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


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Abstract

Rule 68, the offer of judgment rule, has been described as “among the most enigmatic of the Federal Rules of Civil Procedure.” This 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 today that Rule 68 was adopted to encourage settlements, but the Rule’s text makes it an extremely poor settlement device. 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 just a settlement) discourages its use, and the Rule's timing requirements are puzzling. The mystery is why intelligent lawyers and judges in 1938 would have drafted such a poor settlement promotion tool. This Article solves that mystery. Contrary to the conventional view, the 1938 drafters did not intend Rule 68 to encourage settlement in the way we understand that today. They adopted the offer of judgment rule that existed in state practice, the primary purpose of which was litigation fairness not settlement promotion. The state rules aimed to prevent plaintiffs from imposing costs unfairly when the defendant offered everything the plaintiff was entitled to receive from trial. The text of Rule 68 makes much more sense when it is viewed in fairness terms. The prevailing settlement promotion view became entrenched in the 1970s and 1980s, when concerns about litigation cost, case backlog, and litigation delay grew acute and interest in settling cases intensified. Because the settlement promotion view has caused problems for interpretation of the Rule and for efforts to revise it, clarifying the history of Rule 68 is important. Moreover, empirical work on Rule 68 is nearing completion and the Advisory Committee is considering another look at the Rule, so the time is ripe for a clearer understanding. With the FRCP about to celebrate their seventieth anniversary, the history of Rule 68 also sheds light on two of the most important changes in federal civil procedure over the past seventy years: the rise of settlement and the politicization of the rulemaking process.

Table of Contents

INTRODUCTION

I. RULE 68 TODAY

II. RULE 68 IN 1938

A. Setting the Stage: Two Models of Rule 68
1. Settlement Promotion Model
2. Unreasonable Plaintiff Model

B. The 1938 Drafting Process
C. The Nineteenth Century Background
D. Pulling the Pieces Together

III. Rule 68 Since 1938

A. 1938-1975: A Period of Relative Dormancy
B. 1975-1980: Litigation Crisis and the Transformation of Rule 68
C. 1980-1985: Transformation Realized and the Battle Over Rule 68

1. Delta Airlines v. August: The Supreme Court Weighs In
2. 1983-1984: The Advisory Committee Gets Involved
3. Marek v. Chesny: The Supreme Court Weighs in Again

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

IV. Lessons from History

A. Lessons for Interpreting Rule 68
B. Lessons for Amending Rule 68

V. Conclusion

Introduction

The Federal Rules of Civil Procedure are about to celebrate their seventieth anniversary, yet one of those rules, Rule 68 (Offer of Judgment), is still a mystery. Rule 68 has been referred to as a “riddle” and described as “among the most enigmatic of the Federal Rules of Civil Procedure.” 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 judgment on the plaintiff and makes the plaintiff who rejects the offer liable for post-offer

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2 Crossman v. Marcoccio, 806 F.2d 329, 331 (1st Cir. 1986) (referring to the ambiguity in the text concerning whether Rule 68 merely cancels plaintiff’s entitlement to costs or also requires plaintiff to pay defendant’s costs).
costs if she fails to improve on the offer at trial. It is universally accepted that Rule 68 was 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 just a settlement) discourages its use, and the Rule’s timing requirements are puzzling. The 1938 rule 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 also explains why the Rule has been so difficult to understand. The solution 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 the state codes. Those state rules were not designed to promote settlement as such. Their purpose was narrower: 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 prevailing settlement promotion view became entrenched in the 1970s and 1980s when concerns about litigation cost, case backlog, and litigation delay grew acute and interest in settling cases intensified.

3 The economic literature suggests the Rule might even be counterproductive for settlement. See Geoffrey P. Miller, An Economic Analysis of Rule 68, 15 J. LEG. STUD. 93 (1986).
This explanation for Rule 68 is intimately connected to the history of federal civil procedure in the twentieth century, and in particular to the rise of settlement and changing views of the proper role of Congress and the Supreme Court in procedural design. 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. Moreover, Rule 68 played a role in the re-assertion 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. 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 others, its importance has increased markedly over the past three decades. If the conventional view is correct, Rule 68 is the only Federal Rule devoted exclusively to encouraging settlement. As such, it has attracted keen 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. Scholars are now studying Rule 68’s empirical effects,4 and the Advisory Committee recently declared its intention to take another look at the Rule in the near future.5 Any such effort 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

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seventy-year history supports a presumption in its favor as a settlement device. On a
more general level, it is appropriate on the eve of the FRCP’s seventieth anniversary to
take stock of major changes in federal procedure over the past seven decades, and Rule
68 is a particularly good vehicle for doing this, since it is a rule in large part transformed
by that history.

The following discussion is divided into five parts. Part I describes Rule 68 and
highlights four of its puzzling features. 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 FRCP drafters adopt a rule like Rule
68, and why did they draft the Rule the way they did?

Part II answers these 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 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. 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

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6 These archival materials include transcripts of the original Advisory Committee meetings, early drafts of
the original Rules, suggestions received from the public, and original correspondence – all located among
the Edmund Morgan Papers at Harvard Law School Special Collections and the Charles Clark Papers at
Yale University Manuscripts and Archives.
contemporary interpretation in settlement promotion terms. And it also explains how efforts to perfect the Rule as a settlement device contributed to the politicization of the rulemaking process with a profound impact on the integrity of court rulemaking and the role of Congress in designing federal procedure.

Although this Article is mainly historical and analytic, it also has prescriptive implications, and Part IV touches briefly on some of those. These implications are relevant to how the Advisory Committee should approach revising Rule 68 and also to how judges should interpret the Rule if the Committee chooses to leave it intact.

Part V 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, it now reads as follows:7

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7 The style amendments went into effect on December 1, 2007, and they are not supposed to make any substantive changes. Before the style amendments went into effect, Rule 68 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 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.
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 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.

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.\(^8\) Rule 68 gives John ten days to consider the offer.\(^9\) 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 made.”\(^10\) This means he must pay Mary’s post-offer costs as well as his own.\(^11\)

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\(^8\) 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. See 12 C.A. WRIGHT, A.R. MILLER, R.L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §3002 (2d ed. 1997) [hereinafter cited as WRIGHT ET AL., FEDERAL PRACTICE].

\(^9\) Id. § 3004.

\(^10\) Determining whether a judgment is more favorable than an offer can sometimes be tricky, especially when injunctive relief is involved. See id. § 3006.1.

\(^11\) Rule 68 “costs” do not include fees unless a statute so provides. See infra notes 15-16 & accompanying text. If John improves on the offer at trial, then Rule 68 has no application. 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).
The universally accepted view today is that Rule 68 was included in the FRCP “to encourage settlement and avoid litigation.”\textsuperscript{12} 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.\textsuperscript{13} 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.\textsuperscript{14} Four aspects are particularly noteworthy: its small penalty, its asymmetric application, its requirement of a formal judgment, and its 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).\textsuperscript{15} Most important, costs do not include the most

\textsuperscript{12} Marek v. Chesny, 473 U.S. 1, 11 (1985); accord Delta Airlines, 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, § 68 App. 101 (3rd ed. ) [hereinafter cited as Moore’s Federal Practice] (“The purpose of Rule 68 in 1938 was to encourage settlements and avoid protracted litigation by taxing a claimant with costs”); 12 Wright et al., Federal Practice, supra note 8, § 3001, at 92-93 (“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 (1985) (Rule 68 is “the only procedural rule devoted exclusively to settlement” and it has “no purpose apart from encouraging settlement.”).

\textsuperscript{13} Marek v. Chesny, 473 U.S. 1, 11 (1985).

\textsuperscript{14} See 13 Moore’s Federal Practice, supra note 12, at § 68 App. 101 (noting that Rule 68 is “largely ineffective as a means of achieving its goals”).

\textsuperscript{15} 12 Wright et al., Federal Practice, supra note 8, § 3001. 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.” Thus, taxable costs do not even include all the non-fee expenses incurred in litigating a case.
expensive item in litigation, attorney fees – except in those cases where a fee shifting statute applies and awards fees as part of costs.\textsuperscript{16}

Second, the Rule applies asymmetrically. Only a defendant can take advantage of its cost-shifting threat.\textsuperscript{17} 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 discretionary with the court, while payment of costs under Rule 68 is mandatory.\textsuperscript{18} 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 expect a committee bent on encouraging settlement also to have crafted a Rule that worked two-way \textit{and} imposed a penalty greater than taxable costs to give plaintiffs the ability to pressure defendants too.\textsuperscript{19}

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 difference. To use Rule 68, a defendant must agree to accept the entry of a formal judgment against him.\textsuperscript{20} By contrast, settlements are usually concluded without a

\textsuperscript{17} This follows from the fact that Rule 68 applies only to an offer made by “a party defending against a claim.” See 12 Wright et al., Federal Practice, supra note 8, §3002.
\textsuperscript{18} Id. §3006.
\textsuperscript{19} There might be a Rules Enabling Act problem with using Rule 68 to shift fees as well as costs, see infra notes 157-161 & 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 two-way and award expert witness fees and double taxable costs (but not attorney fees). See Ariz. R. Civ. P. 68 (2007).
\textsuperscript{20} See 12 Wright et al., Federal Practice, supra note 8, §3002. 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 in its written Rule 68 offer. See id. at 93-94; 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).
judgment (other than a judgment of dismissal) and are often coupled with a confidentiality limitation to prevent public disclosure. In fact, the requirement of a formal judgment appears to be a major deterrent to use of Rule 68 today: defendants fear that an adverse judgment with attendant publicity will affect reputation and have other potentially serious consequences.21

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.”22 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,23 but this is no reason to deny the option.

Because of these limitations – and especially the weak penalty – Rule 68 was rarely used and largely ignored for nearly half a century.24 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

21 See Lewis & Eaton, supra note 4, at 18-19. 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 be unconditional and dispose of the entire case. See 12 WRIGHT ET AL., FEDERAL PRACTICE, supra note 8, §3002. It would have been easy to write Rule 68 to apply to conditional settlement offers, 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 conditional 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.

22 Greenwood v. Stevenson, 88 F.R.D. 225, 228 (D.R.I. 1979). It is possible to argue that requiring early offers encourages early rather than late 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.

23 See id. at 229.

24 See Chesny v. Marek, 720 F.2d 474, 479 (7th Cir. 1983) (Posner, J.) (noting that as of 1983 Rule 68 is “little known and little used”).
1980s with a flurry of activity aimed at amending the Rule, activity that triggered a
firestorm of controversy that eventually doomed the reform efforts.25 The Supreme Court
entered the fray in 1985 with a highly controversial decision, Marek v. Chesny,26 which
added fees to the penalty in certain types of cases.

These developments not only produced a marked increase in Rule 68 case law
focusing on the Rule as a settlement promotion device,27 but also inspired an extensive
scholarly literature analyzing the settlement effects of different versions of Rule 68.28
Since the early 1980s, many states have amended their own offer of judgment rules to
make them apply symmetrically and to strengthen the penalty. And 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.29

Yet Rule 68 still puzzles courts and commentators. Its gross deficiencies as a
settlement tool are striking. They make amendment difficult because the substantial

25 See infra notes 151-164 & accompanying text for a discussion of the Advisory Committee’s efforts.
held that “costs” in Rule 68 include fees when a fee shifting statute applies and the statute awards fees “as a
part of costs.” For example, a prevailing civil rights plaintiff who does not improve on a Rule 68 offer
cannot obtain post-offer fees otherwise recoverable under Section 1988.
27 A Westlaw search revealed 293 published Rule 68 opinions from 1985 to 2006 (inclusive). This
compares with a total of 47 before 1985. See Shelton, supra note 20, at 877-915 (reviewing much of the
post-1980 case law and concluding that it has generated a great deal of uncertainty that chills use of the
Rule).
28 See, e.g., Yoon & Baker, supra note 4; 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); Kathryn E. Spier, Pretrial Bargaining and the Design of Fee-shifting Rules, 25 RAND J. ECON.
197 (1994); David A. Anderson, Improving Settlement Devices: Rule 68 and Beyond, 23 J. LEG. STUD. 225
(1994); Miller, supra note 3.
29 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 et seq. Recently there has been a spurt
of empirical work on settlement effects. See, e.g., Lewis & Eaton, supra note 4; Yoon & Baker, supra note 4.
And commentators continue to propose revisions to Rule 68 to empower its settlement potential. See,
e.g., Shelton, supra note 20; 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
changes needed to improve the Rule also elicit strong opposition from interest groups. For decades, people have wondered why the Rule was so poorly drafted. Part II provides the surprising answer: Rule 68 was never meant to be an omnibus settlement device.

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 shall call one the “settlement promotion model” and the other the “unreasonable plaintiff model.” These two models frame the historical analysis in Parts II.B. and C. and in Part III. Roughly speaking, the state offer of judgment rules on which Rule 68 was based better fit an unreasonable plaintiff model than a settlement promotion model. Rule 68 became strongly linked with settlement promotion in the 1980s, as judicial enthusiasm for settling cases increased markedly.

1. 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.  

In negotiating a settlement, neither side offers or demands the entire judgment. Instead, each side makes its offers and counteroffers in light of the expected trial outcome; in other words, the likely judgment discounted by plaintiff’s probability of

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30 The account of settlement in the text is the standard account from the settlement literature. See ROBERT G. BONE, THE ECONOMICS OF CIVIL PROCEDURE 69-78 (2003) [hereinafter BONE, ECONOMICS OF PROCEDURE].
obtaining it. The defendant adds and the plaintiff subtracts its anticipated litigation cost from the expected trial outcome to produce an expected loss (defendant) or an expected gain (plaintiff) from going to trial. Settlement is possible when expected loss exceeds expected gain.

Consider the following simple numerical example. Suppose that plaintiff and defendant both estimate plaintiff’s probability of trial success at 60% and the likely judgment at $100,000. Also, suppose that plaintiff and defendant each anticipate incurring $10,000 in litigation costs through trial. 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 $50,000.31 The same analysis gives an expected loss for defendant of $70,000.32 This creates a range of feasible settlements between plaintiff’s minimum demand of $50,000 and 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, they are likely to end up somewhere in the middle; in other words, 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 an extra nudge. It is tempting to think that a penalty will make the plaintiff more willing to accept the

31 $100,000 \times 0.6 - 10,000 = $50,000$
32 $100,000 \times 0.6 + 10,000 = $70,000$. 
defendant’s offer because it makes rejection more costly. But this is a mistake. As Professor Geoffrey Miller showed in an important early analysis of Rule 68, the intuition ignores the defendant’s incentives to reduce its offer to reflect the additional benefit it obtains when the plaintiff does not improve at trial.

We know, however, that parties in the real world can have difficulty settling. If both sides use hard bargaining strategies, for example, they are unlikely to reach agreement even when settlement is otherwise feasible. 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. And, of course, people are not perfectly rational. Cognitive limitations, such as the natural tendency to be irrationally optimistic, can impede successful settlement.

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 literature has developed over the past twenty years evaluating Rule 68 along these lines, both theoretically and empirically. The results are mixed. Some studies predict little effect on the settlement rate, while others find more significant

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33 For an example of the Supreme Court accepting this argument, see Delta Airlines, Inc. v. August, 450 U.S. 346, 342 (1981).
34 Miller, supra note 3, at 111-12. The defendant will expect to have its costs paid if the plaintiff does not improve on the offer, so the defendant should reduce its offer to reflect the amount of its anticipated costs discounted by the probability that the plaintiff will not improve on the offer. And plaintiff will reduce its demand to reflect its increased risk from going to trial.
35 See Bone, Economics of Procedure, supra note 30, at 78-91, 108-111 (explaining typical bargaining obstacles).
36 Id. at 106-07 (describing and applying the overconfidence bias).
37 See, e.g., Miller, supra note 3, at 112-117 (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 Litigation: An Economic Analysis, 1 Sup. Ct. Rev. 163, 168-73 (1982) (same); cf. 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 defendant); David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71
effects, although not necessarily positive ones. For example, it appears that Rule 68 might reduce the asymmetric information obstacle in some cases, but also exacerbate it in others. In the end, most commentators find serious fault with the current Rule and recommend change. Yet, despite these flaws, Rule 68 is universally understood today as implementing the settlement promotion model.

2. Unreasonable Plaintiff Model

The unreasonable plaintiff model is not concerned so much 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.

The unreasonable plaintiff model must include an account of what makes the plaintiff’s litigating decision 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

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38 See, e.g., Spier, supra note 28 (arguing that Rule 68 can increase the settlement rate in cases of asymmetric information over damages but can reduce the settlement rate in cases of asymmetric information over liability); Farmer & Pecorino, supra note 28 (arguing that Rule 68 might reduce the settlement rate under certain bargaining conditions even in cases of asymmetric information about liability, at least if the asymmetry is only one-sided).

39 See Spier, supra note 28, at 198.

40 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).
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.

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 be unreasonable too, since
bargaining involves trying to capture as much as possible for oneself. 41

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 sense 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

41 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. Indeed, it is possible to construct a
fairness theory that justifies giving parties equal shares in proportion to their relative bargaining advantage.
In any case, the important general point is that the definition of a reasonable offer trades on a theory of
fairness that also makes plaintiff’s rejection not just unreasonable but also unfair.
litigate creates external costs, such as those associated with public subsidy of the court system and delays for other cases, and those external costs might tip the social balance in favor of acceptance even when acceptance makes the party individually worse off. However, we do not normally treat rejection as unreasonable under these circumstances, and it is not plausible to attribute such a view to the nineteenth and early twentieth century jurists that developed the offer of judgment and adopted 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 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 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 entitled to receive from trial. The plaintiff might know that 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. 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.\textsuperscript{42}

Without the offer of judgment, 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, since the plaintiff prevailed, the defendant will have to
pay plaintiff’s costs as well as his own.

This is an example of an unreasonable plaintiff. The case is relatively clear on the
merits and the defendant is prepared to concede. The plaintiff will not cooperate either
because she wants to pursue a non-merits-related agenda or because she incorrectly
evaluates the case when she should know better. It seems unfair that the defendant
should have to pay for the plaintiff’s litigation frolic. The offer of judgment rule gives a
defendant a way to shield himself from paying costs by offering to take a judgment in the
full amount.

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 greater than the offer, this is taken to mean that the

\textsuperscript{42} Some of this conduct might be subject to Rule 11 sanction today. \textit{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 prefiling 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.
defendant’s offer was not sufficient and therefore 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, since she is aware of the facts and therefore should know that the offer covers what she is entitled to.43 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.44 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 than her prediction, the

43 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. The former is clearly unfair: no party should be forced to subsidize another party’s offensive or negligent litigation behavior. However, the latter seems more questionable. 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).

resulting litigation costs can end up being unnecessary ex post, but that does not make them unnecessary ex ante, and does not 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 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 rejecting such an offer is unreasonable. I shall argue later that the example of the defendant who concedes everything served as a paradigm for the nineteenth century offer of judgment rules in the states. But the key to the unreasonable plaintiff model is the idea of compensating defendants for losses incurred by plaintiff’s unreasonable rejection, whatever theory of unreasonableness applies.

It is easy to confuse the unreasonable plaintiff model with the settlement promotion model. An offer of judgment in the unreasonable plaintiff model is still an offer inviting acceptance, and it contemplates the end of litigation by mutual consent. But there are major differences.

For one thing, the type of offer differs. The offer in the unreasonable plaintiff model is not supposed to be for some amount lying in the feasible settlement range. The offer is not an invitation to further negotiations or a way to frame the bargaining game; rather, it is an offer that creates a moral obligation in the plaintiff to accept, leaving nothing more to bargain about.

Furthermore, 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 plaintiff’s unreasonable and thus unjustified litigation conduct.45

B. The 1938 Drafting Process

Now that we have the necessary analytic tools in place, we can turn to explaining Rule 68’s puzzling features. The original version of the Rule adopted in 1938 was virtually identical to the modern Rule before the recent style amendments.46 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.

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. 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. And it moved smoothly to adoption without any serious opposition or

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45 This does not explain why current Rule 68 does not compensate for defendant’s fees as well its costs. That explanation has to do with the history of the American rule on attorney fees. *See infra* notes 108-109 & accompanying text.

46 For the version of Rule 68 in effect before the style amendments, *see supra* note 7.
debate. This should be quite surprising to anyone who accepts the settlement promotion model of Rule 68.

Today we take for granted that settlement is a central feature of civil adjudication, but this was not the case in 1938. Early twentieth century jurists vigorously debated the merits of settlement promotion in formal adjudication, especially the proper role of the judge in the process. 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 pre-trial conference. His opposition was shared by several other committee members, and it ultimately prevailed.

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47 The vast majority of filed cases settle before trial. See Judith Resnik, Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, 113 HARV. L. REV. 924, 928 & nn. 10-11 (2000) [hereinafter Trial as Error] (noting that about 70% of filed cases settle and only about 6% reach trial, with the balance being disposed of in other ways); 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 end in settlement before trial). 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 (1986). Indeed, many federal judges today would agree with the assessment of the judge who proclaimed, with only a little hyperbole, that “a bad settlement is almost always better than a good trial.” In Re Warner Communications Sec. Litig., 618 F.Supp. 735, 740 (S.D.N.Y. 1985).

48 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 and 19.9% 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.


50 See 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); Galanter, supra note 48, at 258 (noting that “according to the dominant view [at the time], pre-trial would sharpen cases for trial, making litigation more effective”). 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 pre-trial conference topic. 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. See Galanter, supra, at 259.
One should be careful, however, not to infer too much from the opposition to settlement in Rule 16. Committee members worried mainly about judges getting involved in settlement promotion.\textsuperscript{51} 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.\textsuperscript{52} Given this and the general reluctance to embrace settlement promotion wholeheartedly, it seems reasonable to suppose that there would have been at least some serious discussion of Rule 68’s merits. Indeed, even if the committee had no serious objection to including a settlement-oriented rule, one might have expected some criticism of Rule 68’s obvious deficiencies. But none of this occurred.

What eventually became Rule 68 first appeared as part of Rule A33 in the third Tentative Draft circulated in March 1936, roughly nine months after the committee began its deliberations and after it had already considered two previous drafts.\textsuperscript{53} Rule A33 was entitled “Deposit in Court – Offer of Judgment.” It was added in response to a suggestion at the February 1936 meeting that there should be a separate rule addressing

\textsuperscript{51} Clark, for example, feared the potential adverse effects of judicial involvement on the judge’s impartiality. Charles E. Clark, \textit{Objectives of Pre-Trial Procedure}, 17 Ohio St. L.J. 163, 167 (1956).

\textsuperscript{52} Indeed, the original FRCP as a whole were designed primarily for trying cases. \textit{See} 1 Moore’s \textit{Federal Practice} § 0.01 (1938) (listing the “salient features of the Rules,” all of which focus on preparing cases for trial).

\textsuperscript{53} The original committee was appointed on June 3, 1935, roughly one year after Congress passed the Rules Enabling Act. 295 U.S. 774 (1935). It held its first meeting on June 20, 1935. It met again on November 14, 1935 to discuss the first Tentative Draft circulated in October, and yet again in February 1936 to discuss Tentative Draft II circulated in December. The offer of judgment rule did not appear until Tentative Draft III, circulated after the February meeting. \textit{See} Letter from Charles E. Clark to William D. Mitchell (Apr. 20, 1936), found in Papers of Charles Clark, Sterling Law Library, Yale University, \textit{Series IV: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Preparatory Papers, Drafts, Reports, Correspondence 1935-56}, at Box 109, Folder 46. (“Rule A33, T.D. III, was a new rule requested by the Committee in February “) [hereinafter “4/20/36 Clark to Mitchell Letter”].
how to deposit property or funds in court.\footnote{See Proceedings of Meetings of Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States, vol. 3 (Feb. 22, 1936), found in Papers of Edmund Morgan. Harvard Law School Library, Special Collections, Series II: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Papers, Drafts, Correspondence 1936-1937. 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 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.” \textit{Id.} at 601. This prompted the Chairman to wonder about inserting a “provision for paying money into court and being discharged.” \textit{Id.} at 601. Charles Clark then responded that it might be a good idea to draft a separate rule dealing with deposit. \textit{Id.} at 602.}

The offer of judgment provision was included, without any committee prompting,\footnote{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.” 4/20/36 Clark to Mitchell Letter, \textit{supra} note 53.} as a second paragraph to Rule A33, the first paragraph of which dealt with the matter of deposit.

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. 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).\footnote{This was the Style Committee’s decision, so one should not infer too much of substance from it. See \textit{id}.} Rule 82 and its accompanying one-sentence Note (citing state offer of judgment rules in Minnesota, Montana, and New York) retained the language of Rule A33 intact.\footnote{At least one publication reporting on the Preliminary Draft did not consider Rule 82 remarkable or significant enough to warrant comment. Werner Ilsen, \textit{The Preliminary Draft of Federal Rules of Civil Procedure}, 11 \textit{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.”).}

The Committee received numerous comments on the Preliminary Draft.\footnote{And Charles Clark prepared at least three different versions of the Preliminary Draft before submitting and circulating the Report in April 1937. There were no significant changes to Rule 82.} A few of these comments addressed Rule 82, but none that I have seen questioned the propriety of the Rule or suggested that there was anything unusual about including it in the
FRCP.59 One suggestion worth noting was by Harold Davis, a lawyer who worked with Robert Dodge, a committee member. Davis proposed that the Rule be applied only to suits for damages on the ground that it would be too difficult to determine whether the plaintiff improved on the offer when the judgment involved equitable relief.60 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 downplayed the proposed Rule’s importance, an odd thing to do if the Rule was meant as a device designed explicitly to encourage settlement.61

59 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, Abstracts of Suggestions on the Draft Report of Rules for Civil Procedure (Apr. 1937), found in Papers of Charles Clark, Sterling Law Library, Yale University, Series IV: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Preparatory Papers, Drafts, Reports, Correspondence 1935-56, vol. 17, at Box 103. In addition, the Department of Justice recommended exempting the United States, its agencies, and officers from the Rule, and this recommendation was implemented. See Memorandum from Alexander Holtzoff, Special Assistant to the Attorney General, Department of Justice, to the Advisory Comm. on Rules for Civil Procedure (Nov. 17, 1936), in Advisory Committee on Rules for Civil Procedure: Communications, Sept.-Dec. 1936, found in Papers of Edmund Morgan. Harvard Law School Library, Special Collections, Series II: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Papers, Drafts, Correspondence 1936-1937. And several people suggested adding language that would have allowed the offer to be admitted against the offeree, but this suggestion was rejected.

60 See Letter from R. G. Dodge to Charles E. Clark, with Memorandum of Harold Davis (Mar. 8, 1937), in Advisory Committee on Rules for Civil Procedure: Communications, Feb.-June 1937, found in Papers of Edmund Morgan. Harvard Law School Library, Special Collections, Series II: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Papers, Drafts, Correspondence 1936-1937. Davis’s memorandum also criticizes Rule 81, the rule on deposit in court, which he interprets the rule 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. 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. Dodge in his transmittal letter admits his ignorance: “I may add that Davis knows a great deal more about matters of this sort than I ever knew.”

61 See Charles E. Clark and J. M. Friedman, Comment for the Style Comm. on Rules of Civil Procedure, Feb. 1937 Preliminary Draft, enclosed in Letter from Charles E. Clark to Edgar B. Tolman (Mar. 19, 1937), in Advisory Committee on Rules for Civil Procedure: Communications, Feb.-June 1937, found in Papers of Edmund Morgan. Harvard Law School Library, Special Collections, Series II: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Papers, Drafts, Correspondence 1936-1937: “perhaps the rules [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
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. The offer of judgment rule was renumbered Rule 73 but otherwise remained the same. Comments were solicited over a six-month period before the Final Report was prepared and submitted to the Supreme Court in November 1937 (when the offer of judgment rule was renumbered Rule 68, the way it is today). 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 proposal that was never adopted. The final version of Rule 68 was substantively identical to the original version in Tentative Draft III, the only differences being minor stylistic changes.

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. One conference was held in Cleveland, Ohio, in July of 1938. Members of the century code procedure and many of those state rules applied to suits for equitable relief as well as for damages. See infra notes 65-66, 87 & accompanying text.

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 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 not discussed at the first two meetings, and the only mention of it at the third is a reminder that a note was required and an indication that Charles Clark would draft it. See Papers of Charles Clark, Sterling Law Library, Yale University, Series IV: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Preparatory Papers, Drafts, Reports, Correspondence 1935-56: 8/28-9/2/36, at Box 96, Folder 14; 10/22-27/36 at Box 96, Folder 15; & 2/1-4/37 at Box 96, Folder 15. However, it appears that the rule was discussed at a meeting of the Style Committee and that the committee raised a concern about “whether adding the rule on Offer of Judgment was within our mandate.” 4/20/36 Clark to Mitchell Letter, supra note 53. Unfortunately, I was not able to find anything more to illuminate this intriguing comment.
Advisory Committee explained each of the Rules and answered questions. The discussion of some Rules was extensive and took up multiple pages of the conference transcript. The discussion of Rule 68, by contrast, consumed only two paragraphs.

Committee member Robert Dodge described the Rule briefly, and no one asked a single question.  

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 have received such a neutral response? The reason, I believe, has to do with the pedigree of offer of judgment rules in the states and the purpose the state rules were meant to serve.

The offer of judgment device first appeared in the New York Field Code in the middle of the nineteenth century and was later incorporated into most state codes.  

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64 See Am. Bar Ass’n, PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE, CLEVELAND, OHIO, 337-338 (Dodge’s remarks on Rule 68), 339-43 (discussion) (1938) [hereinafter cited as ABA CLEVELAND PROCEEDINGS]. 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, about whether the cost of a deposition would be recoverable. See PROCEEDINGS OF THE ATLANTA INSTITUTE ON FEDERAL RULES OF CIVIL PROCEDURE, 105, 111 (1938) [hereinafter PROCEEDINGS OF THE ATLANTA INSTITUTE]. George Donworth, also a committee member, handled Rule 68 at the Washington, D.C. conference and the New York symposium. He was asked only one question at each proceeding. See Am. Bar Ass’n, 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, 1939. In D.C., he was asked whether Rules 67 and 68 replace tender, and he answered that they did not. Id. at 201. In New York, he was asked whether a Rule 68 offer can be withdrawn within the ten day window, and he answered no. Id. at 299.

65 1848 N.Y. Laws § 338, reprinted in 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 (1870). The original offer of judgment statute, which was labeled “offer of compromise,” 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
Although it was new with the codes, the device was based on earlier procedures. By tracing this history, it is possible to construct a plausible account of what the offer of judgment device was meant to do. 67

This history begins with the right of tender at common law. 68 This right applied to actions for debt or indebitatus assumpsit. The defendant had to tender the amount due at least once before 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 running 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. 69

The purpose of the common law right of tender was not to encourage settlement. The right applied to a very limited class of cases, those in which the debt was clear and

affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer 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. 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 defendant’s costs but also “cannot recover [his own] costs.” See The Code of Procedure, supra.

66 Most state codes were modeled on the 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 (1894) (noting that “the codes all [states] 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.

67 I focus here on the common law right of tender and the statutory offer of tender because those two devices were generally treated as direct progenitors of the code offer of judgment rules. Other procedures, however, also share features in common with the offer of judgment, such as the cognovit, the judgment by confession, and the offer to liquidate damages. For the cognovit and judgment by confession, see 1 John A. Dunlap, A Treatise on the Practice of the Supreme Court of New York in Civil Actions 356-58 (1921). For the offer to liquidate 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. 1899).

68 See, e.g., 1 Isaac Espinasse, A Digest of the Law of Actions and Trials at Nisi Prius 160 (1801); George Wharton Pepper, Pleading at Common Law and Under the Codes, 89-90 (1891);

69 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 68, at 160; accord Pepper, supra note 68, at 89-90.
the plaintiff insisted on litigating despite the defendant’s genuine efforts to pay the amount in full. 70  Under these circumstances, the plaintiff had no legitimate basis for suing the defendant, since 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 the development of the offer of judgment 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 suit was filed, and second, by extending it to common law actions other than to recover for a debt. 71  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. 72

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. 73  The money became the plaintiff’s property as soon as it

70  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.
72  See H. GERALD CHAPIN, CODE PRACTICE IN NEW YORK 164 (1918).
73  See Taylor v. Brooklyn Elev. R.R. Co., 119 N.Y. 561, 564 (1890) (stating that a deposit is “deemed in law a payment to the plaintiff … of a conceded liability for the injury”).
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.”74

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. Since 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.75

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 the defendant made a deposit. However, this does not mean that its purpose was to promote settlement. Instead, it appears that the purpose had more to do with giving the defendant some control over the costs imposed by plaintiff’s litigating decisions. If the plaintiff insisted on dragging the defendant through a lawsuit when the defendant admitted

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74 CHAPIN, supra note 72, 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 ownership what the result of the trial may be.
BAYLIES, supra note 67, at 112.
75 In some states, such as New York, the plaintiff could accept the tender and still litigate for a larger recovery. 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.” CHAPIN, supra note 72, at 165. 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.
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 costs.\textsuperscript{76}

At least two features of the statutory offer of tender are inconsistent with its 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 defendant’s willingness to concede.\textsuperscript{77} Second, the device, though more broadly applicable than the common law right, was still limited mostly to cases in which the scope of liability was relatively clear, although there were some exceptions.\textsuperscript{78} This limitation would have made it possible to view rejection of the tender and insistence on

\textsuperscript{76} 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. BAYLIES, supra note 67, at 109-110. 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 post 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 (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”).

\textsuperscript{77} As one commentator described the principle behind a tender, “[w]hen 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 76, § 207.

\textsuperscript{78} 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. at § 209 (noting that in Ohio, “the 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”), §§ 212, 217 (noting that in a case with nonmonetary 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 BAYLIES, supra note 67, at 164 (noting 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”).
litigating as unjustified, since a plaintiff with knowledge of the facts bearing on liability should have known better.\footnote{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. \textit{See} Patrick v. Ilwaco Oyster Co., 189 Wash. 152, 155 (1937) (holding that statutory tender applies to tort suits not just contract actions); Atkins v. Ost, 112 Mo. App. 256, 258-59 (1905) (holding that statutory tender applies to cases with unliquidated as well as liquidated damages).}

It is also significant that similar offer-contingent cost-shifting rules existed on the equity side before merger.\footnote{\textit{See} WILLIAM MEADE FLETCHER, A TREATISE ON EQUITY PLEADING AND PRACTICE § 742 (1902).} Although these rules did not lead directly to the offer of judgment, which developed from the common law rules instead,\footnote{The few suggestions that Rule 68 grew out of this equity practice are incorrect. \textit{See} 12 WRIGHT ET AL., FEDERAL PRACTICE, \textit{supra} note 8, § 3001 (tracing Rule 68 to equity and citing Crutcher v. Joyce, 146 F.2d 518, 520 (1945)). 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.} it is worth noting that equity courts clearly envisioned these cost-shifting rules as fairness devices, not settlement promotion tools. Perhaps because the equity rules were flexible, courts and commentators had a bit more to say about the underlying reasons, and those reasons were clearly tied to litigation unfairness.\footnote{\textit{See}, e.g., Lewis v. Yale, 4 Fla. 441 (1854) (noting that the usual rule is “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 that in considering this “a Court of Equity is very much governed by its desire to discourage and repress unnecessary litigation”).} 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.”\footnote{FLETCHER, \textit{supra} note 80, § 742.} Another earlier treatise writer was even more succinct: ‘[w]here 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.”

The offer of judgment, also sometimes referred to as “offer of compromise,” is the final stage in this line of development. The offer of judgment was created in the middle of the nineteenth century as part of the code reforms that merged law and equity. The device was based on the statutory offer of tender 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. However, the offer of judgment, as a code innovation, had a broader range of application than the offer of tender. In New York, for example, it applied to all lawsuits, those for equitable relief as well as for damages.

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 the plaintiff 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

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84 John Beames, A Summary of the Doctrine of Courts of Equity with Respect to Costs, Deduced from the Leading Cases, § 165, at 56-57 (1838); see McCloskey v. Bowden, 82 N. J. Eq. 410, 412 (1914) (stating that “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.”); Frisby v. Ballance, 4 Scam. 287 (Ill. 1843) (costs awarded to defendant because defendant had conceded everything and there was no reason for the plaintiff to sue).

85 See supra note 65. This choice of terminology is not surprising. Compromise meant the same thing as settlement, see Galanter, supra note 48, at 257, and the offer of judgment, whatever its purpose, clearly contemplated a settlement in the sense of a consensual resolution of the dispute.

86 The offer of tender remained in most codes alongside the offer of judgment, and parties could choose between the two. See, e.g., Sellers v. Union Lumbering Co., 36 Wis. 398, 401-02 (1874); Rosenberger v. Harper, 83 Mo. App. 169, 172-73 (1900); Chapin, supra note 72, at 165 (noting that if the defendant “does not wish to make a tender,” he may use the offer of compromise).

87 See Jacob Holmes, Practice in the Supreme Court of the State of New York 156 (1859). It is significant to note that the original 1848 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 65.
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.

The dependence of the offer of judgment on acceptance makes it appear more similar to a settlement offer than a tender, and there are indications that some, but very few, judges may have viewed the procedure at least partially in terms of encouraging settlement.88 The dominant view, however, appears to be that the offer of judgment was simply an extension of tender applicable to a broader range of cases and serving essentially the same function: to permit a defendant to limit its liability for costs when the plaintiff rejected an offer unreasonably and continued litigating despite defendant’s concession of liability.

*Rosenberger v. Harper*89 is illustrative. The Missouri offer of judgment statute expressly required the plaintiff to pay the defendant’s costs, but unlike other statutes, it was silent about who should pay the plaintiff’s post-offer costs.90 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 as the prevailing party. The majority disagreed. They held that the plaintiff had to pay its own costs too, just as for tender, because the costs incurred by a plaintiff who

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88 I have done multiple Westlaw and Lexis searches with “offer of judgment” and variations of “encouraging settlement”, “encouraging compromise”, and “promoting settlement” and these have identified only two or maybe three opinions in the period from January 1, 1848 to January 1, 1939 mentioning the key phrases. For example, the Westlaw search described infra note 99 turned up no references to encouraging or promoting settlement or compromise among the 94 opinions in the eight states searched. The most notable example that I have found of a case that mentions encouraging settlement is Rosenberger v. Harper, 83 Mo. App. 170 (1900), described in the text. Cf. Pierano v. Merritt, 148 N.Y. 289, 293 (1896) (commenting on a special offer of judgment procedure applicable to de novo appeals from the Justice’s Courts in small claim cases, and noting that the purpose of the procedure, which allows both parties to make an offer and requires a party to make an offer when the other does, was to encourage compromises).

89 83 Mo. App. 170 (1900).

90 The relevant statutory language read: “if the plaintiff fail to obtain a more favorable judgment, he shall pay the defendant’s costs from the time of the offer.” Id. at 172.
did not improve on an offer were “useless and unnecessary” and therefore “properly
taxed against him under the general statute [regulating costs].” 91

Judge Biggs dissented. He 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.” 92 Since the statute was based on policy rather
than justice, Judge Biggs reasoned, it should be construed strictly, and since 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.

Although one should be careful about inferring too much from the brief passages
in this opinion, 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. Plaintiff’s decision to continue litigating in the face of defendant’s offer
of judgment was “useless and unnecessary” because the defendant stood ready to give the
plaintiff a judgment for what the plaintiff could legally obtain from trial. Judge Biggs
viewed the offer of judgment as a settlement device, but he was a dissenter and the
majority disagreed with his view. 93

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91 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.
92 Id. at 173. More precisely, he argued that a plaintiff who rejected a 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.
93 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 and 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 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. 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.
The Rosenberger majority’s reasoning is consistent with what appears to be the mainstream nineteenth and early twentieth century view. All the treatise accounts I have read – and there are many – group the offer of judgment together with the right of tender and the statutory offer of tender in a way that assumes all three devices shared a similar function and that the offer of judgment was merely an extension of the other two.\textsuperscript{94} None of these sources mentions settlement promotion as a goal.\textsuperscript{95} Most that refer to purpose focus on giving the defendant a way to deal with a plaintiff who insists on continuing with “unnecessary and fruitless litigation.”\textsuperscript{96} 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.”\textsuperscript{97} 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 in the complaint, for which sum he is willing to confess judgment, will make an offer of compromise.\textsuperscript{98}

\textsuperscript{94} See, e.g., I Claudius L. Monell, A Treatise on the Practice of the Supreme Court of the State of New York, 508-509 (1854) (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 result”).

\textsuperscript{95} One interesting case from the period turns on distinguishing an offer of judgment from a settlement offer. In Parr v. Chicago, Burlington & Quincy R.R. Co., 194 Mo. App. 416 (1916), 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 it. 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. \textit{Id.} at 421-22.

\textsuperscript{96} I Edwin E. Bryant, A Treatise on Justices of the Peace in Wisconsin § 206, at 205 (1924). In his 1854 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. Monell, \textit{supra} note 94, 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.” \textit{Id.} And he described the part that would not be targeted as a cause of action “unjust or doubtful.” \textit{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.

\textsuperscript{97} Fitnam, \textit{supra} note 66, § 522, at 623.

\textsuperscript{98} \textit{Id.} at 622.
This language is not what one would expect from someone focusing on promoting settlement. The descriptions are not written in terms of affecting the parties’ bargaining incentives. 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. Costs are shifted to the plaintiff not because it might induce a settlement, but because it is fair: the costs are the result of plaintiff’s “unnecessary and fruitless litigation” and should in fairness be borne by him.

It is difficult to pin down the precise idea of fairness and reasonableness involved. Most judges simply applied the rules and most treatise writers reviewed the mechanics without saying much, if anything, about the theory behind the procedure. I expect that lawyers and judges thought plaintiff’s litigation conduct 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 grew out of tender. Moreover, 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. This is significant because contract cases are more likely to have

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99 This conclusion is based on a review of the offer of judgment decisions in Westlaw published between January 1, 1848 (before the Field Code was adopted) and January 1, 1939 (after the FRCP were adopted) and dealing with the offer of judgment procedure applicable in the trial court of general jurisdiction. 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. 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 94 cases, of which 82 could be identified by type. The contract-related cases totaled 64 of 82, which is 78%. These broke down by type as follows: contract or implied contract, including employment contracts (42),
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.

It is also possible, however, that these nineteenth century jurists thought that a
rejection was 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. If this is what jurists meant, it still fits an
unreasonable plaintiff model not a settlement promotion model, for 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 mainly on protecting defendants from
the unreasonable accrual of costs. Second, the offer of judgment grew out of tender, 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
rule was seldom used in tort suits, a fact strongly suggested by the distribution of
published decisions, is hard to reconcile with a settlement promotion model, since
there is no reason why settlement would not have been just as keenly sought in tort as in

promissory note (3), debtor-creditor (8), mechanics lien (3), and mortgage/foreclosure (8). The breakdown
for the remaining 18 cases is as follows: conversion (2), replevin (3), insurance (6), trespass (2), auto
accident (4), and medical malpractice (1).

100 See supra note 44 & accompanying text.
101 See supra note 99 & accompanying text.
contract cases. Fourth, it is worth recalling that the parallel equity rules were clearly about being fair to the defendant and not about promoting settlements.102

I do not mean to suggest that the offer of judgment had nothing at all to do with settlement. The device obviously contemplated a settlement. Also, 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.103 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 paradigm that traced all the way back to the common law right of tender – was a case in which the defendant surrendered by offering everything that the plaintiff was entitled to receive from trial. It was unreasonable for a plaintiff to push forward in the face of such an offer. 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 he [the defendant] is right.”104 In effect, potential liability for costs gave the plaintiff “a reason to be reasonable.”105

I expect the paradigm 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 paradigm was the easiest case to justify and the baseline to which all other cases were compared.

102 See supra notes 81-84 & accompanying text.
103 See, e.g., J.G. Hardgrove, Reduction of Trial Issues Under Wisconsin Practice, 12 MARQ. L. REV. 93, 103-04 (1928). Still, it is interesting to note that the example described by Hardgrove in this article did not involve a typical settlement offer, but rather an offer of judgment in the maximum amount that the defendant thought the plaintiff could legally recover at trial. Id. at 103.
104 KINKEAD, supra note 76, § 207.
To be sure, there are a 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.\textsuperscript{106} It might be tempting to read these brief passages as evidence of a settlement promotion model, but I believe this would be a mistake. Judges and practicing lawyers seldom make a point of drawing 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: the offer of judgment encouraged settlement and saved trial costs 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

\textsuperscript{106} 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 67, at 113 (citing and paraphrasing Bathgate).
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 (and tender) filled this gap by giving the defendant a way to limit the accrual of costs.  

The offer of judgment required a formal judgment and not just a settlement because it was based on the idea of replicating the trial outcome without a trial. There were advantages to a formal judgment, such as direct access to the court’s process to enforce it, so a plaintiff might have a legitimate reason to keep litigating if the defendant offered only a settlement, but not if he offered a formal judgment. Moreover, the offer of judgment grew out of the earlier right of tender and statutory offer of tender, which 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 include a small standardized amount for fees. To be sure, this fee amount fell far short of the market rate for attorney fees, but

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107 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, either by dismissing voluntarily or litigating through trial when the defendant unreasonably refused to settle. Defendants could avoid incurring costs in a clearly winning case (for the defendant), when the plaintiff refused to give up, 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. Since the plaintiff will win in the end, the defendant cannot use the ordinary rules on costs. The offer of judgment filled the gap and thus assured that plaintiff and defendant were treated symmetrically.

108 See John Leubsdorf, Toward A History of the American Rule on Attorney Fee Recovery, 47 LAW & CONTEMP. PROBS. 9, 18 (Winter 1984). The Field Code listed specific amounts for “costs” and these amounts included a small fee component. This was standard practice dating back at least to the eighteenth century. 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.
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.\textsuperscript{109}

Also, the history explains why some code offer of judgment rules allowed offers
at any time “before trial or judgment” while others allowed offers only “before trial.”\textsuperscript{110} 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.\textsuperscript{111} 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

\textsuperscript{109} 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 difficulty ascertaining fees after the fact as well as a laissez faire reluctance to interfere with
market ordering, on the other. See Leubsdorf, \textit{supra} note 108, at 18-20.

\textsuperscript{110} 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, but Montana’s allowed the offer to be made “at any
time before the trial or judgment.” See 2 \textit{Minn. Stat.} § 9323 (Mason 1927); \textit{N.Y. Civ. Prac. Law} § 177
(Cahill 1937); 4 \textit{Mont. Rev. Codes Ann.} § 9770 (1935).

\textsuperscript{111} For example, permitting offers to be made at any time might be better than restricting them to before
trial. See \textit{supra} notes 22-23 & accompanying text.
today because we look at the rule as a settlement promotion device, but the code offer of judgment rule was not meant to promote settlements in the way we think of settlement promotion today. 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.112

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.113 Dodge identified the purpose of the Rule in the following way: “it 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.”114 Nowhere did he say anything about encouraging settlement, a curious omission if that was actually the Rule’s intended purpose. His focus is 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.115 Moreover, his reference to a

112 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 the Third Tentative Draft dealing with deposit in court. See supra notes 54-55 & 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 4/20/36 Clark to Mitchell Letter, supra note 53 (“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 didn’t think very hard about the offer of judgment rule, simply copying what he found in the codes.
113 See supra note 64 & accompanying text.
114 ABA CLEVELAND PROCEEDINGS, supra note 64, at 337.
115 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 supra note 53. 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 64, at 105. And again, in response to a question, Clark stated “the 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 capitulation than bargaining.
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.\textsuperscript{116}

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.”\textsuperscript{117} 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).\textsuperscript{118} 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. \textbf{RULE 68 \textit{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 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

\textsuperscript{116} 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 75. 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 Committee simply incorporated the state rules without thinking very hard about them.

\textsuperscript{117} ABA CLEVELAND PROCEEDINGS, supra note 64, at 338.

\textsuperscript{118} The original version of Rule 54(d), like the current version, made the award of costs to prevailing parties discretionary, while Rule 68 made it mandatory.
Rule 68 was based – the code offer of judgment rules and the tender rules that pre-dated 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 only fifteen published opinions. Most of the scholarly articles appeared immediately after 1938 and discussed the Rule in the context of acquainting the bar with the new FRCP. And most of those articles merely described the Rule’s provisions without offering any additional analysis or commentary.

Still, explicit references to Rule 68 as encouraging settlement did appear during this period. A few articles written after adoption of the FRCP linked Rule 68 to settlement, and one, by Armistead Dobie, a committee member, described the effect of

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120 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 – 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 plaintiff’s willingness to accept defendant’s offer to some degree.

121 See, e.g., Edwin G. Martin, Disposition of Cases by the United States Customs Court Pursuant to Stipulation, 9 GEO. WASH. L. REV. 133 (1940) (observing that “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” and concluding that “[i]n fact, the rules clearly indicate an encouragement of such informal settlement”).
the Rule in terms of its impact on settlement dynamics. Yet it does not appear that most people conceived Rule 68 as an instrument to affect bargaining incentives and promote settlements in the way that the settlement promotion model contemplates. There were no doubt exceptions, but generally references to “encouraging settlement” seem to have been tied closely to settling cases that clearly should settle, such as cases that the defendant concedes. This narrow view of settlement reconciles the idea of encouraging settlement with the idea of fairness underlying the unreasonable plaintiff model: Rule 68 was meant to encourage settlements in those cases where it would be unreasonable for the plaintiff not to accept the defendant’s offer and therefore unfair to continue litigating.

There are in fact few explicit references to encouraging settlement during this period. Indeed, no court that addressed Rule 68 between 1938 and 1948 ever mentioned settlement promotion as its purpose. The most important reference is in the Advisory

122 Armistead M. Dobie, The Federal Rules of Civil Procedure, 25 VA. L. REV. 261, 303-304 (1939). Dobie reviews the new FRCP as a whole and devotes two pages to Rule 68. He notes that acceptance of a Rule 68 offer “secures an early pre-trial settlement of the action,” and that “this 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 making such offers.” Id. at 304 n. 195. Dobie’s remarks were aimed at educating lawyers about the new FRCP and thus were mostly descriptive rather than normative, and he made no attempt in the article to reconcile the Rule’s awkward text with a settlement purpose. I doubt very much that Dobie thought terribly hard about what Rule 68 was meant to do, or that he intended his remarks as a well-considered view of the Rule’s purpose. After all, he was not writing an article about Rule 68; he was writing an article introducing the bench and bar to all the FRCP and there were many rules, such as the new discovery, pretrial conference, and summary judgment rules, that were controversial and demanded much more serious attention. I am confident Dobie had no clearer idea why Rule 68 was included in the FRCP or what the state offer of judgment rules were trying to do than he did when the Rule was before the original advisory committee.

123 There are five published opinions from this period. Nabors v. Texas Co., 32 F.Supp. 91, 92 (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 Gamlen Chemical Co. v. Dacar Chemical Products Co., 5 F.R.D. 215, 216 (W.D. Pa. 1946) (holding that a properly framed offer of judgment, if accepted, concludes plaintiff’s entitlement to fees in a fee-shifting case); Cover v. Chicago 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);
Committee Note that accompanied the 1946 amendments to Rule 68, which went into effect in 1948.\textsuperscript{124} This Note contains a sentence which 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.”\textsuperscript{125} 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 FRCP.\textsuperscript{126} 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.\textsuperscript{127} And the discussions continued at three subsequent meetings.\textsuperscript{128}


\textsuperscript{125} FED. R. CIV. P. 68, advisory committee note (1948). It is not clear whether this sentence was meant to be a statement of the Rule’s purpose or simply a description of some of its most significant effects. Moreover, 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.

\textsuperscript{126} See 1946 Report, supra note 124. The resulting package of FRCP amendments was approved by the Supreme Court in 1946 and went into effect on March 19, 1948.

\textsuperscript{127} See Proceedings, Advisory Committee on Civil Rules (May 17-20, 1943) found in Papers of Charles Clark, Sterling Law Library, Yale University, Series IV: United States Supreme Court Advisory Committee on Rules for Civil Procedure: Preparatory Papers, Drafts, Reports, Correspondence 1935-56: vol. 3, at Box 114, Folder 73 [hereinafter cited as “May 1943 Proceedings”]. The inspiration for the proposed 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.

\textsuperscript{128} The 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 considered Rule 68 amendments in more than a perfunctory way at the first four of these meetings, and the Charles Clark Papers at Yale contain transcripts of all these meetings. See Papers of
All 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. 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.” 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.” Lemann then pushed his point over a number of transcript pages, returning to the theme of encouraging settlement on several occasions.

At the same time, there are other references in the transcripts that suggest committee members did not conceive of Rule 68 settlements 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.” 131 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?” 132 This is an odd thing to say if one has a settlement promotion model in mind. 133 Obviously, the reason one tries a case when the other fellow is willing to settle is because one expects more from trial than the defendant is offering, and it is not clear why one should have to pay costs when one’s decision turns out to be wrong. However, these questions make much more sense, and are more difficult to answer, if they presume that the plaintiff rejected unreasonably and thus unfairly dragged the defendant to trial. 134

It is difficult to draw any clear conclusions from these informal statements. In each instance, the statement 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. 135

I believe that the best interpretation of this record is that most advisory committee

131 May 1943 Proceedings, supra note 127, at 984.
132 February 1945 Proceedings, supra note 130, at 761.
133 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. The transcript shows that Lemann clearly understood that tender involved offering everything the plaintiff claimed. 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 situation applying to the offer of judgment too.
134 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.
135 Two things are certainly clear from the transcript. First, even Monte Lemann felt that Rule 68 would not have a significant effect in most cases because risk of paying costs would not apply much settlement pressure. See id. at 764. Second, the discussion confirms that little was given to Rule 68. Everyone seemed a bit puzzled by the Rule’s text, and when in doubt the Chairman 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.” Id. at 763-64. See also id. at 762 (“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.”).
members in the mid-1940s – and probably also most lawyers and judges – viewed Rule 68 from two angles at once: as a rule encouraging settlement and as a rule ensuring fair treatment of defendants. When they thought of settlement, they probably thought of cases where the plaintiff should accept the offer because it would be unfair to reject it. There was no need to address the potential conflict between the two perspectives. A rough understanding of the Rule worked well enough because the Rule was seldom used and no one seriously challenged it on normative grounds.

One thing is clear. There is little evidence that the sentence in the 1946 Advisory Committee Note was meant to endorse Rule 68 as an omnibus settlement tool along the lines of the settlement promotion model. Courts and commentators in the late 1970s and 1980s read the Note that way, but their interpretation had much more to do with the perceived needs of their time than any serious effort to divine historical meaning.

Between 1946 and 1975, Rule 68 drew very little interest. There are only ten reported decisions and no significant law review articles addressing Rule 68 issues. Only three of the ten decisions mention Rule 68’s purpose and all of those rely, directly or indirectly, on the single sentence in the 1946 Advisory Committee Note.\footnote{In chronological order, these three decisions are: Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240, 241 (W.D. La. 1949), aff’d 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: it is an “offer of compromise” and not an “offer of judgment”); Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218 (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 (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 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. I have found no references to this second purpose after 1980.}

B. 1975-1980: Litigation Crisis and the Transformation of Rule 68
This situation changed markedly around 1975. The number of published
decisions took a huge leap between 1975 and 1980. The total of fourteen opinions for
this five-year period is almost three times the count for any five year 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. First, starting in the early
1970s, courts and commentators became increasingly concerned about case backlog,
litigation delay, and high litigation costs. These concerns motivated the search for less
costly alternatives to formal adjudication and helped fuel a strong interest in settlement.
Second, critics questioned the merits of the adversarial system itself and became more
and more intrigued with consensual modes of alternative dispute resolution.

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 was 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. Indeed, by 1978, a student Note author could assert that “whatever

137 These developments have been well documented. See, e.g., Resnik, Trial as Error, supra note 47,
[hereinafter Failing Faith]; Robert G. Bone, The Process of Making Process: Court Rulemaking,
Democratic Legitimacy, and Procedural Efficacy, 87 GEO. L. J. 887, 900-02 (1999) [hereinafter Process of
Making Process].
138 See Resnik, Failing Faith, supra note 137, at 535-37.
139 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.
140 All but six of the fourteen published decisions in the five year period contain extensive discussions.
Some interpreted Rule 68 generously to bolster settlement effects. See August v. Delta Air Lines, Inc., 600
the reasons for ignoring the rule in the past, certain recent developments suggest that the
rule should no longer receive short shrift.”141

C. 1980-1985: Transformation Realized and the Battle Over Rule 68

1. Delta Airlines 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.142 This was the first time the Supreme Court dealt squarely with
Rule 68, and the Court made the most of it. The issue in Delta Airlines was whether a
defendant could use Rule 68 cost-shifting against a plaintiff who lost at trial.143 In a 6-to-
3 decision, the Court held that Rule 68 applied only to a winning plaintiff and not to a

143   The defendant made an offer of judgment of $450. The plaintiff rejected it and then lost at trial. 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. 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.
losing 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.\footnote{Id. at 351-52. In fact, only five Justices agreed on the holding. Three Justices dissented, id. at 366 (Rehnquist, Burger, and Stewart, J.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).}

Given that Rule 54(d) normally required a losing plaintiff to pay defendant’s costs anyway, the Court’s holding merely converted what would have been a mandatory award under Rule 68 into a discretionary award under Rule 54(d).\footnote{Id. at 353.} 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 important, the Court made crystal clear that it viewed Rule 68 as a settlement promotion tool.\footnote{Id. at 352 & n.9 (noting that Rule 68 would be particularly useful in cases where liability is relatively clear or already decided and the amount of the judgment is at issue).} The majority used categorical and unqualified language: “The purpose of Rule 68 is to encourage the settlement of litigation.”\footnote{Id. at 352.} And the dissenters agreed in equally strong terms even as they challenged the majority’s textual, historical, and policy arguments.\footnote{Id. at 379 n. 5 (“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.”)}

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

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\item \footnote{Id. at 351-52. In fact, only five Justices agreed on the holding. Three Justices dissented, id. at 366 (Rehnquist, Burger, and Stewart, J.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).}
\item \footnote{Id. at 352 & n.9 (noting that Rule 68 would be particularly useful in cases where liability is relatively clear or already decided and the amount of the judgment is at issue).}
\item \footnote{Id. at 352. The Court cites 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.}
\item \footnote{Id. at 379 n. 5 (“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.”)}
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plaintiffs who rejected reasonable offers “vexatiously” or “without good cause.” The
“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. 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 Airlines seized on the 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. This happened in 1983.

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149 The Court notes 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 served by these state offer of
judgment rules was to penalize prevailing plaintiffs who had rejected reasonable settlement offers without
good cause.” Id. at 357-58.

150 This is clear a few paragraphs prior to the historical discussion, where the Court responds to
defendant’s argument that a mandatory rather than a discretionary award of costs would increase the
settlement rate. Id. at 356. The Court invokes fairness and in the course of its discussion notes that “[i]f
the 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. Once again, there is no definition of a “reasonable offer” or any
explanation of why fairness is implicated. Nor is there any apparent recognition that the principle supports
at best only a limited version of Rule 68 and not an omnibus settlement promotion device.

151 See Simon, supra note 1, at 6-9.
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.\(^{152}\)

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 system.\(^ {153}\) The 1983 proposal made Rule 68 two-way, applied it to losing plaintiffs (reversing *Delta Airlines*), and included fees in the sanction subject to the court’s discretion.\(^ {154}\)

The proposal sparked a firestorm of controversy. The defendant’s 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.\(^ {155}\) The plaintiff’s bar, and especially the plaintiff’s civil rights bar, strongly opposed the reform, in particular the inclusion of attorney fees in the sanction.\(^ {156}\) Among other things, the opponents

\(^ {152}\) The 1983 amendments also added new Rules 72 through 76 implementing the statutory grant of authority to refer issues to magistrate judges for decision.


\(^ {155}\) See Simon, *supra* note 1, at 12 n. 55; *Fee Shifting Plan Sent Back to Drawing Board*, Legal Times of Washington, May 28, 1984, at 4, col. 1. Some defense counsel, however, objected to the enlargement of time from ten to thirty days for responding to an offer.

\(^ {156}\) See Simon, *supra* note 1, at 13-15. The most intense opposition came from the ACLU, Alliance for Justice, NAACP, and other similar organizations.
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.157

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.158 The new proposal, circulated in 1984, also converted Rule 68 into a two-way rule. 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.159

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.160 But the opposition was stronger. Critics voiced the same concerns as in 1983, including the

157 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. The Rules Enabling Act concern was also raised by committee members and voiced in a letter from Senator Arlen Specter to the Advisory Committee. 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, (2) interfere with contingency fee arrangements by placing plaintiffs at risk of paying defendant’s fees, and (3) chill civil rights plaintiffs with limited resources from filing meritorious suits. Id.


159 See 1984 Proposal, supra note 158. The sanction could include fees in appropriate cases.

160 See Simon, supra note 1, at 4 n.7.
Rules Enabling Act problem,\textsuperscript{161} and they also argued that the reliance on subjective reasonableness standards and judicial discretion would create costly collateral litigation and other problems.\textsuperscript{162}

Very few amendments to the FRCP have engendered such intense controversy. The Advisory Committee permanently tabled the proposals in January 1986.\textsuperscript{163}

However, the Committee still remains interested in reforming Rule 68 as a settlement tool and periodically considers proposals for revision.\textsuperscript{164}

3. \textit{Marek v. Chesny: The Supreme Court Weighs In Again}

Just when it became clear that the Committee’s efforts were doomed to failure, the Supreme Court entered the fray and rendered its second major decision on Rule 68 in a four year period. Over a particularly sharp dissent by Justice Brennan, the Court in \textit{Marek v. Chesny}\textsuperscript{165} held that “costs” in Rule 68 included fees whenever a fee-shifting statute explicitly awarded fees “as part of the costs.” As a result, the civil rights plaintiff

\textsuperscript{161} See Burbank, supra note 153, 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).


\textsuperscript{165} 473 U.S. 1 (1985).
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.166

This was a remarkable tour de force. The Supreme Court, in effect, did through interpretation part of what the Advisory Committee had 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.”167

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.”168 It responded to the objection that its interpretation of Rule 68 conflicted with congressional fee-shifting policies underlying Section 1988 by arguing that Section 1988 and Rule 68 were complementary rather than conflicting: Section 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 if they settled anyway.169

166 Marek involved a 42 U.S.C. § 1983 claim to recover damages brought against police officers for an unconstitutional shooting. Section 1983 claims are subject to fee-shifting in favor of prevailing plaintiffs under 42 U.S.C. § 1988, which awards “a reasonable attorney’s fee as part of the costs.” The defendant made an offer of judgment in the amount of $100,000, and the plaintiff rejected and recovered less.
167 473 U.S. at 5. In his concurrence, Justice Powell stated the purpose of Rule 68 more narrowly: “to ‘[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. 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.
168 Id. at 8-9.
169 Id. at 10.
Marek evoked a strong critical response, objecting among other things to the Court’s simplistic analysis of committee intent and effects on filing incentives. 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. Furthermore, it prompted efforts on the state level to strengthen state versions of Rule 68. Finally, the Advisory Committee retains an interest in amending Rule 68 and plans to consider another look at the Rule in the near future.

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171 See, e.g., sources cited supra at notes 28-29; Solomine & Pacheco, supra note 170, at 62 (remarking on the “cottage industry” of scholarship on Rule 68 in the wake of the early 1980 events). For recent examples of Rule 68 research, see Lewis & Eaton, supra note 4, at 738-41 (describing their empirical survey study); Yoon & Baker, supra note 4 (reporting results of econometric study of the impact on automobile accident litigation of New Jersey’s two-way offer of judgment rule that includes fees and costs).

172 Many states strengthened their offer of judgment rules in response to the criticisms of Rule 68 in the late 1970s and 1980s. See American College of Trial Lawyers, SURVEY OF STATE OFFER OF JUDGMENT PROVISIONS 3-6 (Oct. 2004) (summarizing all the state offer of judgment rules); Solomine & Pacheco, supra note 170, at 64 (counting thirteen states with offer of judgment rules different than Rule 68 and noting that these states “appear to have been motivated, at least in part, by some criticisms of Rule 68”).

173 See supra note 5 & accompanying text. See also Edward H. Cooper, Symposium Reflections: A Rulemaking Perspective, 57 MERCER L. REV. 839, 842 n. 9 (2006).
Another highly significant impact of the Rule 68 controversy was on the rulemaking process itself. It added impetus to what turned into one of the most profound changes in the FRCP, as important a change as the rise of settlement: the politicization of court rulemaking. This politicization 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.\(^{174}\)

For almost forty years after the Rules Enabling Act was adopted in 1934, the traditional court rulemaking model dominated procedural rulemaking in federal court.\(^{175}\) 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 also justified delegating the 1938 FRCP to committee-based rulemaking. The 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 value and best handled by procedural experts.\(^{176}\)

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


\(^{176}\) *Id.* at 893-97.
about the possibility of outcome-neutral process, and diminishing faith in the objectivity of technical expertise.177

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. 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.178 At the same time, the opening up of the committee’s process made it easier for interest groups to get involved and this has had mixed results for rulemaking. 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.179

The politicization of the rulemaking process through interest group pressure has also led to greater congressional involvement in procedural reform.180 Perhaps the most striking example is the Civil Justice Reform Act of 1990, which empowered local districts to experiment with procedural reforms and undermined one of the central tenets of court rulemaking, the importance of uniform rules made by a centralized, committee-based process.181

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177 Id. at 900-902.
179 See Bone, Process of Making Process, supra note 175, at 916-17.
180 See Geyh, supra note 178, at 1187-88.
I do not mean to suggest that the Rule 68 events were the sole cause of these changes. Those events combined with others to dramatize what many had already begun to see as major shortcomings of the traditional court rulemaking model. 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 a profound substantive effect by chilling civil rights litigation and serious distributional consequences by disproportionately burdening litigants of poor and moderate means. They were also reforms that threatened to invade the congressional domain by undermining the effectiveness of fee-shifting statutes and that sharply polarized interest groups in ways that challenged the court rulemaking 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, lessons 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.

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 Rule was lifted from state practice where it better fit an unreasonable plaintiff model than a settlement promotion model. 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. 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. More important, there is no indication
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 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 Federal Rules
liberally to better serve their purposes in light of changing litigation conditions. 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. 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

182 For example, before the Supreme Court discouraged the practice in Leatherman v. Tarrant County
Intelligence & 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 – and some still do. See Christopher M. Fairman,
(2002) (criticizing commentators who support broad flexibility in interpreting the FRCP).
183 See supra notes 165-169 & accompanying text.
other authority.”

The problem is that there is no plausible basis for attributing such an intent to the Committee. The best one can say about committee intent in 1938 is that Rule 68 was meant to operate in the same way as the code offer of judgment rules in state court. And none of those rules included market rate fees in “costs.”

Even though the *Marek* Court focused on intent, purpose played a crucial role in its analysis as well. 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. However, the Court was led astray by trying to squeeze a settlement promotion model into a Rule that was not drafted to serve that 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 defendant’s favor.

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.

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184 473 U.S. at 8-9.
185 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). And he points out, correctly I might add, that this intent is perfectly consistent with the committee knowing about the existence of fee-shifting statutes. *Id.* at 18-20 (Brennan, J., dissenting).
186 Even Justice Brennan in dissent accepted the settlement promotion model of Rule 68. He argued that the 1938 Committee would have wanted uniform settlement promotion and therefore would have rejected any scheme where different settlement promotion effects 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.
187 See Miller, *supra* note 3.
188 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.
Existing FRCP carry with them a strong presumption of validity under the Rules Enabling Act by virtue of successfully negotiating all the rulemaking stages.\textsuperscript{189} When Rule 68 is read as a settlement promotion tool, the presumption of validity extends to the settlement promotion purpose too. 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. Since 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 \textit{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.\textsuperscript{190} 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 meritorious civil rights suits that Congress meant to encourage. Chesny v. Marek, 720 F.2d 474, 479-80 (7th Cir. 1983).


\textsuperscript{190} See Shelton, \textit{supra} note 20, at 881-83.
to use Rule 68 if they can include disclaimers in their offers of judgment too.\textsuperscript{191}

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.\textsuperscript{192}

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, doing 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 judgment 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 attests, 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.\textsuperscript{193}

This leaves the question 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 nearly seventy years – ordinarily would justify a presumption in the rule’s favor, a


\textsuperscript{192} See 12 WRIGHT ET AL., FEDERAL PRACTICE, supra note 8, § 3002 (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”). Also, 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 20, at 883 n. 87.

presumption that should also extend to amendments furthering the rule’s purpose. None
of this, however, applies to Rule 68. Pedigree should matter only if the proposed
amendment is designed to further the same purpose that the rule was meant to serve.
This is not the case for Rule 68 amendments designed to further broad settlement
promotion goals.

This means that 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 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.\footnote{This raises the question 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 \textit{Marek}. Thus, it might be better on balance to abrogate the Rule entirely.}

Focusing attention in this way also highlights three 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.
The committee should also compare a conditional fee shifting rule to other methods for encouraging settlement. The other principal method in vogue today involves direct trial judge intervention in the bargaining process.\textsuperscript{195} 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 second principle is related to the first. 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.\textsuperscript{196} And settlement quality is at least as important as quantity for achieving the deterrence and compensatory purposes of the substantive law.\textsuperscript{197}

The third 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.\textsuperscript{198} This is an important point. The idea that Federal Rules of Civil Procedure should apply uniformly to all

\textsuperscript{195} See WRIGHT ET AL., FEDERAL PRACTICE, \textit{supra} note 8, § 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).

\textsuperscript{196} See, \textit{e.g.}, Miller, \textit{supra} note 3.

\textsuperscript{197} See Bone, \textit{Who Decides?}, \textit{supra} note 193, at 1981-84.

\textsuperscript{198} For example, the effects of a conditional fee shifting rule on settlement might be highly sensitive to different information structures. See, \textit{e.g.}, Spier, \textit{supra} note 28, at 198.
substantive law claims – the so-called trans-substantive ideal\textsuperscript{199} – still has a strong hold on rulemaking today. That hold must be relaxed if the committee is to design sensible fee shifting rules.

These three 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 \textit{Marek}, that the penalty will make a party “think very hard” before rejecting a settlement offer.\textsuperscript{200} Rulemakers must explain why the party needs to think harder and how thinking harder will promote desirable settlements.

\textbf{V. CONCLUSION}

Rule 68 is an example of an FRCP 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


\textsuperscript{200} \textit{Marek v. Chesny}, 473 U.S. 1, 11 (1985).
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 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 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. 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 theory of procedure sufficiently sophisticated to distinguish 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 conflict. 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

\[\text{See Bone, } Who \ Decides?, \supra\ \text{note 193, at 1981-85 (explaining why settlement effects are as important as trial effects in designing procedural rules).}\]
amendments to Rule 68, or pushes the Committee to adopt highly general rules that satisfy all sides but offer trial judges little guidance.202

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 Committee must persuade, and 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 FRCP near 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.

202 See Bone, *Process of Making Process*, supra note 175, at 916-17, 925-26 (analyzing this problem).