IS THE GUMMY RULE OF TODAY TRULY BETTER THAN THE TOOTHY RULE OF TOMORROW? HOW FEDERAL RULE 68 SHOULD BE MODIFIED

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INTRODUCTION

Federal Rule of Civil Procedure 68,[1] the offer-of-judgment rule, has a portentous past and purpose, but it has never lived up to the hype surrounding its creation. Touted as a tool of settlement,[2] the rule lacks the "teeth" necessary to effect settlements. The absence of any such teeth also means that the rule lacks the power to create disincentives for bringing frivolous suits—a second, complementary goal of the rule.

Despite these shortcomings, federal rulemakers have not amended the substance of Rule 68 since 1946. In contrast, state lawmakers have been more responsive to criticisms of the rule. Many

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1. The full text of FED. R. CIV. P. 68 states:

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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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

2. *See* Thomas D. Rowe, Jr., *Offer of Judgment*, *in* 13 MOORE'S FEDERAL PRACTICE § 68.02[2], at 68-7 (3d ed. 2000) ("The primary purpose of Rule 68 is to promote settlements and avoid protracted litigation.").

states have either amended their respective versions of Federal Rule 68 or have completely rewritten the rule.[3] Such state rules concerning attorney's fees may serve as useful models for amending Federal Rule 68 to better serve the rule's twin goals—those of encouraging settlement and deterring frivolous litigation.

I proceed in several parts. In Part I, I address the issue of attorney's fees generally, and the current "gummy" approach under Federal Rule 68. In Part II, I discuss attempts by Alaska, California, Nevada, and Arizona to include attorney's fees in the offer-of-judgment rule. In Part III, I conclude that California's "toothy" approach best serves the dual purposes of encouraging settlement and discouraging frivolous lawsuits, and also that it best addresses some of the major concerns posed by critics. Therefore, California's offer-of-judgment rule is the best current solution to the problems of Federal Rule 68.

I. ATTORNEY'S FEES AND FEDERAL RULE 68

A. An Explanation of Attorney's Fees under Offer-of-Judgment Rules

The most controversial of potential amendments to Rule 68,[4] and perhaps the most necessary,[5] would be the inclusion of attorney's fees, also referred to as "fee shifting," in the language of the rule, or the inclusion of attorney's fees in post-offer costs.[6] In their most basic in-

3. As of the time of this writing, fifteen states, plus the District of Columbia, have versions of offer-of-judgment rules similar to Federal Rule 68. Twenty-seven states depart from the federal rule, ranging from additional time to make the offer, to the inclusion of plaintiffs, to much more drastic rewritings. The eight remaining states make no provision at all for offers of judgment. Contrast this with the state of affairs just six years ago, at which time twenty-eight states, plus the District of Columbia, had versions similar to Federal Rule 68. Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 64 (1997). Thirteen states departed from the federal template in some fashion, and nine states made no provision for offers of judgment. *Id*.

4. *See* Bruce P. Merenstein, *More Proposals to Amend Rule 68: Time to Sink the Ship Once and for All*, 184 F.R.D. 145, 147–48 (1999) (arguing vehemently that not only should attorney's fees not be included in offers of judgment, but that Federal Rule 68 should itself be abolished).

5. *See* Richard Mincer, *Rule 68 Offer of Judgment: Sharpen the Sword for Swift Settlement*, 1995 U. MEM. L. REV. 1401, 1430–31 (positing a modified rule that includes awards of attorney's fees in certain situations). *But see Using Federal Rule 68 to Spur Settlement*, 89 ILL. B.J. 143, 143 (2001) (characterizing Federal Rule 68 as "a powerful mechanism for driving plaintiffs to a reasonable settlement").

6. *See* Solimine & Pacheco, *supra* note 3, at 54, 59 (describing the penalties of the current Federal Rule 68 as "post-offer costs," and describing the inclusion of attorney's fees as the "imposition of fee shifting").

carnations, statutes or procedural rules aimed at fee shifting require, under specified circumstances, the "loser" in a suit to pay the "winner's" attorney's fees.[7] It is difficult to speak of fee-shifting rules in very specific terms without recourse to actual state statutes because the statutes vary in several respects, including the definition of "success,"[8] the inclusion of interest,[9] and the "specified circumstances" under which fee shifting would occur.[10]

Nonetheless, as a general example, suppose that, under a fee-shifting rule, *A* makes an offer of judgment to *B* for $10,000. *B* rejects this offer and recovers some amount less than $10,000, or fails to recover anything at trial. *A* would be considered the "winner." As the "winner," *A* would be entitled to recover from *B* all attorney's fees and costs *A* incurred in defending against the suit after its offer of judgment was made and rejected. If *B* does not pay immediately, *A* may be entitled to interest on the amount. The precise amount *B* must recover to avoid paying *A*'s attorney fees depends upon the relevant statutory language.

If, on the other hand, after *B*'s rejection, *B* recovers $10,000 or more at trial, two options are possible. First, each party might be responsible for its own attorney's fees. Alternatively, as a statutorily defined "loser," *A* might have to pay whatever attorney's fees and costs *B* incurred after *A* made the offer of judgment. Again, *B* may be entitled to interest of the costs and fees.

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7. For a general text on the awarding of attorney's fees, both in the context of Rule 68 and otherwise, see Charles Silver, *Incoherence and Irrationality in the Law of Attorneys' Fees*, 12 REV. LITIG. 301 (1993), which characterizes statutes granting attorney's fees as vague, and thus resulting in an incoherent body of law.

8. *See*, *e.g.*, CAL. CIV. PROC. CODE § 998(c)(2)(A) (West Supp. 2003) (defining success based on whether a plaintiff obtains a "more favorable judgment" as exclusive of postoffer costs); *cf.* S.C. R. CIV. P. 68(a) (defining success based on whether a plaintiff fails to obtain "a more favorable judgment; IDAHO R. CIV. P. 68(b) (defining success in cases involving claims for monetary damages as based on a comparison between the offer and the "adjusted award," which is "defined as (1) the verdict in addition to (2) the offeree's costs under Rule 54(d)(1) incurred before service of the offer of judgment and (3) any attorney fees under Rule 54(e)(1) incurred before service of the offer of judgment.").

9. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-195(b) (West 1991) (requiring that plaintiff recover "more than the sum named in the offer of judgment, *with interest from its date*" (emphasis added)); *cf.* IDAHO RULE CIV. P. 68 (making no mention of interest in the calculation of the offer of judgment).

10. *See, e.g.*, CONN. GEN. STAT. ANN. § 52-195(b) (West 1991) (permitting the recovery of attorney's fees in cases in which a plaintiff recovers more than the offer plus interest, but only up to three hundred fifty dollars); *cf.* ALASKA R. CIV. P. 68(b)(1)–(3) (permitting recovery of attorney's fees in varying amounts depending upon when the offer was made).

B. Why Is Including Attorney's Fees a Necessary Change to the Rule?

The two most logically appealing reasons to include attorney's fees in an offer-of-judgment rule are (1) to encourage parties to consider settlement carefully, and (2) to discourage frivolous litigation. Although encouraging settlement has long been an enunciated goal of offer-of-judgment rules,[11] discouragement of frivolous litigation is less vocally supported.[12] Perhaps if fears about this "penalty enhancement" justification for the addition of attorney's fees can be assuaged, an amendment including attorney's fees to Federal Rule 68 may be successful.

1. *Encouraging Settlement*. Federal Rule 68 was created in part to encourage settlement.[13] The fact that it has been unable to do so[14] indicates that modification is needed to fulfill the drafters' goals.[15] An amendment to Federal Rule 68 that created the potential for the imposition of attorney's fees would serve to encourage settlement in several different ways. For starters, it would create an incentive for the party making the offer to take the steps necessary to make an offer under the tenets of the rule. One of the reasons that Federal Rule 68 is so unsuccessful in encouraging settlement is that there is no incentive to use the rule in the first place. It is unnecessary to use the rule to make an offer if the offer itself is the only incentive to settle-

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11. *See, e.g.*, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 337, 363 (1983) (stating in a Committee Note that the purpose of Federal Rule 68 "was to encourage settlements"); Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 816 (1984) (viewing the offer-of-judgment rule as one "intended to provide incentives for parties to conclude disputes at an early stage when the outcomes are reasonably predictable").

12. *See infra* note 18.

13. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. at 365.

14. *See* Solimine & Pacheco, *supra* note 3, at 55 (observing that the offer-of-judgment rule has "not been effective in achieving its intended purpose"). The advisory committee on civil rules has been especially critical of the ineffectiveness of the rule as drafted. *Id.* at 56–57; Varon, *supra* note 11, at 815 (observing that "attorneys rarely use Rule 68 as a pretrial settlement device").

15. *See* Andrea M. Alonso & Kevin G. Faley, *An Offer You Can't Refuse—A Proposal for a New State Offer of Judgment Rule*, N.Y. ST. B.J. 34, 34 (March/April 1998) (characterizing New York's offer-of-judgment rule, similar in operation to Federal Rule 68, as notable for its "lack of efficacy," which could be cured in part by the inclusion of attorney's fees); Varon, *supra* note 11, at 845–46 (proposing an amendment to Federal Rule 68 that would permit a court to impose attorney's fees).

ment. Although it could be argued that post-offer costs are themselves an additional incentive to use the current Federal Rule 68 to make an offer of judgment, the realities of the current use of the rule (or lack thereof) indicate that post-offer costs are not incentive enough.[16] Indeed, when post-offer costs are so small in proportion to the overall cost of litigation,[17] it is a wonder that the rule is ever used.

Under the current scheme, if a party makes an offer under Federal Rule 68 (despite her lack of incentive to do so), the party receiving the offer also has little or no incentive to consider it. Currently, there is little to distinguish a Federal Rule 68 offer from any other settlement offer, because the only threat associated with a Federal Rule 68 offer is the threat of paying relatively inconsequential costs, which are unlikely to be worth pursuing after the resolution of the conflict. Indeed, parties may have *more* incentive to accept offers made just before trial or after trial has begun—when Federal Rule 68 offers may no longer be made—because those offers may take into account the realities of the trial and the direction of the prevailing winds.

If attorney's fees are included, however, the incentives to approach the bargaining table are considerably greater. When attorney's fees are included, parties not only have incentives to make offers that reflect a realistic assessment of the suit; they also have incentives to accept reasonable offers, because more is at stake. The risk of paying attorney's fees and costs increases the incentives for settlement at the early stages of litigation.

2. *Discouraging Frivolous Litigation*. The more controversial reason for including attorney's fees as part of an offer-of-judgment

16. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. at 363 (observing that the "principal reasons for [Rule 68's] past failure have been (1) that 'costs'. . . are too small a factor to motivate parties to use the rule"); Alonso & Faley, *supra* note 15, at 34 (discussing New York's offer-of-judgment statute and observing that "[m]ost attorneys do not even know of the statute's existence"); Mincer, *supra* note 5, at 1414 (arguing that "[a]s long as potential litigants view the scope (and amount) of recoverable costs as insignificant, offers of judgment will not be utilized").

17. Costs under the current scheme, 28 U.S.C. § 1920 (2000), include the following: fees of the clerk, fees of the marshal, fees of the court reporter, witness fees, copying fees, docket fees, and fees for court-appointed experts. Note that costs are *not* defined in Federal Rule 54 or Federal Rule 68. Alonso & Faley, *supra* note 15, at 34 (estimating that costs as currently calculated, even after a prolonged trial, generally only will amount to $2,000).

rule is to discourage frivolous litigation.[18] If a party rejects a reasonable offer of judgment, thereby forcing the court to go through with the litigation, the rejecting party would have wasted judicial resources that could be better used elsewhere. Under current Federal Rule 68, however, the court has no way of penalizing parties that so waste judicial resources.

Under a modified offer-of-judgment rule, parties would be discouraged from wasting the court's time and resources and could be punished for forcing the judiciary to expend unnecessary time and resources. The imposition of attorney's fees is already used in some circumstances to penalize parties. In civil rights statutes, prevailing plaintiffs are entitled to attorney's fees.[19] Additionally, the Supreme Court has recognized that courts have the power to impose attorney's fees in cases of bad faith *during* litigation.[20] It is not a far stretch to see that the levy of attorney's fees against unnecessarily recalcitrant parties would function in much the same way as the levy does in bad faith and civil rights cases.

It would appear, therefore, that in the history of the American legal system, attorney's fees have not only been awarded to certain litigants, but that the imposition of attorney's fees has been interpreted as a penalty.[21] Although imposing attorney's fees as a penalty

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18. *See* J. Karen Arnold, Delta Air Lines, Inc. v. August*: Taking the Teeth Out of Rule 68*, 43 U. PITT. L. REV. 765, 768 (1982) (observing that Rule 68 is primarily "a regulatory device for controlling unnecessary litigation"); Mincer, *supra* note 5, at 1416 (characterizing an effective version of Rule 68 as "one that effectuates the early settlement of litigation [and] discourages frivolous litigation"). It could also be argued that the Committee's dictation that the rule works to "avoid protracted litigation" supports the idea that the rule's purpose is also to discourage frivolous litigation. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. at 363. *But see* Merenstein, *supra* note 4, at 150 (admonishing that the inclusion of attorneys' fees would "extend the illogic of Rule 68 and would increase the punishment on parties, particularly plaintiffs, who refuse to accept a settlement offer that they reasonably believe is insufficient to satisfy their legal claim").

19. *See, e.g.*, Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) (2000) (permitting fee shifting in favor of prevailing parties); The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b) (2000) (permitting prevailing parties to recover attorney's fees at the court's discretion). For a practical review of practitioners' views of the award of fees in civil rights cases in the 1990s, see generally Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality and Theory*, 48 HASTINGS L.J. 197 (1997).

20. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991) (observing that there are limited circumstances in which federal courts may impose fee shifting, despite the "so-called American Rule" to the contrary).

21. Courts have recognized that penalties may serve the purpose of punishing a party that creates more cost for its opponent, or the purpose of punishing a party acting in bad faith towards the court, or a combination thereof. The Supreme Court observed that the imposition of attorney's fees serves the higher purpose of

may be unappealing to some, there cannot exist one justification for fees, i.e., encouraging settlement, *without* the other justification, that of a penalty. As one modern critic notes, "[f]ee-shifting rules cannot be measured in isolation, for they are part and parcel of a legal system."[22] Though the goal of encouraging settlement is admirable, this encouragement does not take place in a vacuum. Part and parcel of this encouragement is the threat of an unappealing result if a party does not fully consider the settlement option. Incentives for settlement and disincentives for frivolous litigation are merely different sides of the same coin; it is therefore fitting that they are viewed as the equally important twin goals of an effective offer-of-judgment rule.

II. STATE MODIFICATIONS PERMITTING INCLUSION OF ATTORNEY'S FEES

There have been attempts to modify Federal Rule 68. In 1983, a proposal included reasonable attorney's fees and allowed all parties—not just defendants—to make offers of judgment.[23] The Advisory Committee supported changes to the rule that would have allowed courts some discretion in the award of attorney's fees, so as to avoid the "Draconian impact"[24] that might result from a hard-and-fast rule on fee shifting.[25] In 1984, another proposal would have completely replaced the old rule, but would have provided for the same multiparty filing of offers and awards of attorney's fees as the 1983 proposal.[26] The 1984 proposal was promoted as a method of sanctioning parties who "unreasonably" refused to settle.[27] Several changes have been

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> [transcending] a court's equitable power concerning relations between the parties and [reaching] a court's inherent power to police itself, thus serving the dual purpose of 'vindicat[ing] judicial authority without resort to the more drastic sanctions available for contempt of court and mak[ing] the prevailing party whole for expenses caused by his opponent's obstinacy.

Id. at 46 (citations omitted).

22. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1595 (1993).

23. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. at 362; 13 MOORE'S FEDERAL PRACTICE, *supra* note 2, § 68App.101, at 68App.-4.

24. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. at 365 (defining the "Draconian impact" as the situation in which an "'all-or-nothing' rule . . . would impose a heavy award of expenses against an offeree under all circumstances").

25. 13 MOORE'S FEDERAL PRACTICE , *supra* note 2, at 68App.-5 to -7.

26. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 102 F.R.D. 407, 433–35 (1984).

27. 13 MOORE'S FEDERAL PRACTICE , *supra* note 2, at 68App.-9 to -11.

proposed since 1984, but none have ever been debated as amendments.[28]

This is not to say that federal lawmakers were or are wholly opposed to a move towards modified fee shifting. The proposed Common Sense Legal Reforms Act of 1995[29] would have made just such a move. Although this proposed act stalled in the Senate, the fact that it was considered at all indicates an interest in a modified loser-pays system. Limiting the recovery of fees to the total costs and fees of the other party would limit excessive awards of attorney's fees while giving Federal Rule 68 substantially more teeth.

This concern over fee shifting is not limited to the federal sphere. Various states have adopted modified versions of Federal Rule 68 to include attorney's fees. These state rules provide models for improving Federal Rule 68. This Note now turns to a discussion of the mechanics of the approaches that these states have taken.

A. The Expansive Extreme: Alaska

Alaska has adopted an offer-of-judgment rule that supports the award of attorney's fees in virtually all circumstances.[30] In Alaska's version of Federal Rule 68, if the judgment of the court is either 5 or 10 percent less favorable[31] than the refused offer, the offeror is entitled to costs and "reasonable actual" post-offer attorney's fees.[32] Attorney's fees, under the statute, are awarded according to when the offer was made.[33] If the offer was made within sixty days of discovery, the offeror is entitled to have 75 percent of its attorney's fees paid.[34] If the offer was made between sixty and ninety days after discovery, the offeror is entitled to have 50 percent of its attorney's fees paid.[35] If the offer was made more than ninety days after discovery but at least ten

28. For the text of these proposals, see *id*. at 68App.-14 to -39. For a discussion of these proposals, see Merenstein, *supra* note 4, at 150–55.

29. H.R. 64, 104th Cong. § 101 (1995).

30. ALASKA R. CIV. P. 68.

31. The 5 percent figure applies when single parties are involved. The higher 10 percent figure applies when there are multiple defendants. ALASKA R. CIV. P. 68(b).

32. ALASKA R. CIV. P. 68(b)(1).

33. ALASKA R. CIV. P. 68(b)(1)–(3).

34. ALASKA R. CIV. P. 68(b)(1).

35. ALASKA R. CIV. P. 68(b)(2).

days before the commencement of trial, the offeror is only entitled to have 30 percent of its attorney's fees paid.[36]

Notably, Alaska's offer-of-judgment rule operates in Alaska's modified "loser-pays" system, imposed by Alaska Rule of Civil Procedure 82. Rule 82 provides a table that suggests, based upon the court's award and the judicial resources used in the resolution of the suit, the percentage of attorney's fees to be shifted to the losing party.[37] Courts are given some discretion to vary the amount of fees awarded from what the tables suggest, based on the complexity of the trial, the reasonableness of the fees, vexatious or bad conduct, and other factors.[38]

Despite the fact that Alaska's offer-of-judgment rule operates within the context of its general fee-shifting statute, Alaska's modification of the offer-of-judgment rule is relevant outside a loser-pays system because of its use of a percentage approach.[39] Percentage-wise, the offer-of-judgment rule permits greater recovery than the regular modified loser-pays system, thereby creating a greater incentive for

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36. ALASKA R. CIV. P. 68(b)(3). Note that an offer of judgment must be made at least ten days before trial; otherwise, it is not a valid offer of judgment under Rule 68. ALASKA R. CIV. P. 68(a).

Once the percentage of attorney's fees to be paid has been calculated, either under Rule 68 or Rule 82, Alaska case law takes over. The Supreme Court of Alaska explained:

> The mathematical formula to compute the value of a judgment under Rule 68 is:
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> J = (V + PI) + (AF + C), for which
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> J = Judgment for computation under Rule 68 to determine whether the Offer of Judgment has been exceeded;
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> V = Jury verdict;
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> PI = Prejudgment interest accrued prior to the Offer of Judgment;
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> AF = Attorney's fees calculated under the "Contested without Trial" column of Rule 82(b)(1);
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> C = Costs allowable and incurred as of the Offer of Judgment.

Andrus v. Lena, 975 P.2d 54, 57 n.3 (Alaska 1999) (citations omitted).

37. ALASKA R. CIV. P. 82. This rule provides tabled forms for the uniform application of fee shifting. ALASKA R. CIV. P. 82(b)(1). Civil suits are divided into those contested with trial, those contested without trial, and those that are noncontested. *Id.* Judgments fall into one of four categories: the first $25,000, the next $75,000, the next $400,000, and over $500,000. *Id.* The greatest award of attorney's fees is made in cases that are contested with a trial, and the judgment is $25,000 or less. In those cases, the loser pays 20 percent of the winner's attorney's fees. *Id.* The lowest award for attorney's fees is made in noncontested cases where judgment is over $500,000. There, the loser pays only 1 percent. *Id.*

38. ALASKA R. CIV. P. 82(b)(3).

39. Note that parties making an offer of judgment under Alaska's Rule 68 are entitled to fees according to whichever rule, 68 or 82, gives them a higher award. ALASKA R. CIV. P. 68(c). Parties are, however, limited to only one recovery. *Id.*

parties to settle. Because offers of judgment create this incentive to settle, it is irrelevant that they occur in the loser-pays system. A mathematical approach like Alaska's would work in any system, loser-pays or otherwise, provided that the incentives were substantial enough to encourage settlement.

B. The Middle of the Road: California and Nevada

Other states have embraced the middle road, permitting an award of attorney's fees only in cases of bad-faith actions of parties during litigation. California has adopted its rule explicitly in a state rule of civil procedure, while Nevada has generated similar results through case law interpreting a similar rule of civil procedure.

1. *The California Framework*. California's offer-of-judgment rule is section 998 of the Civil Procedure Code.[40] Although the text of this rule differs greatly from that of Federal Rule 68, the relevant fee-shifting provision differs from the federal rule only in that it permits plaintiffs to make offers of judgment, and in that it applies equally to arbitration proceedings.[41] To supplement section 998, California, in 1987, enacted as a pilot project Civil Procedure Code section 1021.1, a provision for discretionary awards of attorney's fees in conjunction with offers of judgment. Section 1021.1 initially applied to Riverside and San Bernadino counties. Subsequent extensions of the rule were applicable only to Riverside County.[42] Together, these two sections create a possible model for amending Federal Rule 68.[43]

Section 1021.1 provides that "[r]easonable attorney's fees may be awarded in an amount to be determined in the court's discretion, to a party to any civil action as provided by this section, and that award shall be made upon notice and motion by a party and shall be an element of the costs of suit."[44] For attorney's fees to be awarded, however, certain criteria must be met. First, the party requesting fees must have made an offer of judgment under section 998.[45] The party to whom the offer was made must not have accepted the offer, and

40. CAL. CIV. PROC. CODE § 998 (West Supp. 2003).

41. *Id.*

42. *Id*. § 1021.1(h) (West Supp. 2003).

43. In this Note, when I refer to the California approach, I refer to sections 998 and 1021.1 as they operate in conjunction with each other.

44. CAL. CIV. PROC. CODE § 1021.1(a).

45. *Id.* § 1021.1(b)(1).

that same party must have failed to obtain a more favorable judgment.[46] In considering whether or not to award these discretionary attorney's fees, section 1021.1 requires that a court examine several factors including (1) the reasonableness of the rejection of the offer,[47] (2) the amount of damages sought and obtained,[48] (3) the parties' efforts to settle,[49] and (4) the existence, if any, of bad faith on the part of parties or their attorneys.[50] The key to California's statute, however, is that the court ultimately retains discretion in both the award itself and the amount thereof.[51]

California courts have determined that inherent in any offer-of-judgment rule is the requirement that the offer not be token or in bad faith.[52] A one-dollar offer of judgment, for instance, was found to

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46. *Id.* § 1021.1(b)(2)–(3).

47. The court is to consider "at least" the following factors in determining reasonableness:

> (A) The then apparent merit or lack of merit in the claim that was the subject of the action. (B) The closeness of the questions of fact and law at issue. (C) Whether the offeror has unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer. (D) Whether the action was in the nature of a "test case," presenting questions of far-reaching importance affecting nonparties. (E) The relief that might reasonably have been expected if the claimant should prevail. (F) The amount of the additional delay, cost, and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged. (G) Those other matters that the court may deem relevant in the interest of justice.

Id. § 1021.1(c)(1). As section 1021.1(c)(1) reflects, the drafters of this statute recognized that this was not an exclusive list to determine reasonableness, but rather that this list embodied the bare bones of a query into reasonableness.

48. *Id.* § 1021.1(c)(2).

49. *Id.* § 1021.1(c)(3).

50. *Id.* § 1021.1(c)(4). Although this statute had a self-repeal date of January 1, 2005, it provided for an assessment of the impact of section 1021.1, and for a subsequent report to the California legislature by March 1, 2004. *Id.* § 1021.1(i). Upon the report of the findings,

> [t]he effectiveness of this section shall be determined based on objective data showing whether, and to what extent, this section increases the early settlement of cases compared to the experience prior to its initial enactment in the courts to which it has applied, and the experience since its initial enactment of the courts in other counties to which it has not applied.

Id. If the legislature determines that the objective data shows that this section "independently and substantially" increased the settlement of cases during that time period, the statute may be revived. *Id*.

51. *See* McDowell v. Watson, 69 Cal. Rptr. 2d 692, 695 (Cal. Ct. App. 1997) (noting that "[a] trial court may, *in its discretion*, award reasonable compensation for attorney's fees . . . pursuant to Code of Civil Procedure section 998") (emphasis added); Colbaugh v. Hartline, 35 Cal. Rptr. 2d 213, 221 (Cal. Ct. App. 1994) (noting that although a court "could have exercised its discretion to award attorney fees to defendants under sections 998 and 1021.1," it impermissibly conflated two of the factors to be considered, and therefore "did not so exercise its discretion").

52. Although courts have primarily addressed nominal offers of judgment in terms of cost shifting under section 998, a good-faith offer is explicitly required under section 1021.1 as well.

have been made in bad faith, and, as such, no expert witness fees were awarded to the offering party, even though the offering party prevailed.[53] This requirement of a good-faith offer of settlement has been applied when a nominal offer was as high as $15,001, in a case in which the ultimate judgment was for more than $1 million.[54] Although the good-faith standard cannot be applied across the board, it appears that, at least in California, judicial discretion comfortably steps in and applies the standard as needed.[55]

2. *The Nevada Framework*. Unlike California, Nevada's offer-of-judgment rule does not explicitly address the same concerns.[56] On

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See CAL CIV. PROC. CODE § 1021.1(c)(4) (noting that the presence of bad faith may influence a court's decision to award attorney's fees).

53. Wear v. Calderon, 175 Cal. Rptr. 566, 568 (Cal. Ct. App. 1981):

> [The court noted that a plaintiff] may not reasonably be expected to accept a token or nominal offer from any defendant exposed to this magnitude of liability unless it is absolutely clear that no reasonable possibility exists that the defendant will be held liable. If that truly is the situation, then a plaintiff is likely to dismiss his action without any inducement whatsoever. But if there is some reasonable possibility, however slight, that a particular defendant will be held liable, there is practically no chance that a plaintiff will accept a token or nominal offer of settlement from that defendant in view of the current cost of preparing a case for trial.

54. Elrod v. Oregon Cummins Diesel, 241 Cal. Rptr. 108, 110, 112–113 (Cal. Ct. App. 1987).

55. *See also Colbaugh*, 35 Cal. Rptr. 2d at 218–219 (noting that two determinations of reasonableness have to be met under sections 998 and 1021: the first is whether the offer was reasonable under section 998; the second is whether the *rejection* of the offer was reasonable under section 1021.1).

56. NEV. R. CIV. P. 68 states in pertinent part:

> (a) *The Offer*. At any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions.
>
> (b) *Apportioned Conditional Offers*. An apportioned offer of judgment to more than one party may be conditioned upon the acceptance by all parties to whom the offer is directed.
>
> (c) *Joint Unapportioned Offers.*
>
> (1) *Multiple Offerors*. A joint offer may be made by multiple offerors.
>
> (2) *Offers to Multiple Defendants*. An offer made to multiple defendants will invoke the penalties of this rule only if (A) there is a single common theory of liability against all the offeree defendants, such as where the liability of some is entirely derivative of the others or where the liability of all is derivative of common acts by another, and (B) the same entity, person or group is authorized to decide whether to settle the claims against the offerees.
>
> (3) *Offers to Multiple Plaintiffs*. An offer made to multiple plaintiffs will invoke the penalties of this rule only if (A) the damages claimed by all the offeree plaintiffs are solely derivative, such as that the damages claimed by some offerees are entirely derivative of an injury to the others or that the damages claimed by all offerees are derivative of an injury to another, and (B) the same entity, person or group is authorized to decide whether to settle the claims of the offerees.

the face of the rule, when a party rejects an offer and fails to obtain a more favorable judgment, several penalties follow. The first is that a party cannot recover "any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment."[57] Additionally, the offeree is bound to pay the offeror's post-offer costs from the time of the offer, and reasonable attorney's fees actually incurred by the offeror since the time of the offer.[58] What the rule does not facially address is in what circumstances attorney's fees should be awarded under Nevada's Rule 68. Thus

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(d) *Judgment Entered Upon Acceptance*. If within 10 days after the service of the offer, the offeree serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service. The clerk shall enter judgment accordingly. The court shall allow costs in accordance with NRS 18.110 unless the terms of the offer preclude a separate award of costs. Any judgment entered pursuant to this section shall be expressly designated a compromise settlement. At this option, a defendant may within a reasonable time pay the amount of the offer and obtain a dismissal of the claim, rather than a judgment.

(e) *Failure to Accept Offer*. If the offer is not accepted within 10 days after service, it shall be considered rejected by the offeree and deemed withdrawn by the offeror. Evidence of the offer is not admissible except in a proceeding to determine costs and fees. The fact that an offer is made but not accepted does not preclude a subsequent offer. With offers to multiple offerees, each offeree may serve a separate acceptance of the apportioned offer, but if the offer is not accepted by all offerees, the action shall proceed as to all. Any offeree who fails to accept the offer may be subject to the penalties of this rule.

(f) *Penalties for Rejection of Offer*. If the offeree rejects an offer and fails to obtain a more favorable judgment,

(1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and

(2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer. If the offeror's attorney is collecting a contingent fee, the amount of any attorney's fees awarded to the party for whom the offer is made must be deducted from that contingent fee.

(g) *How Costs Are Considered*. To invoke the penalties of this rule, the court must determine if the offeree failed to obtain a more favorable judgment. Where the offer provided that costs would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs. Where a defendant made an offer in a set amount which precluded a separate award of costs, the court must compare the amount of the offer together with the offeree's pre-offer taxable costs with the principal amount of the judgment.

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

57. NEV. R. CIV. P. 68(f)(1).

58. NEV. R. CIV. P. 68(f)(2).

courts were left with the job of interpreting the rule to determine when attorney's fees were to be shifted.

The first case to address the appropriateness of an assessment of attorney's fees was *Beattie v. Thomas*,[59] in which the Nevada Supreme Court enunciated four factors to guide the exercise of discretion for awarding attorney's fees:

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount. After weighing the foregoing factors, the district judge may, where warranted, award up to the full amount of fees requested.[60]

The first good-faith factor of the *Beattie* test was delineated by *Yamaha Motor Co., U.S.A. v. Arnoult*.[61] On appeal, the Nevada Supreme Court determined that the first *Beattie* factor (whether the plaintiff's claim was brought in good faith) applies only when the defendant is the offeror.[62] If the plaintiff is the offeror, the first factor that should be weighed is whether the defendant's defenses were litigated in good faith.[63] The court feared that "[i]f the good faith of either party in litigating liability and/or damage issues is not taken into account, offers would have the effect of unfairly forcing litigants to forego legitimate claims,"[64] directly contradicting the offer-of-judgment rule's purposes.

The third *Beattie* factor[65] was similarly refined in *Trustees of Carpenters for Southern Nevada Health & Welfare Trust v. Better Build-*

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59. 668 P.2d 268 (Nev. 1983).

60. *Id.* at 274. Note the similarities between what was judicially interpreted in Nevada and what was statutorily mandated in California. *Compare supra* notes 56–59 and accompanying text *with supra* notes 47–50 and accompanying text. One important result of this interpretation requiring good-faith offers is that fees are not awarded to parties who make nominal offers. Consequently, the greatly feared chilling effect on meritorious litigation is thereby avoided.

61. 955 P.2d 661 (Nev. 1998).

62. *Id.* at 673.

63. *Id*.

64. *Id*.

65. The second *Beattie* factor, that of whether the offer of judgment was reasonable and in good faith in both its timing and amount, has not been extensively discussed in judicial opinions. *See, e.g.*, MRO Communications, Inc. v. Am. Tel. & Tel. Co., 197 F.3d 1276, 1284 (9th Cir. 1999) (finding that affidavits alleging the amount and timing of an offer were sufficient for the district court to consider the second *Beattie* factor, and therefore warranted the conclusion that the fees

ing Co.,[66] in which the Nevada Supreme Court upheld a district court's decision to withhold attorney's fees when the offeree did not recover an amount greater than the offer.[67] The refusal of the offer, the district court held, was reasonable because certain information was withheld that would have made a material difference in the offerees' decision to refuse the offer.[68] Based on the information available at the time that the offer was refused, the Nevada Supreme Court agreed that the offerees did not proceed with the litigation in bad faith.[69]

Beattie's fourth factor (the appropriate amount of attorney's fees) had to be judicially determined in *Schouweiler v. Yancey Co*.[70] The factors the court believed should be contemplated when considering a discretionary award of attorney's fees were:

> (1) the qualities of the advocate: his ability, training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time and skill required, the responsibility imposed and the prominence and character of the parties when they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; and (4) the result: whether the attorney was successful and what benefits were derived.[71]

The amount of the offer itself, the Nevada Supreme Court insisted, was *not* relevant to the reasonable award of attorney's fees.[72]

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sought were reasonable); Dillard Dep't Stores, Inc. v. Beckwith, 989 P.2d 882, 888 (Nev. 1999) (noting the trial court's consideration of the second *Beattie* factor).

66. 710 P.2d 1379 (Nev. 1985).

67. *Id.* at 1382.

68. *Id*.

69. *Id*. Note that in *Better Building Co.*, attorney's fees were withheld because certain essential documents had not been produced. *Id*. The Nevada Supreme Court has refused to extend this doctrine further to encompass reasonableness based on other legal defenses that could potentially be used at trial. *See* LaForge v. State *ex rel.* Univ. and Cmty. Coll. Sys., 997 P.2d 130, 136 (Nev. 2000) ("[Offeror's] failure to bring the issue preclusion defense earlier did not constitute a withholding of information . . . about the federal case from [offeree]. [Offeree] had just as much information about the federal dismissal as did [offeror]. [Offeree's] failure to anticipate [offeror's] defense does not amount to a withholding of information . . . .").

70. 712 P.2d 786 (Nev. 1985).

71. *Id.* at 790 (citations omitted).

72. *Id*. The district court was quoted as saying that "in view of the amount of the offer ($8,500.00), the amount of recovery for attorney's fees will be limited to $5,000.00." *Id*. The Nevada Supreme Court held that this was not an appropriate way to evaluate attorney's fees and remanded the case for consideration of the fees using the appropriate factors. *Id*.

3. *Distinguishing California from Nevada*. Although California and Nevada have ended up, substantively speaking, in the same toothy place, there are procedural and practical differences in how they arrived at those ends. Both rules enunciate similar tests, with a focus on, among other things, the reasonableness of the rejection of the offer[73] and the amount of damages sought and obtained.[74]

Procedurally, on the other hand, California and Nevada began from two different points. California, in the express language of section 1021.1, enunciated factors for courts to consider when determining whether or not to award attorney's fees, and went so far as to include a list of subfactors a court must utilize in making determinations about whether the rejection of an offer was reasonable.[75] Nevada chose to allow state courts to determine what, exactly, was meant by the express language of its offer-of-judgment rule's admonition that only "reasonable" attorney's fees could be recovered.[76] In addition to having distinct procedural approaches, the two states also had distinct practical approaches. Parties in Nevada had to await judicial interpretation, while California parties had to forgo litigation on that point.

C. The Restrictive Extreme: Arizona

Arizona exemplifies the most restrictive approach to the modification of Federal Rule 68 by the imposition of attorney's fees, permitting an award of fees only if the parties agree to such fee shifting at the outset. First, attorney's fees, if contemplated by the parties, must be identified separately as a part of the offer.[77] After an offer has been made, the offeree essentially has three different options. The first op-

73. *See* CAL. CIV. PROC. CODE § 1021.1(c) (West Supp. 2003) (providing characteristics to take into consideration in determining whether a rejection was reasonable); *cf.* Beattie v. Thomas, 668 P.2d 268, 274 (Nev. 1983) (explaining that one of the four factors to be considered in the award of attorney's fees was whether "plaintiff's rejection was grossly unreasonable or in bad faith").

74. *See* CAL. CIV. PROC. CODE § 1021.1(c) (permitting judicial determinations of the applicability of attorney's fees in comparison to the amount of damages sought and obtained); *cf. Beattie*, 668 P.2d at 274 (encouraging courts to consider whether the fees sought were "reasonable and justified in amount").

75. CAL. CIV. PROC. CODE § 1021.1(c).

76. NEV. R. CIV. P. 68(e).

77. ARIZ. R. CIV. P. 68(c)(1).

tion, naturally, is to accept the offer in full.[78] The second option is to permit the offer to lapse. If the offer is permitted to lapse, then and only then may an award of expert witness fees and double costs be permitted as sanctions, if the rejecting party recovers less than the offer.[79] If the offer lapses, however, attorney's fees cannot be imposed. The third option is for the offeree to accept the offer in part. Partial acceptance of the offer occurs when the parties agree as to the monetary award for the causes of action asserted, but disagree as to whether attorney's fees should be awarded, and if awarded, disagree as to the specific amount. In such an instance, the parties may file the offer and acceptance thereof with the court, and apply to the court for a determination of whether or not an award of fees is appropriate, and if so, in what amount.[80]

Although this type of modification is the most restrictive in terms of the award of attorney's fees, it still evinces important shifts from the federal scheme. Even though attorney's fees may only be awarded at the parties' behest (and if even one party refuses to agree to the imposition thereof, courts may not award attorney's fees), double costs and expert fees are still more punitive than the regular costs available under Federal Rule 68.[81] Though the imposition of attorney's fees may be only slightly more widespread in Arizona than under Federal Rule 68, the increased costs serve much the same purpose as the imposition of attorney's fees, even if at a slightly less imposing level.

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78. ARIZ. R. CIV. P. 68(c)(2)–(3). The rule states in pertinent part:

> (2) *Full acceptance of offer; procedure*. If, while such an offer remains effective within the meaning of this Rule, the adverse party serves written notice that the offer is accepted in its entirety, either party may file the offer together with proof of acceptance thereof and a judgment complying with the requirements of Rule 58(a) shall be entered.
>
> (3) *Partial acceptance of offer; procedure*. If, while such an offer remains effective within the meaning of this Rule, the adverse party serves written notice that the portion of the offer stating the monetary award to be made on the causes of action asserted is accepted, either party may file the offer together with proof of acceptance thereof and may apply to the court for a determination whether attorneys' fees should be awarded and, if so, the amount thereof. Following such determination, a judgment shall be entered complying with the requirements of Rule 58(a).

79. ARIZ. R. CIV. P. 68(d).

80. ARIZ. R. CIV. P. 68(c)(3).

81. Indeed, the State Bar Committee of Arizona proposed the amendments that provided for attorney's fees and double costs in order to "make the offer of judgment procedure an even more effective vehicle for the settlement of claims" and "increase the sanctions associated with failure to accept offers of judgment to include reasonable expert witness fees incurred after the offer was made, and post-offer prejudgment interest on unliquidated claims." ARIZ. R. CIV. P. 68 (State Bar Committee Note to the 1992 Amendments).

III. CALIFORNIA AS A MODEL FOR MODIFICATION

In evaluating the standards of offer-of-judgment rules in Alaska, Nevada, California, and Arizona, one must first identify the goals of such legislation, and then determine which, if any, modification best supports those goals. I argue throughout this Note that the twin goals of Federal Rule 68 should be to encourage settlement and discourage frivolous litigation by the imposition of penalties. In this Part, I argue that the toothy California approach best achieves these twin goals.

A. Procedural Advantages

California's approach has several procedural advantages over that of Nevada, although, as I discuss in Part II.B.3, these states have arrived at much the same point. The first advantage is that of clarity. By laying out the factors to be considered by California courts in very explicit terms, California's statutes are subject to less judicial confusion. The second advantage, related to the first, is that California's approach conserves judicial resources. Although Nevada's courts had to distill "reasonableness" into four factors in *Beattie* and then further interpret the *Beattie* factors, California's courts were given the elements of reasonableness at the outset, thus preventing extensive litigation over what, exactly, was reasonable. The third advantage of California's approach is that of timing. Parties know the factors a court will consider in a petition to award attorney's fees at the outset, so they are not subject to the uncertainty that accompanies the wait for judicial interpretation. Because California's approach is procedurally superior to that of Nevada, although the two are substantively quite similar, I evaluate only California's substantive approach in this Part.

B. Incentives for Settlement

For several reasons, California's approach is substantively superior to Alaska's in terms of incentives for settlement. One advantage of the California proposal is that, absent a separate contractual or statutory provision, it does *not* limit recovery of attorney's fees to any fixed percentage.[82] Fixing recovery to a percentage and then plugging

82. The question then becomes what "reasonable" is. Some states have chosen to allow judicial discretion in determining reasonableness. California, for instance, has included a range of factors that are to be used in guiding judicial discretion. *See* CAL. CIV. PROC. CODE § 1021.1 (West Supp. 2003). Other reformers have encouraged the use of a "bright line" test that would

that percentage into a table is overly formalistic and permits too little judicial discretion.

For similar reasons, California's approach is superior to that of Arizona. California does not require the parties in litigation to agree to the imposition of attorney's fees at the outset, which is the only circumstance in which attorney's fees can be awarded under Arizona's offer-of-judgment rule. Arizona's approach seems practically unworkable for this very reason. Parties have no incentive to agree to the imposition of attorney's fees, particularly if the worst that can happen to them otherwise is the imposition of double costs. In this way, Arizona may have undermined the very incentive for settlement it sought to create with the imposition of attorney's fees, and, as a result, may have dramatically lessened the usefulness of its offer-of-judgment rule.

California's approach is therefore preferable, in that it permits judicial discretion when awarding fees, while simultaneously giving California courts a template for determining how to award fees. California also creates true incentives for settlement, in that parties must acknowledge that fees may be imposed, even if the parties themselves do not agree to the imposition.

C. California's Disincentives for Frivolous Suits

California's approach is also superior in terms of creating disincentives for those filing frivolous suits. California's statutes offer a moderate alternative to the bright-line percentages encouraged by the Alaska statute. Though Alaska's approach may be too formulaic to encourage settlement, it may also serve to discourage meritorious litigation, which a more moderate rule would not do.[83] Alaska's rule is

involve the shifting of fees if plaintiff obtains a judgment in excess of 25 percent of a demand, or if defendant does better than his offer by 25 percent. *See* Alonso & Faley, *supra* note 15, at 34–35 (approving of a Florida statute that permits fee shifting if the plaintiff wins a judgment in excess of 25 percent of the offer of judgment).

83. Under section 1021.1 of the California Code of Civil Procedure, parties who plead poverty or who would bear an unfair financial hardship, parties to a Title VII action, or parties to class actions could be found by a judge not to have to pay attorney's fees. *See* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 40 (1995) (noting that the threat of fees "would sometimes chill meritorious litigation by forcing settlements on plaintiffs who could not afford the downside risk of paying defendants' attorneys' fees" and also that "[t]he burden would fall especially hard on civil rights plaintiffs and contingency-fee plaintiffs, many of whom could not pay even their own attorneys"); Carl Tobias, *Reforming Common Sense Legal Reforms*, 30 CONN. L. REV. 537, 555–56 (1998) (opining that fee-shifting amendments to Rule 68 would result in limited access to courts "in cases which are close, complex, difficult or costly to

overinclusive in terms of discouraging litigation, and therefore it is less desirable than California's rule.

Arizona, at the other end of the spectrum, is perhaps underinclusive in its disincentives for frivolous litigation. Too few litigants, whether their suits were meritorious or not, would agree to the imposition of attorney's fees at the outset of an offer of judgment. Because the imposition of attorney's fees under Arizona's rule happens in far too few circumstances, it cannot operate to discourage frivolous litigation as well as California's rule can.

While encouraging settlements through judicial discretion and legislatively suggested standards, California's rule also gives teeth to those desiring more bite in their offer-of-judgment rules. First, those who might not otherwise consider making offers of judgment would be encouraged to do so if discretionary fee shifting was a possibility. These same offerors who are attracted to the rule for its fee-shifting purposes, however, are forced by the other side of the rule to make a reasonable offer of judgment, or face the possibility of fee shifting back on themselves if the other party makes a more reasonable offer of judgment.[84]

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prove, or in which possible plaintiffs have little power or money" and would likely result in proliferation of satellite litigation).

One of the most persistent fears of critics of fee shifting proposals is that the inclusion of attorney's fees in an offer-of-judgment rule would actively discourage meritorious litigation, particularly in the area of civil rights. Solimine & Pacheco, *supra* note 3, at 57–58. The amendment proposed in 1983 concerning fee shifting, for instance, failed in the eyes of many to address this fear adequately:

> Although a prevailing civil rights plaintiff would normally receive attorneys' fees, rule 68's sanctions could cause the fees of expensive defense attorneys to swallow up the plaintiff's entire fee award, and perhaps the judgment as well. Moreover, civil rights plaintiffs who lost would nearly always have to pay the defendant's fees. The 1983 proposal gave courts discretion to reduce the award if the sanctions were unreasonable or excessive, but no lawyer could assure his client that the court would exercise that discretion.

Simon, *supra*, at 12–13 n.55 (quoting letters in support of the 1983 amendment) (citations omitted).

As California has demonstrated, however, it is possible to draft a rule that permits recovery of attorney's fees except when that recovery conflicts with federal statutory law. California's section 1021.1, which states that "[n]othing in this section shall be construed to repeal or modify any other statutory provision for the award of attorney's fees or to diminish any express or implied contractual right which a party to a civil action may otherwise have to obtain an award of attorney's fees for the prosecution or defense of an action," should adequately address critics' concerns over draconian fee shifting. CAL. CIV. PROC. CODE § 1021.1. Including such language would assure critics that judges would have in the language of the rule itself a specific admonition to consider whether a civil rights action was implicated.

84. One element of the toothy nature of the California rule is that it permits plaintiffs to make offers of judgment as well, which would theoretically permit this back-shifting of fees on

CONCLUSION

Federal Rule 68 was adopted as a good-faith attempt at encouraging settlement in federal courts in the United States, arguably one of the most litigious societies in the world.[85] Though the federal rule has been demonstrated to be insufficiently toothy to achieve that end, all proposed amendments to the rule have been rejected. By considering the provisions of various state rules governing offers of judgment, it may be possible to craft a federal offer rule that will encourage settlement and discourage frivolous litigation.

California's approach is the most appealing state model for several reasons. It meets the dual purposes of an offer-of-judgment rule, and it answers critics' concerns about possible chilling effects on meritorious litigation. For these reasons, an amendment to Federal Rule 68 that is modeled on California's rule would give a once gummy rule some desperately needed teeth.

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those who attempt to make lowball offers in order to trigger the fee-shifting statute. Although including plaintiffs in an offer-of-judgment rule without further modification of Federal Rule 68 would have little, if any, effect, the inclusion of plaintiffs in a modified rule like California's creates an entirely new opportunity to encourage settlement by threatening fee shifting. In addition, I would argue that an advantage of the inclusion of plaintiffs in any rule permitting some recovery of attorney's fees is that both parties can consequently engage in more detailed settlements. When a plaintiff does have the ability to make either a reasonable first offer or a counteroffer, both parties may be able to work more effectively toward settlement by rejecting offers that seem unreasonable and making offers that the party deems more reasonable in their places. Though it is possible that formal offers cause parties to harden their positions, and therefore make them more intractable, permitting this kind of formal settlement negotiation *combined with* the possibility for the imposition of attorney's fees would make even the hardest bargainers consider their positions more carefully. As one commentator from Connecticut noted, the rule essentially permits plaintiffs to "put a settlement offer on the table early in the litigation to facilitate an early end to the case." Gary S. Klein, *Plaintiffs' Offers of Judgment*, 6 CONN. LAW. 20, 20 (1996). By permitting plaintiffs to make offers of judgment, the burden on defendants to make a reasonable offer to plaintiffs is shifted equally onto both parties. This shifting would only be fitting, however, if the rule as it currently stands were modified for some inclusion of attorney's fees.

The California rule appeals for practical reasons as well. Presently, there is insufficient empirical data regarding the effectiveness of the current federal rule or its state analogs. California has proposed a study period, the results of which will be evaluated in 2005. Any change to the federal rule, too, should be accompanied by a study period for the purpose of better understanding the effects of the change upon offers of judgment.

85. *See* JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY 4–5 (1981) (providing examples to illustrate the litigious nature of the United States).