
COMMENT

ERIE SIMILARITIES: ALASKA CIVIL RULE 68, “DIRECT COLLISIONS,” AND THE PROBLEM OF NON-ALIGNING BACKGROUND ASSUMPTIONS

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Alaska is unique among the United States in adopting the English Rule, which shifts a portion of the prevailing party’s legal fees to the losing party. This Comment analyzes one consequence of that doctrine, namely the applicability of Alaska Civil Rule 68, Alaska’s fee-shifting offer of judgment statute, in federal diversity actions under the Supreme Court’s Erie-Hanna jurisprudence. It concludes that despite sharing nearly identical text with the federal offer of judgment rule, Federal Rule 68, the substantially different purposes of the two Rules indicate that no “direct conflict” exists and that the substance of Alaska Civil Rule 68 applies in federal diversity actions. The Comment then uses the principles derived from this analysis to evaluate the Erie-Hanna analysis employed by several courts in determining whether to apply state offer of judgment statutes in diversity actions. Finally, it concludes that these courts have fallen short of the ideal analysis as articulated in the Supreme Court’s recent Gasperini decision in three distinct ways.

I. INTRODUCTION

Few of the Supreme Court’s lines of decision have evoked as much anguish among law students, criticism from scholars, uncer-

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tainty among practitioners, and refinements from jurists as has *Erie Railroad Co. v. Tompkins*¹ and its progeny. Essentially, *Erie* held that all state substantive law must apply in federal diversity actions.² Some of the choice of law determinations required by this principle are more difficult than others. Theoretically, determining whether to apply state law or an apparently applicable Federal Rule of Civil Procedure should be easy for federal courts hearing diversity cases. Stated generally, the test is: if the federal rule is broad enough to govern—that there is a “direct collision” between the federal rule and the competing state law—then the federal rule controls.³

The Federal Rules of Civil Procedure are intended to provide a singular, uniform method for adjudicating substantive rights in federal court. Determining whether such a federal rule applies should be a matter of “plain meaning.”⁴ However, when focusing on the intended scope and purpose of the federal rule *vis-à-vis* the competing state rule and when unique or unusual state substantive rights are implicated, the inquiry presents special challenges. After the Supreme Court’s refinement of the *Erie* doctrine in *Gasperini v. Center for Humanities, Inc.*,⁵ an especially careful analysis of the purposes of both the relevant federal rule and the state statute is required to avoid the unnecessary and undesirable federal abrogation of state substantive law. The Alaska Rules of Civil Procedure include one such unique system, requiring a heightened level of care in evaluating which set of rules to apply.

Unlike the rest of the nation, Alaska does not follow the “American Rule,” under which each party bears its own litigation costs.⁶ Instead, since its territorial days in the early twentieth century, Alaska law has provided for the shifting of at least part of the prevailing party’s attorneys’ fees to the losing side.⁷ This fee-shifting system has undergone several rounds of discussion and revision,⁸ and debate over its merits has consumed many pages in this

1. 304 U.S. 64 (1938).

2. *Id.* at 79–80.

3. To be more precise, the federal rule controls in this situation unless it is invalid as outside the rulemaking authority of the Federal Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2000), or is in some other way unconstitutional. *See* *Hanna v. Plumer*, 380 U.S. 460, 470–72 (1965).

4. *See* *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 n.9 (1980).

5. 518 U.S. 415 (1996).

6. Kevin Michael Kordziel, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 429 (1993).

7. *Id.* at 431–32.

8. *See generally id.* at 440–48.

Law Review and other Alaska legal publications.⁹ Most of this scholarship has focused on the theoretical merits and empirically measurable effects of Alaska's fee-shifting regime.¹⁰

Today, Alaska Civil Rule 82 expresses a comprehensive right of the prevailing party in litigation to recover attorneys' fees.¹¹ The scope of this right is defined in Alaska Civil Rule 82 and several other statutes, including Alaska Civil Rule 68, which allows either party to recover additional attorneys' fees if they made an offer of judgment¹² that was rejected by the other party but then not matched or bettered after the trial.¹³ Rule 68 is therefore a device to encourage settlement. It also confers "prevailing party" status on, and requires an enhanced award of attorneys' fees to, a party making an unaccepted offer that proves to be more favorable to the offeree than the litigation's outcome.¹⁴

In diversity cases governed by Alaska law, Alaska Civil Rule 68 encounters apparent conflict with its federal counterpart, Federal Rule of Civil Procedure 68. Federal Rule 68 provides that defendants who make unaccepted offers of judgment that prove to be

9. See, e.g., *id.*; A.J. TOMKINS & T.E. WILLGING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* (Federal Judicial Center 1986); Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33 (1996); Gregory J. Hughes, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129 (1974); Andrew J. Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, 24 JUDGES' J., Summer 1985, at 38; Gerald Z. Marer and John F. Schuck, *Alaska's Rule 82 Fees: A Trap for Unwary Insurers*, 57 DEF. COUNSEL J. 214 (1990); Abizer Zanzi, Note, *The Constitutional Battle Over the Public Interest Litigant Exception to Rule 82*, 21 ALASKA L. REV. 329 (2004).

10. See generally *id.*

11. See ALASKA R. CIV. P. 82.

12. An "offer of judgment" is "a settlement offer by one party to allow a specified judgment to be taken against the party." BLACK'S LAW DICTIONARY 1114 (8th ed. 2004).

13. ALASKA R. CIV. P. 68

14. See *id.* Offer of judgment rules made pursuant to Alaska Civil Rule 68 may be regarded by litigants as "successful" in two situations. First, an *accepted* offer may be "successful" if it results in settlement of the case on favorable, or at least acceptable, terms. Because accepted offers do not result in further litigation, this Comment will set them to one side. Second, an *unaccepted* offer may be regarded as "successful" if the final judgment is sufficiently less favorable to the offeree so that the offeror is entitled to an award of enhanced attorneys' fees under the Rule. See *id.* This Comment is primarily concerned with offers that are "successful" in this second sense. For ease of discussion, this Comment will refer to unaccepted offers that result in an award of enhanced attorneys' fees as "fee-inducing" offers.

more favorable than the plaintiff's ultimate recovery are entitled to costs incurred after the offer of judgment was extended.¹⁵ At issue, then, are the consequences of these "fee-inducing" offers. Courts across the country have split on when and whether various state rules awarding attorneys' fees to litigants who make "fee-inducing" offers of judgment may be applied by a federal court sitting in diversity jurisdiction.¹⁶

As noted above, the critical question for a federal court sitting in diversity jurisdiction is whether there is a "direct collision" between the rules.¹⁷ This turns on the intended scope and purpose of each rule.¹⁸ An examination of the objectives underlying Alaska Civil Rule 68 and Federal Rule 68 reveals important differences. Federal Rule 68 was intended to promote settlement of lawsuits by shifting costs onto plaintiffs who recover less at trial than they were offered pursuant to the Rule and to maintain the status quo American Rule with respect to attorneys' fee awards.¹⁹ Alaska Civil Rule 68 serves the same settlement-encouraging purpose but also operates to identify the prevailing party for *all* attorneys' fees purposes under Alaska's system of fee-shifting.

Thus, the core difference stems from the divergent assumptions underlying the Alaska and federal legal systems with respect to attorneys' fees. When background assumptions upon which federal procedural and state substantive rules are based diverge, the two rules will be in direct conflict only rarely. Precisely because Alaska's fee-shifting scheme does not share the American Rule assumption of other states, this insight into Federal Rule 68 may have limited application in federal diversity cases of state offer of judgment rules outside Alaska.

However, like the lessons learned from Alaska's experience with fee-shifting, the lessons learned from the inquiry into the intended scope and purposes of Alaska Rule 68 and Federal Rule 68 are relevant to practitioners and courts around the nation.²⁰ The inquiry reveals a number of pitfalls that federal courts confronted with potentially conflicting federal and state rules of civil procedure must avoid in determining when there is a "direct collision" between those rules.²¹ Pre- and post-*Gasperini* cases deal with con-

15. See FED. R. CIV. P. 68.

16. See discussion *infra* Part IV.A.

17. See *Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

18. See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980).

19. See *Marek v. Chesney*, 473 U.S. 1, 10 (1985).

20. See *Di Pietro & Carns*, *supra* note 9, at 84–85.

21. See *Hanna*, 380 U.S. at 472.

flicts between state laws and Federal Rule 68 in several problematic ways: 1) by deciding the case on a “piecemeal” basis, limiting the holding to the facts and consequently avoiding the hardest questions about the potential conflict between state and federal rules; 2) by reading the federal rule broadly without conducting a meaningful inquiry into the purposes and intended scope of the federal and state rules; and 3) by creating a hybrid substantive law. None of these approaches fulfills the command of *Gasperini* to ascertain the scope and purpose of the federal and state laws.²²

In Part II, this Comment examines the Alaska fee-shifting system and concludes that Alaska Civil Rule 68 is an integral part of Alaska’s substantive right to attorneys’ fees. Part III places Rule 68 within the framework of case law generated from the *Erie* decision. Part III.A consists of a short exposition of *Erie* and attempts to distill the core rules and policies that determine when state law is to be applied in federal diversity cases. Part III.B investigates the intent of Federal Rule 68 and the decisions interpreting it. Part III.C compares the purposes and functions of Alaska Rule 68 and Federal Rule 68 and finds that because Federal Rule 68 was never intended to serve the same purpose as the Alaska rule, the Alaska rule may be applied in federal diversity actions. Part IV explores the implications of this understanding for other states’ offer of judgment rules and for *Erie* analysis involving anomalous state laws.

II. THE RIGHT TO ATTORNEYS’ FEES UNDER ALASKA CIVIL RULE 68 IS A SUBSTANTIVE RIGHT INCORPORATED BY THE LEGISLATURE INTO ALASKA CIVIL RULE 82(A)

Alaska Rule 82 was adopted in 1959.²³ It set out a schedule for attorneys’ fee awards to be adhered to “[u]nless the court, in its discretion, otherwise directs.”²⁴ Rule 82(a) currently articulates a right to attorneys’ fees for prevailing parties in litigation governed by Alaska law.²⁵ Ordinarily, fees are awarded according to the schedules in subsections (b)(1) and (b)(2), but in 1993, the Alaska Supreme Court added subsections (b)(3)(A) through (K), which permit a court to deviate from the schedules.²⁶ Alaska Rule 82(a)

22. See *Gasperini*, 518 U.S. at 426.

23. Alaska Sup. Ct. Order No. 5, effective Oct. 9, 1959.

24. *Id.*

25. See ALASKA R. CIV. P. 82(a).

26. Alaska Sup. Ct. Order No. 1118, effective July 15, 1993. See *Monzingo v. Alaska Air Group, Inc.*, 112 P.3d 655, 665 (Alaska 2005) (requiring trial court to give “adequate consideration” to Rule 82(b)(3) factors raised by parties).

requires a court to deviate from these schedules “as otherwise provided by law.”²⁷ Rule 82(a), therefore, incorporates by reference other sources defining the right to attorneys’ fees.²⁸ Some of these definitions hinge on the substance of the statute underlying the claim.²⁹ Others turn on the special circumstances and conduct of particular litigation.³⁰

Alaska Rule 82 straddles a fine line between the policies of reducing litigation and allowing access to the courts by parties with good faith claims.³¹ At times, certain justices of the Alaska Supreme Court have expressed concern that Rule 82’s litigation-reducing effectiveness might be *too* great.³² “[F]inancially ruinous” attorneys’ fee awards might deter good faith civil litigants from accessing the courts.³³ Especially with regard to public interest litigants—those whose litigation stands to benefit a wide group of people and who do not have sufficient economic incentive to bring suit—the risk of paying the other party’s attorneys’ fees might prevent meritorious claims.³⁴ The Alaska Supreme Court therefore created a public interest litigant exception under which such litigants were exempt from paying attorneys’ fee awards when they lost and received full reasonable attorneys’ fees when they pre-

27. ALASKA R. CIV. P. 82(a).

28. *See id.*

29. *See, e.g.*, ALASKA STAT. § 09.60.070 (2004) (victims of serious crimes); ALASKA STAT. § 45.50.537 (2004) (unfair trade practices and consumer protection).

30. *See, e.g.*, ALASKA STAT. § 09.60.015 (2004) (allowing “a reasonable amount to be fixed by the court as attorney fees” in small claims actions); ALASKA STAT. § 45.50.537(b) (providing for award of full reasonable attorneys’ fees to prevailing defendant in frivolous fair trade and consumer protection case).

31. This Comment will not discuss the wisdom or effectiveness in achieving this balance, which has been examined elsewhere. *See generally* Di Pietro & Carns, *supra* note 9, at 84–90 (making recommendations for amendments to Alaska Civil Rule 82 after a statistical analysis of its effects on litigation in Alaska); Kordziel, *supra* note 6, at 453–64 (concluding that Alaska Civil Rule 82 prevents middle-income, non-judgment-proof persons with potential claims from bringing those claims or litigating them aggressively).

32. *See, e.g.*, *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2, 6 (Alaska 1992) (Matthews, J., dissenting in part) (proposing that “in determining what fees constitute a ‘reasonable amount’ under Civil Rule 82(a)(1), trial courts must consider whether the award is so great that it imposes an intolerable burden on a losing litigant which, in effect, denies the litigant’s right of access to the courts”).

33. *See Reid v. Williams*, 964 P.2d 453, 462 (Alaska 1998).

34. *See Municipality of Anchorage v. Citizens for Representative Governance*, 880 P.2d 1058, 1061–62 (Alaska 1994) (defining “public interest litigant”).

vailed.³⁵ Although largely abrogated by statute,³⁶ the public interest litigant exception suggests a persistent uneasiness over the potential deterrent effect of Alaska Rule 82 on plaintiffs with meritorious claims.

Alaska Rule 68 also circumscribes the right to attorneys' fees.³⁷ When Rule 68 was initially adopted in 1959, it provided only for an increased rate of prejudgment interest to the successful offeror.³⁸ The Alaska Supreme Court held that the 1993 amendments to Rule 82 allowed, but did not require, the trial court to consider unaccepted Rule 68 offers of judgment when awarding attorneys' fees under Rule 82.³⁹ The court essentially incorporated the Rule 68 offer of judgment into Rule 82(b)(3)'s factors for considering deviation from the ordinary schedule of attorneys' fee awards.⁴⁰ This permitted the trial court to award increased fees to the offeror, even if the offeror had not prevailed in every aspect of the litigation.⁴¹

Such was the state of Alaska Rule 68 when the Ninth Circuit Court of Appeals decided *Home Indemnity Co. v. Lane Powell Moss & Miller*.⁴² The *Home Indemnity* panel faced the issue of whether Alaska Statute section 09.30.065's enhanced prejudgment interest rate applied. The court refused to characterize section 09.30.065 as a substantive prejudgment interest statute because it

35. *Anchorage Daily News v. Anchorage Sch. Dist.*, 803 P.2d 402, 404 (Alaska 1990) (holding prevailing public interest litigants entitled to "full amount of its attorneys' fees, to the extent that they are otherwise reasonable"); *Anchorage v. McCabe*, 568 P.2d 986, 993-94 (Alaska 1977) (noting that no attorneys' fees may be awarded against unsuccessful public interest litigant and holding that the trial court may "award full attorney's fees" to successful public interest litigants in its discretion). For a thorough analysis of the public interest litigant exception and its statutory restrictions, see generally *Zanzi*, *supra* note 9.

36. See ALASKA STAT. § 09.60.010(b) (2004).

37. See ALASKA R. CIV. P. 68.

38. Alaska Sup. Ct. Order No. 5, effective Oct. 9, 1959.

39. *Fairbanks N. Star Borough v. Lakeview Enters., Inc.*, 897 P.2d 47, 62 (Alaska 1995).

40. See *id.* at 61-62.

41. For example, after the 1993 amendment, the court might not award attorneys' fees to a plaintiff even though the plaintiff received some recovery less than the defendant's Rule 68 offer and would otherwise have been entitled to attorneys' fees as the prevailing party. Or the court might award enhanced attorneys' fees to the plaintiff even if most claims were dismissed, if the plaintiff recovered more on the surviving claim or claims than it had offered to settle for under Alaska Civil Rule 68.

42. 43 F.3d 1322 (9th Cir. 1995).

characterized Rule 68 as “punitive in nature.”⁴³ The court based this distinction on dicta in the Alaska Supreme Court’s opinion in *Farr v. Stepp*.⁴⁴ The *Farr* court, however, merely noted the punitive aspect of Alaska Rule 68 and did not create any punitive-substantive distinction.⁴⁵

Based on this distinction, the *Home Indemnity* court held that Federal Rule of Civil Procedure 68, which does not provide for either offers of judgment by plaintiffs or an enhanced award of prejudgment interest in such a case, governed.⁴⁶ The court seems to have substituted a *punitive*-substantive test for the procedural-substantive determination called for under *Erie*. However, the fact that former Alaska Rule 68’s prejudgment interest provision was “punitive in nature” does not preclude it from being “substantive” for *Erie* purposes. In fact, case law suggests that the opposite is true—for state-created fee-shifting schemes, state law governs the amount awarded as punitive damages in federal diversity actions, subject to an ultimate federal constitutional check for exorbitance.⁴⁷

I believe that *Home Indemnity* was incorrectly decided and is therefore not controlling with respect to attorneys’ fees awards under Alaska Rules 68 and 82. Furthermore, even if it is not overruled, its logic should not be extended to cover the current version of Alaska Rule 68.⁴⁸ In 1995, when *Home Indemnity* was decided, Alaska Rule 68 was not as integrally related to Alaska Rule 82 as it is now.⁴⁹

43. *Id.* at 1332.

44. 788 P.2d 35, 37 (Alaska 1990).

45. *See id.* (noting that “the superior court applied the penal costs and sanctions provided for in Civil Rule 68(b)(1)” in recounting the case’s procedural history).

46. *Home Indemnity*, 43 F.3d at 1332.

47. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 431 n.12 (1996); *see S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 311 (7th Cir. 1995) (stating that when there is “a rule awarding successful plaintiffs punitive damages on top of compensatory damages . . . there is no doubt that [it] . . . would be applicable in diversity suits under *Erie*”).

48. *Cf. Fairbanks N. Star Borough v. Lakeview Enters., Inc.*, 897 P.2d 47, 61 (Alaska 1995) (“Given these [1993] amendments, our pre-amendment decisions discussing the impact of a successful Rule 68 offer on attorney’s fees awards have limited application.”). It should be noted that *Farr*, on which *Home Indemnity* was based, was one such “pre-amendment decision” because it was decided in 1990. *See Farr*, 788 P.2d 35.

49. *See supra* notes 36–40 and accompanying text.

In 1997, the Alaska Legislature amended Alaska Statute section 09.30.065—the statute upon which Rule 68 is based⁵⁰—to require that an offeree who had not accepted an offer that turned out to be more than five percent less favorable than the ultimate judgment “pay reasonable actual attorney fees incurred by the offeror from the date the offer was made.”⁵¹ The legislature intended this amendment to effect a change to Alaska Rule 82.⁵² It stated that the amendment had “the effect of amending Rules 68 and 82, Alaska Rules of Civil Procedure, by requiring the offeree to pay costs and reasonable actual attorney fees on a sliding scale of percentages in certain cases, by eliminating provisions relating to interest, and by changing provisions related to attorneys’ fee awards.”⁵³

The 1997 amendment altered the relationship between Alaska Rule 68 and Alaska Rule 82.⁵⁴ Most importantly, it changed the subsection of Rule 82 to which Rule 68 offers of judgment applied.⁵⁵ Previously, offers of judgment were relevant considerations in Rule 82(b)(3)’s list of factors in determining whether to deviate from the attorneys’ fees schedule in subsections (b)(1) and (b)(2).⁵⁶ After the amendment, Rule 68 offers were essentially incorporated into Rule 82(a)’s declaration of a right to attorneys’ fees.⁵⁷ Thus, the amendment’s effect was to require what the court in *Fairbanks North Star Borough v. Lakeview Enterprises, Inc.* had allowed: the use of Alaska Rule 68 offers of judgment in awarding attorneys’ fees.⁵⁸

Moreover, Rule 68 offers became a second way to determine “prevailing party” status. Traditionally, the prevailing party was the one who won “on the main issue of the case.”⁵⁹ However, when

50. For ease of discussion, this Comment will refer to the legal basis for attorneys’ fee awards under Alaska law as “Alaska Civil Rule 68.” This reference should be read as including Alaska Statute section 09.30.065. Similarly, references to Alaska Civil Rule 82 should be understood as implicating its underlying statute, Alaska Statute section 09.60.010.

51. 1997 Alaska Sess. Laws 10.

52. *See id.* at 25.

53. *Id.*

54. *See id.*

55. *See id.*

56. *Fairbanks N. Star Borough v. Lakeview Enters., Inc.*, 897 P.2d 47, 62 (Alaska 1995).

57. *See* 1997 Alaska Sess. Laws 25.

58. *See id.*; *Lakeview Enters.*, 897 P.2d 47.

59. *See, e.g.*, *Halloran v. State, Div. of Elections*, 115 P.3d 547, 553 (Alaska 2005).

a party makes a successful Rule 68 offer, the offeror is the prevailing party for Rule 82 purposes.⁶⁰ Alaska Rule 68 is unlike other states' offer of judgment rules in that it actually defines the "winner" and "loser" in the litigation, rather than merely awarding fees for declining a more favorable offer. Understood as such, Alaska Rule 68 is an integral part of the substantive right to attorneys' fees articulated in Rule 82(a).

Rules that shift attorneys' fees to the losing party are generally considered "substantive" and applied as a rule of law in diversity cases.⁶¹ However, as noted above, Alaska Rule 68 encounters potential conflict with Federal Rule 68 in diversity cases. In determining which rule applies to diversity actions arising under Alaska law, we must enter the perilous domain of *Erie* and its progeny.

III. ALASKA CIVIL RULE 68 WITHIN THE *ERIE* FRAMEWORK

A. A Short Summary of the *Erie* Doctrine⁶²

Until 1938, federal courts created a general federal common law to govern diversity actions under the Rules of Decision Act ("RDA").⁶³ In *Erie*, the Supreme Court changed course, holding that the RDA required federal courts to apply substantive state common law in diversity actions.⁶⁴ The *Erie* decision sought to reduce the incentive for "forum shopping" by litigants hoping for more favorable substantive law in federal rather than state court, and the inequitable application of law to the detriment of victims of forum shopping.⁶⁵ In 1934 Congress adopted the Rules Ena-

60. ALASKA R. CIV. P. 68(c).

61. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 n.31 (1975). United States District Court for the District of Alaska Local Rule 54.3(a)(2) therefore requires that a motion for attorneys' fees "set forth the authority for the award, whether Rule 82, Alaska Rules of Civil Procedure, a federal statute, contractual provision, or other grounds entitling the moving party to the award." D. Alaska R. 54.3(a)(2).

62. *Erie* and its progeny have been described extensively elsewhere. See, e.g., C. Douglas Floyd, *Erie Awry: A Comment on Gasperini v. Center for Humanities, Inc.*, 1997 B.Y.U. L. REV. 267 (1997). Because this Comment deals with only one aspect of the *Erie* framework—the detection of "direct collisions" between federal and state law—it contains only a cursory overview.

63. Judiciary Act of 1789, § 34, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1652 (2000)); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842).

64. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

65. See *Walker v. Armco Steel Corp.*, 446 U.S. 740, 747 (1980) (quoting *Hanna v. Plumer*, 380 U.S. 460, 468 (1965)).

bling Act (“REA”).⁶⁶ The Federal Rules of Civil Procedure were also promulgated in accordance with the REA to set out procedural rules for actions in federal court, including diversity actions.⁶⁷ The Federal Rules cover many, but not all, procedural questions in federal court.⁶⁸

Under *Erie*’s progeny, if no federal rule applies, either federal law under the RDA or the applicable state rule will govern the issue.⁶⁹ To resolve which rule governs, a court must apply the outcome-determinative test of *Guaranty Trust Co. v. York*.⁷⁰ This test hinges on whether application of federal rather than state policy affects the case result in such a way as to give a party incentive to choose federal over state court.⁷¹ If the answer is no, then federal policy governs.⁷² If the answer is yes, then the court must perform a balancing test weighing the relative importance of both the state and federal policies and the extent to which the outcome will be affected.⁷³

For example, in *Ragan v. Merchants Transfer & Warehouse Co.*,⁷⁴ the plaintiff filed his complaint in federal court within the state statute of limitations but did not serve summons on the defendant as required by the Kansas statute governing commencement of actions until after the statute of limitations had run.⁷⁵ Although Federal Rule 3 purported to define how to commence an action in federal court, the Supreme Court held that Federal Rule 3 did not govern the manner in which an action was filed in federal court *for purposes of tolling the state statute of limitations*.⁷⁶ Rather, Kansas’ service statute controlled because it was an integral part of the state statute of limitations, and, under *Guaranty Trust*, the statute of limitations was part of the state-law cause of action.⁷⁷

This Comment focuses on the situation where a federal rule seems to apply. In *Hanna v. Plumer*, the Court recognized that *Erie*’s two purposes were to discourage forum shopping and to

66. Act of June 19, 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2071–2077 (2000)).

67. *See generally* FED. R. CIV. P.

68. *See id.*

69. *See Walker*, 446 U.S. at 752–53.

70. 326 U.S. 99 (1945).

71. *Id.* at 109.

72. *See id.*

73. *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537–38 (1958).

74. 337 U.S. 530 (1949).

75. *Id.* at 531.

76. *Id.* at 533–34.

77. *Id.*

avoid “inequitable administration of the laws”⁷⁸ but concluded that when a Federal Rule of Civil Procedure apparently governs the situation, the outcome-determinative test is not appropriate.⁷⁹ Rather, if the federal rule “cover[s] the point in dispute,” federal courts are to apply it unless it exceeds the rulemaking authority of the Rules Enabling Act or other constitutional bounds.⁸⁰ *Hanna* applies to situations where there is a direct conflict between the federal and local rules.⁸¹ *Hanna*’s method for determining conflict has been refined in subsequent cases.

In *Walker v. Armco Steel Corp.*,⁸² the Supreme Court shifted away from *Hanna*’s federal rule-friendly imperative to a more state-law oriented approach.⁸³ The *Walker* Court redefined the *Hanna* “direct collision” rule, restating the inquiry as whether the federal rule is “sufficiently broad to control the issue before the Court,” though the precise meaning of this phrase is somewhat elusive.⁸⁴ *Walker* instructed lower courts to give the federal rule its “plain meaning” and not strain to avoid conflict with state rules.⁸⁵ It is unclear, however, how seriously the *Walker* Court took this admonition, because it then turned to an examination of what “the Rule was intended” to do, seeming to suggest a broader inquiry (as discussed below).⁸⁶ In short, if the federal rule is broad enough to govern the situation, the *Hanna* inquiry into its validity must follow.⁸⁷ If the federal rule is not broad enough, it is simply inapplicable, and the analysis turns to *Erie*’s goals—preventing forum shopping and ensuring equitable administration of the laws—to determine whether state or federal rules apply.⁸⁸

In *Walker*, the Court characterized Oklahoma’s service of summons statute as “a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations” that “must be considered part and parcel of

78. *Hanna v. Plumer*, 380 U.S. 460, 468 n.9 (1965).

79. *Id.* at 468–70.

80. *Id.* at 470–71.

81. *Id.* at 470.

82. 446 U.S. 740 (1980).

83. *See id.* at 751–52 (holding service of process procedures were an integral part of state law and could not be preempted by the federal rule).

84. *See id.* at 749–50.

85. *Id.* at 750 n.9.

86. *Id.* at 750.

87. *Id.* at 749–50.

88. *Id.* at 752–53.

the statute of limitations”⁸⁹—a substantive state law. The *Walker* Court concluded that Federal “Rule 3 does not replace such policy determinations found in state law.”⁹⁰ In other words, the Court made clear that, even when a federal rule appears to govern a procedural situation, a reviewing court must closely examine the rule’s intent before finding preemption.⁹¹

Gasperini represents the Court’s most current precedent resolving a conflict between state and federal law in diversity cases and casts the Court’s willingness to give effect to substantive state policies even more starkly.⁹² As part of a tort reform measure, New York had imposed a higher standard of review for the size of jury awards.⁹³ The application of these standards in diversity actions became important in *Gasperini*, in federal court through diversity jurisdiction, when the defendant contested the jury’s award of damages.⁹⁴ The *Gasperini* Court characterized the new standard as both procedural, in that it assigned “decisionmaking authority to New York’s Appellate Division,” and substantive, in that it controlled “how much a plaintiff can be awarded.”⁹⁵ “*The dispositive question, therefore, is whether federal courts can give effect to the substantive thrust of [the New York statute] without untoward alteration of the federal scheme for the trial and decision of civil cases.*”⁹⁶

The *Gasperini* Court found both the state and federal interests could be accommodated.⁹⁷ The federal concern at stake was the potential violation of the Re-examination Clause of the Seventh Amendment, which provides that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”⁹⁸ The Re-examination Clause was implicated by the New York statute’s assignment of reviewing authority to the New York Appellate Division.⁹⁹ The Court read the statute as instructing New York trial courts to apply the more stringent standard of review and concluded that the state’s substantive interest could be accommodated if federal dis-

89. *Id.* at 751–52.

90. *Id.* at 752.

91. *See id.*

92. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996).

93. *Id.* at 423.

94. *Id.* at 420–22.

95. *Id.* at 426.

96. *Id.* (emphasis added).

97. *Id.* at 437.

98. U.S. CONST. amend. VII.

99. *Gasperini*, 518 U.S. at 431.

trict courts applied the same standard in diversity suits.¹⁰⁰ The federal interest in preventing a reviewing court from an unconstitutional re-examination of facts was accommodated by ignoring the section of the New York statute that instructed appellate courts to apply the same standard.¹⁰¹ The majority specifically rejected Justice Scalia's contention that Federal Rule 59 left no room for the operation of the New York statute.¹⁰² Indeed, in the same footnote, the Court cited with approval a leading textbook's observation that it "has continued since [*Hanna*] to interpret the federal rules to avoid conflict with important state regulatory policies."¹⁰³ Moreover, the Court noted that "[f]ederal courts have interpreted the Federal Rules . . . with sensitivity to important state interests and regulatory policies."¹⁰⁴

Gasperini again altered *Hanna*'s "direct collision" analysis, reversing the never-vital "plain meaning" rule of *Walker*.¹⁰⁵ In essence, when considering if a Federal Rule of Civil Procedure applies in diversity actions, courts engage in a two-step analysis. First, a court must ascertain the purposes and intended scopes of the Federal Rule and the state law. Second, if no direct conflict exists, the court must determine whether the state law can be accommodated without impairing the integrity of the federal system.¹⁰⁶ This Comment is primarily concerned with the first step in this analysis.

Having explored the intended scope and purpose of Alaska Rule 68 above, we next undertake the same inquiry with respect to Federal Rule of Civil Procedure 68.

B. The Purpose and Intent of Federal Rule of Civil Procedure 68

Federal Rule of Civil Procedure 68 would seem, on its face, to govern the effects of defendants' offers of judgment in federal

100. *Id.* at 436–37.

101. *Id.* at 437.

102. *Id.* at 437 n.22.

103. *Id.* (quoting RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 729–30 (4th ed. 1996)).

104. *Id.* at 427 n.7.

105. See Richard D. Freer, *Some Thoughts on the State of Erie After Gasperini*, 76 TEX. L. REV. 1637, 1643 (1998) (noting that "if the Court means what it says, it may have replaced the search for 'plain meaning' with a heightened sensitivity to potential impact on state policy").

106. Cf. John C. McCoid, II, *Hanna v. Plumer: The Erie Doctrine Changes Shape*, 51 VA. L. REV. 884, 912 (1965) ("The policy of the Court, the mandate of Congress, and the command of the Constitution all require that state substance not be impaired in the absence of federal substantive competence.").

court. Inspired in part by state offer of judgment rules,¹⁰⁷ Federal Rule 68 provides, in relevant part, that:

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 to the property or the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer.¹⁰⁸

Federal Rule 68 was promulgated under the REA, which provides that “[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts.”¹⁰⁹ However, “[s]uch rules shall not abridge, enlarge or modify any substantive right.”¹¹⁰

Rule 68 was intended to facilitate settlement of lawsuits and decrease litigation,¹¹¹ and, like all of the Federal Rules of Civil Procedure, it was intended to provide a uniform procedure for cases in federal court. Rule 68 accomplishes these goals by maintaining the status quo American Rule with respect to attorneys’ fees, although it provides for cost-shifting for successful offerors.¹¹² The American Rule is the default rule in the federal system and among the states: “In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”¹¹³ Therefore, in the federal court system, if the statute defining the cause of action is silent as to attorneys’ fees, the prevailing party is not enti-

107. See FED. R. CIV. P. 68 (Advisory Committee’s Note).

108. *Id.*

109. 28 U.S.C. § 2072(a) (2000).

110. § 2072(b).

111. See *Marek v. Chesney*, 473 U.S. 1, 5 (1985); Leslie S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 379–80 (1997).

112. See *MRO Commc’ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999) (“The requirement under Rule 54(d)(2) of an independent source of authority for an award of attorneys’ fees gives effect to the ‘American Rule’ that each party must bear its own attorneys’ fees in the absence of a rule, statute or contract authorizing such an award.”).

113. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

tled to an award.¹¹⁴ The history of the American Rule helps determine the intended scope of Federal Rule 68.

Initially, Congress instructed the federal courts to apply the attorneys' fee award practices of the state courts in the federal court's district.¹¹⁵ As early as 1796, the Supreme Court "appear[ed] to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts."¹¹⁶ In 1853, Congress standardized the practice of awarding attorneys' fees in federal court, eliminating such awards in the absence of specific statutory authorization.¹¹⁷ This standardization was prompted in part by the wide diversity of the federal practice, which resulted in some losing litigants "being unfairly saddled with exorbitant fees."¹¹⁸ This concern only makes sense when the inequality is the result of the district in which a federal claim is filed. The purpose of federal diversity jurisdiction was to allow out-of-state litigants to avoid prejudice while litigating in state court and not to allow them to avoid the application of substantive state law. Therefore, standardization was appropriate only for cases prosecuting a federal claim. Congress's statute-by-statute approach to attorneys' fee awards further indicates that it intended the 1853 Act to standardize federal question cases; Congress chose a method by which it could only delineate fee awards in cases governed by federal law.

The 1853 Act was carried forward in the Revised Statutes of 1874 and the Judicial Code of 1911.¹¹⁹ By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had defined and authorized cost awards to prevailing parties for more than eighty-five years.¹²⁰ The Federal Rules were adopted against this background. Federal Rule 54(d)(1) provides for an award of costs to the prevailing party as a matter of course.¹²¹ Generally, a

114. *Marek*, 473 U.S. at 7–8 ("By the time the Federal Rules of Civil Procedure were adopted in 1938, federal statutes had authorized and defined awards of costs to prevailing parties for more than 85 years."); *id.* at 8 (noting that most exceptions to American Rule regarding attorneys' fee awards "were found in federal statutes").

115. Chap. XXI, § 2, 1 Stat. 93 (1789).

116. *Alyeska Pipeline*, 421 U.S. at 249 (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

117. *See id.* at 251–52.

118. *Id.* (citing remarks of Sen. Bradbury, CONG. GLOBE, 32d Cong., 2d Sess. 207 (1853)).

119. *Id.* at 255 (footnotes omitted).

120. *Marek v. Chesney*, 473 U.S. 1, 7–8 (1985).

121. *See* FED. R. CIV. P. 54(d)(1).

party who obtains judgment is considered the prevailing party¹²²—in other words, a plaintiff who succeeds on liability but obtains only nominal damages still prevails. The practical effect of Rule 68's award of costs to a defendant who makes a successful offer of judgment is to extend prevailing party status to such defendants, at least for purposes of awarding post-offer costs. But costs, which include such items as copying fees and long distance telephone charges, are rather insignificant when compared to attorneys' fees. Federal Rule 54(d)(2) provides an award of attorneys' fees to the prevailing party only when the underlying cause of action allocates it.¹²³ Federal Rule 54 does not create a substantive right to attorneys' fees—an approach consistent with the REA's prohibition of the creation or expansion of substantive rights (under the Federal Rules of Civil Procedure).¹²⁴

Similarly, Federal Rule 68 should be interpreted as complying with the REA; that is, as not expanding the right to attorneys' fees beyond those rights provided in specific statutes. In fact, Rule 68 has been read even more restrictively. In *Marek v. Chesney*, the Supreme Court interpreted Federal Rule 68 as authorizing an award of attorneys' fees to defendants who make fee-inducing offers only when the underlying cause of action provides for attorneys' fees as part of "costs."¹²⁵ This holding was driven by a strict reading of Rule 68's text in conjunction with relevant statutes.¹²⁶ Under *Marek*, attorneys' fees may be awarded as part of the allowable "costs" under Rule 68 if the underlying statute provided for an award of attorneys' fees *as* costs but not if it provided for an award of attorneys' fees *and* costs.¹²⁷ The text-based reading was criticized as unduly restricting congressional intent.¹²⁸

The result in *Marek* makes more sense when one considers the practical effect of applying Federal Rule 68 offers of judgment to attorneys' fee awards. As explained above, the practical effect is to declare the offeror the prevailing party for Rule 54(d)(1) purposes. The text-based rule, while sometimes arbitrary, reflects an understanding that extending prevailing party status for purposes of attorneys' fees to defendants who made "fee-inducing" offers of judgment would create a new class of litigants who were entitled to

122. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, 10 FEDERAL PRACTICE AND PROCEDURE § 2667 (3d ed. 1998).

123. FED R. CIV. P. 54(d)(2)(A).

124. See 28 U.S.C. § 2072(b) (2000).

125. *Marek*, 473 U.S. at 9.

126. *Id.*

127. *Id.* at 23 (Brennan, J., dissenting).

128. *Id.* at 26.

attorneys' fees (defendants with successful Rule 68 offers), while denying attorneys' fees to plaintiffs who, by virtue of their recovery, would otherwise be entitled to such fees. Without congressional guidance, this redefinition of prevailing party status for attorneys' fees is inappropriate.¹²⁹ Moreover, there is no indication that Rule 68 actually sought to redefine "prevailing party status."¹³⁰ The fact that Federal Rule 68 as a practical matter redefines "prevailing party status" with regard to costs does not indicate intent to change the congressionally prescribed balance struck in statutes which allow for awards of attorneys' fees. The *Marek* Court therefore enunciated a rule applying Federal Rule 68 to attorneys' fee awards only when the textual pull is irresistible.

Since the REA forbids creation or extension of substantive rights, Federal Rule 68 is best read as avoiding the creation of a right to attorneys' fees for parties making a successful offer of judgment by restricting the scope of rights to attorneys' fees for causes of action that already provided for such recovery. In other words, by not providing for an award of attorneys' fees, Federal Rule 68 was merely complying with a statutory directive not to expand substantive rights.¹³¹ Such a reading is consistent with the Supreme Court's emphatic deferral to Congress in *Alyeska Pipeline* to create new rights to attorneys' fees as exceptions to the American Rule.¹³²

129. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 262 (1975) (stating "it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine").

130. *Marek*, 473 U.S. at 5, 11 (noting that the "plain purpose of Rule 68 is to encourage settlement and avoid litigation" while also recognizing that a plaintiff against whom a successful offer of judgment was made was "technically the prevailing party" when it recovered at trial).

131. See *Alyeska Pipeline*, 421 U.S. at 247 (noting "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser" and stating that "it would be inappropriate for the Judiciary, without legislative guidance, to reallocate the burdens of litigation" in declining to adopt "private attorney general" exception to American Rule); *MRO Commc'ns, Inc., v. AT&T Co.*, 197 F.3d 1276, 1281 (9th Cir. 1999).

132. See *Alyeska Pipeline*, 421 U.S. at 262 (stating that "it is apparent that the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine"); *id.* at 263 (noting that congressional exceptions to the American Rule "can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party"); *id.* at 269 (noting that "courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party").

In sum, Federal Rule 68 is not intended to foreclose an award of attorneys' fees based on a successful offer of judgment when the underlying law contemplates prevailing party status for a defendant who makes a successful offer of judgment. Instead, Federal Rule 68 is simply cautious not to expand prevailing party status, with the attendant consequences for attorneys' fees, without authorization from the underlying law.

C. An *Erie-Hanna* Analysis of Alaska Civil Rule 68 and Federal Rule 68

This Comment now evaluates whether Alaska Rule 68 governs in federal diversity actions arising under Alaska law. This inquiry involves two questions. First, does Federal Rule 68 preempt Alaska Rule 68 due to a "direct collision"? Second, if Federal Rule 68 does not preempt Alaska Rule 68, does any federal policy or decisional rule provide a sufficient reason for the non-application of Alaska Rule 68 in diversity cases? This Comment answers both questions in the negative.

1. *There Is No "Direct Collision" Between Alaska Civil Rule 68 and Federal Rule 68.* As described above, when a Federal Rule of Civil Procedure appears to govern in a diversity case, the court must determine whether there is a "direct collision" between the federal rule and potentially applicable state law. Because Alaska Rule 68 and Federal Rule 68 share nearly identical text, they would appear to be in "direct collision" under *Hanna*. But as modified by *Walker* and *Gasperini*, the inquiry into whether the Federal Rule governs must delve deeper—examining the intended scope and purpose of each rule.

When the American Rule is not the background structure for awarding attorneys' fees under state law, the assumption underlying Federal Rule 68's preservation of the status quo does not hold.¹³³ In Alaska, where costs *and* attorneys' fees are awarded to prevailing parties as a matter of course, offers of judgment operate in an entirely different manner. Applying Federal Rule 68 to deny a party attorneys' fees pursuant to an offer of judgment in such circumstances may run afoul of the REA's admonition that the Federal Rules should not abrogate substantive rights.¹³⁴

133. *Cf. id.* at 262 (holding that "[u]nder this scheme of things, it is apparent that the circumstances under which attorneys' fees are to be awarded . . . are matters for Congress to determine" (emphasis added)).

134. *See* 28 U.S.C. § 2072(b) (2000).

Alaska Rule 68 serves at least one purpose for which Federal Rule 68 was not intended: Alaska Rule 68 provides parties with an additional avenue to become the “prevailing party” for purposes of Alaska Rule 82. As examination of its interaction with Federal Rule 54 demonstrates, Federal Rule 68 was *never* intended to determine prevailing party status for the purposes of awarding attorneys’ fees.¹³⁵

Because Alaska Rule 68 confers prevailing party status on successful Rule 68 defendants in precisely this manner,¹³⁶ an award of attorneys’ fees does not implicate Federal Rule 68’s underlying purposes.¹³⁷ A holding that Federal Rule 68 dictates the only consequence of a defendant’s successful offer of judgment would eliminate one key method of obtaining attorneys’ fees under Alaska law, while ignoring Federal Rule 68’s intended purpose.

Defendants would be most affected by such a change. Alaska Rule 68 allows defendants who made a successful offer both (1) to avoid paying attorneys’ fees to a plaintiff who received a lesser recovery (and had to prevail on at least one—probably the main—issue in order to do so), and (2) to recover their own attorneys’ fees.¹³⁸ It is important to note, however, that plaintiffs who made fee-inducing offers are likely to have prevailed on the main issue anyway, or they would not have received the favorable judgment. Under Alaska law, a party who receives an affirmative recovery is the prevailing party unless the recovery was either *de minimis* or incidental to the main issue.¹³⁹ Plaintiffs therefore have less need to use Alaska Rule 68’s alternate means of attaining prevailing party status than do defendants.

2. *Alaska Civil Rule 68 Must Be Applied in the Absence of Conflict with Federal Rule 68.* Once it becomes clear that defendants may establish prevailing party status through successful Alaska Rule 68 offers of judgment in federal diversity actions, application of the measure of attorneys’ fees follows. Alaska Rule 82

135. See *Marek*, 473 U.S. at 11 (characterizing hypothetical plaintiff who rejected more favorable offer as “technically the prevailing party”).

136. See ALASKA R. CIV. P. 68.

137. See, e.g., *Burlington N. R.R. v. Woods*, 480 U.S. 1, 7 (1987) (holding that “the purposes underlying the [applicable Federal] Rule are sufficiently coextensive with the asserted purposes of the [state] statute to indicate that the Rule occupies the statute’s field of operation so as to preclude its application in federal diversity actions”).

138. See ALASKA R. CIV. P. 68.

139. See *Hutchins v. Schwartz*, 724 P.2d 1194, 1204 (Alaska 1986); *Owen Jones & Sons, Inc. v. C.R. Lewis Co.*, 497 P.2d 312, 313–14 (Alaska 1972).

does not provide the appropriate schedule of attorneys' fees for litigants who become prevailing parties through fee-inducing Alaska Rule 68 offers of judgment. Instead, the court must look to the only appropriate source to determine the proper amount of attorneys' fees—Alaska Rule 68.

Because Federal Rule 68 is not broad enough to govern under *Walker* and *Gasperini*, the analysis turns to whether to apply state or federal decisional law. There is some dispute about whether this determination is to be made with reference to “the policies behind *Erie* and *Ragan*”¹⁴⁰ or the balancing test in *Byrd*.¹⁴¹ This Comment is not focused on that controversy, so it will consider both of these methods, each of which yields the same result.

a. Application of Alaska Civil Rule 68 Is Consistent with the “Twin Policies” of Erie. The “twin policies” of *Erie* dictate that the substance of Alaska Rule 68 be applied. Non-application of Alaska Rule 68 would result in forum shopping.¹⁴² The incentive that drives forum shopping in this context is subtle. In each case, an Alaska Rule 68 offer will be more advantageous to one party or the other (often, the party with the stronger case will be able to leverage a favorable settlement with the latent threat of attorneys' fees). If Alaska Rule 68 were inapplicable in diversity cases, all parties except in-state defendants would have the opportunity to evaluate the relative strengths and weaknesses of their cases and could avoid the perils of Rule 68 by filing in or removing to federal court. The same principle applies if Alaska Rule 68 is only partially applicable, as some decisions dealing with other states' offer of judgment statutes have suggested—the calculations that litigants must perform in order to determine which forum is advantageous are simply more complicated. But because partial application of state offer of judgment rules tends to focus on the coverage of Federal Rule 68, when the defendant's offer exceeds the plaintiff's recovery,¹⁴³ partial application of Alaska Rule 68 would entirely deprive defendants of their alternate method of establishing prevailing party status. Therefore, although Alaska Rule 68 is a powerful

140. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 752 (1980).

141. Thomas D. Rowe, Jr., *Not Bad for Government Work: Does Anyone Else Think the Supreme Court Is Doing a Halfway Decent Job in its Erie-Hanna Jurisprudence?*, 73 NOTRE DAME L. REV. 963, 965 (1998).

142. *See Erie R.R. v. Tompkins*, 304 U.S. 64, 75–76 (1938).

143. *See MRO Commc'ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1280 (9th Cir. 1999) (holding Federal Rule 68 inapplicable and instead applying state offer of judgment statute because plaintiff received no recovery).

weapon for defendants, its benefits mostly accrue to parties with stronger cases.¹⁴⁴

Non-application of Alaska Rule 68 would also result in an inequitable application of the law.¹⁴⁵ An in-state defendant “sued by a non-resident . . . is entitled to invoke the protection available to him if the case had been brought in state court.”¹⁴⁶ Even pre-*Erie* cases recognized that the inapplicability of substantive state rights to attorneys’ fees in federal diversity cases would manifest an injustice:

[I]t is clear that it is the policy of the state to allow plaintiffs to recover an attorney’s fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts.¹⁴⁷

Moreover, application of Alaska Rule 68 in federal diversity actions would not harm the integrity of the federal process.¹⁴⁸ Alaska Rule 68 and Federal Rule 68 serve a common stated goal of encouraging settlement and avoiding protracted litigation. In fact, Alaska Rule 68 may be even more effective in promoting settlements than Federal Rule 68.¹⁴⁹ Application of Alaska Rule 68 would also reduce litigation in the federal courts by eliminating any incentive to file in or remove to federal court in an attempt to avoid the rule.¹⁵⁰ Moreover, Alaska Rule 68 is not difficult to administer in most cases: after determining whether attorneys’ fees are “reasonable,” it is a matter of looking at a calendar and then performing simple arithmetic.¹⁵¹ In short, the policies underlying the *Erie* doctrine militate in favor of applying Alaska Rule 68 in diversity actions.

144. Or in some instances, the benefiting party is the one with the deeper pockets and greater ability to pay attorneys’ fees in the event of a loss.

145. See *Erie*, 304 U.S. at 75.

146. *Tanker Mgmt. v. Brunson*, 918 F.2d 1524, 1529 (11th Cir. 1990).

147. *Sioux County v. Nat’l Sur. Co.*, 276 U.S. 238, 243 (1928).

148. See *Gasparini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

149. See Cynthia L. Street, Comment, *Rule 68: Erie Go Again—Costs, Attorneys’ Fees, and Plaintiffs’ Offers—Substance or Procedure*, 20 MISS. C. L. REV. 341, 354 (2000).

150. *Id.*

151. Alaska Civil Rule 68 provides for decreasing percentages of reasonable attorneys’ fees, depending on the amount of time that had elapsed between the date established for initial disclosures and the date upon which the offer was served. ALASKA R. CIV. P. 68(b)(1–3).

b. *Byrd Balancing Indicates that Application of Alaska Civil Rule 68 Is Appropriate.* A balancing of state and federal interests under *Byrd* yields the same result.¹⁵² The state interest in the application of its offer of judgment rule is strong. Alaska Rule 68 serves not only to reduce and expedite litigation but also to determine prevailing party status for attorneys' fees purposes. This litigation-reducing effect benefits both the court where the litigation is pending and the entire state of Alaska. The social costs of excessive litigation justify efforts to curb such litigation, including the substantive rights of reduced statutes of limitations and increased fee-shifting.

In contrast, the federal interest in limiting the consequences of fee-inducing offers to those set out in Federal Rule 68 is negligible. Federal Rule 68 may not be the most effective means by which offers of judgment could serve the Rule's stated purpose.¹⁵³ As noted above, state offer of judgment rules like Alaska's may be even more effective in advancing Federal Rule 68's purpose than the Federal Rule itself.¹⁵⁴ Although it is unclear after *Gasperini* what sort of federal interest might outweigh a state substantive interest,¹⁵⁵ the federal interest here (in applying an arguably less effective settlement-inducing rule) does not seem to qualify.

3. *The Remaining Application of Federal Rule 68 Is Diversity Cases.* Finally, both *Walker* and *Gasperini* left room for the operation of the federal rule or constitutional principle at issue. In *Walker*, Federal Rule 3 was held to govern the running of other procedural deadlines such as periods to answer.¹⁵⁶ In *Gasperini*, the Re-examination Clause of the Seventh Amendment was held to govern the standard of review of the district court's application of the New York state standard.¹⁵⁷ This indicates that Federal Rule 68

152. See *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 538 (1958).

153. See generally *Bonney et al.*, *supra* note 111, at 414–30 (examining several proposals for revising the rule).

154. See *Street*, *supra* note 149, at 354.

155. See *Rowe*, *supra* note 141, at 1011 (“[T]he initial difficulty [is] deciding whether a federal interest sufficient to trigger the *Byrd-Gasperini* [balancing] analysis [exists].”). Professor Rowe counsels “strong hesitancy” in finding federal interests sufficient to supplant state substantive rights and refers to Professor Redish’s assertion that the only federal interest sufficient “to outbalance a truly significant competing state interest [is] that of avoiding significant cost or inconvenience to the federal courts that would accompany the application of a particular state procedural rule.” *Id.* (quoting MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 239 (2d ed. 1990)).

156. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751 (1980).

157. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 438 (1996).

should not be left bereft of all operation by the application of Alaska Rule 68 in federal diversity cases. *Gasperini* suggests how this may be done—the Court applied substantive state law (the standard of review for excessive jury verdicts) while following federal procedure (the trial court’s decision using the New York standard is reviewed for abuse of discretion on appeal).¹⁵⁸

Although the substantive consequences of the offer of judgment and the determination of which parties can extend such offers should govern,¹⁵⁹ it can be inferred that Federal Rule 68 should control the manner in which offers are made and accepted.¹⁶⁰ The district court has a legitimate interest in establishing a uniform method for evaluating the timing of when an offer has been made, even if the state substantive right controls the consequences of fee-inducing offers. Thus, the court may insist offers be made pursuant to the procedures of Federal Rule 68. Like the operation of Federal Rule 3 in *Walker*, the application of Federal Rule 68 will provide for efficient operation of the federal courts.

Of course, Federal Rule 68 and Alaska Rule 68 specify similar procedures for making, accepting, and recording offers. Both require that the offer be made by serving written notice on the adverse party; that the adverse party accept the offer in writing within ten days; that the adverse party serve written notice on the offeror; that the offer will expire after ten days if it is not accepted; and that either party may record the offer and acceptance with the court.¹⁶¹ However, Alaska Rule 68(a) provides that an offer of judgment may not be rescinded within the ten-day period, whereas Federal Rule 68 is silent on that point. Because rescission is an aspect of whether the offer was made and accepted rather than a consequence of an unaccepted offer, it appears to be a procedural aspect of the offer of judgment law. Federal law arguably should govern. Case law interpreting Federal Rule 68 would therefore determine the effect of rescission on the offeror’s right to recover under the substantive portion of Alaska Rule 68.

158. *Id.* at 437–38.

159. *Id.* at 437.

160. *See id.*; *Walker*, 466 U.S. at 750–51; *MRO Commc’ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1282 (9th Cir. 1999)(“The only procedure for notifying a plaintiff of an offer of judgment in federal court is set forth in Federal Rule 68.”).

161. *Compare* FED. R. CIV. P. 68 with ALASKA R. CIV. P. 68(a).

D. Implications for the Proper Scope of the Inquiry into Whether the Federal Rule Is Broad Enough to Govern

As we have seen, determining whether the federal rule applies requires an inquiry into the scope and purpose of both the federal and state rules. In *Walker* and *Ragan*, the Court concluded without much discussion that there was no evidence that the federal rule was intended to serve the same purpose as the state rule regarding tolling.¹⁶² But the *Gasperini* Court conducted a much more lengthy analysis of the New York standard of review for jury verdict excessiveness and the Seventh Amendment's Re-examination Clause.

In *Gasperini*, both the substantive right and the procedure for enforcing that right deviated from the federal model.¹⁶³ In contrast, in comparing Federal Rule 68 and analogous state offer of judgment provisions, the court must determine which law governs the consequences for what is a substantially similar procedure. The question is whether, by specifying one set of consequences for defendants' offers of judgment, Federal Rule 68 intended to preclude other consequences based on state law.

Practice has shown that the answer cannot be based on a "plain meaning" of Federal Rule 68's text. Federal Rule 68's intended scope and purpose can only be understood properly with reference to the Rules Enabling Act, Federal Rule 54, the underlying federal costs statute and its history, and case law interpreting Federal Rules 68 and 54. Moreover, the inquiry is still incomplete absent an understanding of the state rule purportedly preempted by the federal rule. Alaska Rule 68 cannot be properly understood without reference to Alaska Rule 82, prior versions of Alaska Rules 68 and 82, as well as case law interpreting both. These inquiries reveal fundamental differences in the underlying substantive rights in the Alaska and federal legal systems.

As explained above, these inquiries reveal that the consequences for fee-inducing offers of judgment specified in Federal Rule 68 are predicated on an assumption that is incorrect in cases governed by Alaska law. Because Federal Rule 68 was not intended to affect prevailing party status for attorneys' fees purposes but to maintain the status quo with regard to attorneys' fees, its consequences cannot govern when the status quo differs from the underlying assumption. Federal Rule 68 is not broad enough to control "fee-inducing" offers of judgment in federal diversity suits governed by Alaska substantive law. Ultimately, where no Federal

162. *Walker*, 446 U.S. at 750–51; *Ragan v. Merch. Transfer & Warehouse Co.*, 337 U.S. 530, 533–34 (1949).

163. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426–39 (1996).

Rule of Civil Procedure affirmatively precludes a consequence specified by substantive state law, it is not broad enough to govern under *Walker* and *Gasperini*. State law should be applied.

Differences in background assumptions have several consequences for the *Erie-Hanna* analysis. First, awareness of such differences should signal the need for a thorough inquiry into the purpose and intended scope of each rule. When the assumptions differ, textually similar rules might apply differently to different situations. Second, a significant dissimilarity in the assumptions underlying each rule will rarely lead to a direct collision between them. This, in turn, points to a further need for rigorous inquiry into the intended scope and purpose of each rule every time an apparent conflict is presented. Even though the “direct collision” analysis appears to be among the least problematic steps in the *Erie-Hanna* framework, lower courts have fallen short of the ideal in their Federal Rule 68 and *Erie-Hanna* jurisprudence.

IV. THE USE AND ABUSE OF “DIRECT COLLISIONS”: VARIOUS STATE OFFER OF JUDGMENT STATUTES IN THE FEDERAL COURTS

A. The Three Approaches to Potential Collisions Between Federal Rule 68 and State Offer of Judgment Statutes

Cases from around the nation have dealt with the application of state rules awarding attorneys’ fees or other additional costs based on the rejection of a favorable offer of judgment. These cases have taken several differing approaches to the application of state rules facially similar to Alaska Rule 68. One approach applies a similar state statute in full. A second method carefully evades conflict by limiting the holding. A third method involves a federal-state hybrid in which the state offer of judgment is inapplicable, but only for attorneys’ fees purposes.

The Eleventh Circuit has adopted the first approach. In *Tanker Management, Inc. v. Brunson*,¹⁶⁴ the court considered whether to apply a Florida statute authorizing the recovery of attorneys’ fees by a prevailing defendant if the plaintiff unreasonably rejected either a settlement offer or an offer of judgment.¹⁶⁵ The court concluded that Federal Rule 68 was not in “direct collision” with the Florida statute because “Rule 68 concerns only interest and offers of judgment, while the Florida statute concerns attorney’s fees, offers of judgment and settlement offers.”¹⁶⁶ However,

164. 918 F.2d 1524 (11th Cir. 1990).

165. *Id.* at 1528.

166. *Id.*

because even the Supreme Court speaks of Federal Rule 68 offers as “settlement” offers,¹⁶⁷ this reasoning is not entirely persuasive. On a deeper level, the court’s decision reflects its understanding that holding the Florida statute inapplicable would result in forum shopping by out-of-state plaintiffs, and thus it does not hinge on the distinction between settlement offers and offers of judgment.¹⁶⁸

The Ninth and Seventh Circuits have adopted the second approach, finding no “direct collision” on the facts of specific cases. In *MRO Communications, Inc. v. AT&T Co.*,¹⁶⁹ the Ninth Circuit noted that Federal Rule 68 is inapplicable in determining whether a defendant who makes an offer of judgment and then obtains judgment is entitled to attorneys’ fees on the basis of its offer of judgment.¹⁷⁰ Because Federal Rule 68 was inapplicable, there could be no direct collision with the Nevada offer of judgment law. The court then applied the equitable principles of *Erie* and upheld the award of attorneys’ fees under a state offer of judgment law.¹⁷¹ Because Federal Rule 68 does not specifically address plaintiffs’ offers of judgment, the same logic dictates a holding that Federal Rule 68 is inapplicable to plaintiffs’ offers of judgment.¹⁷²

The Seventh Circuit has also taken the second approach, carefully limiting its holding to find no direct conflict on the facts in specific cases. In *S.A. Healy Co. v. Milwaukee Metropolitan Sewage District*, the Seventh Circuit considered whether a Wisconsin statute, which authorized plaintiffs to recover double costs and an increased interest rate when the defendant turned down a favorable settlement demand, should be applied in a federal diversity case.¹⁷³ The court found “no direct conflict between the Wisconsin rule concerning plaintiffs’ settlement demands and any rule of federal

167. See *Marek v. Chesny*, 473 U.S. 1, 10 (1985) (referring to “the offers of settlement encouraged by [Federal] Rule 68”).

168. *Tanker Mgmt.*, 918 F.2d at 1529 (holding that an in-state defendant “sued by a non-resident . . . is entitled to invoke the protection available to him if the case had been brought in state court”).

169. 197 F.3d 1276 (9th Cir. 1999).

170. *Id.* at 1280. Federal Rule 68 authorizes an award of costs on the basis of a successful offer of judgment only when the plaintiff receives some recovery. When the plaintiff receives nothing, Federal Rule 54 governs the award of costs to the defendant. See *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350–51 (1981).

171. *MRO Commc’ns*, 197 F.3d at 1282–83. Although the *MRO Communications* court quoted a case citing *Hanna*, in light of its earlier determination that Federal Rule 68 was not implicated, it does not appear the court engaged in a facial “direct collision” analysis on the narrow facts of the case.

172. See *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995).

173. *Id.* at 307.

procedure . . . [because Federal Rule 68] is limited to offers by defendants.”¹⁷⁴ The *Healy* court therefore declined to find in Federal Rule 68 a negative preclusion of plaintiffs’ offers of judgment.¹⁷⁵ It determined that a rejection of the Wisconsin rule in federal diversity cases would likely result in forum shopping by plaintiffs, while its application would likely not impair the integrity of federal procedures.¹⁷⁶ However, the court noted that “[t]he situation would be different if the case involved defendants’ offers of settlement, because then we would have a state rule and a federal rule covering the identical issue.”¹⁷⁷ This dictum implicitly rejects the thin distinction between offers of judgment and settlement offers.

In *Healy*, the Seventh Circuit observed that federal courts in diversity cases ought not “jigger” procedural rules to alter the balance struck by the state between plaintiffs and defendants.¹⁷⁸ Because the Wisconsin rule governing defendants’ settlement offers are substantively identical to Federal Rule 68, simultaneous application of the Wisconsin rule regarding plaintiffs’ settlement offers and Federal Rule 68 did not alter Wisconsin’s balance.¹⁷⁹ But in other states (including Alaska), application of state rules governing plaintiffs’ offers of judgment without corresponding application of the state rules governing defendants’ offers of judgment *would* upset the state’s chosen balance. Although the *Healy* court was able to maintain Wisconsin’s balance, this dictum was probably ill-founded with respect to offer of judgment statutes that are not identical in consequence to Federal Rule 68.

Four years before *MRO Communications*, the United States District Court for the District of Nevada adopted the third approach—creating a “hybrid” right—in *Nicolaus v. West Side Transport, Inc.*¹⁸⁰ Nevada Rule of Civil Procedure 68 allows a successful offeree to recover attorneys’ fees as a matter of course.¹⁸¹ The court found that defendants in federal diversity cases would be required to make offers of judgment under Federal Rule 68 rather than Nevada Rule 68.¹⁸² To discourage forum shopping by plaintiffs, the court decided that attorneys’ fees were not recoverable by

174. *Id.* at 310.

175. *Id.* at 312.

176. *Id.* at 310–11.

177. *Id.* at 311.

178. *Id.* at 312.

179. *Id.*

180. 185 F.R.D. 608 (D. Nev. 1999).

181. *Id.* at 614.

182. *Id.* at 613–14 (citing *Gil de Rebollo v. Miami Heat Ass’ns*, 137 F.3d 56, 66 (1st Cir. 1998); *Aceves v. Allstate Ins. Co.*, 68 F.3d 1160, 1168 (9th Cir. 1995)).

either party under Nevada Rule 68 in diversity actions in federal court.¹⁸³ However, the *Nicolaus* court held that the plaintiff, as well as the defendant, may recover costs incurred after a successful offer of judgment in Nevada.¹⁸⁴ Because prevailing parties are generally allowed to recover costs in federal court whether or not they make a successful offer of judgment,¹⁸⁵ it is unclear what benefit the plaintiff receives from this hybrid application of the Nevada rule.

The *Nicolaus* court's conclusion that defendants must make their offers of judgment under Federal Rule 68 rather than under Nevada Rule 68, supported by no analysis of its own, seems based on another court's conclusory statement and an inaccurate citation.¹⁸⁶ Moreover, the *Nicolaus* court did not conduct an inquiry into whether the Nevada rule was substantive and whether Nevada's substantive interest, if any, could be accommodated in the federal system.¹⁸⁷

For the reasons above, *MRO Communications* effectively disapproved of the reasoning in *Nicolaus*,¹⁸⁸ yet the issue lived on in *Walsh v. Kelly*.¹⁸⁹ In *Walsh*, the court acknowledged that the Nevada offer of judgment statute was substantive but found it conflicted with Federal Rule 68.¹⁹⁰ It reached this conclusion in part by

183. *Nicolaus*, 185 F.R.D. at 614. In *Gil de Rebollo*, the court found a direct conflict between Federal Rule 68 and a Puerto Rico rule allowing recovery of attorneys' fees following a successful offer of judgment. 137 F.3d at 66–67. However, the court's conclusion that Federal Rule 68 governed was supported by virtually no analysis, especially of the purposes underlying the two rules. Moreover, the *Nicolaus* court's citation to *Aceves* does not support its conclusion. The *Nicolaus* court cited *Aceves* for the *Aceves* court's description of *Tanker Management*, not *Aceves*'s holding. 185 F.R.D. at 613. The *Aceves* opinion, in turn, cited *Tanker Management* for the proposition that the Florida statute at issue was in “direct conflict” with Federal Rule 68 because “the state rule made attorneys fees [incurred after a successful offer of judgment] compensable.” 68 F.3d at 1168 (citing *Tanker Mgmt. v. Brunson*, 918 F.2d 1524, 1528 (11th Cir. 1990)). But the *Tanker Management* court held that “[Federal] Rule 68 is *not* in ‘direct collision’ with the portion of [the Florida statute] applicable in this case” to support the post-offer of judgment attorneys' fee award. 918 F.2d at 1528 (emphasis added). Apparently, *Aceves* cited *Tanker Management* for a position diametrically opposed to the case's actual meaning.

184. *Nicolaus*, 185 F.R.D. at 614.

185. FED. R. CIV. P. 54.

186. See argument *supra* note 183.

187. See *Nicolaus*, 185 F.R.D. 608.

188. *MRO Commc'ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1280 (9th Cir. 1999).

189. 203 F.R.D. 597 (D. Nev. 2001).

190. *Id.* at 600.

characterizing “the point in dispute” as “offer of judgment rules.”¹⁹¹ Although the *Walsh* court noted that state laws awarding attorneys’ fees “usually” do not conflict with the federal rules, it conducted no in-depth analysis of the intentions behind Federal Rule 68 and the state statute. Rather, it found, “even though Nevada state law governs the award of attorney’s fees, there is no statute that applies in this case which is not in conflict with a federal law.”¹⁹²

Does understanding that the non-inclusion of attorneys’ fees in Federal Rule 68 was not intended to foreclose a substantive right to attorneys’ fees—but merely to avoid creating a substantive right where none existed before—change Federal Rule 68’s relationship with other states’ offer of judgment statutes? Each state’s rule must be examined individually to determine its purpose and intended reach, and such a survey is beyond this Comment’s scope. But a few observations are in order. First, Alaska’s fee-shifting scheme is unusual in the American legal system. Attribution of Alaska Rule 68’s purpose and range to other states’ offer of judgment statutes (and vice versa) is therefore inappropriate. Second, because other states’ offer of judgment statutes do not share Alaska Rule 68’s role in determining prevailing party status, it is more likely that their objectives overlap more substantially with Federal Rule 68’s purpose of encouraging settlements. Nevertheless, the federal courts’ experience with these statutes, together with the lessons learned from the lack of a “direct collision” between the facially similar Alaska and federal rules, yields several important lessons for the “direct collision” aspect of the *Erie-Hanna* analysis.

B. Implications for the *Erie-Hanna* Analysis

So far, the federal courts have failed to engage in a searching inquiry into the purpose and intended scope of Federal Rule 68 when determining whether it displaces state offer of judgment rules under *Hanna*.¹⁹³ Because *Healy* and *Tanker Management* were decided before *Gasperini* clarified that the federal courts are to do as the *Walker* court did (inquire into the purpose and intended scope of the Rules) rather than what *Walker* said (adhere to the Rules’ “plain meaning”), they cannot be blamed for this omission. But subsequent cases have not acknowledged the change in “direct col-

191. *Id.*

192. *Id.*

193. *Cf.* Floyd, *supra* note 62, at 303 (criticizing the *Gasperini* court for paying too little attention to what made New York’s material deviation standard a substantive right).

lision” analysis effected by *Gasperini*. Courts failing to conduct a thorough inquiry risk making three potential analytical errors.

1. *The “Piecemeal” Approach.* Federal courts presented with *Erie* problems involving state offer of judgment statutes often approach the issue in a “piecemeal” fashion, concluding that there is no direct collision because Federal Rule 68 does not mention plaintiffs’ offers of judgment¹⁹⁴ or provide for costs when the defendant receives judgment.¹⁹⁵ This approach has been endorsed by at least one commentator,¹⁹⁶ because it allows a court to resolve the issue on apparently narrow and seemingly tidy grounds. Moreover, it allows the court to ground its ruling firmly in the text of Federal Rule 68.

The “piecemeal” approach is seemingly encouraged by *Hanna*’s holding that the federal rule governs when there is a “direct collision.”¹⁹⁷ As long as there is a textual difference between the two rules, the court can often find areas where the overlap is not complete. Superficially, this is a very appealing approach.¹⁹⁸ But as an examination of *Healy* revealed, this may lead to inequitable results when the state’s “balance” between the rights of plaintiffs and defendants would be altered by application of the state’s rule in some circumstances and the federal rule in others.¹⁹⁹

Moreover, the piecemeal approach allows the court to decide the issue without formulating a coherent approach to the state and federal rules. As a result, these precedents will be of little use when the rules seem to collide and *Walker* and *Gasperini* require inquiry into the rules’ purposes and scopes.²⁰⁰ More than being unhelpful, the piecemeal cases may discourage a court in a subsequent case from a detailed analysis by suggesting that either the lack of textual differences ends the inquiry or that the previous court conducted a comparison of the state and federal rules and implicitly

194. *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 310 (7th Cir. 1995).

195. *MRO Commc’ns, Inc. v. AT&T Co.*, 197 F.3d 1276, 1280 (9th Cir. 1999).

196. *See Street*, *supra* note 149, at 354.

197. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965).

198. *See Marek v. Chesny*, 473 U.S. 1, 16 (1985) (“We previously have been confronted with ‘superficially appealing argument[s]’ strikingly similar to those adopted by the Court today, and we have found that they ‘cannot survive careful consideration.’”) (Brennan, J., dissenting) (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 758 (1980)).

199. *See supra* notes 172–78 and accompanying text.

200. *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 432–36 (1996); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 748 (1980).

concluded that the rules actually collide when their text is similar. Finally, cases taking the “piecemeal” approach have yet to explain adequately why Federal Rule 68 does not foreclose operation of state offer of judgment rules in instances where it does not authorize costs, i.e., offers by plaintiffs and offers by defendants who obtain judgment.

2. *Overbroad Characterization of the Federal Rule’s Scope.* The “direct collision” language in *Hanna* may also have the opposite effect, inviting a court to define the federal rule broadly, without conducting a background inquiry into its purpose. It is tempting to characterize all issues surrounding Federal Rule 68 and state offer of judgment rules as “offers of judgment.” But *Walker* forecloses such characterization as an analytical technique.²⁰¹ Moreover, as this Comment demonstrates, there is often more going on behind the scenes of the federal and state rules than is reflected by such a broad characterization.

Nor is the force of the *Walker-Gasperini* command to look to the purpose and intended scope diminished by recent emphasis on text in the Supreme Court’s statutory interpretation jurisprudence.²⁰² Legislative history remains relevant as “context” in determining the meaning of a statute.²⁰³ Nowhere is context more important than in the *Gasperini* inquiry into whether the purpose and intended scope of two competing rules are in direct collision.

Recent Supreme Court jurisprudence has reaffirmed the Court’s commitment to and belief in the federal judiciary’s institutional capacity for balancing issues of federal and state law. In *Grable & Sons Metal Products v. Darue Engineering & Manufacturing*,²⁰⁴ the Court held that cases raising important federal issues fall under the federal question jurisdiction conferred by 28 U.S.C. § 1331, even though the federal question does not appear on the face of the complaint.²⁰⁵ In determining whether the case raised an important federal question, the Court considered whether the federal statute was an essential element of the claim and actually in dispute, and then gauged the federal government’s interest in having the dispute adjudicated in federal court.²⁰⁶ In doing so, the *Grable*

201. See *Walker*, 446 U.S. at 748.

202. See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 125 S.Ct. 1453 (2005).

203. See *id.* at 1462–63 (Breyer, J., concurring); *id.* at 1463–65 (Stevens, J., concurring).

204. 125 S.Ct. 2363 (2005).

205. *Id.* at 2367.

206. *Id.* at 2368.

Court demonstrated that the federal judiciary is capable of making considered decisions about the relative importance of state and federal interests in the context of determining whether a federal court is the proper forum for a claim to be heard. Thus, there is no reason to think the Supreme Court has abandoned its belief that the federal judiciary is capable of making considered decisions about the intended scope and purpose of federal laws and the federal judicial system's capability of accommodating substantive state law.

3. *The Construction of Hybrid Rights.* The federal judiciary also may not create "hybrid" rights—incorporating some part of the state's rule but not others. This practice is really a subset of the piecemeal approach, but it is different enough to merit separate discussion. For example, the *Nicolaus* court held that because Federal Rule 68 did not mention plaintiffs' offers of judgment, state law could apply to such offers.²⁰⁷ The court then faced a dilemma because while defendants were not entitled to attorneys' fees upon making a successful offer of judgment under Federal Rule 68, plaintiffs would be entitled to attorneys' fees by virtue of having made a successful offer under the Nevada rule.²⁰⁸ In order to maintain a balance between plaintiffs and defendants and to discourage forum shopping, the court held that the Nevada offer of judgment rule could only apply to award plaintiff's costs and not attorneys' fees.²⁰⁹ As a court already has discretion to allow costs to the prevailing party under Federal Rule 54, it is unclear how much plaintiffs benefit from this "application" of state law.

Like the piecemeal approach and the overly broad characterization of the federal rule's scope, the construction of hybrid rights is also appealing because it seemingly allows the court to fulfill the mandate of *Walker* and *Gasperini* that the state substantive rule should be accommodated if possible. It places the court in a position to assure fairness to the litigants, ameliorating the potential unfairness of the piecemeal approach.

Nonetheless, the construction of hybrid rights is an unacceptable judicial practice. First, it is unclear whether the federal judiciary possesses the institutional competence to make judgments generally reserved at least partly for state legislatures. It is for the legislature, usually advised by a state judiciary rules committee in a non-adversarial setting, to determine as a matter of policy the pro-

207. *Nicolaus v. W. Side Transp., Inc.*, 185 F.R.D. 608, 614 (D. Nev. 1999).

208. *Id.*

209. *Id.*

cedural “balance” between litigants.²¹⁰ For example, although the *Nicolaus* court maintained a “balance” between plaintiffs and defendants, it did so by eviscerating Nevada’s policy judgment to encourage settlement through offer of judgment-triggered attorneys’ fee awards. This policy benefits not only the court system in which the litigation is pending, but has incidental benefits to the residents of Nevada. In short, it is unclear, given the constraints that this approach assumes are imposed by the Federal Rules of Civil Procedure, whether the court will be able to replicate the legislature’s chosen balance and promote the state’s policies.

Second, judicial creation of a hybrid results in rules unintended by both state and federal drafters. Any judicial process that does not give effect to a legislative intent when two intentions have been expressed is deeply problematic.

Third, the hybrid creation process in *Nicolaus* did not comport with the command of *Gasperini*. In *Gasperini*, the Court examined whether the substantive state law could be accommodated by federal procedure.²¹¹ It contemplated no change to the substance of the state law but only to the manner in which it was administered.²¹² In *Nicolaus*, the court altered the substance of the substantive state right in order to accommodate a perceived conflict with the federal rule.²¹³

Finally, it is unclear where the authority for this ad hoc rule-making originates. The creation of a hybrid rule, like the piecemeal approach, assumes without adequate explanation that the federal rule does not occupy the field. Moreover, the process of determining the partial application of state law closely resembles the process of federal common law-making. According to the Supreme Court, federal common law-making is appropriate in non-*Erie* situations in cases involving a “uniquely federal interest,” which has been so committed to federal control by the Constitution and laws of the United States that state law is preempted where conflicting.²¹⁴ Preemption is necessary when there is a “significant conflict” between an identifiable federal policy and the operation of state law.²¹⁵ In short, this process is what *Erie* prohibits.²¹⁶

210. *S.A. Healy Co. v. Milwaukee Metro. Sewage Dist.*, 60 F.3d 305, 312 (7th Cir. 1995).

211. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

212. *See id.*

213. *See Nicolaus*, 185 F.R.D. at 613–14.

214. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507–08 (1988).

215. *Id.*

216. Not only are these precisely the circumstances in which *Erie* prohibits federal common law-making, but even if it were appropriate, “*Boyle* suggests the

Similarly, the hybrid approach recognizes the two potentially conflicting courses (the federal and state rules) and attempts to strike a balance between them. The hybrid rule-making process, however well intentioned, is therefore essentially common law-making. The incorporation of state rules into the federal procedural common law-making process does not satisfy the principle in *Erie* that substantive state law, rather than federal common law, should govern in federal diversity actions.

V. CONCLUSION

With respect to rules based on underlying systems fundamentally different from those governing the federal rules, extra caution must be exercised when determining the scope and function of the federal and state rules. The Federal Rules of Civil Procedure were crafted to provide a uniform framework for adjudicating varying substantive rights. But even this endeavor contemplates at least some underlying assumptions about the legal systems whose substantive rights are to be adjudicated in the uniform framework. When unique underlying systems of legal rights render those assumptions inapplicable to a substantive right, it is unlikely that there will be a “direct collision” between the federal rule and the state law.

Alaska’s unique fee-shifting structure requires special attention in interactions within the federal courts. Although at first glance it appears that Federal Rule of Civil Procedure 68 forecloses application of Alaska Rule 68, at least in part, closer examination reveals that the federal rule leaves room for the Alaska rule to operate.

An examination of the treatment of state offer of judgment laws in federal diversity cases around the nation reveals several potential pitfalls in what has become the initial inquiry in the *Erie-Hanna* analysis. First, a piecemeal approach to determining whether a direct conflict exists creates unhelpful precedent and may lead to inconsistent results. Second, an overly broad characterization of the federal rule’s purpose and intended scope may create a conflict where none exists. Third, creation of hybrid substantive rights in an attempt to accommodate both state and federal interests is problematic. Ultimately, there is no substitute for a

utmost caution where a federal court seeks to displace a state law that does have important extralitigation objectives with a purely procedural federal common law rule, absent any explicit direction by Congress that it should.” Floyd, *supra* note 62, at 289.

thorough analysis of the intended scope and purpose of both the federal and state rules that are in apparent conflict.