

Article

Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment

Danielle M. Shelton[†]

“If there is any occasion in civil litigation which calls for caution and care by counsel, it is the drafting of a Rule 68 offer.”¹

I.	The Promise of Rule 68 Offers of Judgment	869
	A. A Primer on Rule 68 and Its Purpose	869
	B. The Rule 68 Offer: Requirements and Consequences	872
II.	Difficulties in Interpreting Offers: Uncertainties in Rule 68 Offers Undermine the Rule’s Purpose	876
	A. The Nature of the Uncertainty in Drafting and Evaluating Rule 68 Offers	877
	B. Canvass of Cases in Which Confusion Exists Regarding Validity of Offer	880
	1. Whether Offers May Disclaim Liability	881
	2. Whether Offers May Be Revoked	883
	3. Whether Offers Must Provide for Relief Requested in the Complaint	886

[†] Associate Professor of Law, Drake University; Of Counsel, Belin Lamson McCormick Zumbach Flynn, P.C.; B.A. 1992, *summa cum laude*, Augustana College; J.D. 1995, *magna cum laude*, Harvard Law School; Law Clerk to Judge Ed Carnes, United States Court of Appeals for the Eleventh Circuit (1995–96). The author gratefully acknowledges the receipt of a John & Leslie Fletcher Law School Endowed Faculty Research Stipend. The author thanks Megan Gerriets and Christine Fleming for their research assistance, and also thanks Thomas Mayes, Harold Lewis, and Laurie Doré for reviewing a draft of this Article. Copyright © 2007 by Danielle M. Shelton.

1. *Sampson v. Embassy Suites, Inc.*, No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998).

C.	Canvass of Cases in Which Confusion Exists Regarding Scope of Offers Related to Costs and Attorneys' Fees	888
1.	Whether the Amount of the Offer Includes Costs	888
a.	Confusion When the Offer Mentions Costs	889
b.	Confusion When the Offer Does Not Mention Costs	891
2.	Whether the Amount of the Offer Includes Attorneys' Fees	896
a.	When Attorneys' Fees Are Defined as "Costs": Uncertainty in Fees-as-Costs Cases	897
i.	Confusion About Fees-as-Costs	898
ii.	Confusion About Attorney Fee Provisions in Particular Cases	899
b.	When Attorneys' Fees Are Not Defined as "Costs": Uncertainty in Fees-as-Separate-from-Costs Cases	902
i.	Offers That Are Deemed Ambiguous Regarding Attorneys' Fees	903
ii.	Offers That Are Deemed Unambiguous Regarding Attorneys' Fees	908
3.	The Other Side of the Coin: Uncertainty in the Interpretation of Offers When Comparing Unaccepted Offers to Judgments Obtained	911
D.	The Overall Effects of Uncertainty Defeat the Rule's Purpose: Gun Shy Defendants, Daunted Plaintiffs, and Overburdened Courts	916
1.	Avoidance by Defendants	916
2.	Unfairness to the Plaintiff	918
3.	Costs to Courts	920
4.	Overall, Lack of Certainty Undermines the Rule's Purpose	921
III.	Living Up to the Promise: A Proposal to Revise and Clarify Rule 68 with Regard to Offers	921
A.	Specific Changes to Rule 68's Provisions Relating to Offers	922
B.	Proposed Revised Rule 68	923
C.	Benefits of the Proposed Rule	925

2007]	<i>REWRITING RULE 68</i>	867
	1. Clarity Regarding Components of a Rule 68 Offer	926
	2. Clarity Regarding Whether Particular Offers Are Valid	927
	3. Clarity Regarding Whether an Offer Is Inclusive of Costs	928
	4. Clarity Regarding Whether an Offer Is Inclusive of Attorneys' Fees	930
	5. Clarity Regarding the Comparison Between an Unaccepted Offer and the Judgment	935
	6. Comparison of the Offer's Meaning Under the Current Rule Versus the Revised Rule	936
Conclusion		936

Enacted more than sixty years ago, Federal Rule of Civil Procedure 68² has never lived up to its promise of “encourag[ing] settlements and avoid[ing] protracted litigation.”³ Yet in recent years, as the popularity of alternative dispute resolution waxes, the rule has earned favor among academics.⁴ Still, to most practitioners the rule remains a second-class citizen. The rule’s inferior citizenship is well-deserved. Due to its ambiguity, Rule 68 often creates more uncertainty, and more burdensome litigation, than it resolves. As such, many defendants either avoid it or use it at their peril.

The problem lies in the lack of definition and clarity in the rule itself. The rule, which is the only federal rule of civil procedure that governs formal settlement offers, is supposed to operate to encourage plaintiffs to “think hard” about accepting reasonable settlement offers. Plaintiffs who refuse a Rule 68 offer, and then receive a less favorable outcome at trial, are penalized; they not only lose their ability to recover their post-offer costs and applicable attorneys’ fees but also must pay the other side’s post-offer costs.⁵

In practice, though, the rule’s operation is much less clear. Because the rule is cursory in form and does not alert the parties to its many nuances, defendants often are uncertain or

2. FED. R. CIV. P. 68.

3. 12 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3001, at 66 (2d ed. 1997).

4. Daniel Glimcher, Note, *Legal Dentistry: How Attorney’s Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes*, 27 *CARDOZO L. REV.* 1449, 1452 (2006).

5. FED. R. CIV. P. 68. For the full text of the rule, see *infra* note 6.

misguided about how to draft a Rule 68 offer. Defendants often end up drafting offers that carry unintended consequences. Similarly, plaintiffs who receive Rule 68 offers face uncertainty. A plaintiff must decide whether to accept or reject a given offer, knowing that either decision carries consequences that hinge upon how a court will construe the offer or how a court will compare the offer to the judgment received at trial. It is not surprising that defendants largely avoid the rule and plaintiffs decry the rule as unfair.

Both defendants and plaintiffs are correct in their assessments—the case law is replete with instances in which judges have construed Rule 68 offers as something very different from what the parties intended to offer or accept. The end result of this uncertainty is that cases that would be good candidates for Rule 68 settlements are not so settled, and those in which Rule 68 offers are attempted often result in costly collateral litigation. A defendant who thinks he is making a lump-sum offer for \$15,000 ends up being told by the court that in fact he also must pay a six-figure attorney fee award. Likewise, a plaintiff who thinks she just accepted an offer for \$75,000 exclusive of attorneys' fees is surprised to learn from the court—after she accepted the offer—that in fact the offer already included such fees and thus she cannot recover her six-figure attorneys' fees in addition to the offer.

It does not have to be this way. The rule can and should be amended so that it becomes a predictable and useful tool for practitioners to settle cases. This Article focuses on amending the primary part of the rule that leads to uncertainty—the Rule 68 offer.

Part I provides an overview of the basic features of Rule 68, including the rule's purpose. It also describes the components of Rule 68 offers and the roles of defendants, plaintiffs, and courts in relation to such offers.

Part II examines the current uncertainty surrounding the validity and interpretation of offers under Rule 68. By examining federal court cases in which Rule 68 is applied, it explores uncertainty surrounding the interpretation of such offers. It also explores the implications of such uncertainty, including the failure of defendants to use the rule, the drafting problems when defendants use the rule, the difficulties plaintiffs face in evaluating offers, and the resulting collateral litigation.

Part III proposes an amendment to the rule that would provide clarity and predictability to defendants making Rule 68

offers and to plaintiffs and courts called upon to evaluate such offers. Specifically, it proposes an amendment to the rule that would define what must be included in a Rule 68 offer and direct how courts must interpret such offers. Part III devotes particular attention to amending the rule to eliminate much of the current confusion over whether costs and fees are included in an offer.

With this amendment, defense attorneys will understand and use the rule without fear. Plaintiffs' attorneys, too, will be on notice as to how courts will construe an offer, and will be able to make informed decisions about whether to accept or reject an offer. The end result of such clarity and predictability will be not only that Rule 68 offers will be properly made and properly assessed, but also that such offers will be enforced with only minimal court intervention and limited collateral litigation. With greater certainty in the rule, Federal Rule of Civil Procedure 68 can begin to live up to its purpose of fostering settlements and promoting judicial economy.

I. THE PROMISE OF RULE 68 OFFERS OF JUDGMENT

A. A PRIMER ON RULE 68 AND ITS PURPOSE

Federal Rule of Civil Procedure 68⁶ is the only settlement device or federal rule of any kind, that “deals directly with the consequences of an unreasonable refusal to settle.”⁷ Under the rule, a defendant may make an offer of judgment to the plain-

6. FED. R. CIV. P. 68. The relevant text of the “Offer of Judgment” rule is as follows:

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 offeror 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.

Id.

7. John E. Sprizzo, *Unjustifiable Refusals to Settle and Rule 68*, 62 ST. JOHN'S L. REV. 443, 443 (1988).

tiff, which allows judgment to be taken against the defendant.⁸ While the rule requires few formalities, the offer must be for damages as well as costs then accrued.⁹ If the plaintiff accepts the offer, judgment is entered for the amount of the offer as a matter of course. If, instead, the plaintiff rejects the offer but receives less at trial, Rule 68 penalizes the plaintiff by shifting all post-offer costs to the plaintiff.¹⁰ The penalty is two-fold: the plaintiff must pay the defendant's post-offer costs and the plaintiff cannot recover her own post-offer costs.¹¹ These shifting costs can be particularly high in actions in which attorneys' fees are defined as "costs,"¹² such that the plaintiff is precluded from recovering otherwise applicable attorneys' fees on a successful verdict that is less than the amount of the Rule 68 offer.¹³

8. See WRIGHT ET AL., *supra* note 3, § 3002, at 90. By its plain text, Rule 68 is available only to the party seeking to make an offer, which typically is the defendant. *Id.*

9. *Id.* (quoting *Marek v. Chesny*, 473 U.S. 1, 6 (1985)); see also Monica Wiseman Latin, Note, *Avoiding Disaster: The Applicability of Federal Rule 68 When Multiple Offers of Judgment Result in a Settlement*, 12 REV. LITIG. 687, 696 (1993).

10. See FED. R. CIV. P. 68; *Marek*, 473 U.S. at 5. Notably, Rule 68 is not triggered if the judgment is in favor of the defendant. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). This result has been criticized on grounds that it is arbitrary and contrary to the rule's purpose. See J. Karen Arnold, Note, *Delta Air Lines, Inc. v. August: Taking the Teeth out of Rule 68*, 43 U. PITT. L. REV. 765, 765 (1982).

11. *Marek*, 473 U.S. at 7. Courts have almost uniformly held that defendants cannot recover their attorneys' fees as "costs" pursuant to Rule 68. See Megan Barbero, Note, *Interpreting Rule 68 to Conform with the Rules Enabling Act*, 57 STAN. L. REV. 2017, 2025 (2005) ("In sum, the majority of the circuit courts to have considered the issue have held that the 'properly awardable' language of *Marek* prohibits defendants from recovering attorney's fees from the plaintiffs as part of Rule 68 costs because either the defendant is not the 'prevailing party,' or because the suit is not unreasonable or frivolous and the underlying statute requires the suit to be so for there to be an award of attorney's fees . . .").

12. Although in *Marek* the question before the Court was whether the underlying federal fee-shifting statute defined attorneys' fees as "costs," the Court made clear that Rule 68's reference to "costs" applies to "all costs properly awardable under the relevant substantive statute or other authority." 473 U.S. at 9. Thus, under Rule 68, attorneys' fees are properly treated as part of "costs" so long as they are so defined by a federal fee-shifting statute, state fee-shifting statute, or contract. 13 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* § 68.02[4], at 68-9 (citing *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1027-28 (9th Cir. 2003); *Crossman v. Marcoccio*, 806 F.2d 329, 332-34 (1st Cir. 1986)).

13. Some commentators have questioned whether *Marek's* interpretation of "costs" raises implications under the Rules Enabling Act. See *Marek*, 473

Because of Rule 68's ability to change the financial incentives of pursuing litigation, the rule requires plaintiffs to "think hard" before rejecting Rule 68 offers.¹⁴ A prototypical case is one in which the defendant makes a Rule 68 offer for \$100,000 plus costs then accrued. If the plaintiff accepts the offer, judgment is entered for \$100,000 and the plaintiff also may recover her costs then accrued. If the plaintiff rejects the offer, and then recovers \$105,000 at trial, the rule has no consequence. The plaintiff recovers the amount of the judgment as well as any costs. If, instead, the plaintiff rejects the offer, but recovers only \$80,000 at trial, the rule is triggered and costs shift. Thus, the plaintiff recovers the \$80,000 but cannot recover her post-offer costs and instead must pay the defendant's post-offer costs. This sanction is of particular consequence in fee-shifting cases in which the plaintiff's claim is one under which "costs" are defined to include attorneys' fees.¹⁵ In such cases, the plaintiff cannot recover the post-offer attorneys' fees to which she otherwise would have been entitled.

The often-touted purpose of Rule 68 is "to encourage settlement and avoid litigation."¹⁶ The rule does so by "prompt[ing] 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."¹⁷ The rule's policy of encouraging settlement is said to be neutral, "favoring neither plaintiffs nor defendants."¹⁸

U.S. at 36 (Brennan, J., dissenting) (arguing that the majority's interpretation of Rule 68 would "surely . . . operate to 'abridge' and to 'modify' [the] statutory right to reasonable attorney's fees"); Edward H. Cooper, *Symposium Reflections: A Rulemaking Perspective*, 57 MERCER L. REV. 839, 845-47 (2006) (discussing the Rules Enabling Act in the context of revisions to Rule 68); Barbero, *supra* note 11 (exploring whether *Marek's* interpretation of "costs" as inclusive of attorneys' fees defined as costs abridges, enlarges, or modifies a plaintiff's arguably substantive right to attorneys' fees).

14. *Marek*, 473 U.S. at 11; *see also* Richardson v. Nat'l R.R. Passenger Corp., 49 F.3d 760, 765 (D.C. Cir. 1995) ("[A] Rule [68 offer] imposes certain consequences that can be costly for the [offeree] who declines the offer. The Rule is thus designed to put significant pressure on the [offeree] to think hard about the likely value of its claim as compared to the [offeror's] offer.").

15. *See, e.g.*, 42 U.S.C. § 1988 (2000) (defining fees-as-costs in § 1983 actions).

16. *Marek*, 473 U.S. at 5; *see also* WRIGHT ET AL., *supra* note 3, § 3001, at 66.

17. *Marek*, 473 U.S. at 5.

18. *Id.* at 10.

Despite the rule's clear purpose, it is not clear that much thought was put into drafting the rule.¹⁹ The rule itself is rather cursory in form and "has long been among the most enigmatic of the Federal Rules of Civil Procedure."²⁰ Since 1983, several proposals have been made to amend Rule 68, but none has been adopted.²¹ Most of these proposals have focused on changing the incentives under the current rule²² and stem from the widespread belief that the rule is underutilized, unfair, or ineffective. Indeed, the anecdotal evidence and empirical research on Rule 68 demonstrates that the rule is used infrequently,²³ and some research also suggests that the current incentives are inadequate to achieve the rule's purpose.²⁴

B. THE RULE 68 OFFER: REQUIREMENTS AND CONSEQUENCES

At the core of much litigation involving Rule 68 lies the offer of judgment itself. However, the text of the rule provides little guidance as to what an offer must include and how a court will interpret it:²⁵ "[A] party defending against a claim may

19. WRIGHT ET AL., *supra* note 3, § 3001, at 67.

20. *Id.* at 75 (citing *Crossman v. Marcoccio*, 806 F.2d 329, 331 (1st Cir. 1986)).

21. Indeed, the rule's substance has not been amended since 1946. See MOORE ET AL., *supra* note 12, § 68 App.01-.04; Anna Aven Sumner, Note, *Is the Gummy Rule of Today Truly Better than the Toothy Rule of Tomorrow? How Federal Rule 68 Should Be Modified*, 52 DUKE L.J. 1055, 1055 (2003). In contrast, several states have either revised or enacted offer of judgment rules in recent years. See JOHN E. SHAPARD, FED. JUDICIAL CTR., LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE 25-27 (1995); Lesley S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 414 n.245, 422 (1997); Sumner, *supra*, at 1055 n.3; Laura T. Kidwell, Annotation, *Construction of State Offer of Judgment Rule—Sufficiency of Offer and Contract Formation Issues*, 118 A.L.R. 91 (2004).

22. For example, several proposals involve shifting the defendant's attorneys' fees, at least in some circumstances. For a history of the proposed amendments to Rule 68, see MOORE ET AL., *supra* note 12, § 68 App.101.

23. See, e.g., Glimcher, *supra* note 4, at 1451-52, 1455 (describing Rule 68 as "relatively obscure and vastly underutilized"); Symposium, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session One: "Background and Federal Judicial Interpretation of Rule 68,"* 57 MERCER L. REV. 743, 757 (2006) ("In summary, with some notable exceptions, it appears that Rule 68 is not used very much in the very type of cases in which it might be expected to have the greatest impact.").

24. See Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 158-60 (2006).

25. See, e.g., *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1241 (11th Cir. 2002) ("The sole constraint Rule 68 places on

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.”²⁶

Under well-established case law following the Supreme Court’s decision in *Marek v. Chesny*, an offer must include costs.²⁷ Costs can be included as part of the offer (i.e., the defendant makes a lump-sum offer that is inclusive of costs) or costs can be included after the fact (i.e., the defendant makes an offer for a certain amount that is not inclusive of costs, thus allowing costs to be added later).²⁸

Once a defendant makes a Rule 68 offer, the offer itself is non-negotiable.²⁹ The offeree-plaintiff has only two choices: accept the offer on its face or reject it. Either way, a plaintiff must assess what exactly the offer is, because “a Rule 68 . . . offer has a binding effect when refused as well as when accepted.”³⁰ If the offer is accepted, Rule 68 operates automatically and without the court’s discretion.³¹ As such, if the plaintiff accepts the offer, the court must enter judgment for the amount specified in the offer.³² The court may not second guess the terms of the offer, as “[e]ntry of a Rule 68 judgment is ministerial rather than discretionary.”³³

offers of judgment is its mandate that an offer include ‘costs then accrued.’”).

26. FED. R. CIV. P. 68.

27. See 473 U.S. 1, 9 (1985).

28. *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991).

29. *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997).

30. *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998).

31. *Id.* (“Rule 68 operates automatically, requiring that the clerk ‘shall enter judgment’ upon the filing of an offer, notice of acceptance and proof of service. This language removes discretion from the clerk or the trial court as to whether to enter judgment upon the filing of the accepted offer.” (citing *Mallory v. Eyrich*, 922 F.2d 1273, 1279 (6th Cir. 1991))).

32. Although the court enters “judgment” on an accepted Rule 68 offer, that judgment does not have collateral estoppel implications. See Ian H. Fisher, *Federal Rule 68, A Defendant’s Subtle Weapon: Its Use and Pitfalls*, 14 DEPAUL BUS. L.J. 89, 92 (2001) (demonstrating that Rule 68 judgments do not have collateral estoppel implications because two of the required elements of collateral estoppel—that the issue was “actually litigated” and was “essential” to the judgment—are not present).

33. *Mallory*, 922 F.2d at 1279 (“From the foregoing it appears that Rule 68 judgments are self-executing. Unlike imposed judgments and ordinary consent judgments, once the parties agree on the terms of a Rule 68 judgment, the court has no discretion to withhold its entry or otherwise to frustrate the agreement.”); see also Fisher, *supra* note 32, at 105 (“Upon the filing of a Rule 68 offer . . . , a court must enter judgment . . . as set forth in the offer. A court has no discretion . . .”).

If the plaintiff chooses to reject the offer and instead elects to proceed to trial, the rule's cost-shifting mechanism is triggered if "the judgment finally obtained by the [plaintiff] is not more favorable than the offer."³⁴ The cost-shifting mechanism is mandatory; under the rule, the plaintiff "*must* pay the costs incurred after the making of the offer."³⁵ In practice, this means that the plaintiff must bear her own post-offer costs (that otherwise would be recoverable) and also must pay the post-offer costs of the defendant.³⁶ The offer "stands as the marker by which the plaintiff's results are ultimately measured."³⁷ That is, the offer becomes the benchmark a plaintiff must surpass at trial to avoid the shifting of costs—both her own and those of the defendant—under Rule 68.³⁸

Further, in comparing the offer and the judgment, a court should be mindful that an apples-to-apples comparison be made: if the offer includes costs, the judgment amount, too, should account for or include costs accrued from the time of the offer.³⁹ Because plaintiffs must respond with either acceptance or silence to a Rule 68 settlement offer, and because either response has consequences,⁴⁰ one court has reflected that "plaintiffs are at their peril whether they accept or reject a Rule 68 offer."⁴¹

The question that arises is what constitutes "costs" under Rule 68. The rule itself does not define costs but instead adopts

34. FED. R. CIV. P. 68.

35. *Id.* (emphasis added).

36. See MOORE ET AL., *supra* note 12, § 68.08[2], at 68-55 n.5 ("[A] plaintiff who refuses an offer of judgment and later fails to receive a more favorable judgment must pay the defendant's post-offer costs." (citing *O'Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989))).

37. *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997).

38. See, e.g., *Crossman v. Marcoccio*, 806 F.2d 329, 331-33 (1st Cir. 1986) (reading Rule 68 not only to deny a plaintiff who receives a judgment less favorable than the offer her right to have the defendant pay her costs, but also to require the plaintiff to pay the defendant's post-offer costs).

39. This comparison is complicated when costs, at least arguably, include attorneys' fees. See WRIGHT ET AL., *supra* note 3, § 3006.1, at 125 ("Although the task of comparison is usually straightforward in cases involving only monetary relief, lump-sum offers that combine substantive relief and costs can present complications, particularly where costs include attorneys' fees. . . . [C]ourts have recognized that Rule 68 offers that appeared better actually were not when costs were added in."). For a discussion of cases in which courts have included attorneys' fees in measuring costs, see *infra* Part II.C.2.a.

40. *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998).

41. *Id.*

the statutory definition⁴² of 28 U.S.C. § 1920, the federal taxation-of-costs statute.⁴³ Under that statute, “costs” include clerk’s court costs, court reporter fees, witness fees, and other incidental costs of trial.⁴⁴ Attorneys’ fees, on the other hand, are not considered costs within the meaning of § 1920.⁴⁵ Even so, some statutes expand the § 1920 definition of costs to include attorneys’ fees.⁴⁶ In those cases in which costs are broadly defined, the practical effect is that “a plaintiff who refuses a Rule 68 offer may lose entitlement to some portion of attorneys’ fees if the plaintiff does not recover more in the litigation than the defendant offered in settlement via Rule 68.”⁴⁷

Because a plaintiff’s decision to accept or to reject the offer depends on how a court will construe the non-negotiable Rule 68 offer, any uncertainty about the court’s interpretation of the offer creates risk for the plaintiff.⁴⁸ A risk-averse plaintiff will be particularly susceptible to the pressure of accepting a Rule 68 offer, even if the offer is unclear, lest she otherwise risk losing attorneys’ fees and paying the defendant’s costs later.⁴⁹

42. See MOORE ET AL., *supra* note 12, § 68.02[4], at 68-9 n.13 (citing *Marek v. Chesny*, 473 U.S. 1, 9 (1985)).

43. 28 U.S.C. § 1920 (2000).

44. See MOORE ET AL., *supra* note 12, §§ 68.02[4], 68.08[2].

45. *Id.*

46. See *id.* § 68.02[4], at 68-9 n.10 (“[T]he costs which are subject to the cost-shifting provisions of Rule 68 are those enumerated in 28 U.S.C. § 1920, unless the substantive law applicable to the particular cause of action expands the general § 1920 definition.” (citing *Parkes v. Hall*, 906 F.2d 658, 660 (11th Cir. 1990)); *infra* Part II.C.2.a (discussing cases in which courts include attorneys’ fees as part of costs); *infra* note 169 (referencing sources that list fee-shifting statutes defining attorneys’ fees as part of costs).

47. *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998).

48. See *id.* at 622; *infra* Part II.D.2 (observing that the plaintiff faces a difficult choice when deciding whether to accept or reject an offer of judgment because the plaintiff does not know whether the court will interpret the offer amount to include or exclude fees).

49. See MOORE ET AL., *supra* note 12, § 68-08[2], at 68-55 (citing *Crossman v. Marcoccio*, 806 F.2d 329, 333 (1st Cir. 1986)). One criticism of Rule 68 is that it creates an incentive for plaintiffs to accept offers far below the value of their case. See, e.g., Harold S. Lewis, Jr. & Thomas A. Eaton, *Foreword: Of Offers Not (Frequently) Made and (Rarely) Accepted: The Mystery of Federal Rule 68*, 57 MERCER L. REV. 723, 735 (2006) (“The principal concern [was] that the defendants . . . would routinely make early, low-ball offers of judgment; the plaintiffs, fearful of forfeiting what is often the largest part of their recovery (attorneys fees), would feel compelled to accept”); cf. Yoon & Baker, *supra* note 24, at 162 (“[Rule 68] redistributes wealth from the plaintiff to the defendant Rule 68, if invoked, imposes risk on the plaintiff without any corresponding risk borne by the defendant. The defendant can exploit this inequality in the settlement process, compelling a lower settle-

II. DIFFICULTIES IN INTERPRETING OFFERS:
UNCERTAINTIES IN RULE 68 OFFERS
UNDERMINE THE RULE'S PURPOSE

Despite Rule 68's promise of promoting settlements and ending unnecessary litigation,⁵⁰ the rule has done little to advance either goal. Instead, the rule's ambiguity has served to discourage its use as a settlement vehicle. Under the current rule, plaintiffs are not the only ones who have to "think hard" about a Rule 68 offer—defendants, too, must "think hard" about whether and how to make such an offer in the first place.⁵¹ Uncertain how courts will interpret their offers and not wanting to be in a worse position after making an offer, many defendants make the prudent choice to avoid the rule altogether.⁵² Of equal concern is what happens when a defendant does make an offer. Defendants, uncertain as to the parameters of Rule 68,⁵³ draft arguably ambiguous offers that ultimately subject the defendants to unintended consequences, while at the same time leaving plaintiffs unable to value such offers accurately.⁵⁴ The combined result of litigants' uncertainty is that the rule—whether avoided or used—does little to achieve its purpose of furthering financial and judicial economy.⁵⁵

ment.”).

50. See *Gavoni v. Dobbs House, Inc.*, 164 F.3d 1071, 1077 (7th Cir. 1999) (“Rule 68 is designed to encourage parties to evaluate objectively the strength of their cases; financial and judicial economy are at its core.”); WRIGHT ET AL., *supra* note 3, § 3001, at 66.

51. Some defendants are likely not aware of Rule 68 and its potential as a settlement device. Such unfamiliarity results from several factors. First, the text of the rule “affords no guidance on how to apply [its cost-shifting mechanism].” Lewis & Eaton, *supra* note 49, at 733. Second, most attorneys were not exposed to Rule 68 in law school. Cf. David A. Anderson & Thomas D. Rowe, Jr., *Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?*, 71 CHI.-KENT L. REV. 519, 536 (1995) (suggesting that lawyers recently out of law school may be more receptive to using Rule 68 as a settlement device). Third, and related to the uncertainties explored in this Article, the rule has not established itself as a part of the defense bar's standard tool chest. See, e.g., Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 8 (1985) (“Defendants seldom make Rule 68 offers.”).

52. See, e.g., Fisher, *supra* note 32, at 91 (“Many defendants are reluctant to make an offer of judgment . . .”).

53. See Lewis & Eaton, *supra* note 49, at 733 (noting that the text of the rule does not make its application clear); *supra* note 51 (providing reasons why defense attorneys may be unfamiliar with Rule 68).

54. See *infra* Part II.C for a discussion of the complexities arising from arguably ambiguous offers.

55. Even aside from the rule's uncertainty, most commentators agree that the rule itself is far from perfect. See, e.g., Yoon & Baker, *supra* note 24, at 192

A. THE NATURE OF THE UNCERTAINTY IN DRAFTING AND EVALUATING RULE 68 OFFERS

In theory, “[Rule 68] 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.”⁵⁶ However, under Rule 68, evaluating the value of a case has come to include much more than a party simply determining whether and how much it is likely to win or lose at trial—an evaluation every party engaged in settlement discussions must make.⁵⁷ Instead, parties making or contemplating acceptance of a Rule 68 offer must consider how the court is likely to interpret the terms of such offer; the wording of the offer becomes all-important.⁵⁸ Even seemingly straightforward Rule 68 offers become a riddle for the unsuspecting practitioner.⁵⁹

(concluding that “an offer of judgment rule must have a credible cost-shifting mechanism in order to influence pre-trial negotiations” and commenting that Rule 68 has been ineffective in affecting such negotiations). Whether because of the rule’s one-sided nature or its lack of incentives (especially in non-fee-shifting cases), many think the rule needs reconsideration. *See, e.g.*, Lewis & Eaton, *supra* note 49, at 735 (noting the increased settlement leverage defendants have when making Rule 68 offers); *see also* Peter Margulies, *After Marek, the Deluge: Harmonizing the Interaction Under Rule 68 of Statutes That Do and Do Not Classify Attorneys’ Fees as “Costs,”* 73 IOWA L. REV. 413, 441–45 (1988) (proposing a percentage-based regime that would lessen the uncertainty plaintiffs face in determining the value of their case against a defendant’s offer of judgment by reducing the stakes for a plaintiff who values her case too high). Proposals related to these not uncommon criticisms are generally consistent with the proposal set forth in this Article. *See infra* note 291. Even so, this Article focuses on clarifying the existing rule with regard to offers in order to eliminate barriers to the rule’s use and to reduce collateral litigation when parties use the rule. There is little point in fixing Rule 68’s incentives to be fairer or weightier if the rule’s ambiguity prevents parties from using it in the first place.

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

57. Of course, evaluating a case’s potential value entails its own uncertainty. For a criticism of the rule’s harsh effect on plaintiffs evaluating the value of their case relative to an offer, see Margulies, *supra* note 55, at 445 (contending uncertainty about a case’s value causes plaintiffs to “guess low—maybe too low—because it mandates the forfeiture of attorney’s fees when the plaintiff guesses too high”). Perhaps because it was written shortly after *Marek*, and thus without the benefit of two decades of post-*Marek* litigation, Margulies’ article dismisses the uncertainty highlighted in this Article: the uncertainty faced by litigants who, even assuming they could accurately value the case, cannot accurately predict how a court will interpret the Rule 68 offer. *See id.* at 429–30 (“Little decisional uncertainty exists in this situation because *Marek* requires that a court consider the issue *ex post*. Once the judgment is known, a decision is easy if no problems arise with setting pre-offer fees or assessing the status of injunctive relief.” (footnotes omitted)).

58. *See* Jay H. Krulewitch, Note, *Anatomy of a Double Whammy: The Ap-*

Much of the uncertainty in Rule 68 litigation pertains to recovery of costs and attorneys' fees. In *Marek v. Chesny*, the Supreme Court held that all Rule 68 offers must include costs.⁶⁰ Defendants may include costs by offering a lump-sum settlement inclusive of costs or by offering a settlement exclusive of costs to which costs will later be added if accepted. Attorneys' fees complicate the question because they are not considered part of "costs," and therefore they are not included in the lump-sum settlement, unless the statute under which the lawsuit is brought so defines them.⁶¹ For example, attorneys' fees are defined as part of costs in § 1983 actions⁶² but are defined separately from costs in Age Discrimination in Employment Act (ADEA) claims.⁶³ To add to the complication, even for claims brought under statutes such as the ADEA in which attorneys' fees are not defined as costs, courts may still add attorneys' fees to an offer that does not clearly exclude them.⁶⁴ The result is that Rule 68's application varies greatly depending on how the statute underlying a plaintiff's claim defines attorneys' fees and how the particular offer is drafted.⁶⁵

plication of Rule 68 Offers and Fee Waivers of Civil Rights Attorneys' Fees Under Section 1988, 37 DRAKE L. REV. 103, 115 (1988) ("Application of *Marek* by the lower courts to Rule 68 settlement offers has focused on the specific terms of the offer and its validity.").

59. See Simon, *supra* note 51, at 6 n.18 ("Surprisingly, courts are still debating whether the phrase 'must pay the costs incurred' in [R]ule 68 requires the offeree merely to bear his own post-offer costs or actually to pay the offeror's post-offer costs."); Symposium, *Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases?: Session Three, "Changes to Rule 68,"* 57 MERCER L. REV. 791, 801 (2006) ("It is a complex rule as it is . . .") (statement of Mr. Barry Roseman).

60. See 473 U.S. at 6, 9.

61. MOORE ET AL., *supra* note 12, § 68.02[4], at 68-9 to -10. The issue of whether costs are inclusive of attorneys' fees usually arises in the context of fee-shifting statutes. Even so, *Marek* suggests that attorneys' fees are also properly treated as part of costs in cases in which a contract defines costs as inclusive of attorneys' fees. See *Marek*, 473 U.S. at 9; *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1245 (11th Cir. 2002) (indicating that under *Marek*, costs may include attorneys' fees if a contract between the parties so defines them).

62. See 42 U.S.C. § 1988 (2000) (defining fees-as-costs in § 1983 actions).

63. See 29 U.S.C. §§ 216(b), 626(b) (2000) (defining fees and costs separately).

64. See, e.g., *Marek*, 473 U.S. at 6.

65. In criticizing the majority's holding in *Marek*, Justice Brennan pointed out that the holding would result in "dramatically different settlement incentives depending on minor variations in the phraseology of the underlying fee-award statutes . . ." 473 U.S. at 23 (Brennan, J., dissenting) (emphasis

Consider the following hypothetical: A plaintiff receives a Rule 68 offer of judgment for \$175,000 and must weigh that offer against her assessment of the value of her case at that time. If she thinks she is likely to recover \$150,000 at trial, it would appear at first blush that she should accept the offer. But what if the offer also arguably is inclusive of costs? Imagine the offer is for “\$175,000 including costs.” If her costs at that point are only \$10,000 then it would still appear she should accept the offer. But what if it is a civil rights case under which the relevant statute defines attorneys’ fees as part of “costs?” If her attorneys’ fees at that point are \$40,000, then the offer no longer appears to be a good settlement for her. She is now comparing the offer of \$175,000 to her expected recovery (at that point) of \$200,000. Even so, the offer would be a good settlement for her if her claims were brought under a statute that allowed recovery of attorneys’ fees, although not defining such fees as “costs.” In that situation, she would expect that if she accepted the offer, she would be able to seek recovery of her attorneys’ fees in addition to the \$175,000.

Her uncertainty in evaluating the offer would be magnified if the offer stated that it was for “\$175,000 with costs.” Does the term “with costs” mean that if she accepts the offer, costs will be awarded in addition to the \$175,000, or does it mean costs are included within the \$175,000? What if the offer was for “\$175,000 in full satisfaction of all claims?” What if the offer stated “\$175,000 including costs (but not attorneys’ fees)?” And last, what if it purported to be a “lump sum offer for \$175,000” yet did not explicitly refer to costs and attorneys’ fees?

These hypothetical questions have no clear or easy answers. The text of Rule 68 provides little guidance on how to draft a Rule 68 offer and little notice to plaintiffs about how a court will interpret an offer.⁶⁶ In addition, the case law applying the rule to specific offers does not establish a consistent test for litigants to use in drafting and evaluating Rule 68 offers.⁶⁷ Thus, even if litigants had unlimited resources to research and

added). Indeed, as this Article proposes, not only the incentives (consequences) differ; as an initial matter the terms of Rule 68 offers themselves differ depending upon the underlying fee-award statute, thus creating substantial uncertainty about the meaning of the offer.

66. See Fisher, *supra* note 32, at 117 (“Despite the fact that the rule has been in existence for sixty-three years, confusion often develops in application of this rule to specific cases.”).

67. See *infra* Part II.C (discussing the divergent interpretations of Rule 68 offers).

evaluate Rule 68 before making or accepting an offer—a dubious assumption, especially for a rule intended to promote financial economy⁶⁸—considerable uncertainty would still accompany the current rule.

What are the particular uncertainties and risks litigants face under Rule 68? The only purposeful risk is the risk that the rule was intended to create—the risk to the plaintiff of not being able to recover post-offer costs (and attorneys' fees if the claim is brought under a fee-shifting statute that defines fees as "costs") if the judgment obtained at trial is less than the offer.⁶⁹ The other risks—and risks that do not advance the rule's purpose—are those which stem from the uncertainties surrounding the application of the rule to determine the validity and meaning of particular offers.

The cases discussed below highlight the uncertainty that currently surrounds the interpretation of Rule 68 offers.⁷⁰ Much of this uncertainty stems from the lack of clarity in the rule itself. For the litigant who is unfamiliar with the rule, the rule's text provides neither notice nor guidance as to how courts will construe Rule 68 offers.⁷¹ And even for the reasonably informed litigator, the rule's cursory form leaves considerable uncertainty.

B. CANVASS OF CASES IN WHICH CONFUSION EXISTS REGARDING VALIDITY OF OFFER

Uncertainty arises in Rule 68 cases with regard to whether particular offers are valid. Courts are called upon to decide the validity of offers that disclaim liability (or at least do not admit it),⁷² the validity of offers for which revocation is attempted,⁷³ and the validity of offers that do not provide for both injunctive and monetary relief when both types of relief are requested.⁷⁴ Neither the text of the rule nor the case law clearly resolves

68. *See Marek*, 473 U.S. at 5 ("The plain purpose of Rule 68 is to encourage settlement and avoid litigation.").

69. *See id.*

70. *See infra* Parts II.B–C.

71. *See* FED. R. CIV. P. 68.

72. *E.g.*, *Mite v. Falstaff Brewing Corp.*, 106 F.R.D. 434, 435 (N.D. Ill. 1985).

73. *E.g.*, *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760, 764 (D.C. Cir. 1995).

74. *E.g.*, *Leach v. N. Telecom, Inc.*, 141 F.R.D. 420, 428 (E.D.N.C. 1991).

these issues of validity.⁷⁵ This section explores the uncertainty regarding particular offers' validity, and examines the implications to litigants resulting from this lack of certainty.

1. Whether Offers May Disclaim Liability

One type of uncertainty that arises is whether offers that disclaim liability are invalid. A Rule 68 offer of judgment, unlike a typical settlement offer, is filed with the court upon acceptance, after which a formal judgment is entered against the defendant.⁷⁶ Some defendants, concerned about the negative publicity that may arise from an adverse judgment being entered against them, choose to include a statement in their offer that disclaims liability and/or wrongdoing. Still other defendants say nothing one way or the other about admitting or denying liability in their offers. It is unclear from the rule or the attendant case law whether such a disclaimer, or the absence of an express admission of liability, invalidates a Rule 68 offer.

Most courts to examine the issue have held that an offer is not rendered invalid because it disclaims liability or fails to admit liability. For example, in *Jolly v. Coughlin*, the plaintiff argued that the Rule 68 offer was invalid because the offer specified that it was "not to be construed either as an admission that defendants are liable in this action, or that plaintiff has

75. In addition, certain questions of offers' validity arise in multi-party litigation. Most of these questions, however, arise at the post-offer stage. For example, in litigation involving multiple plaintiffs, a defendant may make a Rule 68 offer to each for a particular amount, yet condition the offer on acceptance by all plaintiffs. One commentator describes the ensuing complications:

Suppose all but one [plaintiff] accept, the offer expires, and the judgment is less favorable to all? Can those who sought to accept be held to pay post-offer fees to the defendant? Should all of the burden be imposed on the one who held out? If only those who reject are subject to Rule 68 consequences, what happens if those who reject do better by the judgment and those who would have accepted do worse, as should happen whenever each made an accurate prediction of the judgment?

Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, in REFORMING THE CIVIL JUSTICE SYSTEM 108, 127 (Larry Kramer ed., 1996). Not surprisingly, courts have reached different conclusions in addressing these complications. Compare *Tocwish v. Jablon*, 183 F.R.D. 239, 242 (N.D. Ill. 1998) (holding an offer conditioned on acceptance by all plaintiffs invalid for cost-shifting purposes), with *Lang v. Gates*, 36 F.3d 73, 75 (9th Cir. 1994) (upholding an offer conditioned on acceptance by all parties and applying cost-shifting provisions to deny post-offer attorneys' fees).

76. See FED. R. CIV. P. 68.

suffered any damage.”⁷⁷ While the court agreed that the statement constituted an “express denial of liability,”⁷⁸ it found no problem with such a disclaimer.⁷⁹ The court reasoned that nothing in the rule or the decisions interpreting the rule imposed a requirement that an offer admit liability, and that, by extension, nothing in the rule disallowed expressly disclaiming liability.⁸⁰ Indeed, as the court observed, to hold otherwise would discourage use of the rule and thereby reduce the rule’s effectiveness as a settlement tool.⁸¹ Similarly, courts have rejected the argument that a Rule 68 offer must expressly admit liability, with one court dismissing such an argument as “utterly without merit.”⁸²

Despite the near uniformity among courts addressing this issue, parties still continue to engage in collateral litigation regarding the significance of an offer’s language (or lack of language) regarding liability. Recently, in *Barrow v. Greenville Independent School District*, the plaintiff argued that the defendant’s Rule 68 offer was invalid because it did not admit liability.⁸³ While the district court rejected that argument,⁸⁴ another court, in *City of Boca Raton v. Faragher*, appears to have accepted it, holding that an offer that does not expressly admit liability does not comply with Rule 68.⁸⁵

Although the district court in *Faragher* was reversed on appeal on other grounds,⁸⁶ the case demonstrates the existence

77. No. 92 Civ. 9026(JGK), 1999 WL 20895, at *5 (S.D.N.Y. Jan. 19, 1999).

78. *Id.* at *9.

79. *See id.* at *8.

80. *See id.*; *see also* *Mite v. Falstaff Brewing Corp.*, 106 F.R.D. 434, 435 (N.D. Ill. 1985) (holding valid an offer that expressly disclaimed liability); *Coleman v. McLaren*, 92 F.R.D. 754, 757 (N.D. Ill. 1981), *aff’d sub nom.* *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir. 1983) (holding offer that expressly disclaimed liability valid although ultimately finding offer less favorable than the relief obtained at trial because of the disclaimer).

81. *See Jolly*, 1999 WL 20895, at *8.

82. *Staples v. Wickesberg*, 122 F.R.D. 541, 544 (E.D. Wis. 1988); *see also Jolly*, 1999 WL 20895, at *8 (discussing case law holding that “Rule 68 does not require that offers of judgment include[] admissions of liability”).

83. *See* No. 3:00-CV-0913-D, 2005 WL 1867292, at *19 (N.D. Tex. Aug. 5, 2005).

84. *See id.*

85. *See* Brief of Appellant City of Boca Raton at *18, *City of Boca Raton v. Faragher*, No. 95-4495, 1995 WL 17063486 (11th Cir. Sept. 5, 1995) (“[T]he District Court found that because the city did not admit liability, the offer did not comply with the requirements of Rule 68.”).

86. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1539 (11th Cir. 1997), *rev’d*, 524 U.S. 775 (1998). Neither the Eleventh Circuit nor the Su-

of continuing uncertainty and resulting collateral litigation.⁸⁷ Without clarification about the necessity and/or propriety of a liability clause, both plaintiffs and defendants face uncertainty at the offer stage. For example, a plaintiff who would like to reject an offer that contains a liability disclaimer because to her it detracts from the value of the offer must decide whether the court will nevertheless uphold the offer as valid. And a defendant who would like to make an offer containing a liability disclaimer also faces uncertainty in deciding whether the inclusion of such a disclaimer will render the offer invalid for Rule 68 purposes. Under such circumstances, a defendant may elect not to make a Rule 68 offer or to make such an offer, only to have a court later hold the offer was invalid. Either scenario detracts from the rule's effectiveness as a tool of settlement.

2. Whether Offers May Be Revoked

Confusion also arises as to whether Rule 68 offers are revocable. The rule itself provides that the offeree has ten days in which to accept the offer, after which time the offer is "deemed withdrawn."⁸⁸ Still, uncertainty arises because "the rule is silent on whether the defending party may withdraw the offer be-

preme Court addressed the Rule 68 issue.

87. While the issue is beyond the scope of this Article, litigants should be cautious in this area because liability disclaimers—even if deemed valid—may affect the court's analysis at the post-offer stage. First, some courts consider the existence of a liability disclaimer in determining whether an unaccepted offer is "more favorable" than the judgment finally obtained. *See Fisher, supra* note 32, at 101–02 (discussing *Coleman* and other cases in which an offer was deemed less favorable than a judgment because a liability disclaimer detracted from the value of the offer). A better rule would seem to be one in which a liability disclaimer does not weigh into the determination of whether the offer is more or less favorable than the judgment obtained. *See Jolly v. Coughlin*, No. 92 Civ. 9026(JGK), 1999 WL 20895, at *8 (S.D.N.Y. Jan. 19, 1999) ("[I]f an admission of liability were a factor considered in the Rule 68 comparison between the offer of judgment and the ultimate judgment obtained, an admission of liability by the defendant would become a *de facto* requirement of every offer of judgment since every judgment finally obtained by the plaintiff after a trial would necessarily contain a finding of liability.>").

Second, some courts find that the existence of a liability disclaimer detracts from plaintiffs' alleged status as prevailing parties. *See Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445, 450–51 (S.D. Ind. 2001) (discussing case law in this area). Notably, this Article's proposed revisions to Rule 68 would eliminate both types of uncertainty that arise at the offer and post-offer stages by amending the rule so that offers are not admissions of liability; thus, the need for offers to state such a disclaimer would be eliminated. *See infra* Parts III.B, III.C.2.

88. FED. R. CIV. P. 68.

fore the ten-day period has elapsed and while the claimant is still considering it.”⁸⁹ Courts addressing the issue of a Rule 68 offer’s revocability have reached different conclusions. Because of this uncertainty, litigants are unsure whether a given offer will be deemed valid under Rule 68.

Some courts have taken a bright-line approach and have held that Rule 68 offers are categorically not revocable.⁹⁰ In *Richardson v. National Railroad Passenger Corp.*, the defendant attempted to revoke his Rule 68 offer upon learning new information in discovery about the extent of the plaintiff’s damages.⁹¹ The court on appeal held that “a Rule 68 offer is simply not revocable during the 10-day period.”⁹² To hold otherwise would be counter to the rule’s “finely tuned procedure.”⁹³ The rule puts “significant pressure on the plaintiff to think hard about the likely value of its claim,” and in return gives the plaintiff “10 days to ponder the matter.”⁹⁴ If Rule 68 offers were revocable, “the pressure on the plaintiff would be greater than the [r]ule contemplates, because the [r]ule so construed would allow a defendant to engage in tactical pressuring maneuvers.”⁹⁵ Other circuits have adopted a bright-line test, similar to that of *Richardson*, and have deemed Rule 68 offers per se irrevocable.⁹⁶

In contrast, other courts have left the door open to allow defendants the opportunity to revoke their Rule 68 offers. In *Cesar v. Rubie’s Costume Co.*, the court allowed the revocation of a Rule 68 offer within the ten-day period.⁹⁷ In doing so, the court adopted a four-prong test that considers the equities to the parties in allowing the revocation.⁹⁸ Applying that fact-

89. WRIGHT ET AL., *supra* note 3, § 3004, at 102–05.

90. See *Richardson v. Nat’l R.R. Passenger Corp.*, 49 F.3d 760, 765 (D.C. Cir. 1995).

91. Specifically, the defendant’s offer provided \$150,000 to compensate plaintiff for his shoulder injuries alleged to have resulted from defendant’s negligence. See *id.* at 762.

92. *Id.* at 765.

93. *Id.*

94. *Id.*

95. *Id.* (citing Morris K. Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401, 405 (1957)).

96. See *Cesar v. Rubie’s Costume Co.*, 219 F.R.D. 257, 259 (E.D.N.Y. 2004) (“In a variety of contexts, the Seventh, Eighth, and D.C. Circuits have all stated that Rule 68 offers are irrevocable during the ten-day period.” (citations omitted)).

97. See *id.* at 261.

98. See *id.*

specific test, the court concluded that the defendant had clearly demonstrated that the offer contained a “clerical error” which a “reasonable attorney could have easily made.”⁹⁹ Given the condensed timing of the offer, revocation, and acceptance, the court held that “there can not be any doubt that the plaintiff can be restored to its *ex ante* position.”¹⁰⁰ Although the court recognized that “[t]here is undoubtedly a valid concern that defendants could strategically use Rule 68 offers to engage in tactical pressuring maneuvers if Rule 68 offers were generally revocable,” it downplayed this concern in situations in which there exists an “obvious mistake” in the text of the offer.¹⁰¹

While *Rubie’s Costume Co.* did not involve an evidentiary hearing, other revocation cases have resulted in extensive costs and delays, stemming in large part from such hearings. Indeed, the trial court proceedings in *Richardson v. National Railroad Corp.* demonstrate the type of legal maneuvers related to revocation and the attendant costs and delays.¹⁰² There, the defendant’s motion relating to revocation of his offer set in place a series of costly legal proceedings. Specifically, the evidentiary hearings were held over a nine-month period, during which time sixteen different experts testified in support of the defendant’s revocation claim.¹⁰³ Following the hearings, the district court somewhat reluctantly denied the defendant’s motion, and the Rule 68 offer was formally entered as judgment.¹⁰⁴ As noted

99. *Id.*

100. *Id.*

101. *Id.* at 260.

102. 49 F.3d 760 (D.C. Cir. 1995).

103. *Id.* at 763. Undoubtedly, the revocation issue was complicated because it dealt with the defendant’s efforts to show fraud on the part of the plaintiff, which the defendant argued justified its revocation. *Id.* at 762. The specifics of the defendant’s assertion were as follows: The defendant claimed that it discovered new information which cast doubt on the extent of the plaintiff’s injuries. *Id.* at 762–63. Because the defendant discovered this information after it had made its Rule 68 offer, the defendant purported to withdraw its offer via a fax to the plaintiff. *Id.* at 762. But the plaintiff, still within the ten-day period for accepting the offer, ignored the purported withdrawal and filed its acceptance of the offer with the court the following day. *Id.* The defendant then filed a “Motion to Set Aside Plaintiff’s Purported Acceptance,” prompting the clerk to defer entering judgment. *Id.* The lengthy revocation proceedings were thus set into motion.

104. *Id.* at 763 (pointing to the district court’s statement in its ruling that it was denying the motions “although not without ‘a degree of reluctance’” (citations omitted)).

above, an appeal followed, with the result that the plaintiff expended years and significant fees on the issue of revocation.¹⁰⁵

The rule's lack of clarity about revocation, and the divergent case law, leaves litigants with considerable uncertainty as to whether and under what circumstances a court will allow a Rule 68 offer to be revoked.¹⁰⁶ Moreover, in jurisdictions in which the rule has been construed to allow such revocation, the uncertainty is magnified, negatively affecting both litigants as well as the courts. Litigants must make decisions in the face of such uncertainty. Defendants may choose to avoid the rule because its parameters are unclear. And plaintiffs, as the court opined in *Richardson*, may be forced to accept a Rule 68 offer prematurely, lest an intervening event occur such that the court allows the defendant to revoke the as-of-yet unaccepted offer. Courts, lacking a clear test from the rule itself, are left to sift through the arguments. These ambiguities undermine the purported self-executing nature of the rule.¹⁰⁷

3. Whether Offers Must Provide for Relief Requested in the Complaint

Injunctive relief also creates confusion in interpreting Rule 68 offers. While it is well-established that a Rule 68 offer must dispose of the case as a whole,¹⁰⁸ some confusion still exists regarding whether an offer made in a case in which both monetary and injunctive relief is sought must offer both types of relief. Specifically, litigants are uncertain whether an offer that only provides for injunctive relief when money damages also are sought is valid and, conversely, whether an offer that only provides for damages when injunctive relief also is sought is valid.¹⁰⁹

105. *See id.* at 760–63.

106. Notably, the circuits are split on the issue, and some circuits have yet to weigh in.

107. *See supra* note 31 and accompanying text (discussing Rule 68's intent that judgments entered pursuant to Rule 68 be self-executing).

108. *See, e.g.,* WRIGHT ET AL., *supra* note 3, § 3002, at 90.

109. In addition to confusion about an offer's validity, offers that involve injunctive relief also raise significant valuation questions. Such questions arise with regard to rejected offers, which require courts to compare the value of the nonmonetary relief offered to the judgment obtained. While no rewriting of Rule 68 can avoid what is an inherently difficult comparison, courts should nonetheless be mindful that as the drafter of the offer, the defendant bears the burden of demonstrating the offer's value and showing that it is more favorable than the judgment obtained. *See id.* § 3006.1, at 127–28 (stating that the comparison of the offer to the judgment obtained is “intrinsicly more difficult

The rule itself does not speak directly to this issue.¹¹⁰ Even so, most courts have held that the rule does not require that an offer specifically provide for all types of relief sought.¹¹¹ In *Leach v. Northern Telecom, Inc.*, the court rejected the plaintiff's motion to strike the offer of judgment.¹¹² The plaintiff contended that the offer was invalid because it did not include the equitable relief it sought in its complaint.¹¹³ The court upheld the offer's validity and stated: "Nothing in Rule 68 requires equitable relief to be included as part [of] an offer of judgment when the complaint seeks both equitable and monetary relief."¹¹⁴

Yet some courts—even within the same jurisdiction—have held otherwise. For example, in *Whitcher v. Town of Matthews*, the defendant offered monetary damages only, even though the plaintiff also had sought injunctive relief.¹¹⁵ In its acceptance of the offer, the plaintiff stated that the defendant had "made no Offer of Judgment concerning Plaintiff[s]' request for injunctive relief and for a declaratory judgment" and that "[t]hese portions of the complaint remain[ed] pending."¹¹⁶ The court disagreed, holding that the offer was all-inclusive.¹¹⁷ In explaining its holding, the court stated that offers that did not include

where one or both involves nonmonetary relief" and that "no clear rules can guide" the comparison). See generally Thomas L. Cabbage, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465 (1991) (surveying court decisions involving the application of Rule 68 to equitable relief and discussing their methods for comparing the Rule 68 offer to the judgment obtained).

For a recent decision in which equitable relief was valued, such that the court decided the Rule 68 offer was less favorable than the judgment obtained, see *Reiter v. MTA New York City Transit Authority*, 457 F.3d 224, 229 (2d Cir. 2006), in which the Second Circuit valued the plaintiff's equitable relief of job reinstatement at more than \$10,000, such that Rule 68 was not triggered.

110. See FED. R. CIV. P. 68.

111. MOORE ET AL., *supra* note 12, § 68.04[5], at 68-28.

112. 141 F.R.D. 420, 429 (E.D.N.C. 1991).

113. See *id.* at 428.

114. *Id.* Similarly, in *Barrow v. Greenville Independent School District*, the court rejected the argument that the Rule 68 offer was invalid because it did not provide for the requested equitable relief. See No. 3:00-CV-0913-D, 2005 WL 1867292, at *20 (N.D. Tex. Aug. 5, 2005). The court reasoned that the rule allows a party making an offer to decide what to offer, and that parties are "not obligated to offer each type of [requested] relief in [their] Rule 68 offers." *Id.* at *20.

115. 136 F.R.D. 582, 582 (W.D.N.C. 1991).

116. *Id.* at 584.

117. See *id.* at 585.

both monetary and injunctive relief, when both such forms of relief were requested in the complaint, would be invalid:

An offer that does not include money damages prayed, but only consents to the plaintiff having the equitable relief demanded, is not consistent with the requirement of the Rule that offers be unconditional. In the same light, offers including only monetary damages but excluding equitable or injunctive relief would also be inconsistent with the [r]ule.¹¹⁸

The rule's ambiguity as to how courts should construe offers when plaintiffs seek injunctive relief affects both litigants and courts. Defendants are uncertain whether their offers will later be deemed invalid because they do not expressly provide for injunctive relief. Plaintiffs, too, do not know how a court will rule on offers' validity under such circumstances, and thus must make a decision to accept or reject an offer in the face of such uncertainty. Courts, like those in *Leach* and *Whitcher*, must resolve collateral litigation about whether offers are valid when they do not provide for injunctive relief sought (or, alternately, only provide for injunctive relief sought). And thus, this "self-executing" settlement rule becomes a catalyst for more litigation.¹¹⁹

C. CANVASS OF CASES IN WHICH CONFUSION EXISTS REGARDING SCOPE OF OFFERS RELATED TO COSTS AND ATTORNEYS' FEES

By far the greatest confusion in interpreting Rule 68 offers relates to the question of the scope of particular offers. This section examines cases showing the various types of confusion inherent under the current rule: whether the amount of the offer includes costs, and whether the amount of the offer includes attorneys' fees. In reviewing the case law, this section explores the problems that result from the rule's ambiguity.

1. Whether the Amount of the Offer Includes Costs

Rule 68 requires that all offers include "costs then accrued."¹²⁰ The Supreme Court explained in *Marek v. Chesny*:

118. *Id.* (citation omitted).

119. See *supra* note 31 and accompanying text (discussing Rule 68's intent that judgments entered be self-executing).

120. FED. R. CIV. P. 68; see also *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1241 (11th Cir. 2002) ("The sole constraint Rule 68 places on offers of judgment is its mandate that an offer include 'costs then accrued.'").

If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of [Rule 68] to include in its judgment an additional amount which in its discretion it determines to be sufficient to cover the costs.¹²¹

The question that arises in particular cases is whether costs were in fact included within the terms of the offer, or whether the court must add them to the offer. The stakes as to whether costs were included are especially high in fee-shifting cases in which the statute underlying the plaintiff's claim authorizes attorneys' fees to be awarded to the prevailing plaintiff as costs, such as civil rights and copyright cases.¹²²

a. Confusion When the Offer Mentions Costs

Defendants' choice of language regarding "costs" in drafting Rule 68 offers often creates considerable confusion. Perhaps because the rule itself requires that an offer of judgment be made for a specified sum "with costs then accrued,"¹²³ some defendants draft their offers using the "with costs" language. In such circumstances, problems arise because of ambiguity surrounding whether "with costs" means that the offer is inclusive of costs or, on the other hand, whether the offer is for a certain amount plus costs. The court in *Kyreakakis v. Paternoster* faced this issue when the defendant offered, and the plaintiff accepted, a Rule 68 offer "for \$50,000.00 with costs now accrued."¹²⁴ The defendant urged the court to construe the offer as a lump-sum offer inclusive of costs, and to deny the

121. 473 U.S. 1, 6 (1985) (citation omitted).

122. *Marek* both established and examined this question in detail. In that case, Rule 68 clearly was triggered; the judgment total was \$92,000 as compared to the \$100,000 offer. *See id.* at 3-4. Thus, the question under *Marek* concerned the consequences of Rule 68 being triggered, and the shifting of particular post-offer costs. *See id.* at 5. The court held that post-offer costs under Rule 68 include attorneys' fees when the underlying statute at issue in the litigation defined such fees as "costs." *See id.* at 8-9. Since *Marek*, litigants have, as Justice Brennan predicted in his dissent, disputed when attorneys' fees are part of the post-offer costs that shift. *See id.* at 24-30 (Brennan, J., dissenting) (discussing the potential inconsistencies between the statutory authorization of attorneys' fees and Rule 68). While the various consequences that attach to a plaintiff when Rule 68 is triggered are beyond the scope of this Article, the same need for certainty that occurs at the offer stage also occurs at the enforcement stage. *See infra* note 320.

123. FED. R. CIV. P. 68.

124. 732 F. Supp. 1287, 1289 (D.N.J. 1990).

plaintiff's motion seeking costs.¹²⁵ The court held, however, that the language was ambiguous¹²⁶ and thus looked to the "totality of the circumstances" surrounding the offer to determine its meaning.¹²⁷ The court concluded that under the particular circumstances the offer's language "with costs" did not mean that costs were included.¹²⁸

Yet in another case with almost identical facts, the court refused to enforce a Rule 68 offer that used the "with costs" language. In *Christian v. R. Wood Motors, Inc.*, the court held that an offer for "Thirty Seven Thousand Five Hundred and no/100 Dollars (\$37,500.00) with costs" was ambiguous, as it could be construed as plus costs or could be construed as inclusive of costs.¹²⁹ Although urged to consider extrinsic evidence to determine the offer's meaning, the court refused to do so.¹³⁰ Under principles of contract interpretation, the court stated, it must look only to the offer itself—and not to extrinsic evidence of the parties' intent and understanding—to determine whether the offer is ambiguous.¹³¹ To do otherwise, would risk "collateral proceedings [that] would undermine entirely the purpose of the rule."¹³² Thus, the court held that the offer lacked a "definite and precise" meaning, such that no meeting of the minds existed between the litigants.¹³³ It therefore refused to enforce the offer in a post-trial proceeding in which the defendant sought to cut off the plaintiff's award of costs.¹³⁴ In concluding, the court noted that its ruling "in no way should . . . be

125. *See id.*

126. *See id.* at 1292.

127. *Id.* at 1294.

128. *Id.* Other courts have similarly interpreted "with costs" language. *See, e.g.,* Laskowski v. Buhay, 192 F.R.D. 480, 480 (M.D. Pa. 2000) (construing an offer of "\$25,000, with costs accrued" as meaning \$25,000 plus costs).

129. No. 91-CV-1348, 1995 WL 238981, at *1, *9 (N.D.N.Y. Apr. 21, 1995).

130. *See id.*

131. *Id.* It is well-established that such principles of contract interpretation should govern the interpretation of Rule 68 offers. *See, e.g.,* MOORE ET AL., *supra* note 12, § 68.04[6]. However, as explored in the holdings discussed above in Parts II.B–C, this unifying principle still does not offer sufficient certainty for litigants. Indeed, as one court explains, a "Rule 68 offer of judgment . . . has characteristics that distinguish it from a normal contract." *Said v. Va. Commonwealth Univ.*, 130 F.R.D. 60, 63 (E.D. Va. 1990) (refusing to consider extrinsic evidence to determine the meaning of an ambiguous offer).

132. *Christian*, 1995 WL 238981, at *9 (quoting *Sas v. Trintex*, 709 F. Supp. 455, 458 (S.D.N.Y. 1989)).

133. *Id.* at *10 (citation omitted).

134. *See id.* at *11.

construed as a finding that all Rule 68 offers which track the language of that [r]ule are necessarily ambiguous” and that instead its ruling was “limited to the unique facts of this case.”¹³⁵

Even leaving aside concerns about fairness to defendants who seemingly track the language of Rule 68 yet end up unpleasantly surprised, rulings such as *Kyreakakis* create a factually intensive, less than bright-line rule that casts uncertainty on future litigants trying to evaluate how a court might construe “with costs” language.¹³⁶ Moreover, the different approaches taken by courts in construing “with costs” language—language which appears to be driven at least in part by policy considerations¹³⁷—leave litigants without guidance as to which approach a court might take. Indeed, the *Christian* court expressly leaves open the possibility of the same court reaching the opposite conclusion were it instead faced with a plaintiff who had accepted an offer and then sought to recover costs as part of that offer.¹³⁸

b. Confusion When the Offer Does Not Mention Costs

The uncertainty regarding whether an offer is lump-sum is exacerbated when the language of the offer is silent as to costs. For example, in *Rohrer v. Slatile Roofing & Sheet Metal Co.*, the defendant was surprised to learn that what it intended to

135. *Id.*

136. This case-by-case determination of intent when faced with arguably ambiguous contract language runs counter to the holdings of other courts that ambiguity in Rule 68 contracts should be resolved against the drafter. *See, e.g., Chambers v. Manning*, 169 F.R.D. 5, 8 (D. Conn. 1996) (rejecting case-by-case determinations of intent and holding that ambiguous language should be construed against the drafter because plaintiffs “should not be left to guess how courts will interpret extrinsic evidence of what is, and is not, included in the offer” (citation omitted)). While the outcome under either test is the same in these particular cases, the case-by-case determination of intent approach leaves the door open to uncertainty for future litigants.

137. *See Christian*, 1995 WL 238981, at *11 (noting the “undeniably harsh result” that would accompany a denial of attorneys’ fees).

138. *See id.* Although some courts have allowed plaintiffs to seek clarification of the terms of an offer before the ten-day acceptance period expires. *See, e.g., Radecki v. Amoco Oil Co.*, 858 F.2d 397, 402 (8th Cir. 1988). Other courts have not allowed clarification. *See, e.g., Util. Automation 2000, Inc. v. Choc-tawhatchee Elec. Coop.*, 298 F.3d 1238, 1240 (11th Cir. 2002) (“Unlike traditional settlement negotiations, in which a plaintiff may seek clarification or make a counteroffer, a plaintiff faced with a Rule 68 offer may only accept or refuse.”). Moreover, such post-offer/pre-acceptance communications have the potential to breed their own collateral litigation. *Cf. Sharpe v. Cureton*, 319 F.3d 259, 276 n.16 (6th Cir. 2003).

be an all-inclusive offer actually subjected it to a judgment for the amount of the accepted offer as well as costs, which included attorneys' fees.¹³⁹ The offer stated that it was "to allow Judgment to be taken against [Defendant] in this action for the aggregate sum of \$3200, i.e. \$800 for each of the Plaintiffs."¹⁴⁰ Upon the plaintiffs' motion for costs, the court held that "[u]nless a defendant's offer expressly provides that the amount includes all costs, the court should determine costs under Rule 68."¹⁴¹ The court rejected the defendant's argument—similar to the holding in *Christian*—that the offer was, at the very least, not enforceable because the defendant had intended for the offer to be inclusive of all costs and fees and thus there was no "meeting of minds."¹⁴²

Instead, the court in *Rohrer* focused on "not whether the parties' minds have met on each component of the judgment, but rather whether the defendant offered to have judgment entered against it and whether the plaintiffs have accepted the offer of entry of judgment."¹⁴³ The court's ruling was especially damaging to the defendant because the case was brought under Title VII, under which attorneys' fees are defined as "costs"; as such, the court required the defendant to pay costs, including attorneys' fees, in addition to the \$3200 offered pursuant to Rule 68.¹⁴⁴ While the court left the amount of such costs and fees open for consideration upon further briefing, the defendant clearly ended up much worse off than it intended when it made the \$3200 offer.¹⁴⁵

139. 655 F. Supp. 736 (N.D. Ind. 1987).

140. *Id.* at 737.

141. *Id.* at 738.

142. *Id.*

143. *Id.*

144. *See id.* at 738–39.

145. In a similar case, *Webb v. James*, the court also refused to alter the plain language of a Rule 68 offer in which the defendant failed to state that its offer was inclusive of costs. *See* 147 F.3d 617, 623 (7th Cir. 1998). To do so, the court reasoned, would undermine the rule's purpose and be unfair to plaintiffs. *See id.* at 621–22. Thus, the court allowed recovery of costs in addition to the amount of the Rule 68 offer. *See id.* at 622. The court also allowed recovery of attorneys' fees, in addition to the amount of the offer, even though such fees were not considered part of "costs." *See id.* The sticker shock to the defendant in *Webb* was considerable: the defendant had to pay over \$98,000 in costs and attorneys' fees in addition to the \$50,000 it offered under Rule 68. *See id.* at 620, 623; *see also infra* Part II.C.2.b.i (discussing the court's holding in *Webb* regarding attorneys' fees, including the court's application of Federal Rule of Civil Procedure 60 to the offer on grounds of "mistake").

While the *Rohrer* court did not elaborate on the reasons for construing an offer's silence against the defendant, the court in *Said v. Virginia Commonwealth University*¹⁴⁶ did. There, in ruling that a Rule 68 offer that was silent as to costs was not inclusive of costs, the court emphasized the unique posture of Rule 68 offers. Because Rule 68 offerees are "bound by an offer of judgment whether it is accepted or not," an offeree must "be able to discern with certainty what the precise terms of that offer are."¹⁴⁷ As such, courts should be "reluctant" to consider extrinsic evidence and instead should construe the offer against the defendant drafter.¹⁴⁸

The problems stemming from the uncertainty in how courts interpret a Rule 68 offer are exacerbated by the inconsistencies in how courts interpret such offers. In a case almost identical to *Rohrer*, the court considered an offer that made no reference to costs yet reached a holding opposite to *Rohrer*.¹⁴⁹ Specifically, the court in *Stewart* refused to construe the offer, which made no mention of costs, against the defendant. The court started with the plain language of the offer, which provided that "judgment be entered on any or all counts against Defendant in a total amount not to exceed FOUR THOUSAND FIVE HUNDRED AND No/100 DOLLARS (\$4,500.00) as provided in Rule 68."¹⁵⁰ The court framed the issue as "involv[ing] whether the parties *intended* that an offer of judgment under [Rule] 68 was to include attorney' fees and costs."¹⁵¹ The court went on to hold that because the parties had different intentions, "[n]o mutual assent was shown to the same terms so there was no valid offer and acceptance under Rule 68."¹⁵² The court then vacated the judgment that had been entered by the district court on behalf of the plaintiff—for \$4500 plus attorneys' fees of approximately \$31,000—and remanded the case to the district court.¹⁵³

146. 130 F.R.D. 60, 63 (E.D. Va. 1990).

147. *See id.*

148. *Id.*

149. 148 F.3d 937, 939–40 (8th Cir. 1998).

150. *Id.* at 938.

151. *Id.* (emphasis added).

152. *Id.* at 939.

153. *See id.* at 939–40 (vacating the Rule 68 judgment pursuant to Rule 60(b), which allows a court to vacate any judgment on grounds of exceptional circumstances). For a discussion of the uncertainty that arises from using Rule 60 to negate the automatic operation of Rule 68, see *infra* note 208.

Other courts have gone a step further and held that a Rule 68 offer that is silent as to costs is nevertheless inclusive of such costs. For example, the court in *Blumel v. Mylander* concluded that an offer for \$501 “to settle all pending claims” was inclusive of costs.¹⁵⁴ The court in particular noted the “large disparity” between the amount of the offer (\$501) and the additional amount sought for costs including fees (\$5162.50).¹⁵⁵ In another case, *McCain v. Detroit II Auto Finance Center, Inc.*, the district court similarly concluded that an offer that did not mention costs was “sufficiently clear” in including costs.¹⁵⁶ The court reasoned that because the offer was for “\$3,000.00 as to all claims and causes of actions for this case,” it was clear that the defendant intended the settlement to be for one lump sum.¹⁵⁷

A party seeking certainty about how a court would interpret a Rule 68 offer would gain little assurance from these cases. The inconsistency between these cases casts doubt on how a court, especially one that has not addressed this issue, would rule. While one case (*Rohrer*) makes clear that the interpretation of a Rule 68 offer does “not [depend on] whether the parties’ minds have met on each component of the judgment,”¹⁵⁸ another case (*Stewart*) expressly bases its holding on the lack of any such meeting of the minds.¹⁵⁹ Other cases—*Blumel* as well as the district court’s opinion in *McCain*—create another level of uncertainty that stems from the potential that a court may read costs into the terms of a Rule 68 offer that does not even mention them.¹⁶⁰ A plaintiff cannot reasonably

154. 165 F.R.D. 113, 115–16 (M.D. Fla. 1996).

155. *Id.* at 116.

156. 228 F. Supp. 2d 799, 801 (E.D. Mich. 2002), *rev’d in part and aff’d in part*, 378 F.3d 561 (6th Cir. 2004).

157. *Id.* On appeal, the Sixth Circuit reversed the district court’s ruling on attorneys’ fees, holding that the defendant’s “silence on the subject of costs in its Rule 68 offer” meant that costs were not included in the offer. *McCain*, 378 F.3d 561, 564 (6th Cir. 2004) (citing *Marek* as standing for the proposition that costs are not included in an offer unless the offer so states). This holding is similar to *Rohrer*. See *supra* text accompanying notes 139–44.

158. *Rohrer v. Slatile Roofing & Sheet Metal Co.*, 655 F. Supp. 736, 738 (N.D. Ind. 1987).

159. See *Stewart v. Prof’l Computer Ctrs., Inc.*, 148 F.3d 937, 939–40 (8th Cir. 1998).

160. See *McCain*, 228 F. Supp. 2d at 801; *Blumel v. Mylander*, 165 F.R.D. 113, 116 (M.D. Fla. 1996). As noted above, on appeal the Sixth Circuit held that an offer that does not mention costs should not be construed as inclusive of costs. *McCain*, 378 F.3d at 564. In *McCain*, the plaintiff ultimately recov-

and fairly value a Rule 68 offer that does not mention costs—and make a decision to accept or reject it—without knowing if a court down the road will read such an offer to include or exclude costs. Still that is precisely what plaintiffs must do, given the fact that Rule 68 offers are “non-negotiable” yet consequential even if rejected.¹⁶¹

Even apart from the uncertainty created by inconsistencies between courts, cases in which courts interpret Rule 68 offers by looking at extrinsic evidence, such as *Stewart*, create uncertainty.¹⁶² This uncertainty has not gone unnoticed. According to the Seventh Circuit, “[u]nless the defendant allows the plaintiff to resolve or eliminate ambiguities, the plaintiff will be forced to guess whether and how the court would interpret the extrinsic evidence.”¹⁶³ Besides being unfair to plaintiffs, courts’ consideration of extrinsic evidence—namely, evidence regarding defendants’ intentions—has another price. It opens the door to “collateral proceedings [that] would undermine entirely the purpose of the rule.”¹⁶⁴ Instead of “encouraging settlement and avoiding protracted litigation,” Rule 68 offers, when left open to courts’ interpretations, breed their own litigation.¹⁶⁵

ered her \$150 in costs, which undoubtedly pales in comparison to the post-offer attorneys’ fees she incurred in litigating the Rule 68 issues. *See id.* at 566. In a related but separate issue in the case, the court held that the plaintiff could not recover her attorneys’ fees in addition to the amount of the offer. *See McCain v. Detroit II Auto Finance Center*, 378 F.3d 561, 563, 565 (2004).

161. *See Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998) (“Rule 68 operates automatically.”); *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997) (“[T]he offer, once made, is non-negotiable.”).

162. *See, e.g., Said v. Va. Commonwealth Univ.*, 130 F.R.D. 60, 63 (E.D. Va. 1990) (“Because of the difficulty of the choice that an offer of judgment requires a claimant to make, it is essential that he be able to discern with certainty what the precise terms of that offer are.”).

163. *Webb*, 147 F.3d at 621 (quoting *Shorter v. Valley Bank & Trust Co.*, 678 F. Supp. 714, 719–20 (N.D. Ill. 1988)). The court went on to state that “[a]dherence to the language of the offer whenever possible alleviates this unfairness to the plaintiff.” *Id.* (quoting *Shorter*, 678 F. Supp. at 719–20). While true, this has not been the consistent view of courts interpreting such offers, which is why the rule itself needs to be amended to guide courts, and thus litigants, in interpreting such offers.

164. *Sas v. Trintex*, 709 F. Supp. 455, 458 (S.D.N.Y. 1989) (rejecting the defendant’s argument that the court “must determine what [the defendant’s] intentions were in making the offer and what the plaintiff’s assumptions were in accepting it”); *see also Nortek, Inc. v. Liberty Mut. Ins. Co.*, 843 N.E.2d 706, 715 n.15 (Mass. App. Ct. 2006) (“[T]he prospect of collateral proceedings weighing extrinsic evidence on an offeror’s claim that its offer was intended to mean something other than expressed in its unambiguous terms seems particularly at odds with the purpose of the rule.”).

165. *See Webb*, 147 F.3d at 621 (refusing to “consider challenges to the

2. Whether the Amount of the Offer Includes Attorneys' Fees

It is curious that, while many Rule 68 offers hinge on the question of attorneys' fees, the Rule itself does not mention the term "attorneys' fees." Indeed nothing in the text of the rule alerts a litigant to the significance of attorneys' fees in the drafting and evaluation of an offer. As one commentator frames the issue:

One of the ironies of Rule 68 is that a lawyer just reading the rule would not see its major consequence because the rule has never been amended to state what *Marek v. Chesny* holds . . . that in a federal fee recovery case when the rule is triggered the plaintiff forfeits not only post-offer costs but also post-offer fees.¹⁶⁶

Given the lack of guidance and notice in the rule, it is not surprising that much collateral litigation under the current rule relates to the availability of attorneys' fees in relation to Rule 68 offers.¹⁶⁷

While *Marek v. Chesny* holds that defendants must always include "costs" in the amount of the offer or the court will add them on, no uniform requirement exists regarding whether offers must include attorneys' fees. Instead, the question of whether an offer must or does include attorneys' fees hinges on the type of case and, specifically, how the underlying statute in that case defines attorneys' fees. While most commentators agree that it at least somewhat "bizarre" to make the question of Rule 68's treatment of attorneys' fees depend on whether a "particular statute happens to have chosen to express the right to attorneys' fees as costs or not," that law is well-established under the legacy of *Marek*.¹⁶⁸

terms of a Rule 68 offer [because] [s]uch challenges undermine the [r]ule's purpose of encouraging settlement and avoiding protracted litigation").

166. Symposium, *Revitalizing FRCP 68: Can Offer of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session Two: "Utilization and Alternatives to Rule 68,"* 57 MERCER L. REV. 771, 786 (2006).

167. See *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1241 (11th Cir. 2002) ("Rule 68 does not define the meaning of the term 'costs,' however, and consequently parties frequently dispute whether attorneys' fees are included.").

168. Symposium, *supra* note 59, at 811 (comments of Professor Edward H. Cooper, who serves on the Civil Rules Advisory Committee and has extensively explored Rule 68). While many scholars agree that the practical implication of *Marek* is "bizarre," that result is not an indictment on *Marek* itself. In *Marek*, the Court obviously had to interpret the rule as drafted, and the "bizarre" implications of *Marek* may simply call for amending the text of the rule. See Cooper, *supra* note 13, at 851 (emphasizing that there is no legal barrier to amending the rule to change *Marek's* outcome, because *Marek's* holding was

Thus, when the underlying statute defines attorneys' fees as "costs," as many civil rights and copyright statutes do, then attorneys' fees,¹⁶⁹ like costs, must be included in the offer.¹⁷⁰ If, on the other hand, the underlying statute provides for attorneys' fees as separate from costs, then there is no requirement that the offer include such fees. The fact that the defendant is not required to include fees does not mean that that these cases do not present complex questions regarding whether the offer includes fees. Indeed, as discussed in Part II.C.2.b below, the complexities and confusion from these cases is perhaps heightened, primarily because litigants face uncertainty regarding how courts will construe offers that are "silent" as to fees.

a. When Attorneys' Fees Are Defined as "Costs": Uncertainty in Fees-as-Costs Cases

In theory, when a statute defines attorneys' fees as costs, there should be no uncertainty regarding whether such fees are included, other than the typical uncertainty regarding costs themselves.¹⁷¹ The sole inquiry would seem to be whether costs are included or not, with the availability of attorneys' fees hinging on that answer. However, two types of confusion still arise. First, despite *Marek*, some litigants still fail to recognize that, when the underlying statute defines attorneys' fees as costs, the Rule 68 offer will be interpreted to treat attorneys' fees exactly as it does costs.¹⁷² That is, if the court deems the offer to be lump-sum and thus inclusive of costs, it will by the same measure deem the offer to be inclusive of attorneys' fees which are a part of costs. Alternately, if the offer is for a dollar

dependent on the rule and not, for example, a constitutional issue).

169. For a comprehensive listing of statutes that define attorneys' fees as a "cost" and those that define attorneys' fees as separate from costs, see Bonney, *supra* note 21, at 414 n.245, 422. For a less comprehensive but more up-to-date listing, see MOORE ET AL., *supra* note 12, § 68.02[4], at 68-10 nn.14-15. See also *Marek v. Chesny*, 473 U.S. 1, 43-48 (1985) (Brennan, J., dissenting) (categorizing and listing various fees-shifting statutes).

170. Indeed, an offer that seeks to limit costs to "court costs, but not attorneys' fees" under a fees-as-costs statute will be held invalid. See, e.g., *Bentley v. Bolger*, 110 F.R.D. 108, 111-14 (C.D. Ill. 1986).

171. As discussed above in Part II.C.1, there is considerable uncertainty regarding how offers are interpreted with regard to costs.

172. See Cooper, *supra* note 13, at 849 ("There is a real concern that some plaintiffs' attorneys, confronted with the unfamiliar beast of a formal Rule 68 offer, will read the rule and escape without any inkling of the most serious consequence that may flow from rejection. Is there no principle of fair notice that requires the rule to spell out this consequence?").

amount that the court deems is not inclusive of costs, then it similarly will not deem the amount to be inclusive of attorneys' fees.¹⁷³ Second, confusion also exists as to whether the underlying statute that provides for attorneys' fees defines attorneys' fees as costs. Such confusion may arise because the statute is unclear in defining attorneys' fees or because the plaintiff's pleadings are unclear as to the claims raised.

i. Confusion About Fees-as-Costs

Although the Supreme Court decided *Marek* decades ago, litigants still make, accept, and refuse Rule 68 offers without recognizing the consequences regarding recovery of attorneys' fees. For example, in *Erdman v. Cochise County*, the defendant made a Rule 68 offer for "\$7,500 with costs now accrued."¹⁷⁴ The offer was made pursuant to a claim under 42 U.S.C. § 1983, the fee provision of which defines attorneys' fees as costs.¹⁷⁵ The defendant was surprised when the plaintiff, after accepting the offer, sought a five-figure attorney fee award in addition to the specific amount offered. The defendant raised two arguments, both of which the court rejected. First, it argued that "'with costs' was intended to mean 'including costs' rather than 'plus costs.'"¹⁷⁶ The court did not address this argument, except to implicitly reject it.¹⁷⁷

Second, the defendant argued that it did not realize the implication of *Marek* that "costs" in actions under § 1983 automatically include attorneys' fees.¹⁷⁸ The court rejected the defendant's argument, found that the defendant had made a "drafting error," and held that the offer "should be construed against [the defendant], rather than against the plaintiff."¹⁷⁹ Thus, the defendant was not allowed to withdraw its offer based upon its mistake and instead was required to pay, in ad-

173. However, this same conclusion may not be true if the offer is made based upon a claim in which the underlying statute does not define fees as costs. Under such circumstances, courts have differed as to how to interpret offers that are "silent" as to attorneys' fees. *Id.*; see *infra* Part II.C.2.b.

174. 926 F.2d 877, 878, 879 (9th Cir. 1991).

175. See 42 U.S.C. § 1988 (2000).

176. *Erdman*, 926 F.2d at 879–80.

177. See *id.*; see also *supra* Part II.C.1 (discussing confusion that arises in cases regarding meaning of Rule 68 offer's language for certain dollar amount "with costs").

178. See *id.* at 879.

179. *Id.*

dition to the amount of the offer, the plaintiff's costs, including his attorneys' fees.

The problem of litigants failing to understand the implication of *Marek* is not passing with time. In a recent decision, *Henderson v. Horace Mann Insurance Co.*, the court rejected the defendant's attempt to vacate a Rule 68 judgment on grounds that the defendant had been mistaken as to the consequences of its offer language under *Marek*.¹⁸⁰ Nor is the problem limited to defendants. One commentator recently expressed concern that a plaintiff, "confronted with the unfamiliar beast of a formal Rule 68 offer, will read the rule and escape without any inkling of the most serious consequence that may flow from rejection."¹⁸¹ Thus litigants, unaware from the face of the rule what implications an offer may have with regard to fees, may draft and evaluate offers that leave the issue of fees unclear or, in the eyes of the court, clear, although not what the litigant intended.

ii. Confusion About Attorney Fee Provisions in Particular Cases

Other uncertainty arises in fees-as-costs cases due to confusion about whether the claims for which the offer is made actually define fees as costs. For example, although fees are defined as costs in most actions arising under Title VII, that is not uniformly the case. The attorneys' fee provision for Title VII mixed-motive claims allows recovery of "attorneys' fees and costs."¹⁸² As such, litigants who assume that an offer for costs is inclusive of attorneys' fees in every Title VII action may end up making, accepting, and rejecting offers without knowing all of the implications.¹⁸³

Even litigants who make every effort to analyze whether an offer is being made pursuant to a fees-as-costs provision face

180. *Henderson*, No. 03-CV-0526-CVE-PJC, 2006 WL 1878897, at *5 (N.D. Okla. July 6, 2006) ("Any effort to research Rule 68 would have alerted an attentive lawyer to the possibility of attorney's fees being included under the rule" (quoting *Aynes v. Space Guard Prods., Inc.*, 201 F.R.D. 445, 449 (S.D. Ind. 2001))).

181. Cooper, *supra* note 13, at 849.

182. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2000). For a case in which the distinction between recovery of attorneys' fees under different parts of Title VII arose, see *Wilson v. Nomura Securities International, Inc.*, 361 F.3d 86, 89-90 (2d Cir. 2004).

183. See *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1337 (4th Cir. 1996).

obstacles. One such obstacle is the complexity that arises when offers are made in cases involving multiple claims, when such claims define the recovery of attorneys' fees differently. For example, in *Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative, Inc.*, the issue before the court was whether attorneys' fees were a part of "costs" under the offer made.¹⁸⁴ The inquiry was complicated because the lawsuit involved multiple claims, one of which arguably defined fees-as-costs (breach of contract) and the other which did not (trade secret violation).¹⁸⁵

Regarding the breach of contract claim, the court engaged in a lengthy discussion first of whether a contract, rather than a statute, could define "costs" for Rule 68 purposes. Because *Marek* "held that the term 'costs' in Rule 68 'was intended to refer to all costs properly awardable under the relevant substantive statute or *other authority*,'" the court held it is proper under *Marek* to look to the underlying contract, in a breach of contract claim, to determine whether it defines attorneys' fees as costs.¹⁸⁶ The *Utility Automation 2000* court declined to reach the issue of how to resolve the tension inherent in a Rule 68 offer made pursuant to multiple claims that define fees differently because it ultimately held that neither the statute nor the contract underlying the lawsuit defined attorneys' fees as costs.¹⁸⁷

That issue, however, was highlighted in *Wilson v. Nomura Securities International, Inc.*¹⁸⁸ In *Wilson*, the plaintiff accepted the defendant's offer of judgment to settle a racial discrimination case, which was brought under federal, state, and municipal law.¹⁸⁹ The offer stated that it was for "\$15,000.00 inclusive of all costs available under all local, state or federal statutes accrued to date."¹⁹⁰ Complications arose because the statutes under which the plaintiff's claims were brought defined attor-

184. See 298 F.3d 1238 (11th Cir. 2002).

185. See *id.* at 1245. The court quickly dismissed the argument that the trade secret act defined attorney fees, absent willful misappropriation, as costs. See *id.*

186. *Id.* (quoting *Marek v. Chesny*, 473 U.S. 1, 9 (1985)).

187. See *id.* at 1246; see also *Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc.*, 260 F.3d 1054, 1059–60 (9th Cir. 2001) (denying an award of attorneys' fees to a plaintiff who accepted a Rule 68 offer in a multi-count case in which only one of the twelve counts provided for attorneys' fees).

188. 361 F.3d 86, 89–91 (2d Cir. 2004).

189. See *id.*

190. *Id.* at 88.

neys' fees differently.¹⁹¹ The municipal law under which the plaintiff sought relief did not define attorneys' fees as costs.¹⁹² Thus, the plaintiff argued that the offer was not inclusive of such fees,¹⁹³ and she sought to recover some attorneys' fees in addition to the offer.¹⁹⁴ The court disagreed and held that no additional fees should be awarded.¹⁹⁵ Specifically, the court held that the applicable federal law was one in which fees were defined as costs (and thus clearly included in the offer already) and that the municipal claim was "factually and legally identical" to the federal claim.¹⁹⁶ The dissent argued that the plaintiff should be able to recover at least some additional fees based upon the municipal claim, because the plain language of the offer left open that possibility.¹⁹⁷

These cases illustrate the type of collateral litigation that occurs regarding disputes over whether attorneys' fees are properly awarded as costs. In some of these cases, the uncertainty and thus collateral litigation arises because unsophisticated litigants make and evaluate Rule 68 offers without regard to the nuances revolving around costs and, in turn, fees. In other cases, the uncertainties are intrinsic to the current rule, especially for Rule 68 settlements of multi-count claims when the underlying fee statutes define fees differently. While the *Wilson* case provides one example of the type of dispute that occurs in such a multi-count case, the possibilities are numerous for confusion and complicated legal analysis.¹⁹⁸ Yet be-

191. *See id.*

192. *See id.* The plaintiff also argued that he was entitled to attorneys' fees under Title VII's mixed-motives prong—which defines fees as separate from costs. *See id.* at 89–90. The court rejected that argument. *See id.*

193. For a more complete discussion of the recovery of attorneys' fees when the offer is silent in fees-as-separate-from-costs cases, see *infra* Part II.C.2.b.

194. The question of the extent of the plaintiff's entitlement to a fee award is somewhat complicated. According to the dissent in *Wilson*, the plaintiff's fee award under the municipal law would have to be offset by "whatever part of the settlement amount [the defendants] can show should be attributed to settlement of the claim for attorney's fees under federal law." 361 F.3d at 93 (Newman, J., dissenting). It is not clear how courts would accomplish this, or, even if they could, that this would be the proper approach.

195. *See id.* at 90–91.

196. *Id.* at 91.

197. *See id.* at 93 (Newman, J., dissenting) (referring to the attorneys' fees claim under the municipal law as "indisputably outside" of the Rule 68 offer).

198. While the dissent in *Wilson* points out that a "careful lawyer[]" would have drafted the offer to be "inclusive of costs and attorney's fees," *id.* at 91, the fact remains that the rule itself does not alert lawyers to this requirement in any way, nor does the case law. Indeed, if the various laws under which the

cause so much of the Rule 68 offer rests on what is a “cost,” it is inevitable that such litigation will continue under the current rule.

*b. When Attorneys’ Fees Are Not Defined as “Costs”:
Uncertainty in Fees-as-Separate-from-Costs Cases*

In the fees-as-costs cases described above, the uncertainty stems from whether fees are defined as costs in the underlying statute or contract. Once the court makes that determination, the attorneys’ fees question is bootstrapped onto the costs question. The court looks to see what the offer says about costs. If the offer says nothing, the court adds costs (and fees defined as costs) on to the amount of the offer. Much less clarity exists regarding how a court will construe an offer with regard to fees in cases where attorneys’ fees are not defined as costs.¹⁹⁹ In such cases, two levels of uncertainty arise—first, uncertainty arises in the determination of whether fees are defined as costs and, if fees are not defined as costs, an additional uncertainty arises in the determination of whether fees (separate from the matter of costs) were part of the offer.

When attorneys’ fees are not part of costs, a defendant under the current rule is not required to include—either explicitly or implicitly—such fees as part of its Rule 68 offer. Unlike costs, such attorneys’ fees will not automatically be added on if not included in the offer. Defendants can, and sometimes do, make offers that specifically provide that no attorneys’ fees should be added on to the amount of the offer.²⁰⁰ Still, many offers fail to make this exclusion explicit. And because no default exists regarding how to construe an offer’s silence regarding attorneys’ fees, litigants face a conundrum—will the court treat the offer as a lump sum settlement and thus inclusive of any applicable attorneys’ fees, or will the court interpret the offer’s silence on the issue of attorneys’ fees as leaving the door open

plaintiff sought relief in *Wilson* all defined fees as costs, the offer would clearly have been inclusive of fees.

199. The question of whether attorneys’ fees are included as part of a Rule 68 offer arises only in cases in which attorneys’ fees are provided for in some way by the underlying statute or contract. In cases in which no right to attorneys’ fees exists, a Rule 68 offer’s silence with regard to attorneys’ fees would be construed as not inclusive of fees.

200. See *Fisher*, *supra* note 32, at 104 (describing a proposed form for a Rule 68 offer that makes it clear that fees are not to be added on in fees-as-separate-from-costs cases).

to recovery of such fees? As discussed below, no clear and readily available answers exist for a litigant facing this issue.²⁰¹

i. Offers That Are Deemed Ambiguous Regarding Attorneys' Fees

When an offer is silent as to attorneys' fees, some courts have held that the plaintiff may recover such fees.²⁰² Specifically, "where the underlying statute does not make attorney fees part of costs, it is incumbent on the defendant making a Rule 68 offer to state clearly that attorney fees are included as part of the total sum for which judgment may be entered."²⁰³ A defendant who fails to do so risks "exposure to attorney fees in addition to the sum offered plus costs."²⁰⁴ If the defendant does not so specify, the court may add attorneys' fees on to the amount of the offer.²⁰⁵ Accordingly, in *Webb v. James*, the court

201. See *id.* at 98 ("Defendants should be especially wary of situations in which the underlying substantive statute mandates a plaintiff's recovery of fees separately from costs.").

202. Notably, the question of whether a plaintiff may recover attorneys' fees in addition to the amount of the offer when such fees are not defined as costs arises only in the context of accepted offers. For offers that are rejected, even if the judgment obtained by the plaintiff is less favorable than the offer, only costs shift. If costs do not include attorneys' fees, such fees are not cut off. Still, the plaintiff's rejection of the offer may be considered by the court in determining the reasonable amount for any fee award. See, e.g., *Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1337 (4th Cir. 1996) (considering rejection of a Rule 68 offer in determining the propriety and amount of an attorneys' fees award where the statute treated attorneys' fees as separate from costs).

203. *Sea Coast Foods, Inc. v. Lu-Mar Lobster & Shrimp, Inc.*, 260 F.3d 1054, 1059 (9th Cir. 2001) (quoting *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997)); see also *Sampson v. Embassy Suites, Inc.*, No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998) (citing *Webb v. James*, 172 F.R.D. 311, 314-16 (N.D. Ill. 1997)) (holding that the burden is on the defendant to "clearly specify that the offer includes attorney's fees").

204. *Nusom*, 122 F.3d at 834. Some courts, like the Ninth Circuit, discuss the question of how to construe an offer in a fees-as-separate-from-costs case when the offer is silent as to attorneys' fees as one of waiver. In *Nusom*, the court construed a Rule 68 offer and held that any waiver of statutory attorneys' fees must be "clear and unambiguous" and that if the offer is ambiguous the defendant must show that both parties intended a waiver. *Id.* at 833; see also *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991).

205. The entitlement to attorneys' fees in these cases stems not from Rule 68, which requires the court to award "costs then accrued," but instead from the underlying fee-shifting statute or contract. *MOORE ET AL.*, *supra* note 12, § 68.02[4], at 68-11 to -12. Even so, it is not a certainty that such fees will be added on. The plaintiff still must show, under the relevant fee statute, that she is entitled to attorneys' fees, which frequently requires the plaintiff to demonstrate that she is the "prevailing party." See, e.g., *Nusom*, 122 F.3d at

allowed the plaintiff to recover attorneys' fees in addition to the amount of the Rule 68 offer when the offer was for "judgment in the . . . amount of Fifty Thousand Dollars (\$50,000)" and made no reference to costs or fees.²⁰⁶

The Seventh Circuit noted that the underlying statute in that case did not define attorneys' fees as costs, but did separately provide for the recovery of such fees to the "prevailing party."²⁰⁷ The court squarely placed the burden on defendants to "make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party."²⁰⁸ Because the defendant could have, but did not, draft a lump-sum settlement inclusive of costs and fees, the court reasoned it was fair to award an additional amount to cover fees.²⁰⁹

833. Ordinarily, a Rule 68 judgment is sufficient to demonstrate prevailing party status; however, fees may not be awarded if the Rule 68 judgment merely reflects a nuisance settlement. *See, e.g., Fletcher v. City of Fort Wayne*, 162 F.3d 975, 976–78 (7th Cir. 1998) (holding in a § 1983 action that plaintiffs were not entitled to attorneys' fees because the accepted offer reflected a nuisance settlement).

206. 147 F.3d 617, 619 (7th Cir. 1998); *see also supra* note 145 (discussing the *Webb* court's holding that the plaintiff was allowed to recover costs in addition to the amount of the offer).

207. *Webb*, 147 F.3d at 622 (applying Rule 68 to a claim involving the Americans with Disabilities Act).

208. *Id.* at 623. In addition to arguing that the defendant was entitled to relief under Rule 68, the defendant in *Webb* also argued that it should be relieved from the unintended consequences of the Rule 68 judgment under Federal Rule of Civil Procedure 60. *See id.* at 619–20. The court agreed, holding that the defendant appropriately sought relief under Rule 60(b)(1) based upon "mistake, inadvertence, surprise, or excusable neglect." *Id.* at 622. Even so, the court provided no such relief, and instead concluded that it was within the district court's discretion to find that the defendant's neglect was not excusable because "Rule 68 itself alerts the reader to the issue of costs, the ADA provision granting attorney's fees is clear and unambiguous, and *Marek* was decided in 1985, more than a decade before [the defendant] extended its offer of judgment." *Id.*

Despite *Webb's* ultimate holding, the court's decision on the Rule 60 issue opens the door to collateral litigation on Rule 68 judgment, albeit under Rule 60 rather than Rule 68 more limited in scope. The amendments proposed in this Article would decrease the likelihood of defendants succeeding under, and thus bringing, a Rule 60 argument to undo a Rule 68 judgment. The text of the revised rule itself would alert the defendant to the issue of attorneys' fees, making any neglect by defendants even less excusable.

209. *See Kelm v. Arlington Heights Park Dist.*, No. 98 C 4786, 2000 WL 1508240, at *2–4 (N.D. Ill. Oct. 10, 2000) (mem.) (awarding attorneys' fees in addition to an offer for "judgment to the plaintiff in the sum of Twenty Thousand and 0/100 Dollars (\$20,000.00)" because the offer "is unclear about whether attorney's fees are included in the \$20,000 Offer of Judgment or not").

Like the *Webb* court, other courts have concluded that an offer that is silent regarding attorneys' fees is not inclusive of such fees. In *Utility Automation 2000*, the Eleventh Circuit held that an offer for "the sum of Forty-five thousand and 00/100 Dollars (\$45,000) with costs accrued" was not inclusive of attorneys' fees.²¹⁰ First, the court held that under the statute at issue attorneys' fees were not defined as costs.²¹¹ Next, the court analyzed whether, like the plaintiff in *Webb*, the plaintiff could recover attorneys' fees in addition to the amount of the offer.²¹² The court held that it could.²¹³ It pointed out that "the offer says nothing one way or the other about fees; attorneys' fees are not mentioned at all."²¹⁴ Thus, the court concluded, "[W]e—much as the offerees—are left to speculate whether the offer was intended to include attorneys' fees or not."²¹⁵ Because a "Rule 68 offeree is at the mercy of the offeror's choice of language," any ambiguity must be construed against the defendant.²¹⁶ Accordingly, the court held that the plaintiff would be allowed to seek attorneys' fees in addition to the amount of the accepted offer.²¹⁷

210. *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1239 (11th Cir. 2002).

211. *See id.* at 1244–45; *see supra* Part II.C.1 (describing cases in which courts determined whether costs are included).

212. *See Util. Automation 2000*, 298 F.3d at 1247.

213. *Id.*

214. *See id.* at 1244.

215. *Id.* In following *Webb*, the Eleventh Circuit had to distinguish its own precedent set by *Arencibia v. Miami Shoes, Inc.*, 113 F.3d 1212 (11th Cir. 1997). In *Arencibia*, the offer was "in the amount of \$4,000" and made no reference to costs or attorneys' fees. *Id.* at 1213. The court held that the plaintiff could obtain costs in addition to the amount of the offer, but not attorneys' fees (which were not defined as costs under the statute in that case). *See id.* at 1214. In explaining why the plaintiff in *Utility Automation 2000* could seek fees whereas the plaintiff in *Arencibia* could not, the *Utility Automation 2000* court stated that the difference was in the issue presented to the court: "The only issue before this Court in *Arencibia* was whether the district court could grant attorneys' fees as costs 'by virtue of Rule 68.'" 298 F.3d at 1242 (quoting *Arencibia*, 113 F.3d at 1214).

216. *Util. Automation 2000*, 298 F.3d at 1244; *see also* *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830, 834 (9th Cir. 1997) (holding that where the accepted offer is silent as to fees, the plaintiff is entitled to seek attorneys' fees in addition to the amount of the offer if the underlying statute provides for attorneys' fees, in addition to costs, to the "prevailing party").

217. The court left open for remand whether the amount of attorneys' fees sought by plaintiff (approximately \$61,000) was reasonable. *Util. Automation 2000*, 298 F.3d at 1249.

But the apparent bright lines from these decisions are not really so bright because other courts have reached opposite conclusions, even when faced with similar offer language.²¹⁸ In particular, some courts have held offers that are silent as to fees to be unenforceable because they are ambiguous; other courts have held that certain offers that are silent as to fees are “unambiguously” inclusive of such fees.²¹⁹ Other courts have held that such offers are revocable by the offeror on grounds that the offeror was mistaken as to the fact that the offer was not inclusive of attorneys’ fees.²²⁰ The result is considerable uncertainty about how a court will interpret an offer that is silent as to fees.²²¹

Rather than construing ambiguity in the offer regarding whether fees are included against the defendant, as did the court in *Webb*, other courts have used the offer’s ambiguity as grounds to consider extrinsic evidence as to what the parties intended regarding fees.²²² Specifically, the court in *Radecki v.*

218. See *supra* text accompanying notes 223–27 (discussing *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988)).

219. See *supra* text accompanying notes 231–36 (discussing *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390 (7th Cir. 1999)).

220. See *Fisher v. Stolaruk Corp.*, 110 F.R.D. 74, 74 (E.D. Mich. 1986) (allowing an offeror to revoke an accepted Rule 68 offer for “\$5,000 ‘with costs then accrued’” when the offeror mistakenly believed that “costs” included attorney’s fees under the claim at issue).

221. The issues that arise in fees-separate-from-costs cases in which the offer is silent in some ways parallel the issues that arise with regard to the inclusion of costs when offers are silent with regard to costs. See *supra* Part II.C.1.

222. Some courts and commentators contend that these different rulings do not reflect inconsistency, but instead merely reflect differences between the cases. The contention asserts that the cases are consistent because in all cases the courts apply “contract law [such] that, absent parol evidence as to the meaning of an ambiguous term, ambiguous terms of a contract are construed against the drafter of the contract.” *Hennessy v. Daniels Law Office*, 270 F.3d 551, 553–54 (8th Cir. 2001); see also WILLIAM W SCHWARZER ET AL., CALIFORNIA PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 15:155.3 (2006) (explaining the treatment of ambiguous Rule 68 offers).

While the search for consistency in the rule’s application is noble, no unifying theory exists that adequately captures the holdings of the cases. For example, in contrast to *Radecki* and *Basha*, both *Webb* and *Utility Automation 2000* held it inappropriate for a court to consider extrinsic evidence of an offer’s alleged ambiguity. Compare *Basha v. Mitsubishi Motor Credit of Am., Inc.*, 336 F.3d 451, 454 n.5 (5th Cir. 2003) (commenting that the *Radecki* court also “conducted a review of extrinsic evidence”), and *Radecki v. Amoco Oil Co.*, 858 F.2d 397, 402 (8th Cir. 1988) (finding the offer ambiguous even after “reviewing all the evidence”), with *Util. Automation 2000*, 298 F.3d at 1244–46 (relying solely on the offer’s language to determine the plaintiff’s entitlement

Amoco Oil Co. rejected the plaintiff's argument that the offer's silence as to fees should be conclusive that fees were not included.²²³ Instead, the court reasoned that "it runs counter to the purpose of Rule 68 to assume that forms of relief not mentioned are not intended to be included within the sum offered."²²⁴ Thus, the court considered extrinsic evidence of the parties' pre-offer settlement discussions.²²⁵ After "[c]arefully reviewing all of the evidence," the court held that it was "firmly convinced that [the defendant] intended to include attorney fees in its . . . offer."²²⁶ Finding "no mutual assent, and hence no binding agreement," the court vacated the Rule 68 judgment and remanded the case to the district court "for the parties to approach the settlement question anew."²²⁷

to attorneys' fees), and *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998) (asserting the soundness of "refus[ing] to consider challenges to the terms of a Rule 68 offer"). Specifically, in *Utility Automation 2000*, the court emphasized that "the responsibility for clarity and precision in the offer must reside with the offeror" and "any ambiguity in the terms of an offer must be resolved against its drafter, and therefore, absent a clear indication to the contrary the accepting party cannot be deemed to have received its fees or waived the right to seek them." 298 F.3d at 1244 (citing *Nusom*, 122 F.3d at 835). Similarly, in *Webb*, the Seventh Circuit stated that "[u]nless the defendant allows the plaintiff to resolve or eliminate ambiguities, the plaintiff will be forced to guess whether and how the court would interpret the extrinsic evidence. Adherence to the language of the offer whenever possible alleviates this unfairness to the plaintiff." 147 F.3d at 621 (quoting *Shorter v. Valley Bank & Trust Co.*, 678 F. Supp. 714, 720 (N.D. Ill. 1988)). That holding is likely why the Seventh Circuit in *Nordby*, bound by its precedent in *Webb*, concluded that the offer in the *Nordby* case was unambiguous (in favor of the defendant) in order to reach the result it did. See *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999).

In any event, it matters little to practitioners and their clients whether, as claimed by some, the law is consistent yet applied in unique ways to inconsistent facts or whether the law itself is inconsistent. Either way, the uncertainty, expense, and unfairness that often result from the rule's application significantly deter practitioners and clients from using the rule.

223. 858 F.2d 397, 400 (8th Cir. 1988) (resorting to "factors outside the words themselves" to determine whether the defendant's offer was intended to include attorneys' fees since the offer itself did not address them).

224. *Id.* at 401.

225. *Id.*

226. *Id.* at 402.

227. One of the judges in *Radecki* would have enforced the Rule 68 offer as inclusive of costs. See *id.* at 403 (Fairchild, J., concurring in part, dissenting in part) ("[A]n offer of judgment for a specified sum, including costs, necessarily means that if the offer be accepted, the resulting judgment will be for the specified sum, without addition of an attorney's fee whether or not the attorney's fee is a part of costs.").

Other courts have taken *Radecki* a step further and have held that offers that are silent as to fees are nonetheless inclusive of such fees. Instead of finding “no mutual assent,” these courts have affirmatively interpreted the offer to be inclusive of fees. For example, in *Basha v. Mitsubishi Motor Credit of America, Inc.*, the court affirmed the district court’s refusal to award attorneys’ fees to a plaintiff who had accepted a Rule 68 “offer to pay plaintiff \$2,000.”²²⁸ In doing so, it stated: “Although the . . . offer does not expressly address attorney[s]’ fees, we agree with the district court that the circumstances surrounding the offer, if not the text itself, strongly support the view that the parties intended to settle all claims, including those for attorney[s]’ fees.”²²⁹ Thus, the court affirmed the judgment entered on the offer, as well as the district court’s denial of attorneys’ fees.²³⁰

ii. Offers That Are Deemed Unambiguous Regarding Attorneys’ Fees

Other courts have enforced Rule 68 offers that are silent as to fees as being inclusive of such fees when the offer is “completely unambiguous” in including fees.²³¹ In *Nordby v. Anchor Hocking Packaging Co.*, the Seventh Circuit held that an offer that did not explicitly refer to attorneys’ fees was nonetheless “unambiguously” inclusive of such fees.²³² Had the court found the offer to be ambiguous, it would have been forced, based upon its holding in *Webb*, to construe the offer against the defendant.²³³ Instead, the court distinguished the offer from that

228. 336 F.3d 451, 453 (5th Cir. 2003).

229. *Id.* at 453–54.

230. *Id.* at 455. The short opinion in *Basha* leaves unclear the precise basis for the court’s holding. While the court calls attention to extrinsic evidence regarding the pre-offer settlement talks, suggesting that it found the offer to be ambiguous and thus resorted to extrinsic evidence, it also indicates that “the text itself” may make clear that fees are included in the offer. *Id.* at 454. Thus, it is likely that litigants will attempt to use *Basha* to show that courts should interpret an offer for a plain dollar amount, with no explicit reference to fees or anything suggesting a lump sum settlement, as inclusive of fees, even absent any supporting extrinsic evidence.

231. *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999).

232. *See id.* at 393 (rejecting a magic-words approach that would require a defendant to mention attorneys’ fees expressly in favor of an approach that “gives effect to an unambiguous offer even if it does not mention attorneys’ fees explicitly”).

233. *See id.* at 391.

in *Webb*, holding that this offer was for “\$56,003.00 plus \$1,000 in costs as one total sum as to all counts of the amended complaint.”²³⁴ Because one of the counts specifically sought relief for attorneys’ fees, the court held that such relief was unambiguously encompassed by the offer.²³⁵ Unlike the offer in *Webb*, which did not make clear that it was all-encompassing, the court held that the offer in *Nordby* left no room for doubt about its lump-sum nature.²³⁶

All of these cases leave litigants wrestling with uncertainty about how a court will construe a Rule 68 offer. First, it is unclear when a court will construe a Rule 68 offer as “completely unambiguous” with regard to the inclusion of fees. *Nordby* itself highlights this type of uncertainty. Rather than providing a bright line to alert litigants to what makes an offer inclusive of fees, these cases provide litigants with a blurred line between what makes an offer “ambiguous” as in *Webb* and what makes it “completely unambiguous” as in *Nordby*.²³⁷ And while a litigant who engages in substantial research will learn from these precedents that an offer of “one total sum as to all counts of the amended complaint” is inclusive of fees when one count specifically seeks relief for attorneys’ fees, she will be left with uncertainty should she receive an offer for, say, “\$25,000 in total settlement.”²³⁸ Any deviation in the language creates ambiguity.

234. *Id.* at 391–92 (comparing the offers in *Webb* and *Nordby*).

235. *See id.* at 391.

236. *See id.* at 392. For yet another twist in the case law in this area, see *Barrow v. Greenville Independent School District*, No. 3:00-CV-0913-D, 2005 WL 1867292, at *26 (N.D. Tex. Aug. 5, 2005). *Barrow* cites *Nordby* and holds that a Rule 68 offer that is silent as to costs in a fees-as-costs case is nonetheless inclusive of attorneys’ fees that are defined as costs when the offer for \$100,000 states that it “encompasses any and all items of damage and recovery sought by Plaintiff, including attorney’s fees.” *Id.* (quoting the defendant’s offer of judgment made on Jan. 18, 2001).

237. *See Nordby*, 199 F.3d at 392. For a discussion of how the question of attorneys’ fees plays out in a case in which the offer includes costs but is silent as to fees, yet involves claims that arise under both types of fee-shifting statutes, see *Wilson v. Nomura Securities International, Inc.*, 361 F.3d 86, 91 (2d Cir. 2004), which denied attorneys’ fees beyond those contained in the offer.

238. The Sixth Circuit Court of Appeals also deemed language to be unambiguously inclusive of attorneys’ fees in *McCain v. Detroit II Auto Finance Center*, another fees-as-separate-from-costs case. 378 F.3d 561, 563, 565 (6th Cir. 2004). The *McCain* court followed *Nordby* in holding that an offer of “three thousand dollars (\$3000.00) as to all claims and causes of actions for this case” was unambiguous where the underlying claims all sought statutory attorneys’ fees. *Id.* at 563. For a discussion of the costs issue in *McCain*, see *supra* Part II.C.1.b.

But, in fact, application of the rule is not even that straightforward. Courts likely will construe even identical language in an offer differently depending on the law under which the plaintiff seeks a fee award. As the court pointed out in *Nordby*, if the defendant had made the offer instead in a case in which “the plaintiff [was] seeking an award of fees under a statute or rule or common law principle not cited in any of the counts of the complaint,” a different result might have occurred.²³⁹ In such a case, “it would be arguable that the reference to ‘one total sum as to all counts’ did not include such an award.”²⁴⁰ And presumably, if it were at least arguable that the offer was not inclusive of fees, the court would deem the offer to be ambiguous and thus construe it against the defendant as not inclusive of fees.²⁴¹

Additionally, it is unclear how a court will interpret a Rule 68 offer that is ambiguous with regard to fees. While some courts construe such offers against the defendant without considering extrinsic evidence, others first consider extrinsic evidence.²⁴² Because not all circuits have addressed the issue, many litigants cannot predict what approach their court will take. Even litigants who know their court will consider extrinsic evidence face considerable uncertainty.²⁴³ They do not know what the court will determine to be the actual value of the of-

239. *Nordby*, 199 F.3d at 392–93.

240. *Id.* at 393.

241. *See id.* at 392–93.

242. This uncertainty is highlighted by *Nusom v. COMH Woodburn, Inc.*, 122 F.3d 830 (9th Cir. 1997). While *Nusom* addressed a plaintiff’s motion for fees which the defendant defended solely on grounds of waiver, the court appears to have left open the possibility that in further proceedings in the district court the defendant might introduce extrinsic evidence regarding the parties’ intentions with regard to fees. *See id.* at 832, 835. Even that possibility is unclear, though, because at least two judges on the three-judge panel disagreed about whether such proceedings would be proper on remand. *See id.* at 835 (Goodwin, J., concurring). One judge suggested that the court’s opinion closed the door to future litigants seeing relief on grounds that there was no meeting of the minds “because defendants will now be on notice that they must make explicit that their Rule 68 offers include fees.” *Id.* (Goodwin, J., concurring).

243. This Article focuses on the uncertainty created by courts that allow consideration of extrinsic evidence. But another critique of such decisions is that a Rule 68 offer, like a settlement agreement, that denies a plaintiff’s right to attorneys’ fees under § 1983 should be “clear and unambiguous.” *Erdman v. Cochise County*, 926 F.2d 877, 880 (9th Cir. 1991).

fer—inclusive or exclusive of fees—and, as *Nordby* warns, “can’t make an intelligent choice whether to accept it.”²⁴⁴

3. The Other Side of the Coin: Uncertainty in the Interpretation of Offers When Comparing Unaccepted Offers to Judgments Obtained

While many cases dealing with the terms of a Rule 68 offer involve an accepted offer, the same issues regarding what an offer means arise when an offer is rejected and the defendant moves, after trial, to have costs shifted. Specifically, the defendant, who must show that the offer is more favorable than the judgment, must demonstrate the terms of the offer to the court so that the court may compare the offer to the judgment.²⁴⁵ As such, the same disputes about the terms of the offer arise in cases involving rejected Rule 68 offers, because the amount of the offer is the basis for comparison to the judgment.²⁴⁶

This type of uncertainty arose in *B&H Manufacturing Co. v. Bright*, where the defendant sought to have costs shifted by arguing that the refused Rule 68 offer was more favorable than

244. *Nordby*, 199 F.3d at 392 (citing WRIGHT ET AL., *supra* note 3, § 3002, at 94–96) (discussing the interpretation problems associated with Rule 68 offers that stem from the rule’s automatic operation). The discussion in the plaintiff’s brief to the Ninth Circuit in *Lu-Mar Lobster & Shrimp, Inc. v. Sea Coast Foods, Inc.* highlights the uncertainty plaintiffs face. See Brief of Appellant, *Lu-Mar Lobster & Shrimp, Inc. v. Sea Coast Foods, Inc.*, 260 F.3d 1054 (9th Cir. 2001) (No. 99-36156). In that case, fees were not defined as costs, and the issue was whether the plaintiff could, having accepted the Rule 68 offer that was silent as to fees, recover attorneys’ fees in addition to the amount of the offer. *Lu-Mar Shrimp & Lobster, Inc.*, 260 F.3d at 1059. The trial court had not allowed recovery of such fees. *Id.* at 1058. In its brief on appeal, the plaintiff’s counsel explained to the court that he had “struggled to define for [plaintiff] the risks inherent in rejecting [defendant’s] Rule 68 offer.” Brief of Appellant, *supra*, at *20. Ultimately, the plaintiff’s counsel advised his client that fees were not included in the offer and thus could be separately sought after accepting the Rule 68 offer, but that such fees would not be available to the plaintiff if it recovered at trial less than the amount of the offer. *Id.* at *20–21. Not surprisingly, that advice turned out to be at least partially erroneous. See *Lu-Mar Lobster & Shrimp, Inc.*, 260 F.3d at 1061 (holding that while the plaintiff “believes that because it accepted a Rule 68 offer . . . it should receive all of its expenditures on this case, including all costs and attorneys’ fees,” the plaintiff is wrong).

245. See FED. R. CIV. P. 68.

246. One interesting difference, though, is that in the post-trial cost-shifting cases, litigants “switch” roles with regard to their arguments about the scope of the offer, with defendants now arguing that the offer was not inclusive of costs and fees, and plaintiffs arguing it was. See *supra* note 259 for a discussion of this phenomenon.

the judgment the plaintiff obtained at trial.²⁴⁷ The rejected offer was for one million dollars plus injunctive relief, but did not include costs.²⁴⁸ At trial, the plaintiff recovered only \$851,500 plus injunctive relief and attorneys' fees.²⁴⁹ Thus, the defendant argued that the offer was more favorable. Leaving aside the question of the value of the injunctive relief, the court held that the relevant comparison was between one million dollars and \$851,500 plus plaintiff's pre-offer attorneys' fees.²⁵⁰ With attorneys' fees added on to the amount of the judgment, the court held that the offer was not more favorable than the judgment.²⁵¹

Notably, the relevant apples-to-apples comparison, and likely the ultimate outcome pursuant to Rule 68, would have been different in *B&H Manufacturing Co.* had attorneys' fees been defined as costs in the statutes underlying the claims asserted.²⁵² Because a Rule 68 offer must include costs—either explicitly or implicitly—the court would have deemed the *B&H* offer to have required that costs (and thus attorneys' fees when such fees are defined as “costs”) be added to the amount of the offer rather than implicitly included as part of the offer.²⁵³ If so, the comparison would have been between the one million dollars offered plus pre-offer costs (including attorneys' fees) and the \$851,500 judgment plus pre-offer costs (including attorneys' fees). The costs (including attorneys' fees) would have cancelled each other out, making the amount of the offer and the amount of the judgment an apples-to-apples comparison.²⁵⁴

247. No. CVF01-6619 AWI LJO, 2006 WL 547975, at *20–22 (E.D. Cal. Mar. 3, 2006).

248. *Id.* at *21.

249. *Id.*

250. *Id.*

251. *Id.* (finding that the plaintiff obtained \$1,044,047.75 at trial, which was more than the one million dollar offer).

252. See 15 U.S.C.A. § 1117a (West Supp. 2006) (entitling prevailing plaintiffs to recover “the costs of the action,” but only to recover “reasonable attorney fees” in “exceptional cases”).

253. See *B&H Mfg. Co.*, 2006 WL 547975, at *21.

254. The flip side of this complication, as discussed in Part II.C, relates to ascertaining the offer's scope at the time it is made. For example, imagine that *B&H Manufacturing Co.* involved a plaintiff seeking to evaluate the terms of the offer in order to decide whether to accept it, rather than a defendant seeking to demonstrate the offer's value to show that the rule was triggered. Such a plaintiff would have to assess whether costs were included in the offer, and whether costs in that case included attorneys' fees.

In other cases, courts have ruled on an offer's silence as to attorneys' fees in the context of a post-trial motion by the defendant to trigger Rule 68's cost-shifting mechanism. In *Bevard v. Farmers Insurance Exchange*, the Ninth Circuit held that Rule 68's cost-shifting mechanism was triggered because the judgment was less favorable than the Rule 68 offer.²⁵⁵ The court's holding depended on whether it interpreted the Rule 68 offer as inclusive of attorneys' fees.²⁵⁶ The court held that the offer did not include such fees.²⁵⁷ In doing so, the court followed its holding in *Nusom v. COMH Woodburn, Inc.*, a case in which it held, in the context of an accepted offer, that "a Rule 68 offer for judgment in a specific sum together with costs, which is silent as to attorneys' fees, does not preclude the plaintiff from seeking fees when the underlying statute does not make attorneys' fees a part of costs."²⁵⁸ While the court's holding in *Nusom* favored the plaintiff by allowing it to recover attorneys' fees in addition to the amount of the offer, its holding in *Bevard* disfavored the plaintiff. Specifically, because attorneys' fees were not deemed to be part of the offer, the court also did not, when determining the amount of the judgment for purposes of comparing it to the offer, include attorneys' fees as part of that judgment.²⁵⁹ As such, the apples-to-apples comparison was deemed to be the amount of the offer (\$8001, which by its terms

255. 127 F.3d 1147, 1148 (9th Cir. 1997).

256. *See id.*

257. *Id.*

258. 122 F.3d 830, 835 (9th Cir. 1997).

259. *Bevard*, 127 F.3d at 1148. As *Bevard* as compared to *Nusom* highlights, one difference between those cases involving an accepted Rule 68 offer versus a rejected one are the positions the parties take with regard to the scope of the offer. A plaintiff seeking to enforce an accepted Rule 68 offer typically will argue that the offer did not include costs and fees, and will seek to recover such costs and fees in addition to the amount of the offer. On the other hand, a plaintiff seeking to defend himself from a Rule 68 cost-shifting motion based upon an offer he rejected that defendant claims is more favorable than the judgment plaintiff obtained at trial typically will argue for a broad and inclusive reading of the Rule 68 offer.

Because the rule's cost-shifting mechanism is not triggered unless the offer is more than the judgment, the plaintiff will argue that the offer included such costs and fees. That way, the relevant apples-to-apples comparison will be between the offer amount (again, inclusive of costs and attorneys' fees) and the judgment with pre-offer costs and pre-offer attorneys' fees added on—a much more favorable comparison for the plaintiff than comparing the offer amount solely to the judgment. The same switch in viewpoints, of course, occurs among defendants as well, who broadly portray the offer's scope if it is accepted but narrowly portray the offer's scope if it is rejected.

was inclusive of costs) versus the amount of the judgment (\$5625 plus pre-offer costs of \$1916).²⁶⁰

Had the court determined that the offer was inclusive of attorneys' fees as well as costs, then the relevant comparison would have been between the "offer" (\$8001, inclusive of costs *and attorneys' fees*) versus the amount of the judgment (\$5625 plus pre-offer costs of \$1916 and pre-offer attorneys' fees). As long as the pre-offer attorneys' fees were more than \$460, the judgment would have been more favorable than the offer and thus the rule's cost-shifting consequences would not have been triggered.

The court's decision in *Bevard* creates uncertainty for plaintiffs by construing an offer that is silent as to fees in a manner that ultimately is unfavorable for plaintiffs. Unlike the cases in which an accepted offer's silence as to attorneys' fees is used against the drafting defendant, in *Bevard* the court construed the offer's silence (and thus ambiguity) against the plaintiff.²⁶¹ In doing so, the court seemed to ignore the reasoning of its underlying precedent, *Nusom*, which held that the defendant must bear the risk of uncertainty in an offer.²⁶² Rather than penalizing the defendant for its failure to "state clearly that attorneys' fees are included as part of the total sum for which judgment may be entered,"²⁶³ *Bevard* allowed the defendant to use that ambiguity to its advantage. It is the plaintiff who was penalized, having to "speculate whether the offer was intended to include attorneys' fees or not."²⁶⁴

260. *Bevard*, 127 F.3d at 1148.

261. Indeed, the *Bevard* court's conclusion that the offer there is silent as to attorneys' fees is itself questionable, given that the offer provides for \$8001 "including any recoverable costs and fees," which, arguably, unambiguously includes attorneys' fees. *See id.* at 1149 (Norris, J., concurring in part, dissenting in part) ("Here, [the defendant's] offer was not silent as to fees. It expressly included 'any recoverable costs *and* fees.' It is hard to imagine what 'recoverable fees' [the defendant] intended to include in the offer if not recoverable attorneys' fees." (emphasis added)).

262. *See Nusom*, 122 F.3d at 834 ("[D]efendants bear the brunt of uncertainty but easily may avoid it by making explicit that their offers do or do not permit plaintiffs to recover attorneys fees."); *Erdman v. Cochise County*, 926 F.2d 877, 880–81 (9th Cir. 1991) (placing the burden on the defendant to "provide clear evidence that demonstrates that an ambiguous clause was intended by *both* parties to provide for the waiver of fees"). While the court in *Bevard* quoted *Nusom*'s statement regarding defendants bearing the "brunt of uncertainty," the court does not appear to have followed the rationale expressed in this statement. *Bevard*, 127 F.3d at 1148.

263. *Nusom*, 122 F.3d at 834.

264. *Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d

One court has described the defendant's opportunity to argue after-the-fact about what its offer meant as allowing the defendant to "have its cake and eat it too."²⁶⁵ Rather than having to live with its drafting choices, the defendant gets to "sit back and interpret the offer based upon the factual circumstances it finds itself in."²⁶⁶ The court in *Rateree v. Rockett* posed the following scenario to highlight the defendant's advantage:

[A] likely scenario would have been that if Plaintiffs had rejected the offer and received a verdict of anything less than \$71,000 at trial, the Defendant would have argued that the plain language of the offer excluded fees and costs, and therefore Plaintiff would be responsible for the costs incurred after rejection of the offer.²⁶⁷

In addition to the unfairness to plaintiffs, allowing defendants to pick and choose the meaning of the offer depending on the context directly contravenes Rule 68's purpose of "avoiding protracted litigation."²⁶⁸ Instead of ending the litigation, the Rule 68 offer spawns its own branch of litigation. If the door is open to collateral litigation, there will at least be one party that will seek to challenge the terms of the offer after the fact.

1238, 1244 (11th Cir. 2002).

265. *Rateree v. Rockett*, 668 F. Supp. 1155, 1159 (N.D. Ill. 1987). For a discussion of why placing such uncertainty on the plaintiff is unfair, see *Webb v. James*, 147 F.3d 617, 621 (7th Cir. 1998), stating that "because rejection of the offer can have serious consequences for the [offeree], courts have rightly been reluctant to allow [offerors] to challenge the meaning of an offer of judgment, either before or after acceptance."

266. *Rateree*, 668 F. Supp. at 1159.

267. *Id.*

268. See, e.g., *Webb*, 147 F.3d at 621 ("We believe there is an additional reason [besides fairness concerns regarding the plaintiff] for district courts to refuse to consider challenges to the terms of a Rule 68 offer. Such challenges undermine the [r]ule's purpose of encouraging settlement and avoiding protracted litigation."); *Nortek, Inc. v. Liberty Mut. Ins. Co.*, 843 N.E.2d 706, 715 (Mass. App. Ct. 2006) ("[C]hallenges by the offeror to the meaning of an accepted offer of judgment tend to undermine the purpose of rule 68 to encourage settlement and avoid protracted litigation."); Appellants' Reply Brief at *8, *Collins v. Minn. Sch. of Bus.*, No. C7-01-690, 2001 WL 34727949 (Minn. Ct. App. June 29, 2001) ("Furthermore, to allow an offer[or] to challenge the terms of its offer would undermine Rule 68's purpose of encouraging settlement and avoiding protracted litigation." (citing *Webb*, 147 F.3d at 621)).

D. THE OVERALL EFFECTS OF UNCERTAINTY DEFEAT THE
RULE'S PURPOSE: GUN SHY DEFENDANTS, DAUNTED PLAINTIFFS,
AND OVERBURDENED COURTS

The uncertainty regarding how to interpret Rule 68 offers has a price. It makes defendants reluctant to make Rule 68 offers, lest they fall prey to one of the rule's many pitfalls. When defendants do make offers, those offers often have unintended and unwelcome results. Without guidance from the rule itself, defendants draft offers that do not reflect their intentions. Plaintiffs, too, are affected by the rule's uncertainty. Plaintiffs cannot choose to avoid the rule, and must make educated guesses about how a court will interpret a particular offer.²⁶⁹ The end result is that cases that could have been resolved through Rule 68 remain unresolved because the defendant never makes a Rule 68 offer or because the defendant makes an offer that results in costly and unpredictable collateral litigation. Thus, instead of litigants "evaluat[ing] the risk and costs of litigation"²⁷⁰ as intended by the rule, litigants instead end up evaluating the risks and costs of Rule 68. None of these results makes sense for a rule designed to reduce litigation and promote settlement.

1. Avoidance by Defendants

The uncertainty created for defendants deters them from making Rule 68 offers. As the cases discussed above demonstrate, defendants all too often discover that a court's interpretation of a Rule 68 offer differs from what the defendant intended. The rule itself does not put the defendant on notice to the rule's traps for the unknowing, nor is the case law a model of clarity. Many practice guides do not adequately advise defendants of the potential pitfalls in drafting Rule 68 offers, and thus may mislead a defendant into making an offer that leaves the defendant vulnerable, particularly with regard to attorneys'

269. One commentator analyzed some of the uncertainty surrounding Rule 68 offers and concluded that "the uncertainties created by such ambiguity actually benefit a defendant." Fisher, *supra* note 32, at 117. Even if this claim were true—which Parts II.B and II.C suggest is not always the case—it still would not be an excuse for leaving the rule as it is. This type of uncertainty is not part of the intent of the rule and is counter to the rule's purpose to encourage *reasonable* settlements, not settlements coerced by the uncertainty of a poorly drafted rule.

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

fees.²⁷¹ Given the uncertainty, defendants can and will avoid a rule that seems arbitrary or overly complicated.²⁷² Those defendants who do make Rule 68 offers must conduct considerable research to make sure the offer is drafted to reflect the defendant's intent. Ultimately, the uncertainties in the rule undermine the very financial efficiencies that the rule was intended to promote.

It is doubtful that only defendants who are uninformed as to the rule attempt avoid it. Even the informed yet prudent defendant must consider the risk that the court will misinterpret an offer (along with the costs of researching and drafting the offer's language) and weigh that risk against the expected benefit.²⁷³ Any risk may be too much if the expected payoff is low. And even a substantial expected payoff—such as cutting off the plaintiff's attorneys' fees—may not be enough to induce the defendant to make an offer. Even in cases in which the expected payoff for the defendant would seem to be high, such as cases involving fee-shifting statutes, defendants have ended up worse off from having to pay more than they expected.²⁷⁴ Such “un-

271. For example, a leading pretrial advocacy textbook contains a discussion of Rule 68 as well as a sample form to use in drafting a Rule 68 offer. See THOMAS A. MAUET, PRETRIAL 385 (6th ed. 2005). Although the text makes clear the need to specify whether attorneys' fees are part of the offer, the sample form makes no reference to attorneys' fees. Thus, defendants who draft offers using that form may encounter the types of problems faced by the defendants in *Webb* and *Utility Automation 2000*. See *id.*

272. Given Rule 68's cursory form and the fact that it is not taught in most law schools, some defense attorneys may not use the rule because they do not know about it. At a recent symposium addressing Rule 68, the discussion “prompted repeated suggestions that one reason for the relatively infrequent use of Rule 68 offers is that many defense lawyers do not know about Rule 68.” Cooper, *supra* note 13, at 849.

273. For example, had the defense carried the day in *Wilson v. Nomura Securities International, Inc.*, discussed *supra* in Part II.C.2.a.ii, the sophisticated defense attorneys likely would have wished they had avoided the rule. Indeed, because of the current rule's various pitfalls, some found through careful research and some yet-to-be-discovered, attorneys who are aware of rulings like *Wilson* likely will think twice before making offers under the rule.

274. One prominent practice guide advises defendants: “If you're drafting an offer of judgment, don't leave these matters in doubt. Lack of clarity exposes your client to potentially greater liability.” SCHWARZER ET AL., *supra* note 222, § 15:178.3. As this Article demonstrates, that statement could be revised to instead say, “Lack of clarity from the rule exposes your client to potentially greater liability.”

Also, the risk that defendants weigh is not just the risk that the offer will be misinterpreted. A defendant's attorney necessarily also weighs the risk that he will be faced with a malpractice action based upon his Rule 68 offer—a risk that probably does not exist if the attorney does not make the offer. Indeed, a

foreseen liability” acts to “discourage settlements and, thus, highly frustrate[s] the policy behind Rule 68.”²⁷⁵

2. Unfairness to the Plaintiff

The inconsistencies and uncertainties described in the cases above show a problem in the rule that cannot simply be dismissed as a defendant’s problem. Even if it were within the power of defendants to fix the problem by drafting clear offers—a dubious assumption given the rule’s lack of guidance to litigants and courts alike—their failure to do so would still cause problems for the plaintiffs and courts left to evaluate poorly drafted offers. While defendants, at least in theory, can “preempt Rule 68 disputes,” plaintiffs cannot.²⁷⁶ Plaintiffs are stuck with defendants’ drafting choices and cannot, as in typical settlement discussions, exchange drafts of the settlement offer’s language.

The lack of clarity in the rule places plaintiffs in a double bind when an offer is unclear as to fees: Does a plaintiff accept the offer, on the gamble that she will be able to recover fees in addition to it? Or does she reject the offer, only later to discover that it did not, in the court’s view, include fees? In the latter scenario, the interpretation of the offer as not including attorneys’ fees might be the trigger for Rule 68’s cost-shifting mechanism to apply.²⁷⁷ Any uncertainty about how a court will interpret a Rule 68 offer that is silent as to fees potentially leaves a plaintiff in “the position of guessing what a court will later hold the offer means.”²⁷⁸

Even in situations in which a plaintiff’s educated guess turns out to be correct, the costs of the rule’s uncertainty still

good defense to a malpractice case seeking damages from an attorneys’ failure to file a Rule 68 offer is that given the uncertainties existing in the application of the rule, the defendant’s counsel was exercising prudence.

275. *Blumel v. Mylander*, 165 F.R.D. 113, 116 (M.D. Fla. 1996).

276. *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 391–92 (7th Cir. 1999); *see also Util. Automation 2000, Inc. v. Choctawhatchee Elec. Coop.*, 298 F.3d 1238, 1249 (11th Cir. 2002) (admonishing that defendants could “easily preempt [collateral litigation about the terms of the offer] by clearly stating their intent in the offer of judgment”).

277. Specifically, a plaintiff who recovers a judgment at trial that is more than the amount of the offer might be surprised to find that the rule is triggered nonetheless because the relevant comparison is the judgment plus the attorneys’ fees accumulated at the time of the rejected offer. *See, e.g., Bevard v. Farmers Ins. Exch.*, 127 F.3d 1147, 1148 (9th Cir. 1997); *see also supra* Part II.C.3 (discussing *Bevard*).

278. *Webb v. James*, 147 F.3d 617, 623 (7th Cir. 1998).

exist. First, even in cases in which the expected recovery is relatively small, plaintiffs must expend considerable attorneys' fees and costs simply to analyze the court's likely application of the rule to a given offer. These costs are particularly high for the plaintiff whose counsel does not regularly litigate cases in which Rule 68 is invoked.²⁷⁹ Indeed the worst-case scenario, and one that likely exists given the rule's lack of notice, is one in which the plaintiff's counsel accepts or rejects an offer unaware of the question of whether it includes costs and attorneys' fees.²⁸⁰ Second, even for the plaintiff whose lawyer does sufficient research, considerable uncertainty still exists in a given case because of the fact-based approach that many courts take in construing Rule 68 offers. How, for example, can a plaintiff know how a court will construe an offer for a certain sum "with costs" or an offer that is silent as to fees when neither the rule or courts have provided a bright-line test?

And even bright lines sometimes elicit their own problems. In trying to create bright lines by issuing warnings directed toward defendants, courts may unintentionally create more uncertainty for plaintiffs. For example, a litigant who took literally a court's warning that "offers must explicitly include reference to attorneys' fees" would almost certainly have misevaluated the offer presented in *Nordby*.²⁸¹ And a plaintiff who researched the case law enough to learn that fees are recoverable in addition to an offer so long as the offer did not "clearly specify that [it] include[d] attorney[s]' fees" would miss the mark in a fees-as-costs case in which costs were included in the offer.²⁸²

279. Cooper, *supra* note 13, at 848–49.

280. *Id.* at 849 (discussing in the context of cost-shifting sanctions the concern that plaintiffs are not put on notice of costs and fees issues).

281. For example, the *California Practice Guide*, in discussing lump-sum offers, states that "the offer must *specify* that it includes costs and fees." SCHWARZER ET AL., *supra* note 222, § 15:155.2. While the guide goes on to cite *Nordby* as holding that there is "no need to specify fees" when the offer is for "all counts of the complaint," *id.*, litigants who are unfamiliar with the rule will likely fail to consider the nuances but instead look for the bright lines that at least seem to provide clarity.

282. *Sampson v. Embassy Suites, Inc.*, No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998). While the focus in this subpart is on recovery of fees when fees are defined as separate from costs, certainly the plaintiff would be wrong in her assessment if such fees were defined as costs and the offer was deemed inclusive of costs. Thus, for example, a plaintiff who accepted an offer for "\$5000 including costs" upon the belief that because it did not "specify that [it] includes attorneys' fees," *see id.*, would be unpleasantly surprised to learn that attorneys' fees were included as part of costs and thus

3. Costs to Courts

Rule 68's lack of clarity regarding how offers should be construed imposes costs on the court as well as litigants. Because the rule's language provides little guidance, litigants who are uncertain as to the meaning of particular offers under Rule 68 must turn to courts to resolve their disputes. And courts, for their part, often resolve such disputes by resorting to case-by-case rulings. The end result is frequent, and often extensive, collateral litigation about the meaning of Rule 68 offers.²⁸³ For an already burdened judicial system, litigation arising from a settlement rule that is intended to curb litigation is both ironic and disappointing.

In addition to the costs of litigation, the uncertainties under the current rule have other less tangible, but nevertheless serious, costs to courts. The Federal Rules of Civil Procedure are intended to create uniformity in the federal judicial system.²⁸⁴ As leading commentators in the area have pointed out, the benefits of uniformity under the Federal Rules of Civil Procedure are several: fairness to litigants, such that the costs of litigation do not vary greatly by district; avoidance of forum shopping; and standardization, which enables lawyers easily to practice law across districts.²⁸⁵ This last benefit is especially noteworthy in the context of Rule 68. Specifically:

If rules vary among districts, lawyers must expend substantial time learning the individual rules for each district. Inevitably, lawyers will sometimes err in dealing with unfamiliar procedures, leading to additional court time in admonishing attorneys and enforcing compliance.²⁸⁶

Given the complexity of and inconsistencies in the law surrounding Rule 68 offers, it is not surprising that courts do in fact expend considerable time enforcing Rule 68.²⁸⁷ It also is not

could not be recovered in addition to the Rule 68 offer amount.

283. See, e.g., *supra* text accompanying notes 102–05 (discussing *Richardson v. Nat'l R.R. Passenger Corp.*, 49 F.3d 760 (D.C. Cir. 1995)).

284. Erwin Chemerinsky & Barry Friedman, *The Fragmentation of the Federal Rules*, 46 *MERCER L. REV.* 757, 757 (1995) (describing the primary argument that influenced the enactment of the Federal Rules of Civil Procedure: “procedure ought to be the same across the federal courts and the cases those courts hear[.]”).

285. See *id.* at 782 (discussing threats to uniformity stemming from the proliferation of local rules).

286. *Id.* at 783.

287. See *supra* Part II.B–C.

surprising that—given the rule’s optional nature for defendants—litigants often avoid the rule.

4. Overall, Lack of Certainty Undermines the Rule’s Purpose

For a rule established to foster settlement and reduce the burdens of litigation, the rule’s lack of clarity with regard to offers undermines its very purpose. Simply because certain aspects of litigation are inherently risky and uncertain does not excuse building such uncertainty into the Federal Rules of Civil Procedure.²⁸⁸ Allowing this uncertainty is particularly undesirable if the purpose of Rule 68 is not just to act as a private benefit to litigants but also to provide a public benefit to the legal system.

III. LIVING UP TO THE PROMISE: A PROPOSAL TO REVISE AND CLARIFY RULE 68 WITH REGARD TO OFFERS

With soaring litigation expenses and burgeoning court dockets, Rule 68 theoretically should serve as a useful tool for litigants and courts alike.²⁸⁹ In practice, though, the rule serves as a rarely used tool that, even when employed, ends up spawning the very litigation that it is intended to decrease. The cases above demonstrate that the failure of litigants to use the rule, as well as the collateral litigation that results when they do, stems largely from a lack of clarity in the rule itself.²⁹⁰ Much of this ambiguity exists with regard to the meaning of Rule 68 offers. Litigants who are uncertain about how an offer will be interpreted will be disinclined to make such offers. Likewise, litigants who make, accept, or reject an offer, only later to discover that they were mistaken in their understanding of that offer, will litigate the matter. All of this uncertainty has a cost, both to the litigants and to the courts.

The question becomes how best to diminish the current uncertainties surrounding interpretation of Rule 68 offers.²⁹¹ Any

288. Justice Brennan, dissenting in *Marek*, noted the need for uniformity in application of the Federal Rules, stating: “As with all of the Federal Rules, the drafters intended Rule 68 to have uniform, consistent application in *all* proceedings in federal court.” *Marek v. Chesny*, 473 U.S. 1, 23 (1985) (Brennan, J., dissenting).

289. See Latin, *supra* note 9, at 703.

290. See *supra* Part II.B–C.

291. This Article focuses on making the law governing the terms of Rule 68 offers clear, such that defendants are willing to make Rule 68 offers and plain-

such solution must decrease uncertainty at the points when it matters most—when the defendant is contemplating making a Rule 68 offer and when the plaintiff is contemplating accepting a Rule 68 offer. Both parties must be able to predict how a court will later interpret the offer. Such predictability is especially important concerning whether an offer will be deemed inclusive of costs and attorneys' fees. At the same time, any amendment to the rule must not undermine the rule's purpose in other ways.²⁹² Thus, the solution lies in creating clarity within the rule itself, such that parties are not left to guess how a court will later interpret an offer under the rule.

Accordingly, the rule should be revised to make clear how offers will be interpreted. At the very least, the rule must alert parties to the pivotal issues regarding costs and attorneys' fees, as well as the validity of offers. The rule should be sufficiently user-friendly so that litigants do not need to expend excessive time and resources to determine whether an offer includes or excludes costs and attorneys' fees. Instead, the rule itself should provide a clear test for litigants to determine whether courts would interpret a given offer as inclusive of costs and fees.

A. SPECIFIC CHANGES TO RULE 68'S PROVISIONS RELATING TO OFFERS

The proposed revised rule provides two general ways for defendants to make Rule 68 offers: "damages-only" offers and

tiffs are able to fairly assess such offers. It may also be the case—as several commentators have suggested—that other aspects of the rule need to be amended, such as the incentives with regard to consequences under Rule 68 when the rule is triggered. *See, e.g.,* Margulies, *supra* note 55, at 441 (proposing a percentage-based approach). Other proposals suggest that plaintiffs, as well as defendants, should be able to make offers under Rule 68. *See* WRIGHT ET AL., *supra* note 3, § 3001.2 n.2, at 80 (listing state provisions that allow plaintiffs to make offers of judgment); Geoffrey Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93, 125 (1986). Yet other proposals have looked at the economic impact of the current Rule 68 on wealth distribution between plaintiffs and defendants. *See* Simon, *supra* note 51, at 9. All of these proposals take the certainty of the offer as a starting point, and thus have a different focus than this Article. These proposals generally are consistent with the proposal suggested in this Article, but are not necessary to achieve the baseline benefits set forth here. This Article's proposals eliminate practical barriers to defendants making Rule 68 offers and eliminate the unfairness and collateral litigation that result from uncertainty about how courts will interpret offers.

292. *See, e.g.,* Cooper, *supra* note 13, at 848 (cautioning against the "lure of drafting ever more detailed rules" and instead urging that rules be crafted "to declare general principles that guide judicial discretion").

2007]

REWRITING RULE 68

923

“lump-sum” offers. The proposed rule establishes the “damages-only” offer as the default. As such, all offers will be interpreted to be “damages only,” and thus not inclusive of costs and attorneys’ fees unless they strictly comply with the opt-out provision regarding lump-sum offers. In addition, under the proposed rule, a lump-sum offer by definition must include not only costs, but any applicable attorneys’ fees as well.²⁹³ Thus, under either type of offer—damages-only or lump-sum—costs and attorneys’ fees are treated the same, thereby eliminating the need to differentiate between those fees that are defined as costs and those that are not.

B. PROPOSED REVISED RULE 68

*Proposed Federal Rule of Civil Procedure 68: Offer of Judgment*²⁹⁴

(a) At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an ~~an~~ damages only or lump sum offer to allow judgment to be taken against the defending party for the money or property to the effect specified in the offer, ~~with costs then accrued.~~

(b) 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.

(c) An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

(d) All offers must be construed as “damages only” unless the text of the offer complies with part (h) of this Rule. Offers may be for monetary and/or nonmonetary relief.

(e) Damages-only offers must be construed as inclusive of any applicable prejudgment interest then accrued and

293. Under the current rule, a lump-sum offer must include attorneys’ fees in fees-as-costs cases but not in fees-as-separate-from-costs cases. *See supra* notes 169–70 and accompanying text.

294. The text of the proposed revised rule indicates changes to the current rule as follows: strikeouts show where text was deleted from the current rule, underlined text shows additions to the rule, and text neither underlined nor stricken is the original text.

as not inclusive of costs then accrued or any applicable attorneys' fees then accrued.

(f) Upon acceptance of an offer, the adverse party's costs then accrued and applicable attorneys' fees then accrued shall be added to the offer, and judgment entered accordingly. The only exception to this provision is pursuant to an offer made under Rule 68(h) below, to which no additional amount shall be added.

(g) If the judgment²⁹⁵ 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.

(h) For an offer to be construed as a "lump-sum" offer, the offeror must state in the text of its offer the following: "This offer is being made pursuant to Rule 68(h) and represents a lump-sum offer inclusive of prejudgment interest then accrued, costs then accrued, and any applicable attorneys' fees then accrued."

(i) "Applicable attorneys' fees then accrued" are any attorneys' fees to which the adverse party is entitled by statute, rule, or contract for one or more of the claims resolved by an offer made under this Rule.

(1) Notwithstanding the provisions of this Rule, the court must still decide under a damages-only offer what attorneys' fees are applicable under the relevant authority.

(2) Nothing in this Rule shall be construed to create a substantive right to attorneys' fees, not already provided for under the applicable substantive law.

(3) The term "applicable attorneys' fees then accrued" includes any litigation expenses to which the adverse party is entitled.

(j) An offer made and/or accepted under this Rule does not constitute an admission of liability. An offeror may include language in the text of the offer to this effect.

295. While this Article focuses on amending Rule 68 to provide clarity at the offer stage, it is worth noting that the term "judgment" in Rule 68, which arises at the comparison stage, contains its own ambiguity. This ambiguity could be resolved by amending the rule to make clear what is implicit in *Marek*—that the "judgment" to which an unaccepted offer is compared includes not only the plaintiff's verdict but the plaintiff's pre-offer costs and, when applicable, pre-offer attorneys' fees. See *Marek v. Chesny*, 473 U.S. 1, 6–7 (1985); Lewis & Eaton, *supra* note 49, at 733.

(k) The fact that an offer is made but not accepted does not preclude a subsequent offer.

(l) Unexpired offers are not revocable.

(m) When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

C. BENEFITS OF THE PROPOSED RULE

The proposed rule will benefit litigants and courts alike. Rather than requiring extreme “caution and care by counsel,” the proposed rule provides counsel with certainty in drafting and evaluating Rule 68 offers.²⁹⁶ It does this by providing clarity in the rule itself. At the front end, the proposed revised rule will allow litigants to draft and evaluate Rule 68 offers with awareness of what is required by the rule, and with particular awareness of the role of costs and attorneys’ fees in relation to the offer. Thus, collateral litigation regarding Rule 68 offers will be greatly curbed because, rather than analyzing the meaning of unlimited drafting possibilities, parties and courts will learn that Rule 68 offers must take one of two forms.

Second, in those occasions in which litigants do dispute an offer’s terms, the proposed revised rule will provide courts with a bright-line test to apply in resolving disputes. A defendant who, for example, wishes to argue that its offer was for a lump-sum amount, notwithstanding the fact that it purported to exclude attorneys’ fees, will, as always, be able to have a bite at the apple. But because the plain language of Rule 68 gives courts no discretion to treat an offer as lump-sum unless it complies with the express requirements of the rule, courts presumably would deal with such a challenge summarily and inexpensively. The sections that follow explain the particular benefits of the proposed revised rule, demonstrating that the uncertainties revealed in Parts II.B and II.C are resolved by rewriting the rule. The net effects of the revised rule’s greater

²⁹⁶ Sampson v. Embassy Suites, Inc., No. Civ. A. 95-7794, 1998 WL 726649, at *1 (E.D. Pa. Oct. 16, 1998).

clarity would be increased use of the rule by defendants, fairness to plaintiffs who must respond to offers under the rule, and less collateral litigation.

1. Clarity Regarding Components of a Rule 68 Offer

Perhaps because the rule was drafted decades ago, it does not alert litigants to the basic components of a Rule 68 offer. The revised rule provides clarity for litigants in this regard. Specifically, the text of the proposed rule alerts litigants to the required components of a Rule 68 offer with particular attention to the role of costs and attorneys' fees in the offer.²⁹⁷

Such clarity is important for two reasons. First, defendants who do not understand the basic components of a Rule 68 offer tend either to avoid the rule or to draft offers that do not include such components, or at least do not include them clearly.²⁹⁸ Moreover, the current rule is self-defeating to the extent that its purpose of promoting settlement and decreasing litigation is undermined by defendants' hesitancy to use it and by the rule's propensity to spawn collateral litigation.²⁹⁹ Second, clarity in the rule about the components of Rule 68 offers is important to plaintiffs as well as defendants. Plaintiffs who must respond to a Rule 68 offer need to understand what is at stake and what effect a particular offer has on costs and attorneys' fees.³⁰⁰

While it is true, as some courts have suggested, that a litigant who conducts basic research on Rule 68 would uncover the *Marek* decision, that fact alone would simply alert the litigant to the potential for attorneys' fees to be treated as part of costs.³⁰¹ The litigant still would need to conduct further research into other bodies of law to discern whether costs in that particular case are inclusive of fees. Moreover, focusing on what litigants could or should uncover in their research raises

297. The revised rule also clarifies that prejudgment interest is included as part of a Rule 68 offer, whether the offer is for damages-only or lump-sum. While this is not an area of significant confusion under the current rule, it should be made clear in the revised rule. *See, e.g., Henderson v. Horace Mann Ins. Co.*, No. 03-CV-0526-CVE-PJC, 2006 WL 1878897, at *4 (N.D. Okla. July 6, 2006) (citing *Mock v. T.G.&Y. Stores Co.*, 971 F.2d 522, 527 (10th Cir. 1992)) (holding that an offer that did not mention prejudgment interest was inclusive of such interest).

298. *See supra* Part II.D.1.

299. *See supra* Part I.A for a discussion of Rule 68's purpose.

300. *See supra* Part II.D.2.

301. *See Marek v. Chesny*, 473 U.S. 1, 9 (1985); *supra* Part I.A.

the question of why the rule itself should not provide such basic illumination. Not all cases involve large dollar amounts, and not all litigants are repeat players within the Rule 68 universe. Why should a rule intended to decrease costs instead require litigants to expend resources becoming veritable experts on the rule? Moreover, because the rule is intended to serve the public function of promoting settlements generally, not simply to perform a private function for individual litigants,³⁰² the public good is served by alerting litigants to the components of Rule 68 offers.

2. Clarity Regarding Whether Particular Offers Are Valid

Litigants know that absent a valid offer, Rule 68 has no impact. But under the current rule, litigants do not know what is required in order for an offer to be deemed valid.³⁰³ This uncertainty results in underutilization of the rule as well as difficulties in assessing offers that are made. The text of the revised rule addresses this problem by explicitly providing guidance in three areas in which significant confusion exists regarding the validity of offers.

Specifically, part (j) of the rule provides that a Rule 68 offer does not constitute an admission of liability, thus eliminating the need for defendants to specify whether the offer is an admission or not. In addition, part (l) of the rule provides that Rule 68 offers are never revocable. Finally, part (d) states that an offer may include monetary and/or nonmonetary relief, making clear that either or both is sufficient.

All of these revisions enable litigants to know at the front end whether courts will deem particular offers valid. The result is that defendants are more likely to make offers under the rule, because they are confident their offers will not later be invalidated. The revisions also create a more level playing field for plaintiffs, who have no input into an offer's language and should not be required to second-guess whether a particular offer will be deemed valid.

The potential downside of these revisions is slight. First, a defendant who may want to admit liability, because he thinks a plaintiff might value such an admission, cannot factor the ad-

302. See *supra* notes 16–18.

303. See *supra* Part II.B. Some observers have argued that the rule should be revised so that it does not apply to class actions. This issue is beyond the scope of this Article. For a discussion of policy arguments surrounding class actions and Rule 68, see WRIGHT ET AL., *supra* note 3, § 3001.1, at 76–78.

mission into the value of the offer. However, nothing prevents a defendant from making the same settlement offer, with an admission of liability, apart from Rule 68. If the offer is accepted, it makes little difference whether it is accepted pursuant to Rule 68 or not, because cost-shifting implications are triggered. Second, a defendant who, perhaps because of newly discovered information, wants to revoke a Rule 68 offer within the ten-day acceptance period cannot do so. While circumstances of obvious clerical error³⁰⁴ may make this provision troubling, the reality is that disallowing revocations makes defendants no worse off than plaintiffs. Just as a plaintiff cannot withdraw her acceptance of a Rule 68 offer upon discovering new information that makes the offer less appealing, the defendant too must remain bound by its offer for the ten-day period.

3. Clarity Regarding Whether an Offer Is Inclusive of Costs

Too much uncertainty exists regarding whether offers are inclusive of costs. While uncertainty is reduced by alerting litigants to the components of Rule 68 offers,³⁰⁵ this alone is not enough. Simply put, there are too many potentialities in Rule 68 offers to achieve clarity under the current rule.³⁰⁶ And, unlike typical settlement offers, in which litigants can mutually resolve uncertainties at the drafting stage, the uncertainties in Rule 68 offers instead are resolved through collateral litigation.³⁰⁷

The revised rule eliminates the confusion that arises from the various drafting potentialities by limiting the types of Rule 68 offers a party can make. Specifically, the rule allows defendants to make only two types of offers: damages-only offers and lump-sum offers. In addition, the revised rule establishes damages-only offers as the default. Thus, unless the defendant uses the specific language contained in part (h) of the rule to opt out of the default and thus make a lump-sum offer, the offer will uniformly be construed as a damages-only offer.

304. See, e.g., *supra* text accompanying notes 96–101 (discussing *Cesar v. Rubie's Costume Co.*, 219 F.R.D. 257 (E.D.N.Y. 2004)).

305. See *supra* Part III.C.1.

306. See *supra* Part II.C.1 (discussing the confusion that arises in cases in which offers are arguably ambiguous as well as cases in which offers are silent with regard to costs). Even if courts construed such offers uniformly—which these cases suggest is not the reality—differences in an offer's language or the circumstances of a particular case may engender uncertainty regarding the meaning of a particular offer. See *id.*

307. See *supra* Part II.B–C.

The benefits of restricting the types of Rule 68 offers defendants can make are several. First, the revised rule eliminates the need to construe on a case-by-case basis the variety of offers that arise in Rule 68 cases. Thus, instead of the current uncertainty that arises when an offer is silent as to costs, the revised rule makes clear that an offer must not only mention costs but also comply with the other requirements of part (h) in order to be deemed inclusive of costs. Second, and related, the revised rule provides clarity to litigants at the front end, rather than in the course of collateral litigation when it is too late. It should be clear to defendants drafting offers, and to plaintiffs evaluating offers, whether the offer is lump-sum or not.

Third, revising the rule helps ensure that litigants making and evaluating Rule 68 offers have the same understanding of the terms of the offer, thereby eliminating the kinds of surprises that too often arise in Rule 68 cases.³⁰⁸ While it is counterproductive to the rule's purpose of encouraging settlements to require an actual meeting of the minds, the clarity and specificity of the revised rule at least make it more likely that the litigants will have mutual understanding of the meaning of the offer. This characteristic alone will greatly encourage the use of the rule by defendants³⁰⁹ and will make the rule's use fair for plaintiffs.

Fourth, the bright-line nature of the revised rule eliminates any need for courts to consider extrinsic evidence in construing Rule 68 offers. This result makes sense for multiple reasons, not the least of which is that the consideration of extrinsic evidence is expensive and inherently uncertain. Moreover, the consideration of such evidence after-the-fact leaves plaintiffs vulnerable because they must evaluate and decide upon the meaning of a Rule 68 offer even though a court has not yet decided that meaning.³¹⁰

Undoubtedly, even under the proposed revised rule some defendants still will make mistakes when drafting their Rule 68 offers. A defendant might make an offer that it intends to be

308. For a discussion of the various possible understandings litigants may have when an offer is silent regarding attorneys' fees, see *Wilson v. Nomura Securities International, Inc.*, 361 F.3d 86, 92–93 (2d Cir. 2004) (Newman, J., dissenting).

309. As discussed in Part II.D.1, defendants who have been burned by the rule, or those who anticipate that possibility, will elect not to use the rule rather than risk unintended consequences.

310. See *supra* Part II.C.1.b (discussing why courts should be reluctant to consider extrinsic evidence in the context of Rule 68 offers).

lump-sum, but that does not comply with part (h). Under the plain language of the rule, such an offer will be deemed to be for damages only and, if accepted, costs and any applicable attorneys' fees will be added to it. While this result is unfortunate for the particular defendant, it is necessary if the rule is to provide the level of certainty necessary to enable plaintiffs to fairly evaluate offers and to cut off collateral litigation. The alternative—leaving in place the current uncertainty about whether an offer is lump-sum or not and thus making the plaintiff guess as to how the court will construe it—is more unfair and more burdensome on courts.

Similarly, it is true that eliminating the lump-sum option altogether would add even more clarity at the offer stage. However, that change would not be desirable. Perhaps most important, preserving a defendant's ability to make a lump-sum settlement offer is necessary for the simple reason that many defense attorneys would not make Rule 68 offers if such offers left the issue of fees open. For example, one prominent defense attorney has stated that he has never drafted a Rule 68 offer exclusive of attorneys' fees, because it would be too much of a "wild card" to leave the issue of attorneys' fees up to the court.³¹¹ On the other hand, another prominent defense attorney has stated that "the preferred way that we like to make offers of judgment is a sum certain plus reasonable attorneys' fees and costs incurred to date to be determined by the court."³¹² Thus, in order to maximize the use of the rule, any proposed change should keep both options open, as the proposed revised rule does.

4. Clarity Regarding Whether an Offer Is Inclusive of Attorneys' Fees

Because the rule's value to defendants is greatest when attorneys' fees are at issue, defendants are most likely to make Rule 68 offers in cases in which a fee-shifting statute is involved.³¹³ Yet the current rule's failure to mention attorneys' fees at all creates considerable uncertainty regarding how to construe offers in fee-shifting cases. This intersection of the

311. Symposium, *supra* note 166, at 780 (comment by Mr. Richard Alfred).

312. *Id.* at 779 (comment by Mr. John Kennedy) (suggesting that the advantage of making the offer exclusive of fees is that "all you have to put your science on is the dollar sum, the damage sum, to measure against the trial result" instead of "trying to guess at what those fees are").

313. See MOORE ET AL., *supra* note 12, § 68.02[4], at 68-13.

rule's lack of clarity regarding attorneys' fees combined with its increased use in fee-shifting cases has led to significant uncertainty on the part of litigants and has resulted in complex collateral litigation.

As described in Part II.C.2 above, the sources of litigants' uncertainty about whether attorneys' fees are included in the offer are several. Sometimes litigants are unaware that attorneys' fees are implicated in any way by Rule 68.³¹⁴ Yet more often the confusion stems from uncertainty about how the underlying fee-shifting statute characterizes attorneys' fees,³¹⁵ and about whether attorneys' fees may be recovered when the offer is silent as to fees.³¹⁶ These uncertainties are inherent under the current rule, in which the interpretation of offers is bootstrapped on to the underlying fee-shifting statute.

The revised rule reduces uncertainty regarding attorneys' fees by alerting litigants to the issue of attorneys' fees and by specifying what an offer must say in order to be construed as inclusive of such fees. Yet these two changes alone, which are discussed in detail above in Part III.C.1 and III.C.3, are not sufficient to resolve the uncertainties that now accompany Rule 68 offers in fee-shifting cases.³¹⁷ Greater clarification is needed because under the current rule, the meaning of a Rule 68 offer is entirely dependent on the fee-shifting statute involved.³¹⁸ Thus, identical language from two Rule 68 offers is construed as having two different meanings simply because the offers were made in cases involving different fee-shifting statutes.³¹⁹

314. *See supra* Part III.C.1.

315. *See supra* Part II.C.2.a.

316. *See supra* Part II.C.2.b.

317. *See supra* Part II.C.2.

318. *Id.*

319. *Id.*

To eliminate this distinction without true meaning,³²⁰ which is the source of far too much uncertainty under the current rule, the revised rule effectively replaces the concept of “costs” at the offer stage with the concept of “costs and applicable attorneys’ fees.” The result is that under the plain language of the rule, offers must be construed without regard to the underlying fee statute involved.³²¹ So, for example, a “lump-sum” offer must always be inclusive of applicable attorneys’ fees as well as costs (regardless of how the underlying fee statute defines attorneys’ fees). And a damages-only offer cannot be inclusive of either attorneys’ fees or costs.³²²

This change in the rule is particularly necessary to reduce collateral litigation in cases in which offers are silent with regard to attorneys’ fees.³²³ Under the current rule, such an offer’s meaning is resolved by the court, long after the plaintiff is required to accept or reject the offer, based upon the court’s conclusion as to whether the offer is ambiguous.³²⁴ And even

320. Many commentators that have considered this distinction have done so within the context of the cost-shifting penalties of the rule, under which the shifting of attorneys’ fees is dependent on the type of fee-shifting statute involved. *See, e.g.*, Cooper, *supra* note 13, at 849. The distinction permeates the rule with uncertainty at the offer stage as well. While beyond the scope of this Article, the *Marek* distinction also needs to be eliminated at the cost-shifting phase. *See id.* (“No one could have intended to write a rule that cuts off post-offer statutory attorney fees if the underlying statute characterizes fees expressly as costs, but not if the statute characterizes fees expressly as fees.”); *supra* note 122. While such a revision to the rule is not necessary in order to achieve clarity at the offer stage, it would address many of the same types of concerns raised in this Article, such as predictability to defendants, fairness to plaintiffs, and a reduction in collateral litigation.

321. Not all attorneys’ fee provisions are statutory in nature. *See supra* note 122. Fees also may be awarded pursuant to contracts. Even so, statutory attorney fee provisions are by far the most common fee entitlement, and thus this Article refers generically to such provisions.

322. Along these lines, the revised rule also defines attorneys’ fees as inclusive of any applicable litigation expenses. *See Proposed Revised Rule 68(i)(3), supra* Part III.B. This definition makes clear that such expenses are treated as part of applicable attorneys’ fees for purposes of the rule, avoiding the difficulty that arises when expenses such as expert fees are defined by an underlying statute as part of attorneys’ fees or as a separately recoverable item. *See, e.g.*, Spruill v. Winner Ford of Dover, Ltd., No. Civ. A. 94-685 MMS, 1998 WL 186895, at *2 (D. Del. Apr. 6, 1998) (noting that although expert fees are not traditionally part of attorneys’ fees, Title VII and § 1988 explicitly define expert fees as part of attorneys’ fees).

323. However, it is likely that insofar as the text of proposed revised Rule 68 alerts defendants to the issue of attorneys’ fees, offers that are silent as to fees will be less commonplace. *See supra* Part III.C.1.

324. *See supra* Part II.C.2.b (describing cases in which uncertainty exists

whether a court labels an offer ambiguous is not necessarily conclusive of the result, given the varying consequences that courts attach to ambiguous offers.³²⁵ While a determination of ambiguity sometimes depends only on the fee-shifting statute at issue, at other times it depends on the particular causes of actions and relief specified in the complaint.³²⁶ Hence, a plaintiff who wants to know what meaning a court may attach to an offer that does not mention attorneys' fees has to distinguish between language like "total settlement" versus "one total sum as to all counts," as well as what the latter means if the counts specified in the complaint did not include a fee award.³²⁷

None of this makes sense under any set of circumstances, but it is particularly troublesome in the context of a rule intended to curb litigation costs. Thus, under the revised rule, litigants are not required to second-guess whether a court will deem an offer unambiguous. The rule makes clear that all offers are damages only (and thus by definition not inclusive of costs and applicable attorneys' fees) unless the offer strictly complies with the lump-sum provisions contained in part (h). Thus, an offer that does not mention fees by definition would not comply with part (h) and would be just another example of a damages-only offer to which applicable fees should be added if accepted.

In addition, eliminating distinctions in offers based upon underlying fee statutes adds particular clarity in cases in which Rule 68 offers involve two different types of fee statutes. Under the current rule, considerable confusion and collateral litigation arises in such cases because it is unclear how a court will construe an offer that "includes costs" when the case itself arises under two fee-shifting statutes that define costs differently. Namely, it is unclear in such cases whether a court will define costs with reference to the underlying fees-as-costs statute, the underlying fees-as-separate-from-costs statute, or some combi-

because offers are silent regarding fees).

325. See *supra* Part II.C.2.b.i (comparing *Utility Automation 2000, Inc. v. Choctawhatchee Electric Cooperative*, 298 F.3d 1238 (11th Cir. 2002), *Radecki v. Amoco Oil Co.*, 858 F.2d 397 (8th Cir. 1988), and *Basha v. Mitsubishi Motor Credit of America, Inc.*, 336 F.3d 451 (5th Cir. 2003)).

326. See *supra* Part II.C.2.b.

327. See *supra* Part II.C.2.b.ii (discussing the Seventh Circuit's holding in *Nordby v. Anchor Hocking Packaging Co.*, 199 F.3d 390, 392 (7th Cir. 1999), including dicta suggesting that the particular offer's language might have been held to be ambiguous if the plaintiff had been seeking an award under some authority not cited in the complaint).

nation thereof.³²⁸ The revised rule, in eliminating the distinction between costs and fees, makes the type of underlying fee statute irrelevant for purposes of evaluating the offer. No uncertainty regarding the offer need arise because under the revised rule, attorneys' fees are treated, for purposes of evaluating the offer, the same as costs, regardless of the type of fee statutes involved.³²⁹ Thus, the type of collateral litigation that arose in the *Wilson* case—where one claim involved a fees-as-costs statute and another claim involved a fees-as-separate-from-costs statute—could not arise under the revised rule. Rather, the inquiry would be limited to determining if the offer were lump-sum or not, with that answer determining whether attorneys' fees were included.

Notably, the revised rule does not permit defendants to make damages-only offers that are inclusive of costs but not attorneys' fees. This limitation has always existed in fees-as-costs cases, in which attorneys' fees by definition are part of costs.³³⁰ However, the revised rule also extends this limitation to fees-as-separate-from-costs cases.³³¹ While the revision allows defendants less freedom to craft individualized offers, it is necessary due to the uncertainty that arises precisely because offers often vary so greatly. Moreover, this revision does not have a significant downside, because costs as a category separate from fees typically are not sizeable.³³² Fewer options create more certainty; what some courts have hailed as flexibility under the

328. See *supra* Part II.C.2.a.ii (discussing *Wilson v. Nomura Securities International, Inc.*, 361 F.3d 86 (2d Cir. 2004)).

329. See *supra* Part II.C.2.a.

330. See, e.g., *Bentley v. Bolger*, 110 F.R.D. 108, 111–14 (C.D. Ill. 1986).

331. While it is possible that this provision may result in less frequent use of Rule 68 in fees-as-separate-from-costs cases, defendants are more likely simply to make lump-sum offers in such cases. Defendants making a lump-sum offer retain the ability to set the total dollar amount as they wish. In any event, because attorneys' fees do not shift in these fees-as-separate-from-costs cases, perhaps the effect of the rule's clarity will be to make litigants more aware of what is at stake in these cases. The case law demonstrates that at least some defendants make offers in these cases under a misapprehension that applicable attorneys' fees always shift under the rule rather than shifting only in fees-as-costs cases per *Marek*. See MOORE ET AL., *supra* note 12, § 68.08[3], at 68-55 to -56; *supra* Part II.C.2.b.

332. Even so, nothing in *Marek* would prevent the rule from being amended to carve out a third type of offer between the damages-only offer and the lump-sum offer, such as a “damages and costs only” offer. Because *Marek* was based upon a statutory interpretation question, and not a constitutional question, the *Marek* Court's interpretation of “costs” could essentially be written out of the rule for purposes of the offer.

current rule³³³ may just as well be a buzzword for collateral litigation.³³⁴ Thus, the proposed revised rule benefits litigants and courts alike by eliminating, at least for purposes of the offer, this distinction for which there is no rational basis.³³⁵

5. Clarity Regarding the Comparison Between an Unaccepted Offer and the Judgment

By creating certainty as to whether an offer is lump-sum or not—and what the lump sum includes—the proposed rule would eliminate the uncertainty that currently exists when courts compare an unaccepted offer with a judgment. Under the current rule, the same uncertainties that exist in the context of accepted offers occur when defendants seek to shift costs after trial for offers alleged to be more favorable than the judgment obtained.³³⁶

As in the context of accepted offers, the proposed revised rule creates clarity at the comparison stage because it simplifies the apples-to-apples comparison between the judgment obtained and the offer. Specifically, under the revised rule the defendant may make only two possible types of offers—damages-only offers and lump-sum offers. And because of the mandatory language in the rule itself, litigants and courts should be able easily to discern which type of offer is being made.³³⁷ As such, the process of comparison post-trial should be straightforward. The costly and complicated collateral litigation concerning whether the rule was in fact triggered, as in *B&H Manufactur-*

333. See *Webb v. James*, 147 F.3d 617, 622–23 (7th Cir. 1998) (rejecting a magic-words approach in a Rule 68 context).

334. It may be that, even aside from the one-sided nature of Rule 68 offers, the flexibility under the current Rule 68 hurts plaintiffs. See Stephen Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 989–90 (1987) (observing in the context of non-Rule 68 alternative dispute resolution mechanisms, like mediation and negotiation, that the weaker party often is disadvantaged by procedures that are less predictable and consistent).

335. Unrelated to the concerns addressed in this Article, an additional benefit of requiring the defendant to include fees in the offer regardless of the fee-shifting statute is that this requirement may help avoid problems related to “low-ball offers.” For a discussion of problems related to “low-ball offers,” see WRIGHT ET AL., *supra* note 3, § 3002.1, at 97–100.

336. See *supra* Part II.C.3.

337. For a discussion of the rule’s provisions regarding the two types of offers, see *supra* Part III.C.3.

ing Co. v. Bright,³³⁸ would not exist under the revised rule. Instead, the language would make clear whether the offer was lump-sum or not, and thus it would also make clear—regardless of the type of fee-shifting statute—whether attorneys’ fees were part of the offer.

6. Comparison of the Offer’s Meaning Under the Current Rule Versus the Revised Rule

In sum, the proposed revisions to the rule would inject certainty into the meaning of Rule 68 offers. Such certainty is necessary in order to curb the collateral litigation that the current rule perpetuates and to better effectuate the rule’s purpose of encouraging settlements. For example, the revised rule should eliminate collateral litigation in which litigants wrestle over the arguable distinctions between an offer for a certain sum “with costs” versus one that instead states that it is “including costs.” Similarly, the rule will curtail collateral litigation about whether an offer for “one total sum” includes attorneys’ fees or not, and will also eliminate the need to look to the underlying fees-shifting statute in order to answer that question.

Thus, the questions posed by the hypothetical described in Part II.A would all easily be resolved under the proposed revised rule. In assessing the offer’s value, the plaintiff would not need to consider the type of fee-shifting statute involved, nor would she need to carefully examine discrete drafting choices contained in the offer. So, for example, the plaintiff would only need to determine whether the offer were lump-sum or not, and then, having so determined, make the relevant comparison. To the extent the defendant purported to make a lump-sum settlement of sorts, say for “\$175,000 in full satisfaction of all claims,” the mandatory language of the revised rule would treat that offer as damages-only unless it complied with part (h).

CONCLUSION

Federal Rule of Civil Procedure 68 was created as a tool to promote settlement and decrease litigation. Its need has never been greater as litigation expenses continue to skyrocket and courts’ dockets continue to increase. Yet because much uncertainty surrounds how courts interpret Rule 68 offers, the rule’s

338. No. CVF016619 AWI LJO, 2006 WL 547975 (E.D. Cal. Mar. 3, 2006). For a discussion of the complications and uncertainties arising in *B&H Manufacturing Co.*, see *supra* note 254 and accompanying text.

purpose has not been achieved. The rule is rarely used and, when it is, collateral litigation often results. Much of this collateral litigation pertains to confusion about how Rule 68 offers should be interpreted, with heightened confusion regarding whether costs or attorneys' fees are included as part of the offer.

This Article proposes a revised rule that eliminates significant confusion regarding the meaning of Rule 68 offers. The revised rule explicitly instructs litigants regarding how Rule 68 offers will be interpreted, so that litigants need not resort to expensive and time-consuming research on the nuances of interpreting Rule 68 offers. Most notably, because the revised rule creates a bright line, clarifying that a lump-sum settlement only exists if certain criteria are met, litigants should encounter no confusion regarding whether an offer is lump-sum or not. Also, because the revised rule requires that both costs and any allowable attorneys' fees be treated together for purposes of the offer—either as part of a lump-sum offer or to be added on to a damages only offer—there should be little or no confusion. The clarity in the rule itself should provide litigants with certainty about how offers will be interpreted, so that defendants are not discouraged from making Rule 68 offers, and so that plaintiffs are able to fairly and accurately evaluate offers. With key in hand to unlock the puzzle of Rule 68, litigants will be able to access the rule without resorting to extensive research or collateral litigation.