Marek v. Chesny: The Inherent Incompatibility of "Offers of Judgment" and the Civil Rights Laws

I. INTRODUCTION

Marek v. Chesny[1] substantially abridges the rights of plaintiffs to recover attorney's fees from opponents when authorized to do so by a fee-shifting statute.[2] In *Marek*, the United States Supreme Court held that a plaintiff who rejects a pretrial settlement offer that is greater than the final judgment obtained after trial must be denied all post-offer costs—including attorney's fees. *Marek* allows courts to levy a stiff monetary sanction against a client and an attorney if they miscalculate the pecuniary worth of their case. This sanction is a consequence of the Supreme Court's application of Rule 68 of the Federal Rules of Civil Procedure[3] to a plaintiff who sought an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. § 1988).[4]

This Comment analyzes the impact of the *Marek* decision upon the vigorous enforcement of the civil rights laws. Part II summarizes the

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1. 105 S. Ct. 3012 (1985).

2. A fee-shifting statute shifts the responsibility for paying the plaintiff's attorney's fees to the defendant if the plaintiff prevails in the action.

3. Rule 68 provides:

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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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

FED. R. CIV. P. 68.

4. Section 1988 provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1983).

treatment of attorney's fees in the United States and the congressional policies behind the enactment of fee-shifting statutes. Part III reviews the history and objectives of Rule 68. Part IV examines cases involving the issue of whether Rule 68 should be applied when fee-shifting provisions are present, with emphasis upon cases brought under section 1988. Finally, this Comment discusses recent proposed amendments to Rule 68 and their effect upon cases involving fee-shifting statutes.

II. THE TREATMENT OF ATTORNEY'S FEES IN THE UNITED STATES

A. *The "American Rule"*

Traditionally in the United States, each litigant has paid his or her own attorney's fees unless a rule or statute authorizes otherwise.[5] This so-called "American rule" has been described as an historical accident,[6] a product of the early American frontier experience,[7] and a result of a distrust of lawyers by the colonial settlers.[8] Whatever the reason for its existence, the American rule is unique among the world's democratic legal systems.

In virtually every country outside the United States, courts award attorney's fees to the prevailing party as part of court costs or include them in damages.[9] The American rule preventing fee-shifting has faced growing criticism and has been riddled with exceptions over the years.[10] Much of the criticism arises from the belief that the rule prevents lower- and middle-class litigants from bringing meritorious claims.[11] For those litigants who do bring claims, the rule prevents prevailing parties from being adequately compensated because the full cost of pursuing their claims is not refunded.[12] These concerns have led legislatures and courts to recognize exceptions to the American rule.

B. *Exceptions to the American Rule: Fee-Shifting Statutes*

Litigating in bad faith has long been recognized as a common law exception to the American rule and is one of the non-statutory grounds for fee-shifting.[13] Congress has also authorized exceptions to the rule.

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5. 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2675 (1983).
6. Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 640-642 (1974).
7. *Id.*
8. *Id.*
9. *Id.* at 639.
10. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651 (1982) [hereinafter cited as Rowe].
11. Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346, 348 (1980).
12. *Id.*

avoid protracted litigation.[33] The rule actively encourages defendants to make settlement offers ("offers of judgment") to accomplish the goal of early settlement.[34] Rule 68 provides that up to ten days prior to trial, a defending party may make a formal offer to settle a claim for monetary or other relief, plus "costs then accrued."[35] Should the plaintiff refuse the offer and then obtain a judgment "not more favorable than" the offer refused, the plaintiff must pay all of the defendant's as well as the plaintiff's own post-offer costs.[36] Consequently, it is to an offeree-plaintiff's advantage to consider an offer of judgment seriously and to weigh its value against probable recovery at trial. Rule 68, therefore, indirectly reduces congestion in the federal courts.

Although Rule 68 is a potentially powerful negotiation tool, defendants have rarely relied upon it in making settlement offers. Explanations for the infrequent use of Rule 68 range from practitioners' ignorance of the rule to the relatively modest costs saved by using the rule.[37] However, this trend was reversed by *Mr. Hanger, Inc. v. Cut Rate Hangers, Inc.*,[38] a case that demonstrated the potentially tremendous economic impact of Rule 68.

In *Mr. Hanger,* the defendant submitted a Rule 68 offer of $25.00 to the plaintiff along with the promise to forbear using a disputed patented design.[39] The plaintiff refused the offer and subsequently lost on the merits at trial.[40] The court assessed the entire amount of the defendant's $1,000 costs against the plaintiff pursuant to the defendant's request.[41] The court stated that application of Rule 68 was mandatory and "[e]ven apart from the explicit language of the rule, sound judicial policy warrants construing it in a manner that would encourage litigants to take advantage of its provisions and avoid its sanction."[42]

Mr. Hanger established the usefulness of Rule 68 as a settlement device and sparked interest in the use of offers of judgment.[43] Curiously, most Rule 68 cases heard after *Mr. Hanger* have been in the civil rights area.[44] Because of the equitable considerations in this area, serious conflicts arise when courts attempt to apply the Rule 68 sanction in civil rights cases.[45]

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33. *See* 10 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3001 (1973).
34. Note, *Delta Air Lines, Inc. v. August: Taking the Teeth Out of Rule 68*, 43 U. PITT. L. REV. 765, 769, 770 (1982) [hereinafter cited as *Delta* Note].
35. FED. R. CIV. P. 68, *supra* note 3.
36. *Id.*
37. Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 890.
38. 63 F.R.D. 607 (E.D.N.Y. 1974).
39. *Id.* at 608.
40. *Id.* at 609.
41. *Id.* at 611.
42. *Id.*
43. *Delta* Note, *supra* note 34, at 773.
44. *Id.*
45. *Id.*

IV. The Application of Rule 68 in Cases Involving Section 1988

A. *The Impact Upon Plaintiffs*

The disagreement concerning whether Rule 68 should be applied in civil rights actions[46] results from the drafters' failure to define the term "costs."[47] The term's ambiguity has caused a split among the courts; courts disagree as to whether "costs" should include attorney's fees even though attorney's fees are generally awarded to plaintiffs under section 1988.

Prior to the Supreme Court's ruling in *Marek*, three federal courts had concluded that "costs then accrued" must include attorney's fees. In *Scheriff v. Beck,*[48] one of the defendants made a Rule 68 offer of judgment that was subsequently greater than the plaintiff's ultimate recovery.[49] The offer, however, explicitly excluded attorney's fees then accrued.[50] Consequently, the United States District Court for the District of Colorado held the offer fatally defective and refused to award the defendant-offeror his costs which accrued after the date of the offer of judgment.[51]

In reaching this conclusion, the district court first observed that "Rule 68 requires that an offer of judgment include payment of costs then accrued."[52] Next, it stated that attorney's fees *may* constitute part of costs in civil rights actions, and that Rule 68 does not allow an offeror to choose which accrued costs he is willing to pay.[53] Therefore, the court held that an offer for costs then accrued that excluded attorney's fees must be invalid. The premise that attorney's fees are subsumed within costs is implicit in the court's conclusion.

In *Fulps v. City of Springfield,*[54] the Court of Appeals for the Sixth

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46. For authorities discussing this issue *see generally* Simon, *infra* note 47; Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719 (1984); Note, *The 'Offer of Judgment' Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 GOLDEN GATE L. REV. 963 (1980); Commentary, *Upping the Ante for Rejecting Settlement Offers—Marek v. Chesny and New Rule 68 Proposals*, 7 ATTORNEY FEE AWARDS RPTR. 1 (Dec. 1984); *Levin, Practical, Ethical and Legal Considerations Involved in the Settlement of Cases in Which Statutory Attorney's Fees are Authorized*, 14 CLEARINGHOUSE REV. 515 (1980).

47. Simon, *Rule 68 at the Crossroads: The Relationship Between Offers of Judgment and Statutory Attorney's Fees*, 53 U. CINN. L. REV. 889, 910 (1984) [hereinafter cited as Simon].

48. 452 F. Supp. 1254 (D. Colo. 1978).

49. *Id.* at 1259.

50. *Id.*

51. Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978).

52. *Id.*

53. *Id.*

54. 715 F.2d 1088 (6th Cir. 1983).

Circuit held that the term "costs" as used in Rule 68 should be construed as including attorney's fees when fees are authorized by the statute at issue in the case. The court's reasoning was premised on the fact that section 1988 allows reasonable attorney's fees as part of the costs.[55]

Finally, in *Waters v. Heublein, Inc.*[56] the District Court for the Northern District of California stated that it denied plaintiff's counsel attorney's fees for his post-offer work because the final judgment obtained by the plaintiff was less than the pretrial judgment offer rejected by the plaintiff.[57]

The courts in *Scheriff* and *Fulps* essentially followed the same line of reasoning in concluding that attorney's fees are a part of costs. These courts determined that costs should include attorney's fees because section 1988 expressly allows reasonable attorney's fees to be paid as part of court costs. While this reasoning is logical on its face, the courts fail to consider that "costs" have been historically interpreted as including only the traditional items listed in 28 U.S.C. § 1920.[58] Rule 54(d) of the Federal Rules of Civil Procedure supports this interpretation by implying that costs include only those items that can be tallied by a clerk upon one day's notice.[59] Therefore, the conclusions drawn by the courts in *Scheriff* and *Fulps* are inconsistent with the traditional meaning

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55. "Since Section 1988 includes attorney's fees 'as a part of the costs,' then, a Rule 68 offer of judgment providing for 'costs then accrued' must be read to include 'costs and attorney's fees then accrued.'" *Id.* at 1092.

56. 485 F. Supp. 110 (N.D. Cal. 1979).

57. *Id.* at 114.

58. Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshall;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
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> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
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> (5) Docket fees under section 1923 of this title;
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> (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.
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> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 *U.S.C.* § 1920 (1978).

59. *See* Rule 54(d), *infra* note 86.

of the term costs.

In *Waters,* the court was influenced by the attorney's unreasonable claim for fees.[60] The desire of the court to prevent unreasonable claims for fees, however, could have been accomplished without ruling that attorney's fees should be a part of costs. Rather than including attorney's fees in costs to penalize dilatory conduct, the court should have used other established sanctions. The common law sanction for vexatious or bad faith litigation[61] or the section 1988 provision which awards "reasonable" counsel fees only should be used to punish attorney or plaintiff misconduct.[62] *Piggie Park* also sets forth the standard that attorney's fees should be awarded under section 1988 "*unless special circumstances* would render such an award unjust."[63] *Scheriff* is one example of a case in which a court refused to award the prevailing plaintiff attorney's fees based upon the special circumstances involved. The plaintiff instituted a frivolous lawsuit with the intent of totally depleting the savings of one of the defendants.[64] In refusing to award fees to the plaintiff the court stated:

> Here the civil rights violation was precipitated by an irrational, deliberate scheme to involve [the defendant] in some type of litigation. Plaintiff engaged in conduct over several months that cannot be considered to be anything but outrageous. His fee and cost request is some forty times the amount of his recovery. If the phrase "special circumstances" has any application to a prevailing plaintiff in any case, it applies here. Plaintiff's motion for an award of fees and costs will be denied.[65]

As illustrated by *Scheriff,* the court's discretionary power to award reasonable fees or to withhold an award entirely promotes meritorious civil rights claims and prevents undermining the purposes of section 1988 more effectively than the policy of adding counsel fees to costs.

Marek demonstrates that the United States Supreme Court places greater emphasis on clearing dockets than on making courts amenable to civil rights actions. In *Marek,* the defendants made a timely pretrial settlement offer of $100,000 including accrued costs and attorney's fees.[66] The plaintiff refused the offer because he believed that $500,000 was a more reasonable sum.[67] The district judge stated that both figures

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60. In discussing the attorney's motion for fees, the court described the attorney's time records as "minimally useful" and "vague" and stated that the hours claimed were "undeniably excessive." Waters v. Heublein, Inc., 485 F. Supp. 110, 112 (N.D. Cal. 1979).

61. *See supra* text accompanying note 13.

62. *See supra* text accompanying notes 28-31. Although 42 U.S.C. § 2000e-5(K) rather than § 1988 was the statutory fees provision applicable in *Waters,* it too permits reasonable fees only. *See* Waters v. Heublein, Inc., 485 F. Supp. 110, 114 (N.D. Cal. 1979).

63. Newman v. Piggie Park Enter., 390 U.S. 400, 402 (1968) (emphasis supplied).

64. Scheriff v. Beck, 452 F. Supp. 1254, 1257 (D. Colo. 1978).

65. *Id.* at 1260.

66. Commentary, *Upping the Ante for Rejecting Settlement Offers—Marek v. Chesny and New Rule 68 Proposals,* 7 ATTORNEY FEE AWARDS RPTR. 1, 4 (Dec. 1984) (*citing* Chesny v. Marek, 547 F. Supp. 542, 545 (1982) [hereinafter cited as FEE RPTR.].

67. *Id.*

were unrealistic and suggested a compromise between $250,000 to $400,000, without success.[68] After the trial the jury awarded the plaintiff $60,000.[69] The Supreme Court granted certiorari to determine whether attorney's fees incurred by a plaintiff after a Rule 68 offer of settlement must be paid by the defendant under section 1988, when the plaintiff recovered a judgment less than the offer.[70]

By including attorney's fees in the term "costs" as used in Rule 68, the Supreme Court places civil rights plaintiffs under additional financial pressure to settle. The Court characterized this result as advantageous to plaintiffs who "will benefit from the offers of settlement encouraged by Rule 68."[71] By agreeing to settle, some plaintiffs may receive more compensation than would have been awarded had the case gone to trial.[72] The Court further stated that, even if the compensation is not greater, the plaintiff will have the benefit of earlier enjoyment of the award without the burdens of litigation.[73]

Another result of the *Marek* decision is that it enables a defendant who may have violated the law to make an offer under Rule 68 immediately upon being served with a complaint. The plaintiff will be forced to accept or reject the offer before information can be obtained through discovery to assess the strength of a claim and the worth of the settlement offer.[74] This inadequate investigation of the claim and the settlement offer will inevitably place pressure on plaintiffs requiring them to accept unsatisfactory settlements in order to avoid the cost of litigation.

The Court's reasoning in *Marek* is questionable in three respects. First, it presumes that the litigants are in substantially equal bargaining positions.[75] This presumption is erroneous, however, given that many civil rights plaintiffs are economically disadvantaged individuals when compared to the defendants, who are often governmental entities.[76] It is, therefore, unrealistic to suggest that such plaintiffs will not be in an inferior negotiation position.

Second, while it is consistent with the goals of civil rights that plaintiffs accept settlement offers, the plaintiffs' role as enforcer of these rights necessitates reaching the best possible arms-length agree-

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68. *Id.*

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

70. Marek v. Chesny, 105 S. Ct. 3012, 3014 (1985).

71. *Id.* at 3018.

72. *Id.*

73. *Id.*

74. Simon, *supra* note 47 at 921; Marek v. Chesny, 105 S. Ct. 3012, 3029 (1985) (Brennan, J., dissenting).

75. Note, *The Impact of Proposed Rule 68 on Civil Rights Litigation*, 84 COLUM. L. REV. 719, 740 (1984) [hereinafter cited as COLUM. Note].

76. *Id.* at note 132.

ment.[77] In addition, Congress enacted section 1988 to encourage plaintiffs to act as enforcers of civil rights by bringing suit against violators.[78] Injecting additional financial pressure into civil rights litigation in order to force settlements is wholly inconsistent with the attorney's fees statute and the policies behind civil rights laws.[79]

Finally, the Court's decision was made with the benefit of hindsight which facilitated its appraisal of the worth of the offer. Plaintiffs, however, do not have this advantage when evaluating whether a defendant's offer will be more substantial than the final judgment awarded by the jury. Thus, predicting the ultimate worth of a settlement offer may be an impossible task.[80]

The weight of authority lies on the side of excluding attorney's fees from items of taxable costs.[81] As early as 1946 in *Gamlen Chemical Co. v. Dacar Chemical Products Co.*,[82] the District Court for the Western District of Pennsylvania held that the plaintiff was not entitled to receive attorney's fees as part of costs.[83]

Less than forty years later, the United States Supreme Court also rejected the notion that court costs include attorney's fees.[84] The Court's decision was based on its understanding that "costs" had a well-settled meaning restricted to traditional items of costs set forth in 28 U.S.C. § 1920.[85] This conclusion is consistent with the suggestion in Federal Rule of Civil Procedure 54(d) that costs were intended to encompass only those readily calculated charges that could be tallied by a clerk upon a single day's notice of settlement.[86] Furthermore, it makes little sense to include attorney's fees in the category of readily calculated charges because only a court can award fees after hearings that are often lengthy and detailed.[87]

Subsequently, federal courts generally have held that the costs recoverable under Rule 68 do not include attorney's fees[88] for several

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77. Note, *The 'Offer of Judgment' Rule in Employment Discrimination Actions: A Fundamental Incompatibility*, 10 GOLDEN GATE L. REV. 963, 981 (1980).

78. *Id.*

79. *Id.*

80. *Id.* at 980.

81. *Infra* note 88.

82. 5 F.R.D. 215 (W.D. Pa. 1946).

83. *Id.* at 216.

84. Roadway Express, Inc. v. Piper, 447 U.S. 752, 759-761 (1980).

85. *See supra* note 58.

86. "Costs may be taxed by the clerk on one day's notice." FED. R. CIV. P. 54(d).

87. Marek v. Chesny, 105 S. Ct. 3012, 3019 (1985) (Brennan, J., dissenting).

88. Roadway Express, *supra* note 84, *see also* Pigeaud v. McLaren, 699 F.2d 401 (7th Cir. 1983); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983); White v. New Hampshire Dept. of Employment Sec., 629 F.2d 697 (1st Cir. 1980); *rev'd on other grounds*, 455 U.S. 445 (1982); Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 495 (D. N.D. 1982); Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980); Gay v. Waiters' and Dairy Lunch Men's Union, Local No. 30, 86 F.R.D. 500 (N.D. Cal.

reasons. First, "when the draftsmen of the Federal Rules of Civil Procedure wished to include attorney's fees they have been specifically mentioned."[89] Second, the definition of costs in Rule 54(d) details items quite dissimilar from the discretionary fees allowable under section 1988.[90] Finally, "there is no evidence that Congress, in its enactment of 42 U.S.C. § 1988, intended to incorporate thereby a broadening of the meaning of 'costs' in Rule 68."[91]

The majority in *Marek*, however, chose to reduce drastically the broad protection offered by section 1988 to civil rights plaintiffs against the high cost of legal representation, by disregarding the conclusions drawn by the greater number of lower courts. *Marek* will negatively affect plaintiffs who request attorney's fees under section 1988, as well as those cases involving other fee-shifting statutes. Consequently, this holding affects at least one-third of all federal litigation.[92]

B. *Disruption of the Attorney-Client Relationship*

In addition to reducing the protection traditionally offered civil rights plaintiffs, *Marek* will disrupt the attorney-client relationship because including attorney's fees in costs in fee-shifting cases injures lawyers as well as clients. By awarding attorney's fees, Congress not only intended to make it possible for plaintiffs with few assets to obtain legal assistance, it also intended to reward lawyers whose services benefitted the public.[93] The majority in *Marek* dismisses the notion of compensating attorneys for their services if their clients' ultimate recovery is less than a rejected settlement offer because when this occurs, the prevailing party has received no financial benefit from the post-offer work of the attorney.[94] This argument has merit when the attorney intentionally brings an obviously vexatious or frivolous claim, or intentionally prolongs the litigation hoping to accrue more fees. But an attorney's unethical conduct can and should be sanctioned by using the court's *discretionary* power to award counsel fees under existing law.[95] The high standards of fee-shifting statutes will not be met if attorneys refuse to serve clients for

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1980) and Gamlen Chemical Co. v. Dacar Chemical Products Co., 5 F.R.D. 215 (W.D. Pa. 1946).

89. Pigeaud v. McLaren, 699 F.2d 401, 403 (7th Cir. 1983). Chief Judge Cummings directs specific attention to Rules 30(g), 37(a)(4), 37(d), and 56(g) of the FEDERAL RULES OF CIVIL PROCEDURE.

90. White v. New Hampshire Dept. of Employment Sec., 629 F.2d 697, 702 (1st Cir. 1980), *rev'd on other grounds*, 455 U.S. 445 (1982).

91. Association for Retarded Citizens of N.D. v. Olson, 561 F. Supp. 495, 498 (D. N.D. 1982).

92. Simon, *supra* note 47, at 892.

93. Dowdell v. City of Apopka, 698 F.2d 1181, 1191 (11th Cir. 1983) (*citing* Freeman v. Ryan, 408 F.2d 1204, 1206 (D.C. Cir. 1968)).

94. Marek v. Chesny, 105 S. Ct. 3012, 3018 (1985).

95. *See supra* text accompanying notes 61-63.

fear that they will not be compensated even if their client prevails.[96]

Marek poses a dilemma for the attorney who wishes to be compensated for services rendered. The attorney may encourage a client to settle to safeguard the attorney's fees rather than zealously represent the client. If a client insists on rejecting a settlement offer the attorney may prepare less diligently for trial, keeping the monetary investment at a minimum. This lack of preparation could result in a recovery less than the rejected offer.

Forcing the attorney to bear the loss of fees each time the attorney and client erroneously estimate the worth of a case is too strict a sanction. It is unrealistic to expect that an attorney and a plaintiff can foresee, in every instance, the exact weight a jury may give to the evidence set forth at trial or the precise monetary value the jury will assign to the plaintiff's injury.

Marek aptly illustrates the subjective nature of making such a difficult prediction. Although the judge initially shared the plaintiff's view that the $100,000 offer was unreasonably low, he nevertheless re-characterized the offer as a good faith attempt to settle the case and required the plaintiff to forfeit his statutory right to recover post-offer attorney's fees from his opponents.[97] Requiring the plaintiff and the attorney to accept a settlement offer or bear the penalty that will result from misjudging the ultimate financial value of the case is inequitable and impractical, when even a disinterested factfinder cannot predict the final outcome accurately.

Ironically, the *Marek* decision is likely to promote additional litigation. A client may reject a Rule 68 settlement offer and go to trial based on advice from the client's attorney. If the client fails to recover post-offer counsel fees because the offer was higher than the ultimate recovery, the client may decide to sue the attorney for malpractice to recover lost fees from the original case.[98]

Attorneys in cases brought pursuant to fee-shifting statutes can expect to receive stiffer sanctions for extending the length of litigation than will other lawyers. Although misconduct by a civil rights lawyer is just as objectionable as misconduct by any other lawyer, "[t]here is no persuasive justification for subjecting lawyers in different areas of practice to differing sanctions for dilatory conduct."[99] A more desirable approach is for the courts to exercise their inherent authority to assess fees against parties who act "in bad faith, vexatiously, wantonly, or for

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96. Comment, *Settlement Offers Conditioned Upon Waiver of Attorney's Fees: Policy, Legal and Ethical Considerations*, 131 U. PA. L. REV. 793, 795 (1983).

97. FEE RPTR., *supra* note 66, at 4.

98. *Accord* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1088 & n.41 (1984).

99. Roadway, *supra* note 84, at 763.

oppressive reasons."[100] Assessing fees against parties who act in bad faith will result in more objective and consistent standards of expected conduct, thereby lessening the instances of such negative behavior.

V. PROPOSED AMENDMENTS TO RULE 68 BY THE ADVISORY COMMITTEE ON CIVIL RULES

By interpreting costs in Rule 68 as encompassing attorney's fees the Supreme Court in *Marek* has drastically altered the balance of power, to the detriment of plaintiffs in cases adjudicated under fee-shifting statutes. Although the majority contends that Rule 68 "is neutral, favoring neither plaintiffs nor defendants,"[101] this contention is firmly contradicted by the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. The Advisory Committee has twice commented that Rule 68 "is a 'one-way street,' available only to those defending against claims and not to claimants."[102]

The Advisory Committee on Civil Rules has proposed amendments to Rule 68 for the past three years in an effort to rid the Rule of its ambiguity.[103] The 1983 proposal was withdrawn after strong opposition.[104] The 1984 proposal was drafted in response to some of the criticism of the 1983 proposal.[105]

The 1984 proposal vests broad discretion in the district judge to determine whether and when a party should be penalized for "unreasonably" rejecting a settlement offer.[106] The district judge would also determine the amount of any sanction. The 1984 proposal expands the Rule's scope to include a party who unreasonably rejects a settlement offer and then loses the case, which would eliminate the current anamolous situation created by *Delta* and *Marek*: that a defeated plaintiff

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100. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-259 (1975). *See also* text accompanying notes 61-63, 95. A civil rights plaintiff who unreasonably fails to accept an offer of settlement and recovers a judgment less than the offer is precluded under § 1988 from recovering post-offer fees, as interpreted by Hensley v. Eckerhart, 461 U.S. 424 (1983). *Hensley* held that "the extent of a plaintiff's success is *a* crucial factor in determining the proper amount of an award of attorney's fees." *Id.* at 440 (emphasis added). Justice Brennan analyzes this point concisely, *see* Marek v. Chesny, 105 S. Ct. 3012, 3031 (1985) (Brennan, J., dissenting).

101. Marek v. Chesny, 105 S. Ct. 3012, 3027 (1985).

102. 98 F.R.D. 339, 363 Advisory Committee's Note, proposed amendment to FED. R. CIV. P. 68 (1983); 102 F.R.D. 407, 434 Advisory Committee's Note, proposed amendment to FED. R. CIV. P. 68 (1984).

103. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, *reprinted in* 98 F.R.D. 339 (1983) and 102 F.R.D. 407 (1984) [hereinafter cited as 1983 Draft and 1984 Draft respectively].

104. FEE RPTR., *supra* note 66, at 5. "The amendments proposed in 1983 would have provided for an automatic, mandatory shifting to the offeree of all the offeror's post-offer attorneys' fees in the event that the offeree failed to obtain a judgment as favorable as a rejected settlement offer." *Id.*

105. FEE RPTR., *supra* note 66, at 5.

106. 1984 Draft, *supra* note 103.

is in a better position than a prevailing plaintiff who recovers less than expected.[107]

By enlarging the Rule to allow "parties" (including plaintiffs) to make settlement offers, the 1984 proposal would reduce the overwhelming advantage *Marek* grants to defendants. By requiring (1) a minimum of sixty days after the service of the summons and complaint before a party may make a Rule 68 offer and (2) a party to extend an offer a minimum of ninety days before trial, the 1984 proposal further equalizes the bargaining positions of the litigants.

Although the 1984 proposal might improve the position of plaintiffs affected by the *Marek* decision, it is doubtful that any reduction in litigation would result. On the contrary, adding a "reasonableness" standard to the rule would create more litigation to interpret the standard. Consequently, Rule 68's objective of preventing protracted litigation would not be achieved by this proposal.

Adoption of the 1984 proposal as an amendment to Rule 68 is unlikely. At the present time, the proposal has been tabled by the Committee,[108] and it is doubtful that fruitful discussion of the 1984 proposal will be initiated in the near future. Thus, the question of accomodating the contradictory philosophies inherent in Rule 68 and fee-shifting statutes remains unanswered.

VI. CONCLUSION

Present-day enthusiasm for settling disputes before trial has produced Supreme Court precedent that elevates settling disputes and reducing the judicial workload above the vigorous enforcement of civil rights laws. The *Marek* decision wrongly subverts the goals of section 1988 and other fee-shifting statutes in order to promote the goals of Rule 68. The only realistic answer to this seemingly irreconcilable situation is to amend Rule 68 to exclude cases brought under fee-shifting statutes. Exempting such statutes, especially section 1988, from the force of Rule 68 is completely warranted when examined in light of the public policy objectives behind fee-shifting.

While the 1984 proposed amendment may have rectified some of the damage caused by *Marek* it would have done so at the expense of Rule 68. Amending Rule 68 in an attempt to clarify some of its ambiguities will do little more than add to the existing confusion that has been caused by applying Rule 68 to situations for which it was not originally designed. The only viable method that will serve the ideals of both Rule 68 and the fee-shifting statutes is to exempt fee-shifting

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107. COLUM. Note, *supra* note 75, at 726.

108. Verified by telephone conference with the Rules Committee, Office of General Counsel, on September 19, 1986.

statutes from the operation of Rule 68. Further attempts to compromise will only add to the confusion and create obstacles that will prevent reaching either ideal.

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