 consist mostly of contract-type cases and include very few personal injury or property damage tort suits.<sup>132</sup> This is significant because contract cases are more likely to have symmetric information about liability and damages, making it reasonable to suppose that the plaintiff should have known the facts and thus been able to determine the nature of the defendant’s offer.<sup>133</sup>

In sum, with very few exceptions,<sup>134</sup> the evidence strongly supports the

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He might have believed that its purpose was to induce compromise only in cases of relatively clear liability where the defendant offered essentially all of what the plaintiff could reasonably obtain at trial.

<sup>132</sup> This conclusion is based on a review of the offer of judgment decisions in Westlaw published before January 1, 1939 (to cover the period prior to adoption of the FRCP) and dealing with the offer of judgment procedure applicable in the ordinary trial courts of the state. The search was performed for eight states, including the three states (Minnesota, Montana, and New York) referred to in the committee note to Rule 68. The other five states were California, Massachusetts, Michigan, Ohio, and Pennsylvania. I chose these states because of their size and importance and in order to be sure to sample states from different sections of the country. The search was performed over all the opinions in the Westlaw database for the period and looked for any opinion with “offer of judgment,” “offer of compromise,” or “offer of settlement” in the full text within ten terms of “rule” or “code.” An opinion was included in the count if it showed that the offer of judgment procedure was used in the case. The search identified ninety-four cases, of which eighty-two could be identified by type. The contract-related cases totaled sixty-four of eighty-two, which is 78%. These contract or implied contract cases broke down by type as follows: employment contracts (42), promissory note (3), debtor-creditor (8), mechanic’s lien (3), and mortgage/foreclosure (8). The breakdown for the remaining eighteen cases is as follows: conversion (2), replevin (3), insurance (6), trespass (2), auto accident (4), and medical malpractice (1).

<sup>133</sup> One more point deserves a brief note. There is some evidence that legislators, at least in New York, knew how to construct a two-way offer of judgment rule to promote settlement when they wanted one. A special New York rule applied to appeals to the county court seeking a new trial from judgments of the justice’s courts (which generally involved smaller claims). See *Pierano v. Merritt*, 42 N.E. 718, 718–19 (N.Y. 1896) (reviewing the history of this code provision). See generally 4 NICHOLS, *supra* note 116, §§ 2902–46 (describing the appeal process in general). This rule permitted *either party* to make an offer of judgment in the county court if the appeal involved only a money judgment, and it allowed the party who made the offer to recover the costs of appeal if the other side failed to improve on the offer. See *id.* § 2944. Given that these were cases in which a judgment had been rendered already and the appeal sought a *de novo* trial, and given the incentives to appeal, there might well have been special reasons to try to discourage new trials on appeal by encouraging settlements. In any event, the rule’s settlement purpose was acknowledged explicitly by the New York Court of Appeals in one case. See *Pierano*, 42 N.E. at 720 (“We think that the object of the statute was to further an adjustment of differences by encouraging compromises, and making it dangerous for either party to reject a fair offer made by the other.”). The one-way nature of the ordinary offer of judgment rule and the paucity of references to a settlement promotion purpose are all the more significant when viewed in this light.

<sup>134</sup> Other than Judge Biggs’s dissent in *Rosenberger v. Harper*, see *supra* notes 124–131 and accompanying text, (and excluding *Pierano* because it deals with a special two-way rule for *de novo* appeals, see *supra* note 133), I found only one other source that appears to link the rationale for the offer of judgment rule to settlement promotion. In 1919, the American Judicature Society (AJS) developed a set of model state procedural rules and included a rule entitled “Payment into Court” that embraced both tender and offer of judgment, and also added some novel devices not present in the state codes. See *Bulletin XIV: Rules of Civil Procedure Supplementary to the State-Wide Judicature Act (Bulletin VII-A) of the American Judicature Society*, 14 AM. JUDICATURE SOC’Y 107 (1919). A brief set of notes accompanying the proposed rule referred to the court as an “official and impartial medium between the parties for effecting a compromise and settlement” and to cost-shifting as “a strong incentive to defendants to

conclusion that most courts and commentators viewed the offer of judgment in terms of protecting the defendant from unreasonable and unfair litigation. Because of the scarcity of any meaningful policy discussion, however, it is difficult to pin down the precise idea of reasonableness and fairness involved. I expect that lawyers and judges thought a plaintiff's litigation conduct was unreasonable and unfair because they assumed that the plaintiff knew or should have known at the time of the rejection that the defendant's offer covered virtually everything the plaintiff was entitled to receive from trial. After all, tender worked that way originally, and the offer of judgment was closely related to tender. Moreover, as mentioned above, the published offer of judgment opinions were mostly contract-type cases, in which the plaintiff was likely to know the facts and able to verify that the defendant's offer covered all of what the plaintiff was entitled to receive.<sup>135</sup>

It is also possible, however, that these nineteenth-century jurists thought that a rejection would be unreasonable and costs imposed on the defendant useless and unnecessary just because the plaintiff did not improve on the offer at trial. This line of reasoning—that the plaintiff's decision to litigate was wasteful in hindsight because it did not produce any additional benefit—would be a mistake, but it is the sort of hindsight bias error people sometimes make.<sup>136</sup> If this is what the jurists meant, it still fits an unreasonable plaintiff model, not a settlement promotion model, because it evaluates the plaintiff's rejection in light of its *ex post* results and its impact on the defendant.

Thus, the history of the offer of judgment and most nineteenth- and early twentieth-century descriptions of the device fit the unreasonable plaintiff model. First, none of the treatises referred to the offer of judgment as encouraging settlement and many of those that bothered to describe the rule's purpose focused on protecting defendants from the unreasonable accrual of costs. Second, the offer of judgment was closely associated with tender and generally understood to replace it,<sup>137</sup> and as we have seen, tender was clearly about saving defendants from the consequences of plaintiffs' unreasonable litigation decisions. Third, the fact that the offer of judgment

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make and to plaintiffs to accept a reasonable offer." *Id.* at 108, 111. Whatever these sketchy passages might have meant, one should be careful about treating them as an expression of views held more generally. For one thing, it is apparent that the AJS understood that its payment into court rule was doing something novel. *See id.* at 108. Moreover, the rule seems to have had very little, if any, impact. I suppose that it is conceivable that some Advisory Committee members might have been influenced by the views of the AJS when they deliberated on Rule 68, but I very much doubt it. No one on the committee ever mentioned the model rule or the commentary quoted above in any of the records I have read. Indeed, there is no suggestion at all that any committee member even knew the model rule existed. It appears that the committee simply incorporated existing state code provisions and thought very little about what those provisions might be trying to accomplish.

<sup>135</sup> *See supra* note 132 and accompanying text.

<sup>136</sup> *See supra* note 55 and accompanying text.

<sup>137</sup> *See* 1 RUMSEY, *supra* note 100, at 622 (noting that with the offer of judgment, "there are very few cases where [tender] need now be resorted to").

rule was seldom used in tort suits—a fact strongly suggested by the distribution of published decisions<sup>138</sup>—is hard to reconcile with a settlement promotion model because there is no reason why settlement would not have been just as keenly sought in tort cases as in contract cases. Fourth, the parallel equity rules were also about being fair to the defendant and not about promoting settlements.<sup>139</sup>

Of course, I do not contend that the offer of judgment had nothing at all to do with settlement. The device obviously contemplated a settlement. Moreover, I have little doubt that lawyers sometimes used the offer of judgment rule strategically to gain a settlement advantage, but that is what lawyers do with all procedural rules.<sup>140</sup> My point is that the offer of judgment statute was written with a paradigmatic situation in mind. It contemplated an offer that the plaintiff could not reasonably reject, and the clearest example—the paradigmatic case that traced all the way back to the common law right of tender—was a case in which the defendant surrendered by offering everything the plaintiff was entitled to receive at trial. It was unreasonable for a plaintiff to push forward in the face of such an offer, and therefore the plaintiff had to assume all responsibility for post-offer costs if, as one commentator put it when discussing tender, “it be found finally in the trial of the controversy that [the defendant was] right.”<sup>141</sup>

I expect the paradigmatic case served as a focal point that organized thinking about reasonableness and fairness in these situations. Lawyers and judges may have responded intuitively and pragmatically to other situations as well, but the paradigmatic case was the easiest to justify and the baseline to which all other cases were compared.

To be sure, there are some, but very few, references in the case law and the treatises that describe the purpose of the offer of judgment (and statutory tender) in terms of saving trial costs rather than remedying unreasonable litigation behavior.<sup>142</sup> It might be tempting to read these brief passages as evidence of a settlement promotion model, but I believe that this would be a mistake. Judges and practicing lawyers seldom make a point of draw-

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<sup>138</sup> See *supra* note 132 and accompanying text.

<sup>139</sup> See *supra* notes 107–111 and accompanying text.

<sup>140</sup> See, e.g., J.G. Hardgrove, *Reduction of Trial Issues Under Wisconsin Practice*, 12 MARQ. L. REV. 93, 103–04 (1928). It is noteworthy that the example described by Hardgrove involves an offer of judgment in the maximum amount that the defendant thought the plaintiff could legally recover at trial. *Id.* at 103 (describing a costly accounting proceeding in which liability was admitted and in which the defendant, to avoid the high costs, made an offer of judgment for “an amount certain to cover the liability on any theory which to the defendant and his counsel seemed possible of being maintained against him”).

<sup>141</sup> KINKEAD, *supra* note 103, § 207, at 191.

<sup>142</sup> See *Bathgate v. Haskins*, 63 N.Y. 261, 264 (1875) (“The object of the provision is to circumscribe and arrest litigation by preventing trials, and thus diminish the expenses arising from the same and avoid the trouble and annoyance as well as the costs of a legal controversy.”); BAYLIES, *supra* note 93, at 113 (citing and paraphrasing *Bathgate*).

ing precise normative distinctions when describing procedural rules. Thus, it is quite possible that nineteenth-century jurists viewed the offer of judgment sometimes in terms of saving the expense and burden of trial and other times in terms of protecting defendants from unreasonable imposition of costs. After all, the device achieved both ends concurrently. Indeed, had they been pressed, these jurists could have easily reconciled the two objectives: insofar as the offer of judgment saved trial costs, it did so in those cases that *should* settle because the defendant's offer was one the plaintiff simply had to accept.

This history explains why the offer of judgment rule was constructed the way it was and in particular makes sense of four otherwise peculiar features: its availability only to defendants, its requirement of a formal judgment, its inclusion of costs but not fees, and timing limitations on its use.

The offer of judgment was available only to defendants because plaintiffs already had a way to avoid incurring additional costs in a losing case. They could simply dismiss the suit voluntarily. Moreover, plaintiffs had a way to protect themselves from incurring costs in a clearly winning case when the defendant unreasonably refused to accept a settlement demand. The plaintiff could simply litigate the case, win at trial, and recover costs from the losing defendant in the ordinary course as a prevailing party. The defendant, however, had no comparable way to end litigation when the suit was a winning one for the plaintiff but the plaintiff insisted on prolonging the litigation unreasonably. The offer of judgment (or tender) filled this gap by giving the defendant a way to limit the accrual of costs.<sup>143</sup>

The offer of judgment required a formal judgment, instead of merely a settlement, because it sought to give the plaintiff everything he was entitled to at trial. A formal judgment has advantages over a settlement, such as direct access to the court's process for enforcement, so a plaintiff might reasonably keep litigating if the defendant offered only a settlement when it would be unreasonable to do so if the defendant made an offer of judgment. Moreover, the offer of judgment was closely associated with the earlier right of tender and statutory offer of tender, and those tender devices involved a concession of liability and payment in full, not merely an offer to settle.

This history also explains why the offer of judgment rule shifted only costs. For one thing, that is what the statutory offer of tender and common law right of tender did. Moreover, "costs" in the codes were supposed to

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<sup>143</sup> Thus, plaintiffs could avoid incurring costs in clearly losing or clearly winning cases (for the plaintiff) without any help from an offer of judgment rule, and defendants could avoid incurring costs in a clearly winning case (for the defendant) simply by litigating through trial and obtaining costs from the losing plaintiff as a matter of course. This leaves only one scenario not handled by other procedural rules: where the defendant wants to avoid incurring costs in a clearly losing case (for the defendant) and is prepared to surrender completely, but the plaintiff insists on litigating. Because the plaintiff will win in the end, the defendant cannot use the ordinary rules on costs. The offer of judgment filled this gap and thus assured that plaintiff and defendant were treated symmetrically.

include a small standardized amount for fees.<sup>144</sup> To be sure, this fee amount fell far short of the market rate for attorney fees,<sup>145</sup> but this was an explicit policy decision of the code drafters, and it would have been sensible to limit a code provision like the offer of judgment rule in the same way.<sup>146</sup>

The history also explains why some code offer of judgment rules allowed offers at any time "before trial or judgment" while others allowed offers only "before trial."<sup>147</sup> I doubt that the timing mattered very much to those who drafted the code rules. Timing should have mattered if the rule had been about encouraging settlement, but not as much if it had been about fairness.<sup>148</sup> In the paradigmatic case, the defendant knows early that the plaintiff will win because this is obvious from the law and the known facts. The defendant is not interested in creating an optimal bargaining situation, but simply wants to give up and avoid litigation costs.

#### D. Pulling the Pieces Together

This history explains the puzzles of Rule 68 and also why the Rule received so little attention from the Advisory Committee and seemed so unremarkable to the legal community in 1938. Rule 68 was copied virtually verbatim from the typical code offer of judgment rule and included all its distinctive features. Those features are puzzling to us today because we look at the Rule as a settlement promotion device, but the code offer of

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<sup>144</sup> See John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 18 (1984). The New York Field Code listed specific amounts for "costs" and those amounts included a small fee component. *Id.* This was standard practice dating back at least to the eighteenth century.

<sup>145</sup> The colonies regulated fees at a level equal to what the client could recover from the losing party as part of "costs," so recoverable costs were supposed to fully reimburse the winning party for attorney fees as well. See *id.* at 10–12 (noting, however, that colonial lawyers probably found ways to circumvent these limitations and recover more from their clients). In the early nineteenth century, the statutes on recoverable costs continued to include an amount for fees, and lawyers were supposed to limit the fees they charged their own clients to this amount; however, these constraints were routinely circumvented or ignored, and lawyers ended up charging much more than what the client could recover from a losing party as statutory costs. See *id.* at 13–17; see also FRANCIS HILLIARD, *THE ELEMENTS OF LAW: BEING A COMPREHENSIVE SUMMARY OF AMERICAN CIVIL JURISPRUDENCE FOR THE USE OF STUDENTS, MEN OF BUSINESS, AND GENERAL READERS* 322 (The Lawbook Exchange 2002) (1835) (reporting that recoverable "costs" include "a reasonable allowance for the expenses of counsel, witnesses, jury, Clerk").

<sup>146</sup> As Professor Leubsdorf explains, the decision of the 1848 Field Code drafters not to award market rate fees reflected a compromise between the justice of forcing a losing party to pay the winner's fees, on the one hand, and the difficulty ascertaining fees after the fact as well as a *laissez faire* reluctance to interfere with market ordering, on the other. See Leubsdorf, *supra* note 144, at 18–20.

<sup>147</sup> For example, of the three code provisions cited in the 1938 Advisory Committee note, Minnesota's and New York's required the offer to be made before trial, see 2 MINN. STAT. § 9323 (Mason 1927); 1 N.Y. CIV. PRAC. ACTS ANN. § 177 (Nichols-Cahill 1937), but Montana's allowed the offer to be made "at any time before the trial or judgment," see 4 MONT. REV. CODES ANN. § 9770 (1935).

<sup>148</sup> For example, permitting offers to be made at any time might be better than restricting them to before trial. See *supra* notes 27–28 and accompanying text.

judgment rule was not meant to promote settlements in general. Moreover, Advisory Committee members had no need to consider Rule 68 carefully because no one seriously challenged the Rule during the drafting process or tried to clarify its purpose.<sup>149</sup>

This history also explains why Robert Dodge described the Rule the way he did when he presented it to the July 1938 Cleveland conference of the American Bar Association's Institute on Federal Rules.<sup>150</sup> Dodge identified the purpose of the Rule in the following way: "[I]t affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance."<sup>151</sup> Nowhere did he say anything about encouraging settlement, a curious omission if that was actually the Rule's intended purpose. His focus was on giving the defendant a tool for "stopping the running of costs," which, as we have seen, is exactly how the state offer of judgment and the earlier tender rules were understood.<sup>152</sup> Moreover, his reference to a case where the defendant "admits that part of the claim is good" does not fit the idea of settlement bargaining underlying the settlement promotion model very well at all.<sup>153</sup>

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<sup>149</sup> Based on this history, it is possible to speculate about what might have motivated Charles Clark to add an offer of judgment paragraph to Rule A33 of Tentative Draft III, dealing with deposit in court. *See supra* notes 71–72 and accompanying text. I expect that his (or more likely, his assistant's) focus on drafting a deposit in court rule led him to the offer of tender, which required a deposit, and this connection prompted him to consider adding a similar device to the FRCP, which he did by adopting the more general code version in the form of the offer of judgment. *See* Clark to Mitchell Letter, *supra* note 69 ("The Committee's request was in terms only for a deposit rule, but when I came to work upon it, it seemed so closely tied up to the other branch of the rules on Offer of Judgment, so far as the codes generally are concerned, that we included it."). It appears that he did not think very hard about the offer of judgment rule, simply copying what he found in the codes.

<sup>150</sup> *See supra* note 89 and accompanying text.

<sup>151</sup> ABA CLEVELAND PROCEEDINGS, *supra* note 86, at 337; *see also* Elmo Hunter, *One Year of Our Federal Rules*, 5 MO. L. REV. 1, 19–20 (1940) ("[Rule 68] affords a means of stopping the running-up of costs when the defendant admits that part of the claim of the plaintiff is good . . .").

<sup>152</sup> In his April 20, 1936, letter to William Mitchell, Clark strongly suggested that he associated the offer of judgment with tender rules and this was the reason why he lumped the offer of judgment in the deposit rule originally. *See* Clark to Mitchell Letter, *supra* note 69. Furthermore, at the Atlanta conference, he described Rule 68 in the following way: "You may make an offer of judgment and save yourself the running of costs, if you have made an offer of the appropriate amount of judgment." PROCEEDINGS OF THE ATLANTA INSTITUTE, *supra* note 86, at 105. And again, in response to a question, Clark stated, "[T]he whole effect of the offer of judgment is to protect you against further costs." *Id.* at 111. These are significant passages for two reasons: first, there is no mention of facilitating settlement, and second, Clark refers to "the appropriate amount of judgment," a reference that is much more consistent with the unreasonable plaintiff model than the settlement promotion model.

<sup>153</sup> It is curious, however, that Dodge referred to admitting part of the claim and contesting the rest. The statutory right of tender worked that way in some states—a defendant could deposit an amount in court and if the plaintiff insisted on litigating for more, the defendant could contest the rest, with its liability for costs measured by the residue. *See supra* note 102. But the state offer of judgment rules were not constructed in this way, and neither was Rule 68. They required an offer that concluded the entire case. I read Dodge's confusion as further evidence that the Advisory Committee simply incorporated the state rules without thinking very hard about them.

Dodge also defended the Advisory Committee’s choice to make Rule 68 only one-way:

The Committee . . . felt that the application of the rule, if it were broadened [to apply to plaintiffs too], would rarely be made. The main object of the rule is doubtless accomplished by giving the defendant or the plaintiff, if a cross-claim is asserted against the plaintiff, the right to make the offer.<sup>154</sup>

Dodge probably had in mind the fact that a plaintiff who made an offer of judgment would recover costs in any event as a prevailing party. However, one still has to wonder why a two-way rule was not drafted if settlement promotion was its “main object.” It would have been easy to do, and a two-way Rule 68 would have marginally increased settlement incentives by making costs mandatory rather than discretionary under Rule 54(d).<sup>155</sup> The reason is that no one on the committee focused hard on the Rule or thought about making it an effective settlement tool. Indeed, no one thought the Rule important enough to deserve much attention at all.

### III. RULE 68 SINCE 1938

To recap so far, we saw first that Rule 68 is extremely puzzling if it is understood as a rule designed to promote settlement as we conceive of settlement promotion today. Its text is poorly drafted to accomplish that purpose and its genesis and reception in 1938 are inconsistent with that interpretation. We then examined the state models on which Rule 68 was based—the code offer of judgment rules and the tender rules that predated them—and discovered that those rules were not meant to promote settlement, but rather to address particular fairness concerns. Finally, we returned to the puzzling aspects of Rule 68’s drafting and reception, and saw how those puzzles disappear when Rule 68 is read to address the same fairness concerns as the state rules.

Still, we have answered one set of questions only to raise another. How did Rule 68 come to be understood as a general settlement promotion device? The answer to that question reveals a good deal about the history of federal procedure since 1938.

#### A. 1938–1975: A Period of Relative Dormancy

Rule 68 received very little judicial and scholarly attention between 1938 and 1975. The Rule was rarely used and generated no more than twelve federal court opinions discussing its provisions in more than a casual

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<sup>154</sup> ABA CLEVELAND PROCEEDINGS, *supra* note 86, at 338.

<sup>155</sup> The original version of Rule 54(d), like the current version, made the award of costs to prevailing parties discretionary. See ABA CLEVELAND PROCEEDINGS, *supra* note 86, at 114–15 (quoting the original version of Rule 54(d), which provided that “costs shall be allowed as of course to the prevailing party *unless the court otherwise directs*” (emphasis added)).

way.<sup>156</sup> Most of the scholarly articles appeared immediately after 1938 and discussed the Rule in the context of acquainting the bar with the new FRCP or promoting the FRCP for adoption in the state courts. And most of those articles merely described the Rule's provisions without offering any additional analysis or commentary.

Still, some explicit references to Rule 68 as encouraging settlement did begin to appear during this period,<sup>157</sup> and brief discussions of the Rule by two Advisory Committee members mentioned its settlement effects.<sup>158</sup> Yet, as the following analysis demonstrates, the Advisory Committee—and I suspect most lawyers and judges—had little idea why Rule 68 was adopted and did not use the Rule sufficiently often to care much about it. Those who referred to settlement in more than an offhand way—and there were very few—seemed to link the Rule to cases where the plaintiff *should* settle because the defendant's offer conceded everything the plaintiff could reasonably expect to receive at trial.

There are in fact few explicit references to encouraging settlement during this period. Indeed, no federal court that addressed Rule 68 between

<sup>156</sup> These statistics are based on a review of the Westlaw federal cases database for citations to Rule 68. Indeed, the chair of the Advisory Committee in 1983 described Rule 68 as a “dead letter.” Advisory Comm. on Civil Rules, Summary of Meeting of May 27–28, 1983, at 1, *available at* <http://www.uscourts.gov/rules/Minutes/CV05-1982-min.pdf>.

<sup>157</sup> *See, e.g.*, Edwin G. Martin, *Disposition of Cases by the United States Customs Court Pursuant to Stipulation*, 9 GEO. WASH. L. REV. 133, 141 (1940) (“Both the pretrial procedure and the rule regarding ‘offer of judgment’ show that the Supreme Court is not averse to the settlement by the interested parties of cases which have been brought into litigation. In fact, the rules clearly indicate an encouragement of such informal settlement.”). It is natural for someone who reads the Rule quickly without knowing its history—and this seems to have been the position of most committee members and commentators—to describe it loosely as encouraging settlement. After all, the Rule is based on offer and acceptance, contemplates a consensual resolution, and shifts costs in a way that should affect the plaintiff's willingness to accept the defendant's offer to some degree.

<sup>158</sup> George Donworth, a committee member, wrote an article with several coauthors that reviewed the new FRCP for the Washington bar. This article devoted one short paragraph to Rule 68 and described the Rule as facilitating settlement by encouraging plaintiffs to be reasonable. *See* George Donworth et al., *Changes Suggested in Washington Practice and Procedure*, 14 WASH. L. REV. & ST. B.J. 154, 175 (1939) (referring to Rule 68 as an “excellent novel provision” that “facilitates compromise settlements and the speedy determination of litigation” because it is easier to use than Washington's tender procedure and noting that “[f]uture costs as the plaintiff's reward or punishment are his incentive to be reasonable”). Committee member Armistead M. Dobie also wrote an article reviewing the new FRCP and devoted one paragraph and four explanatory footnotes to Rule 68. *See* Armistead M. Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 303–04 (1939) (noting that a Rule 68 offer “secures an early pre-trial settlement of the action,” and that “[t]his provision, in a case involving some doubt, might strongly influence the plaintiff to accept the defendant's offer; or, if the offer is not accepted, it, of course, relieves the offering defendant of the burden of future costs, thereby constituting an inducement to the making of such offers”). The purpose of these articles was to educate lawyers about the new FRCP, and thus, the discussions are mainly descriptive rather than normative. Both articles treat Rule 68 in a relatively cursory way, and neither tries to reconcile the Rule's awkward text with a settlement purpose. I doubt very much that Donworth and Dobie had any clearer idea why Rule 68 was included in the FRCP or what the state offer of judgment rules were trying to do than they did when the Rule was first before the Advisory Committee.

1938 and 1946 ever mentioned settlement promotion as its purpose.<sup>159</sup> The most important reference is in the Advisory Committee note that accompanied the 1946 amendments to Rule 68, which went into effect in 1948.<sup>160</sup> This note contains a sentence that became the principal source of authority in the 1970s for reading Rule 68 as a settlement promotion tool. After describing the amendments, the note tacks on the following sentence at the end: “These provisions should serve to encourage settlements and avoid protracted litigation.”<sup>161</sup> There is no additional discussion or elaboration.

The process that culminated in the 1946 amendments began in 1943, when the Advisory Committee undertook a comprehensive review of all the Federal Rules.<sup>162</sup> When the committee, working sequentially through each rule, came to Rule 68 for the first time at its May 19, 1943 meeting, it considered several possible amendments, the most significant of which authorized multiple Rule 68 offers in the same case.<sup>163</sup> And the discussions

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<sup>159</sup> There are five published opinions from this period that refer to Rule 68 in more than a passing way. *Nabors v. Texas Co.*, 32 F. Supp. 91, 92 (W.D. La. 1940), which dealt with the manner of service of an offer of judgment, did remark on the purpose of Rule 68, observing that “the purpose . . . is to fix responsibility for costs” and notably avoiding any mention of settlement. *See also* *Cover v. Chi. Eye Shield Co.*, 136 F.2d 374 (7th Cir. 1943) (holding that a defendant can serve an offer of judgment after trial on validity and infringement in a patent case and before the hearing on an accounting because the accounting is a separate “trial” within the meaning of Rule 68); *Gamlen Chem. Co. v. Dacar Chem. Prods. Co.*, 5 F.R.D. 215, 216 (W.D. Pa. 1946) (holding that a properly framed offer of judgment, if accepted, concludes the plaintiff’s entitlement to fees in a fee-shifting case); *Larson v. Gen. Motors Corp.*, 52 F. Supp. 286, 287 (S.D.N.Y. 1943) (holding that Rule 68 is not available to plaintiffs); *FDIC v. Fruit Growers Serv. Co.*, 2 F.R.D. 131, 133 (E.D. Wash. 1941) (holding that the defendant must make an offer of judgment before trial).

<sup>160</sup> *See* Advisory Comm. on Rules for Civil Procedure, *Report of Proposed Amendments in Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 483 (1946) [hereinafter *1946 Report*].

<sup>161</sup> FED. R. CIV. P. 68 advisory committee’s note (1948). The original draft of the note did not contain this sentence. *See* Preliminary Draft of Amendments, in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS No. CI-2012-89 (Cong. Info. Serv.). The sentence was added in a later draft. *See* Preliminary Draft III of Amendments (Feb. 1, 1944), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS No. CI-6204-72 (Cong. Info. Serv.). It is significant, I believe, that the final version of the note refers to avoiding “protracted litigation” as well as encouraging settlement. The former is at least consistent with the unreasonable plaintiff model, and the use of the pejorative term “protracted” suggests an unreasonable decision to continue litigating—although I would not rely too much on this inference.

Furthermore, it is not clear whether the crucial sentence was meant to be a statement of the Rule’s purpose or simply a description of some of its most significant effects. Finally, the sentence is perfectly consistent with an assumption that the Rule encourages settlements in that subset of cases that *should* settle because the plaintiff had no legitimate reason to reject the defendant’s offer.

<sup>162</sup> *See 1946 Report, supra* note 160. The resulting package of FRCP amendments was approved by the Supreme Court in 1946 and went into effect on March 19, 1948.

<sup>163</sup> *See* Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (May 17–20, 1943) [hereinafter May 1943 Proceedings], in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-301-01, CI-311-50 to -66 (Cong. Info. Serv.). The inspiration for the proposed

continued at four subsequent meetings.<sup>164</sup> All of these meetings were transcribed, and the transcripts show that most of the discussion focused on technical matters without any serious attention to Rule 68's purpose.<sup>165</sup>

In the course of two meetings, however, committee members George Donworth and Monte Lemann did refer to Rule 68 as encouraging settlement. At the initial May 1943 meeting, Donworth remarked, referring to the high costs of patent litigation: "It is a very expensive litigation, as everyone knows, and this Rule is intended to discourage litigation and encourage settlements; that is its purpose, of course."<sup>166</sup> And again at the February 1, 1945 meeting, Lemann responded to a suggestion from a Philadelphia committee that the restriction on making offers to ten days before trial be eliminated: "I am just thinking aloud as to why you should not go whole hog, like Philadelphia says, and cut out the 10 days, if you want to encourage settlements."<sup>167</sup> Lemann then pushed his point over a number of transcript pages, returning to the theme of encouraging settlement on several occasions.<sup>168</sup>

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amendment was the decision in *Cover v. Chicago Eye Shield Co.*, 136 F.2d 374 (7th Cir. 1943), which held that a defendant can make an offer of judgment after trial on infringement in a patent case and before the hearing on an accounting, because the accounting is a separate "trial" within the meaning of Rule 68. The committee's discussion focused mainly on whether the first offer should continue to have an effect on post-offer costs when the defendant made a second offer.

<sup>164</sup> The Advisory Committee met a total of six times between 1943 and 1946, when it sent the final set of amendments to the Supreme Court. The meetings took place on May 17–20, 1943; October 25–28, 1943; April 3–5, 1944; January 29–February 2, 1945; April 30–May 2, 1945; and finally March 25–28, 1946. The committee discussed Rule 68 amendments at some length at the first four of these meetings, and the Judicial Conference Records (as well as the Charles Clark Papers at Yale) contain transcripts of all these meetings. See May 1943 Proceedings, *supra* note 163; Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (Oct. 25–28, 1943), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-319-19 to -34 (Cong. Info. Serv.); Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (Apr. 3–5, 1944), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-229-29 to -38 (Cong. Info. Serv.); Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (Jan. 29–Feb. 2, 1945) [hereinafter February 1945 Proceedings], in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-409-30 to -52 (Cong. Info. Serv.). The committee briefly considered Rule 68 again at its fifth meeting. See Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (Apr. 30–May 2, 1945), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-420-35 to -37 (Cong. Info. Serv.). The committee met one more time but did not discuss Rule 68. See Proceedings of the Advisory Committee on Rules for Civil Procedure for the Supreme Court of the United States (Mar. 25–28, 1946), in RECORDS OF THE U.S. JUDICIAL CONFERENCE, COMMITTEES ON RULES OF PRACTICE AND PROCEDURE, 1935–1988, *microformed on* CIS Nos. CI-422-47 to -49 (Cong. Info. Serv.).

<sup>165</sup> See *supra* note 164.

<sup>166</sup> May 1943 Proceedings, *supra* note 163, at 978, *microformed on* CIS No. CI-311-53.

<sup>167</sup> February 1945 Proceedings, *supra* note 164, at 761, *microformed on* CIS No. CI-409-42.

<sup>168</sup> See *id.* at 761–64, *microformed on* CIS Nos. CI-409-42 to -46.

At the same time, there are other references in the transcripts that raise doubts about whether committee members viewed Rule 68 offers in the way the settlement promotion model envisions. At the May 19, 1943 meeting, shortly after Donworth spoke, Senator George Pepper responded to a claim that a plaintiff who receives two offers of judgment in a case should be liable only for those costs incurred after the second offer: “I can’t see why the plaintiff is in a meritorious position to make the claim that in that event he would be making because the defendant (as it turns out) has offered all, which in substantial justice, he was ever liable to pay.”<sup>169</sup> This argument does not refer to bargaining or settlement; instead, it suggests a concern with the unfairness of imposing costs on a defendant who offers what the plaintiff could “in substantial justice” receive.

Moreover, at the February 1, 1945 meeting, Lemann noted in the course of his lengthy argument about the ten-day requirement: “Why try a case if the other fellow is willing to settle? Why shouldn’t you be required to bear the costs if you think you can do better[?]”<sup>170</sup> This is an odd thing to say if one has a settlement promotion model in mind.<sup>171</sup> Obviously, the reason one tries a case when the other fellow is willing to settle is because one expects more from trial than the other fellow is offering. It is not clear why one should have to pay costs when that decision turns out to be wrong. However, if we presume the plaintiff rejected the offer unreasonably and thus unfairly dragged the defendant to trial, Lemann’s questions make much more sense and are more difficult to answer.<sup>172</sup>

What is one to make of these Advisory Committee discussions? Two points are clear from the transcript. First, committee members, including Monte Lemann, assumed that Rule 68 would not have a significant effect in most cases because the risk of paying costs would not apply much settlement pressure.<sup>173</sup> Second, no one gave much thought to the Rule or had a clear understanding of its precise provisions. The committee members seemed quite puzzled by the Rule’s text, and when in doubt, the chairman

<sup>169</sup> May 1943 Proceedings, *supra* note 163, at 984, *microformed on* CIS No. CI-311-59.

<sup>170</sup> February 1945 Proceedings, *supra* note 164, at 761, *microformed on* CIS No. CI-409-42.

<sup>171</sup> Later in the same discussion, Lemann, who practiced in New Orleans, asked whether Rule 68 would displace Louisiana’s tender statute in federal court. *Id.* at 769, *microformed on* CIS No. CI-409-50. The transcript shows that Lemann clearly understood that tender involved offering everything the plaintiff claimed. *See id.* Although one should not make too much of these remarks, Lemann’s linking of the two devices might mean that he imagined the same kind of rationale applying to the offer of judgment.

<sup>172</sup> It is also worth noting that Robert Dodge posed a hypothetical to test the argument, which involved an uncontested claim and an offer for the full amount that the plaintiff demanded (but not including interest on that amount). *Id.* at 767–68, *microformed on* CIS Nos. CI-409-48 to -49.

<sup>173</sup> *See id.* at 764, *microformed on* CIS No. CI-409-45; *cf. id.* at 770, *microformed on* CIS No. CI-409-51 (recording that Chairman Mitchell, frustrated by the amount of time the Rule 68 discussion was taking and eager to move on to the next rule, stated: “I practiced law forty years, and I have never known of more than two cases of this kind. We have rules here . . . that are just as important, and it seems to me that we are never going to get through if we take time on this thing.”).

simply deferred to the fact that the Rule was modeled on state provisions and that “the [state] rules and statutes had some reason back of them.”<sup>174</sup>

It is difficult, however, to determine clearly what committee members had in mind when they referred to Rule 68 as encouraging settlement, and there is probably little point in trying to reconstruct their meaning based on a few informal statements. In each instance, the statement about encouraging settlement was made in the course of pursuing a technical point, and the committee focused on the technical point rather than the broader statement of purpose. Indeed, the lawyer-dominated committee was not likely to think much about theory or delve deeply into the difference between settlement promotion and unreasonable plaintiff models. There was no need to do so in any event, because the Rule was seldom used and no one seriously challenged it on normative grounds. I expect that if asked, committee members would describe Rule 68 from two angles at once: as a rule encouraging settlement *and* as a rule ensuring fair treatment of defendants. These two perspectives merged whenever someone focused on encouraging settlement in cases that really *should*, in fairness, settle.

That the Advisory Committee should be confused about Rule 68 in the 1940s, when it focused seriously on the Rule for the first time, is not surprising. The committee’s confusion merely reflects the fact that it originally adopted Rule 68 by duplicating state offer of judgment rules designed for limited purposes without a clear idea of what those purposes were and without giving much thought to how Rule 68 was supposed to function in the FRCP. In later decades, this confusion would set the stage for expansions of Rule 68: without a clear objective to guide it, the Rule stood ready to absorb a settlement promotion purpose far beyond anything the original code offer of judgment rules were meant to do. But in the 1940s, there is little evidence that the committee intended—or the final sentence in the 1946 Advisory Committee note meant—to endorse Rule 68 as an omnibus settlement tool.<sup>175</sup>

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<sup>174</sup> *Id.* at 763–64, *microformed on* CIS Nos. CI-409-44 to -45; *see also id.* at 762, *microformed on* CIS No. CI-409-43 (“I wonder where we got 10 days? . . . I have just a suspicion that we looked over the statutes about offers for judgment and followed the general trend of events.”).

<sup>175</sup> In this regard, there is a striking parallel between the history of Rule 68 and the history of the summary judgment rule, Rule 56, as described by Professor Burbank. *See* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 594–603 (2004). According to Professor Burbank’s account, the summary judgment rule existed in various forms in England and in a few American states prior to 1938 and was originally designed as a tool for plaintiffs with liquidated demands to dispose of sham defenses. *Id.* at 594–96. This is similar to the offer of judgment. Both summary judgment and the offer of judgment were originally conceived as tools to deal with one-sided cases—summary judgment benefited plaintiffs with liquidated demands by allowing them to eliminate sham defenses, and the offer of judgment was rooted in tender, which originally benefited defendants facing liquidated demands by allowing them to surrender in clear cases. The Advisory Committee adopted an expanded version of summary judgment and relied on state practice for support without giving much attention to how far Rule 56 deviated from that practice. *Id.* at 602. Similarly, the Advisory Committee relied on state practice for Rule 68 without

Between 1947 and 1975, Rule 68 drew very little interest. There are no more than seven federal decisions discussing Rule 68 with any care and no significant law review articles addressing Rule 68 issues. Only three decisions clearly mention Rule 68's purpose, and all of those rely, directly or indirectly, on the single sentence in the 1946 Advisory Committee note.<sup>176</sup>

*B. 1975–1980: Litigation Crisis and the Transformation  
of Rule 68*

The situation changed markedly around 1975. The number of published federal decisions took a leap between 1975 and 1980. The total of fourteen opinions for this period significantly exceeds the count for any comparable period before 1975. Moreover, the pattern continued after 1980, with the number of decisions rising rapidly.

What happened around 1975 to heighten interest in Rule 68? The answer, I believe, has to do with two developments in the history of federal procedure that changed attitudes toward formal adjudication in the mid-1970s.<sup>177</sup> First, starting in the early 1970s, courts and commentators became increasingly concerned about case backlog, litigation delay, and high litigation costs.<sup>178</sup> These concerns motivated the search for less costly alternatives to formal adjudication and helped fuel a strong interest in settlement.<sup>179</sup> Second, critics questioned the merits of the adversarial system itself and be-

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spending much time trying to understand the state rules. Of course, there are many differences between the histories of and committee experiences with the two Rules, but the similarities are intriguing. I might add that the historical parallel continued beyond 1938. Like Rule 68 as described later in this Article, Rule 56 played a very minor role in federal litigation until the 1980s, when it was strengthened as a tool to deal with the perceived litigation crisis. I am indebted to Steve Burbank for drawing my attention to these interesting comparisons between Rule 68 and Rule 56.

<sup>176</sup> In chronological order, these three decisions are: *Maguire v. Federal Crop Insurance Corp.*, 9 F.R.D. 240, 242 (W.D. La. 1949), *aff'd in part and rev'd in part*, 181 F.2d 320 (5th Cir. 1950) (quoting the Advisory Committee sentence and holding that an offer made before the filing of the suit does not count under Rule 68 because it is an "offer of compromise" and not an "offer of judgment"); *Staffend v. Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219 (N.D. Ohio 1969) (quoting *Moore's Federal Practice*, which quotes the 1946 Advisory Committee sentence, and holding that the court has no power to extend the ten-day period for accepting an offer of judgment); and *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610–11 (E.D.N.Y. 1974) (quoting *Staffend* for the proposition that "Rule 68 is intended to encourage early settlements of litigation"—where *Staffend* relied on *Moore's Federal Practice*, which in turn relied on the 1946 Advisory Committee note—and holding that the defendant gets costs even when the plaintiff loses). It is worth mentioning that the latter two opinions, *Staffend* and *Mr. Hanger*, also referred to a second purpose: relieving the defendant of the burden of post-offer costs. *Mr. Hanger*, 63 F.R.D. at 610; *Staffend*, 47 F.R.D. at 219. I have found no references to this second purpose after 1980.

<sup>177</sup> These developments have been well documented. See, e.g., Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 900–02 (1999); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 534–37 (1986); Resnik, *supra* note 63, at 942, 947–49.

<sup>178</sup> See Resnik, *supra* note 177, at 534–35.

<sup>179</sup> *Id.* at 535–38.

came more and more intrigued with consensual modes of alternative dispute resolution.<sup>180</sup>

To jurists in the mid-1970s who were searching for ways to reduce costs and promote consensual resolution, Rule 68 must have seemed very attractive. Here was a Rule—indeed, the only rule in the FRCP—that seemed to be all about promoting settlement. It should not be surprising then that judges seized on Rule 68, published more Rule 68 decisions, and included much more extensive discussion of the legal issues and the settlement effects.<sup>181</sup> Indeed, by 1978, a student note author could assert that “[w]hatever the reason for ignoring the [R]ule in the past, certain recent developments suggest that the [R]ule should no longer receive such short shrift.”<sup>182</sup>

### C. 1980–1985: Transformation Realized and the Battle over Rule 68

1. *Delta Air Lines v. August: The Supreme Court Weighs In.*—This growing interest in Rule 68 as a settlement tool came to a head in the early 1980s. The first important event was the 1981 Supreme Court decision in *Delta Air Lines, Inc. v. August*.<sup>183</sup> This was the first time the Supreme Court

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<sup>180</sup> Even the Chief Justice of the United States Supreme Court, Warren Burger, got into the act by criticizing the adversarial process and vigorously promoting ADR during the late 1970s and early 1980s. See, e.g., Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

<sup>181</sup> Eight of the fourteen decisions between 1975 and 1980 contain extensive discussions. Some interpreted Rule 68 generously to bolster settlement effects. See *August v. Delta Air Lines, Inc.*, 600 F.2d 699 (7th Cir. 1979), *aff'd*, 450 U.S. 346 (1981) (holding that Rule 68 applies when a plaintiff loses at trial); *Waters v. Heublein, Inc.*, 485 F. Supp. 110, 114 (N.D. Cal. 1979) (holding that fees are part of costs when a fee-shifting statute applies); *Greenwood v. Stevenson*, 88 F.R.D. 225, 228, 231 (D.R.I. 1980) (approving *Waters* in principle and also holding that the phrase “before the trial begins” in Rule 68 allows offers “at the last possible point in time”); *Dual v. Cleland*, 79 F.R.D. 696, 697 (D.D.C. 1978) (holding, like *August*, that Rule 68 applies when a plaintiff loses at trial). But see *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 501–04 (N.D. Cal. 1980) (holding that Rule 68 does not apply to class actions). Some opinions discuss settlement effects in quite a bit of detail, and a few of these also include strands of the unreasonable plaintiff model, especially in the context of dealing with frivolous suits. See, e.g., *Mirabal v. Gen. Motors Acceptance Corp.*, 576 F.2d 729, 734 (7th Cir. 1978) (Swygert, J., dissenting) (pointing out that Rule 68 gives defendants a tool to “curtail, if not stop entirely, the possibility of ‘forced settlements’” in frivolous suits); *Greenwood*, 88 F.R.D. at 227–32 (providing a detailed analysis of the Rule with particular attention to settlement effects); *Simonds v. Guar. Bank & Trust Co.*, 480 F. Supp. 1257, 1260–61 (D. Mass. 1979) (referring to Rule 68's benefits in overcoming Prisoners'-Dilemma-type obstacles to making settlement offers and justifying the Rule as fair to plaintiffs and defendants and beneficial to the court); *Perkins v. New Orleans Athletic Club*, 429 F. Supp. 661, 666–67 (E.D. La. 1976) (explaining how Rule 68 enables a defendant to respond to an unreasonable demand by offering “what is really due” and shifting the cost burden to the plaintiff); *Honea v. Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201, 203 (E.D. La. 1975) (discussing Rule 68 as a tool to deal with unreasonable plaintiffs and suggesting that defendants have an obligation to use the Rule).

<sup>182</sup> Note, *Rule 68: A “New” Tool for Litigation*, 1978 DUKE L.J. 889, 890.

<sup>183</sup> 450 U.S. 346 (1981).

dealt squarely with Rule 68, and the Court made the most of it. The issue in *Delta Air Lines* was whether a defendant could use Rule 68 cost shifting against a plaintiff who lost at trial.<sup>184</sup> In a six-to-three decision, the Court held that Rule 68 applied only to a winning plaintiff, because a losing plaintiff, even though failing to improve on the offer, was not a party who “finally obtained a judgment” within the meaning of Rule 68.<sup>185</sup> Given that Rule 54(d) normally required a losing plaintiff to pay the defendant’s costs anyway, the Court’s holding merely converted what potentially would have been a mandatory award under Rule 68 into a discretionary award under Rule 54(d).<sup>186</sup> However, the Court took the opportunity to provide a wide-ranging discussion of the Rule’s history and policy, a discussion that set the stage for later efforts to expand its reach.

Most importantly, the Court made crystal clear that it viewed Rule 68 as a settlement promotion tool.<sup>187</sup> The majority used categorical and unqualified language: “The purpose of Rule 68 is to encourage the settlement of litigation.”<sup>188</sup> And the dissenters agreed in equally strong terms even as they challenged the majority’s textual, historical, and policy arguments.<sup>189</sup>

The Court went on to discuss Rule 68’s settlement effects and to review the history of the Rule briefly. The historical discussion should have set up a tension with the settlement promotion model—and it did, but not in a way that the Court recognized. The Court’s historical discussion correctly traced the origins of Rule 68 to the earlier state offer of judgment rules, which, it explained, were designed to “penalize” prevailing plaintiffs who rejected reasonable offers “vexatiously” or “without good cause.”<sup>190</sup> The

<sup>184</sup> The defendant made an offer of judgment of \$450. *Id.* at 348. The plaintiff rejected it and then lost at trial. *Id.* at 349. The case was complicated by the fact that it involved a claim of employment discrimination under Title VII, with Title VII’s strong policy in favor of encouraging meritorious claims. *Id.* at 348. Some thought this policy might be undermined by applying Rule 68 when the plaintiff lost, and this concern directly influenced the decisions of the district court and the court of appeals. However, it was not an explicit factor in the Supreme Court’s decision.

<sup>185</sup> *Id.* at 351–52. In fact, only five Justices agreed to the holding. Justice Rehnquist filed a dissenting opinion, which Justices Burger and Stewart joined, *id.* at 366 (Rehnquist, J., dissenting), and although Justice Powell concurred in the result, he did so because of flaws in the form of the offer and joined the dissent with regard to the main issue, *id.* at 362 (Powell, J., concurring).

<sup>186</sup> *Id.* at 353 (majority opinion).

<sup>187</sup> *Id.* at 352 & n.9 (noting that Rule 68 would be particularly useful when liability is relatively clear or already decided and the amount of the judgment is at issue).

<sup>188</sup> *Id.* at 352. The Court cited three sources to support its statement: the 1946 Advisory Committee note, Wright and Miller’s treatise, and *Moore’s Federal Practice*, the latter two of which rely on the 1946 Advisory Committee note as well. *Id.* at 352 n.8.

<sup>189</sup> *Id.* at 379 n.5 (Rehnquist, J., dissenting) (“The nearly 100 Rules of Federal Civil Procedure have numerous and often differing purposes, but it bears repeating that the purpose behind Rule 68 . . . is to promote *settlement* and thereby diminish the number of trials necessary to resolve the cases which are filed in the federal courts.”).

<sup>190</sup> *Id.* at 356–58 (majority opinion) (noting that Rule 68 grew out of the practice of “denying costs to a plaintiff ‘when he sues vexatiously after refusing an offer of settlement’” and that “the only purpose

“vexatiously” and “without good cause” requirements coupled with the idea of a compensatory penalty for acting unreasonably define the unreasonable plaintiff model.

Given this, one might have expected some hesitation before endorsing a settlement promotion model of Rule 68. But the Court did not hesitate at all. Instead, it ignored the “vexatiously” and “without good cause” qualifiers and assumed that rejection of a “reasonable offer” by itself was unfair and warranted a Rule 68 penalty.<sup>191</sup> Nowhere did it define a “reasonable offer,” explain why a plaintiff acted unreasonably in rejecting the offer, or explain why fairness values were triggered by rejection. And nowhere did it explain how any of this fit a settlement promotion model.

2. *1983–1984: The Advisory Committee Gets Involved.*—Courts and commentators after *Delta Air Lines* seized on the Supreme Court’s strong endorsement of a settlement promotion model and largely ignored its awkward effort to come to terms with the earlier offer of judgment precedents. With settlement promotion officially instantiated in Rule 68 and pressure for settlement mounting, it was only a matter of time before the Advisory Committee would take on the task of correcting Rule 68’s deficiencies.<sup>192</sup> This happened in 1983.

The year 1983 is particularly salient for the modern history of procedural reform. It marks one of the most aggressive attempts by the Advisory Committee to deal with the perceived federal litigation crisis. The package of amendments adopted in 1983 strengthened Rule 11 by bolstering the penalties for frivolous litigation, amended Rule 16 to add settlement promotion to the pretrial conference, and altered Rule 26 to give the trial judge discretion to limit the amount of discovery on cost-benefit grounds.<sup>193</sup>

The committee also circulated a proposal to amend Rule 68. The goal was to empower the Rule as a settlement promotion tool in order to meet “public demand” for action in the face of an out-of-control litigation sys-

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served by these state offer-of-judgment rules was to penalize prevailing plaintiffs who had rejected reasonable settlement offers without good cause”).

<sup>191</sup> This is clear a few paragraphs prior to the historical discussion, where the Court responded to the defendant’s argument that a mandatory rather than a discretionary award of costs would increase the settlement rate. *See id.* at 353. The Court appealed to fairness and in the course of its discussion noted that “[i]f a plaintiff chooses to reject a reasonable offer, then it is fair that he not be allowed to shift the cost of continuing the litigation to the defendant in the event that his gamble produces an award that is less than or equal to the amount offered.” *Id.* at 356. Once again, the Court provided no definition of a “reasonable offer” or any explanation of why fairness was implicated. Nor was there any apparent recognition that the principle supported at best only a limited version of Rule 68 and not an omnibus settlement promotion device.

<sup>192</sup> *See* Simon, *supra* note 1, at 6–9.

<sup>193</sup> *See* Report of the Advisory Committee on Rules of Civil Procedure to the Standing Committee on Rules of Practice and Procedure 1–5 (Mar. 9, 1982), *available at* <http://www.uscourts.gov/rules/Reports/CV03-1982.pdf>. The 1983 amendments also added new Rules 72 through 76, implementing the statutory grant of authority to refer issues to magistrate judges for decision. *See id.*

tem.<sup>194</sup> The 1983 proposal made Rule 68 two-way, applied it to losing plaintiffs (reversing *Delta Air Lines*), and included fees in the sanction subject to the court's discretion.<sup>195</sup>

This proposal sparked a firestorm of controversy. The defendants' bar, joined by the American College of Trial Lawyers, supported the proposal and urged its adoption as a way to handle the problem of frivolous and weak suits.<sup>196</sup> The plaintiffs' bar, and especially the plaintiffs' civil rights bar, strongly opposed the reform, in particular the inclusion of attorney fees in the sanction.<sup>197</sup> Among other things, the opponents expressed concern that including fees in Rule 68 would violate the Rules Enabling Act by "modifying" the substantive right to fees created by Congress for fee-shifting cases.<sup>198</sup>

The ensuing furor convinced the Advisory Committee to withdraw its 1983 proposal and to try again with a new and weaker version of the Rule designed to placate the opposition and skirt Rules Enabling Act objections.<sup>199</sup> The new proposal, circulated in 1984, also converted Rule 68 into

<sup>194</sup> See Stephen B. Burbank, *Proposals to Amend Rule 68—Time to Abandon Ship*, 19 U. MICH. J.L. REFORM 425, 427–28 (1986).

<sup>195</sup> See Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts (Aug. 23, 1983), reprinted in 98 F.R.D. 337, 361–67 (1983). The proposal also added prejudgment interest to the sanction, created exceptions for bad faith offers, and extended the period for responding to an offer from ten days to thirty days. *Id.*

<sup>196</sup> See Simon, *supra* note 1, at 12 n.55; *Fee Shifting Plan Sent Back to Drawing Board*, LEGAL TIMES WASH., May 28, 1984, at 4. Some defense counsel, however, objected to the enlargement of time from ten to thirty days for responding to an offer. See Simon, *supra* note 1, at 12 n.55.

<sup>197</sup> See Simon, *supra* note 1, at 13–15. The most intense opposition came from the ACLU, Alliance for Justice, NAACP, and other similar organizations. *Id.* at 14 n.61.

<sup>198</sup> See *id.* at 15–16. The Rules Enabling Act limits the rulemaking power to "general rules of practice and procedure" and prohibits rules that "abridge, enlarge, or modify any substantive right." 28 U.S.C. § 2072 (2000). The Rules Enabling Act concern was also raised by committee members and voiced in a letter from Senator Arlen Specter to the Committee on Rules of Practice and Procedure. See Simon, *supra* note 1, at 15 n.73. The other arguments against the proposal included that a stronger Rule 68 would (1) deprive plaintiffs of a federal forum by forcing them to file in state court to avoid the Rule's effect, (2) interfere with contingency fee arrangements by placing plaintiffs at risk of paying defendants' fees, and (3) chill civil rights plaintiffs with limited resources from filing meritorious suits. *Id.* at 12–15.

<sup>199</sup> See Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S., Preliminary Draft of the Proposed Amendments to the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, Rules Governing Section 2254 Cases in the United States District Courts, and Rules Governing Section 2255 Proceedings in the United States District Courts (Sept. 6, 1984) [hereinafter 1984 Proposal], reprinted in 102 F.R.D. 407, 433–34 (1984). By characterizing the Rule 68 penalty as a "sanction" for an unreasonable refusal to settle and making the sanction discretionary, the Advisory Committee had hoped to fit the 1984 proposal into the pigeonhole of a "procedural" rule and avoid Rules Enabling Act problems. See Letter from Hon. Walter R. Mansfield, Chairman, Advisory Committee, to the Comm. on Rules of Practice & Procedure (Aug. 1984), reprinted in 102 F.R.D. 423, 424 (1984).

a two-way rule.<sup>200</sup> Its major change from the 1983 proposal was to make “unreasonable” rejection the triggering event for sanctions (instead of any failure to improve on the offer) and to give broad discretion to the trial judge to determine when a rejection was unreasonable and what sanction to impose.<sup>201</sup>

Interest groups lined up for and against the 1984 proposal in much the same way they did in 1983. Even Chief Justice Warren Burger got involved by throwing his support in favor of reform and pressuring the committee to act favorably.<sup>202</sup> But the opposition was stronger. Critics voiced the same concerns as in 1983—including the Rules Enabling Act problem<sup>203</sup>—and they also argued that the reliance on subjective reasonableness standards and judicial discretion would create costly collateral litigation and other problems.<sup>204</sup> Moreover, Representative Kastenmeier wrote a letter in July 1985 to the new chair of the Advisory Committee, Judge Frank Johnson, expressing his strong reservations about adopting the amendment through the rulemaking process rather than through Congress. Kastenmeier’s views apparently had a chilling effect on Judge Johnson and the committee.<sup>205</sup>

Very few amendments to the FRCP have engendered such intense controversy. The Advisory Committee permanently tabled the proposals in January 1986.<sup>206</sup> However, the committee still remains interested in reforming Rule 68 as a settlement tool and periodically considers proposals for revision.<sup>207</sup>

<sup>200</sup> 1984 Proposal, *supra* note 199, at 432–33. (“[E]ither party may serve upon the other party but shall not file with the court a written offer . . . .”).

<sup>201</sup> *See id.* The sanction could include fees in appropriate cases. *Id.* at 433.

<sup>202</sup> *See* Simon, *supra* note 1, at 4 n.7.

<sup>203</sup> *See* Burbank, *supra* note 194, at 435–40 (arguing that the existence of a Rules Enabling Act problem for the 1984 proposal was likely, although not certain, and recommending that the committee abandon its efforts to avoid a political struggle over rulemaking authority).

<sup>204</sup> *See* Simon, *supra* note 1, at 18–19; John P. Woods, *For Every Weapon, a Counterweapon: The Revival of Rule 68*, 14 FORDHAM URB. L.J. 283, 345 n.315, 347–49 (1986).

<sup>205</sup> *See* Burbank, *supra* note 194, at 440 n.81.

<sup>206</sup> *See* Paul D. Carrington, “Substance” and “Procedure” in the Rules Enabling Act, 1989 DUKE L.J. 281, 283.

<sup>207</sup> In 1992, for example, a distinguished federal judge, William Schwarzer, floated a new proposal to amend Rule 68 that contained protective provisions against crippling sanctions. *See* William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992). The Federal Judicial Center conducted a Rule 68 survey at the request of the Advisory Committee, *see* JOHN E. SHAPARD, FED. JUDICIAL CTR., LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE (1995), and the committee briefly entertained an amendment along the lines of Judge Schwarzer’s proposal, *see* Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108, 135–47 (Larry Kramer ed., 1996) (reprinting proposed rule and Advisory Committee note). The committee abandoned the effort in the face of growing opposition and along the way even considered abrogating Rule 68 altogether. *See* Harold S. Lewis, Jr. & Thomas A. Eaton, *Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723, 737 (2006).

3. *Marek v. Chesny: The Supreme Court Weighs In Again.*—In the midst of growing controversy over the committee’s efforts, the Supreme Court entered the fray to render its second major decision on Rule 68 in a four-year period. Over a particularly sharp dissent by Justice Brennan, the Court in *Marek v. Chesny*<sup>208</sup> held that “costs” in Rule 68 included fees whenever a fee-shifting statute explicitly awarded fees “as part of the costs.”<sup>209</sup> As a result, the civil rights plaintiff in the case could not recover his post-offer fees under 42 U.S.C. § 1988 even though he prevailed at trial because he did not improve on the defendant’s Rule 68 offer.<sup>210</sup>

This was a remarkable tour de force. The Supreme Court, in effect, did through interpretation part of what the Advisory Committee was having trouble doing (and ultimately failed to do) through amendment. Along the way, it firmly entrenched the settlement promotion model of Rule 68: “The plain purpose of Rule 68 is to encourage settlement and avoid litigation. The Rule prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits.”<sup>211</sup>

The Court reasoned that the 1938 Advisory Committee knew of fee-shifting statutes and therefore must have intended Rule 68 “costs” to include fees whenever the applicable statute expressly made fees part of “costs.”<sup>212</sup> It responded to the objection that its interpretation of Rule 68 conflicted with congressional fee-shifting policies underlying § 1988 by arguing that § 1988 and Rule 68 were complementary rather than conflicting: § 1988 encouraged filing while Rule 68 encouraged settlement. Echoing the prevailing enthusiasm for settlement, the Court added that civil rights plaintiffs would often be better off anyway if they settled.<sup>213</sup>

*Marek* evoked a strong critical response, with the critics objecting to, among other things, the Court’s simplistic analysis of committee intent and

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<sup>208</sup> 473 U.S. 1 (1985).

<sup>209</sup> *Id.* at 8–9.

<sup>210</sup> *Marek* involved a 42 U.S.C. § 1983 claim to recover damages brought against police officers for an unconstitutional shooting. *Id.* at 3–4. Such claims are subject to fee-shifting that awards prevailing plaintiffs “a reasonable attorney’s fee as part of the costs.” 42 U.S.C. § 1988 (2000). The defendant made an offer of judgment in the amount of \$100,000, and the plaintiff rejected the offer and eventually recovered less. *Marek*, 473 U.S. at 4.

<sup>211</sup> *Id.* at 5 (citation omitted). In his concurrence, Justice Powell stated the purpose of Rule 68 more narrowly: “[T]o [facilitate] the early resolution of marginal suits in which the defendant perceives the claim to be without merit, and the plaintiff recognizes its speculative nature.” *Id.* at 12–13 (Powell, J., concurring) (quoting *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring)). Although the offer of judgment applied to meritorious suits as well, Justice Powell at least recognized that the device had something to do with fairness—here, the fairness of enabling defendants to escape from frivolous suits.

<sup>212</sup> *Id.* at 8–9 (majority opinion).

<sup>213</sup> *Id.* at 10.

effects on filing incentives.<sup>214</sup> Yet the Court's decision reflects the pressure of the times. Once the settlement promotion model was firmly entrenched, the intense concerns about cost, delay, and backlog, and growing disenchantment with the adversary process must have made empowering Rule 68 virtually irresistible.

*D. Since 1985: Rule 68, Procedural Politics, and the Rulemaking Process*

The intense focus on Rule 68 in the early 1980s, while unsuccessful in amending the Rule and only modestly successful in strengthening it through interpretation, has had a profound impact in other areas. For one thing, it inspired a huge literature exploring the effects on settlement of Rule 68-type sanctions and more general forms of fee shifting conditioned on trial outcome, and this work continues today.<sup>215</sup> Furthermore, it prompted efforts on the state level to strengthen state versions of Rule 68.<sup>216</sup> Finally, the Advisory Committee retains an interest in amending Rule 68 and plans to consider another look at the Rule in the future.<sup>217</sup>

The controversy over Rule 68 also had a profound impact on the rulemaking process itself, at least as important as its impact on settlement promotion. Since the 1980s, the court rulemaking process has become increasingly politicized, and Rule 68 is partly responsible for this development. The politicization of rulemaking has made it very difficult to revise the FRCP in general and Rule 68 in particular, because conflicting interest group pressures tend to create Advisory Committee stalemate.<sup>218</sup>

For almost forty years after the Rules Enabling Act was adopted in 1934, the traditional court rulemaking model dominated procedural rule-

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<sup>214</sup> See Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 61–62 (1997) (describing the reaction as “explosive” and reviewing the critical literature).

<sup>215</sup> See, e.g., *id.* at 62 (remarking on the “cottage industry” of scholarship on Rule 68 in the wake of the events of the early 1980s); sources cited *supra* notes 33–35. For recent examples of Rule 68 research, see Lewis & Eaton, *supra* note 7, at 337–39 (describing their empirical survey study), and Yoon & Baker, *supra* note 7 (reporting the results of an econometric study on the impact on automobile accident litigation of New Jersey’s two-way offer of judgment rule that includes fees and costs).

<sup>216</sup> Many states strengthened their offer of judgment rules in response to the criticisms of Rule 68 in the late 1970s and 1980s. See AM. COLL. OF TRIAL LAWYERS, *supra* note 34, at 3–6 (summarizing all the state offer of judgment rules); Solimine & Pacheco, *supra* note 214, at 64 (counting thirteen states with offer of judgment rules different from Rule 68 and noting that these states “appear to have been motivated, at least in part, by some criticisms of Rule 68”).

<sup>217</sup> See *supra* note 8 and accompanying text; see also Edward H. Cooper, *Symposium Reflections: A Rulemaking Perspective*, 57 MERCER L. REV. 839, 842 n.9 (2006).

<sup>218</sup> See Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 15 (1997) (noting that constructive reform will require “subordination of client-interest and self-interest, and a good faith willingness to compose views and work toward a consensus” but “[t]he history of judicial reform efforts over the last couple of decades does not provide much basis for optimism”).

making in federal court.<sup>219</sup> At the heart of this model lie two propositions: that courts rather than legislatures should make procedural rules, and that those rules should be drafted in the first instance by a court-appointed committee of experts. These propositions stood opposed to the nineteenth-century focus on legislatively-drafted code procedure and justified delegating the 1938 FRCP to committee-based rulemaking. The court rulemaking model made sense within a broad view of procedure that marked a sharp distinction between procedure and substance, and envisioned procedural design as mainly a technical exercise unaffected by substantive values and best handled by procedural experts.<sup>220</sup>

The court rulemaking model was celebrated in the 1940s, 1950s, and 1960s, and few commentators voiced any serious concern with its legitimacy. This started to change in the early 1970s. Several factors contributed to the growing disenchantment, including mounting concern about the substantive effects of procedural rules, increasing skepticism about the possibility of outcome-neutral process, and diminishing faith in the objectivity of technical expertise.<sup>221</sup>

The Rule 68 furor in 1983 and 1984 accelerated this process. It was one of the first times that intense interest group pressure was mobilized within the Advisory Committee itself, and it dramatically highlighted the substantive and political stakes in rulemaking.<sup>222</sup> Prompted partly by this and other similar events, Congress amended the Rules Enabling Act in 1988 to require the Advisory Committee to open up its process and hold public hearings, which ushered in a new era of transparency.<sup>223</sup> At the same time, opening up the committee's process made it easier for interest groups to get involved. As the experience with Rule 68 demonstrates, the more intense and visible the interest group conflict, the more reluctant the committee is to act even when it thinks a reform might be desirable.<sup>224</sup>

The politicization of the rulemaking process through interest group pressure has also led to greater congressional involvement in procedural reform.<sup>225</sup> Perhaps the most striking example is the Civil Justice Reform Act of 1990, which empowered local districts to experiment with new proce-

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<sup>219</sup> For a thorough account of the court rulemaking model, its history, and underlying rationale, see Bone, *supra* note 177, at 892–902.

<sup>220</sup> *Id.* at 893–97.

<sup>221</sup> *Id.* at 900–02.

<sup>222</sup> *Id.* at 902–04; Stephen B. Burbank, *Implementing Procedural Change: Who, How, Why, and When?*, 49 ALA. L. REV. 221, 228–29 (1997).

<sup>223</sup> Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. § 2073(c)). Although this legislation formalized steps the committee had already undertaken on its own, it also went further to open up the rulemaking process. See Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1187–88 (1996).

<sup>224</sup> See Bone, *supra* note 177, at 916–17.

<sup>225</sup> See Geyh, *supra* note 223, at 1187–88.

dures and in so doing undermined one of the central tenets of court rule-making: the importance of uniform rules made by a centralized, committee-based process.<sup>226</sup>

I do not mean to suggest that the Rule 68 events were the sole cause of these changes. These events combined with others to dramatize what many had already begun to see as major shortcomings of traditional court rule-making.<sup>227</sup> The 1983 and 1984 Rule 68 proposals did so, however, in a particularly striking way. They combined all the salient elements that challenged the integrity of court rulemaking. They were procedural reforms that many thought would have profound substantive effects by chilling civil rights litigation and serious distributional consequences by disproportionately burdening litigants of poor and modest means.<sup>228</sup> They threatened to invade the congressional domain by undermining the effectiveness of fee-shifting statutes. And they sharply polarized interest groups, challenging the ideal of procedural rules crafted by reasoned deliberation rather than interest group accommodation.

#### IV. LESSONS FROM HISTORY

There are lessons to learn from the history of Rule 68 that are relevant to interpreting the Rule and also to revising it. While the focus of this Article is mainly historical and analytic, it is worth briefly noting some of these lessons in a general way. Section A below cautions against broad judicial interpretations that seek to enlist Rule 68 for a settlement promotion purpose it was never meant to serve. Section B focuses on reform and makes the case for the Advisory Committee or Congress starting from scratch rather than amending existing Rule 68. Section B also outlines four principles that should guide the task.

##### *A. Lessons for Interpreting Rule 68*

Interpreting Rule 68 is a much more complicated matter than most federal judges realize today. The assumption that the drafters clearly intended to create a settlement promotion tool does not fit the Rule's history. The

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<sup>226</sup> Pub. L. No. 101-650, 104 Stat. 5089 (1990); see Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 385-96 (1992). The CJRA had a sunset provision and most of what was enacted as part of that statute is no longer in effect.

<sup>227</sup> See Bone, *supra* note 177, at 902-07 (summarizing some of the salient events, starting with suspension of the proposed Federal Rules of Evidence in 1973 and including political-type battles over Rule 4 and Rule 11 in 1983); Geyh, *supra* note 223, at 1187-91 (describing some of the signal events since 1973 that have cast rulemaking in a political light and triggered congressional intervention in the process).

<sup>228</sup> See, e.g., Simon, *supra* note 1, at 13-15 (describing concern about effect on civil rights litigation); Statement of Burt Neuborne before the Comm. on Rules of Practice & Procedure of the Judicial Conference of the U.S. Concerning Rules 68 and 83 (Jan. 18, 1994), reprinted in PRACTISING LAW INSTITUTE, THE NEW AND PROPOSED FEDERAL RULES OF CIVIL PROCEDURE 169, 173 (1984) (noting the adverse distributional effects).

Rule was lifted from state practice where it better fit an unreasonable plaintiff model than a settlement promotion model.<sup>229</sup> When the Advisory Committee revisited the Rule to amend it in the mid-1940s, committee discussions included some references to Rule 68 as encouraging settlement, and the final committee note included a sentence to that effect.<sup>230</sup> Still, there is no indication that the committee thought very carefully about Rule 68’s purpose or about the apparent mismatch between purpose and text.<sup>231</sup> More importantly, nothing suggests that committee members viewed Rule 68 as a tool to overcome bargaining obstacles and shape bargaining incentives in the way the settlement promotion model contemplates.

It is difficult to construct even an idealized hypothetical account of committee intent based on this record. The best one can say in favor of a settlement promotion view is that the committee intended its Rule to serve two purposes at once: to compensate defendants for costs unfairly incurred when the plaintiff unreasonably rejected the defendant’s offer, and to encourage settlements in cases that *should* settle because they were relatively one-sided. This is a far cry from the broad settlement promotion model.

There are, of course, other ways to interpret a rule than relying on committee intent. Courts frequently use a purposive approach and construe the FRCP liberally to better serve their purposes in light of changing litigation conditions.<sup>232</sup> Once again, however, Rule 68 creates problems because its text and its history do not fit a settlement promotion purpose.

*Marek v. Chesny* is perhaps the most notorious example of the hazards created by an oversimplified interpretive approach.<sup>233</sup> As we have seen, the *Marek* Court relied heavily on an argument that the 1938 Advisory Committee must have intended Rule 68 “costs” to include all “costs properly awardable under the relevant substantive statute or other authority.”<sup>234</sup> The problem is that the relevant evidence of committee intent does not clearly support such an interpretation. There is some evidence that the 1938 committee assumed that “costs” were a matter for substantive law,<sup>235</sup> but it is unclear whether the committee also assumed that fees would be included in

<sup>229</sup> See discussion *supra* Part II.C.

<sup>230</sup> See discussion *supra* Part III.A.

<sup>231</sup> See discussion *supra* Part II.B.

<sup>232</sup> For example, before the Supreme Court discouraged the practice in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), some federal judges interpreted Rule 8(a)(2) to require strict pleading as a way to deter frivolous suits. See Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); see also *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007) (construing Rule 8(a)(2) to adopt a plausibility standard that grants district judges some flexibility to require more factual detail). See generally Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119–20 (2002) (criticizing commentators who support broad flexibility in interpreting the FRCP).

<sup>233</sup> See *supra* notes 208–213 and accompanying text.

<sup>234</sup> *Marek v. Chesny*, 473 U.S. 1, 8–9 (1985).

<sup>235</sup> See *id.* at 8–9; Mitchell to Clark Letter, *supra* note 85.

“costs” whenever a substantive fee-shifting statute was worded in the right way.<sup>236</sup> The best one can say about committee intent in 1938 is that Rule 68 was meant to operate in the same manner as the code offer of judgment rules in state court. And none of those rules included market rate fees in “costs.”<sup>237</sup>

Even though the *Marek* Court focused on intent, purpose also played a crucial role in its analysis. The Court was driven by a desire to improve Rule 68 as a settlement tool. This goal obviously affected its reading of committee intent as well as its rather cursory treatment of opposing arguments.<sup>238</sup> However, the Court was led astray by trying to squeeze a settlement promotion model into a Rule that was drafted to serve a different end. The result is a one-way Rule 68 that affects fees as well as costs and imposes a greater risk on plaintiffs than on defendants. As others have argued, this asymmetry confers a strong settlement advantage on the defendant and is likely to produce results skewed improperly in the defendant’s favor.<sup>239</sup>

There is another risk with trying to squeeze settlement promotion into Rule 68. It makes the Rules Enabling Act problems seem less serious than they actually are.<sup>240</sup> Existing FRCP carry with them a strong presumption of validity under the Rules Enabling Act by virtue of successfully negotiat-

<sup>236</sup> The October 13, 1937 Mitchell to Clark Letter is the basis for Steve Burbank’s opinion that the Court probably was correct in holding that “costs” include fees when a substantive statute so provides. See Burbank, *supra* note 194, at 438 n.69. I am not convinced. The letter merely refers to “costs” as being a matter of substantive law rather than procedural practice, which is almost certainly a reference to how defining costs would be too substantive for the Rules Enabling Act. This says nothing, however, about what law the committee thought should apply to define “costs.” Indeed, it seems quite reasonable that the committee would have assumed that 28 U.S.C. § 1920, defining taxable costs, would be the appropriate provision to apply.

<sup>237</sup> Justice Brennan’s reading of committee intent in his *Marek* dissent is much closer to the mark, although even he assumes more deliberation than actually took place. Brennan argues that the Advisory Committee intended “costs” in Rule 68 to include only the § 1920 taxable costs awarded to prevailing parties by Rule 54(d). *Marek*, 473 U.S. at 18–20 (Brennan, J., dissenting). And he points out—correctly I believe—that this intent is perfectly consistent with the committee knowing about the existence of fee-shifting statutes. *Id.*

<sup>238</sup> Even Justice Brennan in dissent accepted the settlement promotion model of Rule 68. *Id.* He argued that the 1938 committee would have wanted uniform settlement promotion and therefore would have rejected any scheme where different settlement promotion effects were obtained for different types of cases, as would result from including fees only when a statute said so. *Id.* at 23–27. In fact, the problem with the majority’s argument is much simpler: the state offer of judgment rules that the committee adopted were not designed for settlement promotion at all.

<sup>239</sup> See Miller, *supra* note 3, at 94, 110, 121–22.

<sup>240</sup> The *Marek* majority gave the Rules Enabling Act objections very short shrift. See *Marek*, 473 U.S. at 35–38 (Brennan, J., dissenting) (criticizing the majority’s superficial treatment of the Rules Enabling Act issues). However, Judge Posner, who wrote the Court of Appeals opinion below, took those objections very seriously. He reasoned that the Rule should not be interpreted to include fees because doing so might run afoul of the Rules Enabling Act by modifying the plaintiff’s statutory right to fees and chilling meritorious civil rights suits that Congress meant to encourage. *Chesny v. Marek*, 720 F.2d 474, 479–80 (7th Cir. 1983). For a careful analysis of these Rules Enabling Act issues, see Burbank, *supra* note 194.

ing all the rulemaking stages.<sup>241</sup> When Rule 68 is read as a settlement promotion tool, the presumption of validity extends to the settlement promotion purpose as well. One can then argue that including fee shifting in the Rule is also presumptively valid because it merely improves the Rule as a settlement promotion device.

The presumption of validity, however, should apply only to interpretations of a Rule that are meant to further the Rule’s actual purpose in some sufficiently direct way. The presumption, after all, is based on the idea that the Rule has been vetted by the rulemaking process, so only interpretations sufficiently connected to the Rule as so vetted should receive the benefits of the presumption. Because Rule 68 was not adopted to be an omnibus settlement promotion device, interpreting it to serve that purpose goes beyond anything that conceivably was before the Advisory Committee, the Supreme Court, or Congress in 1938.

Thus, the *Marek* holding is tainted by the Court’s erroneous understanding of Rule 68’s purpose. This error also creates other interpretive difficulties. For example, there is some confusion in the case law as to whether a defendant can disclaim liability in its offer of judgment.<sup>242</sup> This was not an issue under the code offer of judgment rules because they assumed that the defendant conceded liability for the full amount. The disclaimer issue arises under the settlement promotion model because settlements routinely include liability disclaimers. Courts reason that defendants will be more willing to use Rule 68 if they can include disclaimers in their offers of judgment too.<sup>243</sup> However, this can create problems. The defendant who uses Rule 68 makes an offer to accept a judgment, not simply a settlement, and a formal judgment without liability can present tricky issues in some cases.<sup>244</sup>

### B. Lessons for Amending Rule 68

The lesson of the previous section is that judges should refrain from generous interpretations of Rule 68 that make it serve settlement promotion goals beyond the scope of anything the Rule was originally designed to do. If the FRCP should promote settlement in this way, the decision to do so should be left to the Advisory Committee or Congress. Designing a conditional fee-shifting rule—one which conditions a fee shift on how the judg-

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<sup>241</sup> *Burlington N. R.R. v. Woods*, 480 U.S. 1, 5 (1987).

<sup>242</sup> See Shelton, *supra* note 24, at 881–83.

<sup>243</sup> See, e.g., *Jolly v. Coughlin*, No. 92 Civ. 9026 (JGK), 1999 WL 20895, at \*8 (S.D.N.Y. Jan. 19, 1999).

<sup>244</sup> See 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3002, at 93–94 (noting that a disclaimer of liability can create “nice questions if the offer provides for injunctive relief that is authorized only after a finding of a violation”). Additionally, a disclaimer can create problems applying Rule 68 itself, such as whether the disclaimer affects the value of the offer for purposes of comparing it with the plaintiff’s trial result. See Shelton, *supra* note 24, at 883 n.87.

ment compares with the offer—in a way that promotes settlement optimally is a complex undertaking, and as the history of efforts to revise Rule 68 at-tests, it also implicates controversial policy choices. Rulemaking of this sort should be done only with public input and a careful understanding of the global effects.<sup>245</sup>

This leaves the question of whether a conditional fee-shifting rule should be created by amending Rule 68 or by adopting an entirely new Rule. It is natural to feel more comfortable amending an existing Rule than creating a new one. The fact that intelligent people decided to adopt the Rule and the Rule has survived over time—in Rule 68's case for seventy years—ordinarily would justify some confidence in the Rule and thus also in amendments aimed at making the Rule work better. However, pedigree should matter only if the proposed amendment is designed to further the same purpose that the Rule was meant to serve, and this condition is not satisfied by Rule 68 amendments designed to further broad settlement promotion goals.

For this reason, there is no benefit to amending the existing Rule. Moreover, there is a potential cost. Focusing on Rule 68 is likely to be distracting if it causes committee members or interested members of the public to dwell on the deficiencies of the current Rule. It would be better to start from scratch and design a new Federal Rule. Approaching the task in this way focuses attention where it should be focused—on the justifications for conditional fee shifting as a settlement tool rather than on the perceived deficiencies of Rule 68 itself. Furthermore, starting from scratch facilitates creating a Rule tied directly to settlement rather than one bound up with judgment, like Rule 68.<sup>246</sup>

Focusing attention in this way also highlights four general principles that ought to guide the rulemaking effort. First, any Rule should be justified specifically for its contribution to reducing an identifiable obstacle to settlement bargaining. Whatever the obstacle—asymmetric information, hard bargaining, bounded rationality, or something else—it should be specifically identified and supported with some kind of empirical evidence.

Second, the committee should compare conditional fee shifting to other methods for encouraging settlement. The other principal method in vogue

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<sup>245</sup> See generally Robert G. Bone, *Who Decides?: A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 2011–15 (2007) (describing the deficiencies with case-specific discretion and recommending general rulemaking for most settlement promotion rules).

<sup>246</sup> This raises the question of what to do with current Rule 68. It could be left in place if the committee thought its core function, to prevent the unfair imposition of litigation costs, was still important and not adequately handled by other rules like Rule 11. However, the very limited use of Rule 68 from 1938 to 1985 suggests that the Rule in its original form might not be terribly useful. Moreover, any such Rule can be manipulated by clever attorneys to serve purposes it was not meant to serve, especially with the fee-shifting gloss added by *Marek*. Thus, it might be better on balance to abrogate the Rule entirely.

today involves direct trial judge intervention in the bargaining process.<sup>247</sup> Conditional fee shifting works differently. It relies on shaping party incentives indirectly by altering litigation payoffs. Both methods are fraught with risks, and the Advisory Committee must evaluate the comparative costs and benefits.

The third principle is related to the first two. No conditional fee-shifting rule should be adopted until the committee has reviewed and approved its impact on the *quality*, not just the quantity, of settlements and evaluated its distributional effects. The theoretical literature confirms that a conditional fee-shifting rule can affect what parties settle for as well as whether they settle at all.<sup>248</sup> Settlement quality is at least as important as quantity for achieving the deterrence and compensatory purposes of the substantive law.<sup>249</sup>

The fourth principle has to do with tailoring conditional fee-shifting rules to the circumstances of different case types. For example, the Rules Enabling Act or respect for the goals of congressional fee-shifting statutes might require exempting civil rights cases. Moreover, the likely effect of conditional fee shifting on settlement probably varies too much by case type to justify a single uniform rule.<sup>250</sup> This is an important point. The idea that the Federal Rules of Civil Procedure should apply uniformly to all substantive law claims—the so-called transsubstantive ideal<sup>251</sup>—still has a strong hold on rulemaking today. That hold must be relaxed if the committee is to design sensible fee-shifting rules.

These four principles will make it difficult for the committee to adopt a conditional fee-shifting rule. But that is as it should be. Tinkering with settlement incentives is a risky and difficult undertaking, as the theoretical and empirical literature on Rule 68 attests, and it must be done cautiously and with an adequate grasp of the likely consequences. One thing is clear: it is not enough simply to argue, as the Supreme Court did in *Marek*, that the penalty will make a party “think very hard” before rejecting a settlement offer.<sup>252</sup> Rulemakers must explain why the party needs to think harder and how thinking harder will promote desirable settlements.

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<sup>247</sup> See 12 WRIGHT, MILLER & MARCUS, *supra* note 10, § 3001, at 70 (suggesting that there has been a shift in recent years from relying on incentive-based settlement promotion tools like Rule 68 to relying on judicial intervention coupled with ADR).

<sup>248</sup> See, e.g., Miller, *supra* note 3.

<sup>249</sup> See Bone, *supra* note 245, at 1981–84.

<sup>250</sup> For example, the effects of a conditional fee-shifting rule on settlement might be highly sensitive to different information structures. See, e.g., Spier, *supra* note 33, at 198.

<sup>251</sup> See Robert M. Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975).

<sup>252</sup> *Marek v. Chesny*, 473 U.S. 1, 11 (1985).

## CONCLUSION

Rule 68 is an example of a Federal Rule transformed by a pro-settlement ideology. The Rule was changed without judges even being aware that a change was taking place. Other FRCP have been altered through interpretation, but in those cases, the interpretation is justified as furthering a sensible account of the Rule's original purpose. Rule 68 is different. Its interpretation is tied to a revisionist understanding of what the Rule was supposed to do.

Rule 68 was born in a concern about fairness, and from the beginning it incorporated the elements of an unreasonable plaintiff model. The Rule played only a minor role in the FRCP for nearly forty years. Then, when interest in settlement promotion became intense in the 1970s and 1980s, Rule 68 was resurrected as a settlement promotion tool. The original history of the Rule, always poorly understood, was revised in settlement promotion terms. In this way, Rule 68 was reborn, but the Rule's text kept getting in the way. The mismatch between revisionist purpose and original text still creates problems for interpreting the Rule and is likely to frustrate Advisory Committee efforts to amend it.

The history of Rule 68 also holds lessons for the future of rulemaking in general. The most important lesson is that rulemakers must be prepared to explain publicly the normative justification for a procedural rule and to do so in a careful way. One of the reasons the original Rule 68 has been so problematic is that the drafters did not think hard enough about the Rule's purpose or its text and did not justify their choices publicly.

The Advisory Committee today is right to be concerned about procedure's effect on settlement and also right to consider a conditional fee-shifting rule as a possible settlement tool.<sup>253</sup> However, the committee must resist the pressure to focus exclusively on maximizing the number of settlements. It is crucial to consider settlement quality too. To evaluate quality, however, the committee must develop a normative account of procedure that distinguishes good settlements from bad.

The second lesson has to do with the relationship between rulemaking and politics. As the experience with Rule 68 demonstrates, procedural rules sometimes provoke intense interest group conflicts. Faced with competing interests and sharp disagreement, the Advisory Committee all too often tries to appease through compromise. This strategy either paralyzes the committee, as it did with the proposed amendments to Rule 68, or pushes the committee to adopt highly general rules that satisfy all sides but offer trial judges little guidance.<sup>254</sup>

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<sup>253</sup> See Bone, *supra* note 245, at 1981–85 (explaining why settlement effects are as important as trial effects in designing procedural rules).

<sup>254</sup> See Bone, *supra* note 177, at 916–17, 925–26 (analyzing this problem).

The solution to this dilemma is to reject the urge to compromise. The committee's proper role is not to accommodate interests or cater to lawyer preferences. The committee's role is to develop a normative account of procedure and evaluate proposals on the basis of that account. Rather than compromise, the Advisory Committee must persuade through carefully reasoned arguments. In particular, the history of efforts to revise Rule 68 shows that for conditional fee shifting as a settlement tool, compromise is doomed to failure.

As the Federal Rules of Civil Procedure celebrate their seventieth anniversary, it is a good time to take stock of the changes in adjudication and civil procedure over the past seventy years. Rule 68 offers a clear view of those changes, and the history of the Rule holds lessons for the future. We would do well to learn those lessons.

