ONE-WAY FEE SHIFTING STATUTES AND OFFER OF JUDGMENT RULES: AN EXPERIMENT

Thomas D. Rowe, Jr. and David A. Anderson*

ABSTRACT: Many federal statutes, most notably the Civil Rights Attorneys' Fees Awards Act ("§ 1988"), make defendants liable for the attorneys' fees of prevailing plaintiffs. Federal Rule of Civil Procedure 68 makes plaintiffs who reject a formal defense offer of judgment and fail to improve on it at trial liable for defendants' post-offer "costs." Although "costs" ordinarily do not include attorneys' fees, several federal fee award statutes refer to the fees as part of costs, suggesting that plaintiffs cannot recover their own post-offer fees and can become liable for post-offer defense attorneys' fees. This article identifies three alternative interpretations of the interplay of § 1988 and Rule 68 and provides data on the effects of these interpretations on settlements. The study finds that how Rule 68 is interpreted to affect § 1988 attorney fee entitlements and liabilities can have a significant effect on settlement bargaining. If the objective is to maximize out-of-court settlements, the most effective rule would have a rejected but unbettered Rule 68 offer reverse a plaintiff's § 1988 attorney fee entitlement, making the plaintiff liable for post-offer defense attorney's fees.

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The Civil Rights Attorneys' Fees Awards Act ("§ 1988")[1] allows a federal court to award attorneys' fees to a prevailing party who brought suit to enforce various civil rights statutes.[2] If a claim is deemed frivolous or vexatious,[3] § 1988 also allows a prevailing defendant to receive an award of attorneys' fees. This provision may have helped increase the number of civil rights cases commenced annually in U.S. district courts, which grew by 125% between 1975 and 1992, outpacing the 93% increase in the total number of civil cases over the same period.[4]

Federal Rule of Civil Procedure 68, on the other hand, seeks to reduce the volume of litigation by encouraging reasonable and timely out-of-court settlements. Rule 68 allows a party defending against a claim to formalize an offer to settle out of court. A plaintiff who refuses the offer and does not improve on it at trial must pay the defendant's post-offer legal costs. The Supreme Court in *Marek v. Chesny*[5] interpreted "costs" in Rule 68 to include attorneys' fees awardable under § 1988.[6] However, *Marek* did not fully determine whether Rule 68 or § 1988 should dominate when both apply, and, as shown in Table 1, three interpretations are possible.[7]

Experience suggests that § 1988 promotes litigation and that the cost-shifting Rule 68 does little to encourage settlement. The potential effectiveness of a *fee*-shifting Rule 68 in tort cases has been questioned,[8] although its influence in civil rights cases has been unclear.[9] To examine the effects of a

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1. 42 U.S.C. § 1988 (1994). In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Supreme Court held that specific authorization from Congress was usually necessary before courts could order a losing defendant to pay attorneys' fees.

2. These are four Civil War-era statutes; Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000(d) (1994); and Title IX of the 1972 Education Act, 20 U.S.C. § 1681 (1994).

3. *See* Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

4. *See* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1987 169 (1987); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1993 206 (1993). For a discussion of the increase in civil rights cases after the adoption of § 1988, see Robert A. Diamond, *The Firestorm over Attorney Fee Awards*, 69 A.B.A. J. 1420 (1983).

5. 473 U.S. 1 (1985).

6. Legal costs are generally not considered to include attorneys' fees.

7. In Crossman v. Marcoccio, 806 F.2d 329 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987), the court of appeals refused to hold a prevailing plaintiff who failed to improve on a rejected Rule 68 offer liable for post-offer defense fees. This result rejects what we call "Rule Z."

8. *See, e.g.*, David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225 (1994); David A. Anderson & Thomas D. Rowe, Jr., *Empirical Research on Settlement Devices: Does Rule 68 Encourage Settlement?* 71 CHI.-KENT L. REV. (forthcoming 1996); Tai-Yeong Chung, *Settlement of Litigation under Rule 68: An Economic Analysis*, 25 J. LEGAL STUD. 261 (1996); Dale A. Oesterle, *Proposed Rule 68 on Offers of Settlement*, CORNELL L. F., Feb. 1984, at 11; Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 L. & CONTEMP. PROBS. 139 (Winter 1984); Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986).

9. Thomas D. Rowe, Jr. & Neil Vidmar, *Empirical Research on Offers of Settlement: A Preliminary Report*, 51 L. & CONTEMP. PROBS.13 (Autumn 1988) ("highly tentative" results).

fee-shifting Rule 68 in the civil rights context,[10] this study had lawyers complete a computerized litigation simulation. To provide information that can be used to achieve the best reconciliation of § 1988 and Rule 68, this article examines the shift in bargaining power and the associated effects on settlement that occur when Rule 68 is given varying degrees of dominance over § 1988 fee awards.

Table 1
SUMMARY OF LEGAL RULES

American Rule. The loser (defined as the defendant in the case of any verdict in favor of the plaintiff, and the plaintiff otherwise) pays costs for both parties. Each side pays its own attorneys' fees regardless of the outcome.

Section 1988. Under the federal Civil Rights Attorney's Fees Awards Act, a prevailing civil rights plaintiff ordinarily is entitled to an award for reasonable attorneys' fees. Defendants usually cannot recover attorneys' fees under this section.

Rule 68. Rule 68 of the Federal Rules of Civil Procedure provides that if a plaintiff rejects a defendant's Rule 68 offer and does not win more than that offer at trial, the plaintiff is liable for the defendant's reasonable post-offer "costs." If the verdict exceeds the rejected Rule 68 offer, the plaintiff is not liable for any of defendant's "costs." Plaintiffs cannot make offers under Rule 68, although they may of course make demands in settlement bargaining that have no effect on formal entitlements to cost or attorney fee awards.

Rule X. A plaintiff's failure to improve at trial on a rejected Rule 68 offer leaves the plaintiff's § 1988 entitlement to post-offer attorneys' fees unaffected. That is, "costs" under Rule 68 exclude attorneys' fees. Thus a plaintiff who rejects the defendant's Rule 68 offer and wins anything at trial is entitled to post-offer attorneys' fees under § 1988, and there is no threat of paying the defendant's post-offer fees regardless of the amount won at trial.

Rule Y. A plaintiff's failure to win a jury award that exceeds a rejected Rule 68 offer cancels, but does not reverse, a prevailing civil rights plaintiff's § 1988 entitlement to post-offer attorneys' fees.

Rule Z. A plaintiff's failure to win a jury award that exceeds a rejected Rule 68 offer reverses a prevailing civil rights plaintiff's entitlement to post-offer attorneys' fees under § 1988, making the plaintiff liable for post-offer defense fees.

10. A one-sided Rule 68 favors defendants. *See* Anderson, *supra* note 8, at 231-36; Miller, *supra* note 8, at 117-18. Section 1988 favors plaintiffs.

Section I presents hypothesized settlement offers under alternative rules based on a theoretical bargaining model. Section II explains the empirical research instrument. Section III describes the empirical findings, and Section IV concludes that the rule under which the plaintiff must pay the defendants' post-offer fees if the plaintiff does not improve on the settlement offer at trial will maximize the number of out-of-court settlements.

I. THEORETICAL FRAMEWORK

We use E to represent the verdict that the defendant expects if the case goes to trial, Q is the defendant's cumulative density function for the expected verdicts, F_d and F_p are the defendant's and plaintiff's respective expected future attorneys' fees, C_d and C_p are their respective future court costs, and O_d is the offer made by the defendant. The threat point for a defendant or plaintiff is respectively the highest or lowest offer that the party cannot improve on without the cooperation of the adverse party, represented by T_d and T_p. In the model considered below, the threat points are equivalent to the parties' net expected trial outcomes. The settlement range consists of the set of Pareto-optimal settlement values between the two parties' threat points. To simplify the analysis, this article assumes that the defendant is risk neutral, that both parties expect a non-zero verdict, and that the two parties have equal bargaining power.

The potential for overlap between § 1988 and Rule 68 occurs when a federal civil rights plaintiff rejects a Rule 68 offer and fails to improve on it at trial. There are three primary ways for the two rules to mesh in that event. The first ("Rule X") says that the coincidence in wording does not bring § 1988 fees within Rule 68 "costs," and a prevailing plaintiff ordinarily is entitled to all reasonable fees without regard to the defendant's offer. The second possibility ("Rule Y") is that the plaintiff cannot recover post-offer fees under § 1988, nor can the defendant collect post-offer fees under Rule 68. In other words, each side would pay its own attorneys' fees. The third approach ("Rule Z") prevents the plaintiff from recovering post-offer fees under § 1988, but makes the plaintiff liable for the defendant's post-offer fees under Rule 68. In effect, the plaintiff would pay post-offer fees for both sides. Figures 1 and 2 summarize these rules.

Figure 1

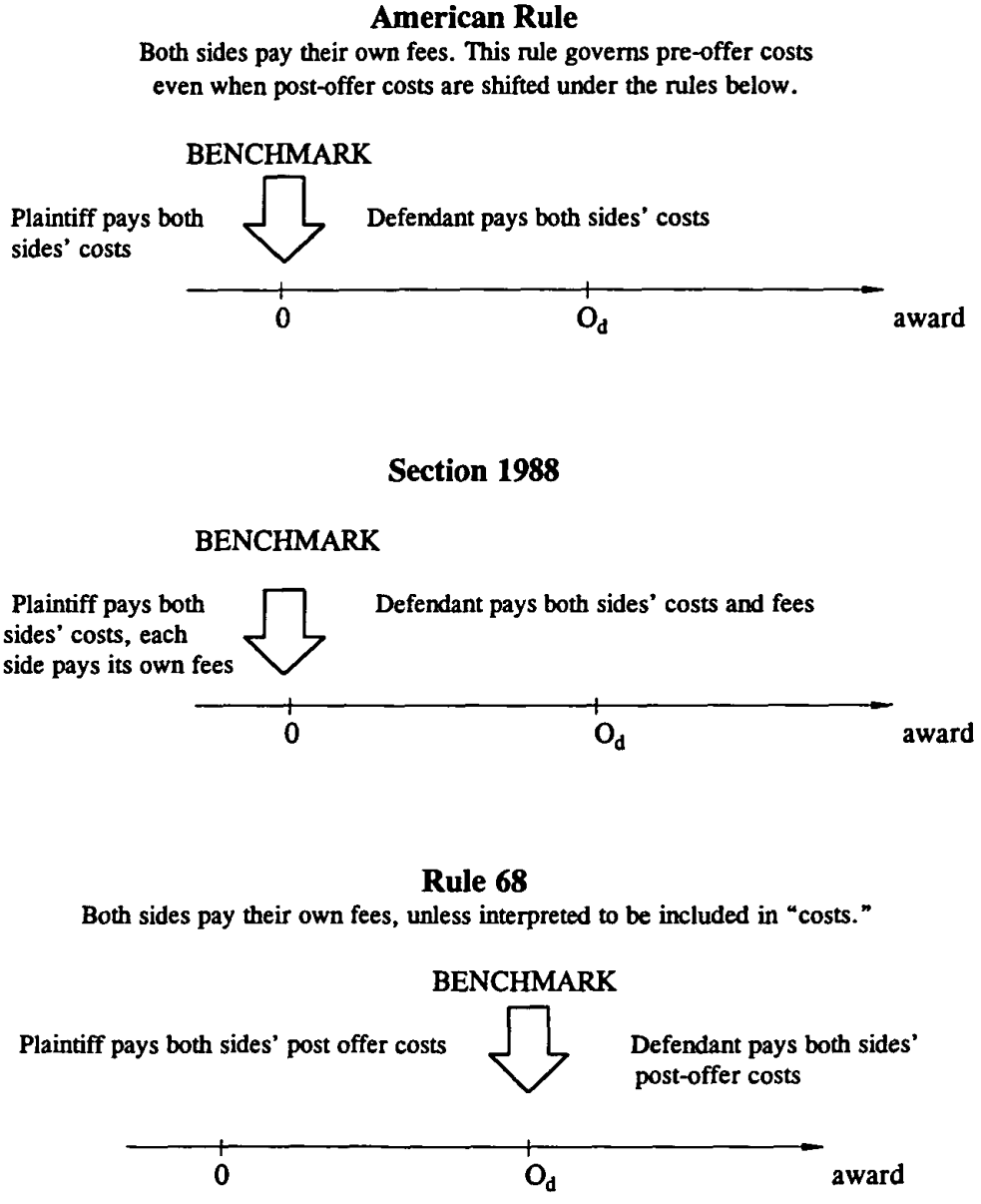
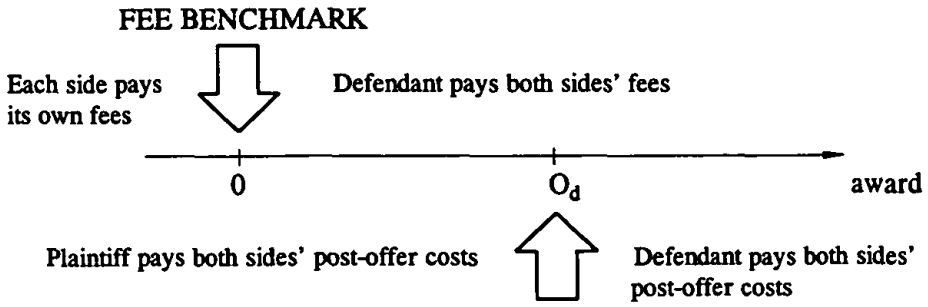
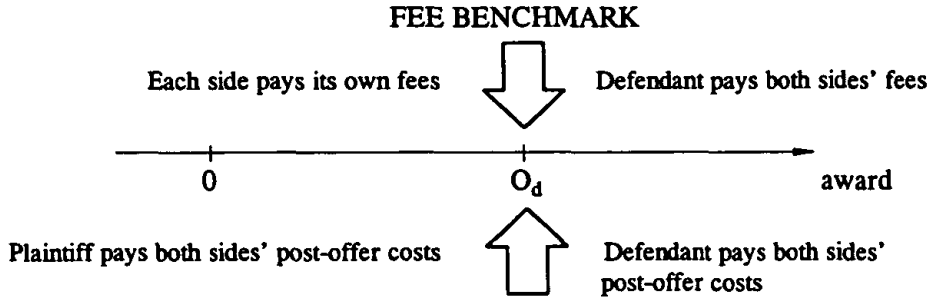

American Rule
Both sides pay their own fees. This rule governs pre-offer costs even when post-offer costs are shifted under the rules below.
BENCHMARK
Plaintiff pays both sides' costs
Defendant pays both sides' costs
0
O_d
award
Section 1988
BENCHMARK
Plaintiff pays both sides' costs, each side pays its own fees
Defendant pays both sides' costs and fees
0
O_d
award
Rule 68
Both sides pay their own fees, unless interpreted to be included in "costs."
BENCHMARK
Plaintiff pays both sides' post offer costs
Defendant pays both sides' post-offer costs
0
O_d
award

Figure 2*

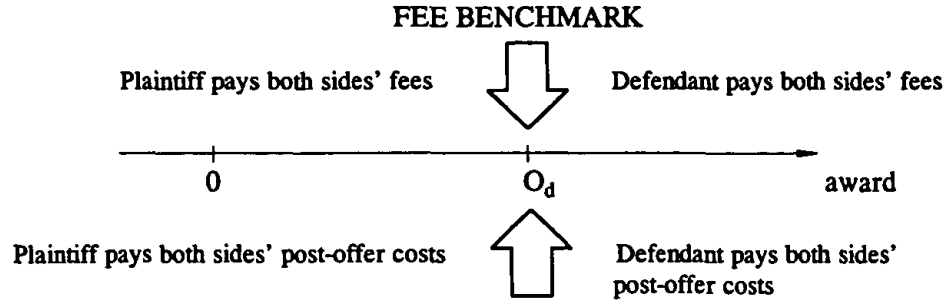
Rule X



Rule Y



Rule Z



*Fees refer to attorney's fees. Pre-offer fees are paid by the defendant if there is a non-zero award, and by each side if there is a zero award to post-offer.

A. No Rule 68

In the absence of Rule 68, a plaintiff can proceed to trial with costs and fees paid by the defendant. The threat point is the expected verdict, E. Assuming a non-zero verdict, the defendant is liable for the plaintiff's fees under § 1988 and the plaintiff's costs under the "American rule." The defendant's threat point is the expected verdict plus costs and fees for both sides,

$$E+F_d+F_p+C_d+C_p.$$

The evenly-matched defendant will make an offer midway between the two threat points:

$$O_d=E+\frac{1}{2}(F_d+F_p+C_d+C_p).$$

For example, if the defendant's expected verdict is $26,000 and each party's costs and fees are $500 and $8,000, respectively, then the defendant's offer would be $34,500. If the two sides expect the same verdict and have equal bargaining power, the defendant's maximum offer and the plaintiff's minimum demand will be identical. This is true under each of the rules considered, i.e., a particular rule's effect on the defendant's maximum offer will be equal to that rule's predicted effect on the plaintiff's minimum demand.

B. Rule X

If Rule 68 applies but "costs" do not include attorneys' fees, threat points for each side decrease by the probability that the verdict will be less than the defendant's offer times the sum of the two parties' costs (which will be shifted from the defendant to the plaintiff if the verdict is less than the offer). The threat points are thus

$$T_p=E-Q(O_d)\cdot(C_d+C_p)$$

and

$$T_d=E+F_d+F_p+[1-Q(O_d)](C_d+C_p),$$

and the defendant's offer is

$$O_d=E+\frac{1}{2}(F_d+F_p+C_d+C_p)-Q(O_d)\cdot(C_d+C_p).$$

Following the numerical example above, and assuming that the cumulative density function is $Q(O_d)=O_d/52{,}000$, the defendant would offer $33,849, about 2% less than the no-Rule-68 offer.

C. Rule Y

If Rule 68 negates § 1988 payments of post-offer fees by the defendant, the parties' threat points decrease relative to the no-Rule-68 positions by the probability that the verdict will be less than the defendant's offer times the sum of the two parties' costs plus the plaintiff's fees. The threat points are thus

$$T_p = E - Q(O_d) \cdot (C_d + C_p + F_p)$$

and

$$T_d = E + F_d + [1 - Q(O_d)](C_d + C_p + F_p),$$

and the defendant's offer is

$$O_d = E + \frac{1}{2}(F_d + F_p + C_d + C_p) - Q(O_d) \cdot (C_d + C_p + F_p).$$

The numerical example above would result in an offer of $29,410, about 15% less than the no-Rule-68 offer.

D. Rule Z

Finally, if Rule 68 dominates, i.e., if a plaintiff who rejects and fails to improve on a defense offer pays all post-offer defense fees, both sides' threat points decrease relative to their "no rule" positions by the probability that the verdict will be less than the defendant's offer times the sum of both parties' costs and fees. The threat points are thus

$$T_p = E - Q(O_d) \cdot (C_d + C_p + F_d + F_p)$$

and

$$T_d = E + [1 - Q(O_d)](C_d + C_p + F_d + F_p)$$

and the defendant's offer is

$$O_d = E + \frac{1}{2}(F_d + F_p + C_d + C_p) - Q(O_d) \cdot (C_d + C_p + F_d + F_p).$$

For the numerical example above, defendant would offer $26,000, about 25% less than the no-Rule-68 offer.

For Rule 68 fee-shifting to be desirable, the plaintiff must not only accept a lower settlement due to the Rule's influence, but also a rational defendant must realize the advantage that a strengthened Rule 68 entails and adjust expectations accordingly. Hence, the important empirical question is this: As the expected outcome and the associated threat points shift in favor of the defendant, does the minimum offer the plaintiff will accept (the

"minimum demand") decrease more or less than the maximum offer the defendant is willing to make (the "maximum offer")? If the two sides view their relative bargaining positions or the likely jury award differently, then they may not reach a settlement despite a decrease in the plaintiff's minimum demand that exceeds the decrease in the defendant's maximum offer. For Rule 68 to encourage settlement, the decrease in the plaintiff's minimum demand must be sufficiently greater than the decrease in the defendant's maximum offer to overcome the gap between the two values that prevent settlement in the absence of Rule 68. The empirical work discussed below measures the impact of fee-shifting under Rule 68 on the minimum demand and maximum offer levels.

II. RESEARCH DESIGN

The survey instrument was an interactive, computerized litigation simulation completed by practicing lawyers.[11] The lawyers were randomly selected members of the American Inns of Court Foundation.[12] While responses were anonymous, the computer program collected experience and demographic information on respondents so that statistical analysis could account for these variables. The program asked respondents to report their typical clientele (plaintiffs, defendants, or no emphasis), year of first bar admission (to determine years of experience), office zip code (to determine geographical location), type of computer monitor (color or monochrome), time spent on the survey, and experience in tort and civil rights litigation.

Participation was voluntary, and the response rate was 8.5%,[13] yielding responses from 170 attorneys from all regions of the country. Respondents had an average of 13 years of practice experience. Half had experience with civil rights cases, and 89% had experience in tort litigation. In practice, 29% typically represented plaintiffs, 42% typically represented defendants, and 29% represented both.

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11. The simulation is available from the authors on computer diskette or in printed form.

12. We are grateful to the Foundation for its cooperation in providing endorsement of our research and mailing lists, and to the members who completed the computer simulation and returned diskettes. The Foundation is a national law organization with approximately 10,000 practitioner, judge, and law student members. It includes among its objectives the promotion of civility in litigation. That emphasis could introduce some bias in our sample, but much of the focus of our research is on the extent of differences between behavior under varying forms of offer rules, which should not be affected by this factor. We sent our survey materials to practitioner members of selected Inns, chosen for geographical and city-size dispersion.

13. This response rate, of course, raises questions about self-selection effects in the sample. We cannot rule out some biases of unknown direction and magnitude; with the survey instrument sent out on a diskette and respondents asked to run the program and mail back the diskette, our sample is presumably more computer-literate than the lawyer population as a whole. Still, we have no reason to think that this would bias the results, and the self-reported characteristics were broadly representative of the lawyer population at large.

The program randomly assigned each respondent to either a plaintiff's or a defendant's track. Both tracks presented the same factual information, but called on respondents to play the role of either defendant's or plaintiff's counsel and to recommend offer or demand levels, acceptance or rejection of the adversary's offers, etc. This channeling of respondents, and the ability to identify experienced plaintiffs' and defendants' counsel on each track, permits measurement of what verdicts each side expects based on identical facts. In addition, it allows an assessment of the presence or absence of settlement-damaging optimism about likely results. The out-of-specialty assignment of some counsel allows determination of whether certain tendencies grow out of habitual representation of plaintiffs or defendants.

The civil rights scenario involved a mistaken-address drug bust. A couple was arrested for allegedly excessive resistance, booked, jailed for five hours, and lived under criminal charges until they were dismissed, and their landlord refused to renew their lease. In addition to relating these facts, the program provided information about claims and verdicts in 15 similar cases, which were based on actual jury verdict reports. After reading the scenario of the hypothetical case and the jury verdict information, respondents were asked for their best estimate of the likely jury award.

To determine the influence of the three interpretations of Rule 68, the program first asked subjects for the lowest offer or highest demand that they would advise their client to accept in pretrial settlement bargaining in the absence of Rule 68. The program then described the three alternative rules and asked for the respondent's recommendation under each rule. The defense lawyers were asked to indicate a particular offer that constituted their bottom line. Plaintiffs' lawyers were asked whether they would advise accepting or rejecting Rule 68 offers from their adversary that were either $2,000 above, equal to, or $2,000, $4,000, $6,000, $8,000, and (except for Rule X) $10,000 below their no-Rule-68 minimum demand. If $2,000 was too little above their no-Rule-68 minimum demand, or $10,000 ($8,000 for Rule X) too little below, they were asked to specify their minimum demand. This process imitates the real-world litigation-bargaining game where only defendants can indicate Rule 68 offers and plaintiffs must respond. The program randomized the order in which the three alternative rules were presented, and the order of offers (ascending or descending) to plaintiffs.

Asking each subject to operate under alternative rules is more realistic than asking one group to consider only § 1988 and other groups to consider only particular hybrid rules. In the real world, lawyers are forced to operate under several rules in succession, as case types, venues, and the applicable rules change. If a new standard for interpreting the interaction between Rule 68 and § 1988 develops, then they will have to make a similar cognitive shift to work under the new rule, as they shift from tort to civil rights cases, for example. Thus, within-subject comparisons are more appropriate in this study

than in studies where only one value for a particular variable will affect an agent in the real world (e.g., the effect of heredity on the intelligence of an individual).

Table 2 defines the variables studied, and Table 3 presents their means and standard deviations. The independent variables include the year of each respondent's first bar admission, the region of the country in which the respondent practices or studies (indicated by office zip code), and whether the respondent has previous tort or civil rights litigation experience. Practice experience is measured as the number of years since first bar admission (EXPERIENCE). Regional differences are coded using dummy variables for practice in the West, South, North, or East (contained in the vector REGION). Dummy variables also indicate respondents to whom the survey was mailed (PRIMARY),[14] lawyers with previous tort experience (CLIENTS), lawyers to whom offers were made in descending valuations (DESCENDING), lawyers with color monitors (HIGHTECH), and the rule in operation when the response was entered (RULEX, RULEY, RULEZ). The dependent variable is the natural log of the minimum (maximum) amount accepted by plaintiffs' (defendants') lawyers,[15] given the interpretation of § 1988 and Rule 68. Estimation of pertinent coefficients in equations (1) and (2) below measures the relative effect of the rules:

$$\text{LN MIN. DEMAND} = \gamma_0 + \gamma_1\text{EXPERIENCE} + \gamma_2\text{CIVIL RIGHTS} + \gamma_3\text{TORT} + \gamma_4\text{REGION} + \gamma_5\text{HIGHTECH} + \gamma_6\text{CLIENTS} + \gamma_7\text{MINUTES} + \gamma_8\text{PRIMARY} + \gamma_9\text{RULEX} + \gamma_{10}\text{RULEY} + \gamma_{11}\text{RULEZ} + \epsilon \quad (1)$$

and

$$\text{LN MAX. OFFER} = \delta_0 + \delta_1\text{EXPERIENCE} + \delta_2\text{CIVIL RIGHTS} + \delta_3\text{TORT} + \delta_4\text{REGION} + \delta_5\text{HIGHTECH} + \delta_6\text{CLIENTS} + \delta_7\text{MINUTES} + \delta_8\text{PRIMARY} + \delta_9\text{ADVISE} + \delta_{10}\text{RULEX} + \delta_{11}\text{RULEY} + \delta_{12}\text{RULEZ} + \epsilon \quad (2)$$

14. We invited respondents to pass the program along to other lawyers in their office after completion. The PRIMARY variable was created to distinguish secondary respondents who received the program from a colleague from primary respondents to whom the program was mailed. Eighty-two percent of respondents were primary respondents.

15. The use of a semilog specification yields coefficient estimates that can be interpreted as the proportional change in offers resulting from a unit change in the corresponding independent variable. It also allows for nonlinearities in the relationships between offers and independent variables.

Table 2
Variables

YEARS OF EXPERIENCE	The number of years since the lawyer first passed the bar exam.
MINUTES SPENT ON PROGRAM	The number of minutes that the lawyer devoted to completing the simulation
CIVIL RIGHTS EXPERIENCE	1 if lawyer has civil rights litigation experience, 0 if not.
TORT EXPERIENCE	1 if lawyer has tort experience, 0 if not.
PLAINTIFF CLIENTS	1 if lawyer has mostly plaintiffs as clients
DEFENDANT CLIENTS	1 if lawyer has mostly defendants as clients
EAST	1 if respondent lives in eastern U.S., 0 if not.
WEST	1 if respondent lives in western U.S., 0 if not.
NORTH	1 if respondent lives in northern U.S., 0 if not.
SOUTH	1 if respondent lives in southern U.S., 0 if not.
PRIMARY RESPONDENT	1 if lawyer was a randomly selected respondent, 0 if not.
PLNTS.' EXPECTED VERDICT	Expected verdict for plaintiffs' lawyers.
NO RULE MINIMUM DEMAND	Min. acceptable offer to the plaintiff under no offer rule (in $1000's).
RULE X MINIMUM DEMAND	Min. acceptable offer to the plaintiff under Rule X (in $1000's).
RULE Y MINIMUM DEMAND	Min. acceptable offer to the plaintiff under Rule Y (in $1000's).
RULE Z MINIMUM DEMAND	Min. acceptable offer to the plaintiff under Rule Z (in $1000's).
X OFFERS ASCENDING	1 if Rule X offers to the plnt.'s side were in ascending order, 0 if not.
Y OFFERS ASCENDING	1 if Rule Y offers to the plnt.'s side were in ascending order, 0 if not.
Z OFFERS ASCENDING	1 if Rule Z offers to the plnt.'s side were in ascending order, 0 if not.
COUNTER X	1 if plnt.'s lawyer would counter Rule X offer, 0 if not.
COUNTER Y	1 if plnt.'s lawyer would counter Rule Y offer, 0 if not.
COUNTER Z	1 if plnt.'s lawyer would counter Rule Z offer, 0 if not.
X COUNTER AMOUNT	Amount the plnt.'s lawyer would demand to counter Rule X offer.
Y COUNTER AMOUNT	Amount the plnt.'s lawyer would demand to counter Rule Y offer.
Z COUNTER AMOUNT	Amount the plnt.'s lawyer would demand to counter Rule Z offer.
DEFS.' EXPECTED VERDICT	Expected verdict for defendants' lawyers.
NO RULE MAXIMUM OFFER	Max. acceptable demand from the defendant under no offer rule (in $1000's).
RULE X MAXIMUM OFFER	Min. acceptable offer to the plaintiff under Rule X (in $1000's).
RULE Y MAXIMUM OFFER	Min. acceptable offer to the plaintiff under Rule Y (in $1000's).
RULE Z MAXIMUM OFFER	Min. acceptable offer to the plaintiff under Rule Z (in $1000's).
ADVISE X	1 if defs.' lawyer would advise an offer under Rule X, 0 if not.
ADVISE Y	1 if defs.' lawyer would advise an offer under Rule Y, 0 if not.
ADVISE Z	1 if defs.' lawyer would advise an offer under Rule Z, 0 if not.
COLOR MONITOR	1 if lawyer had a color computer monitor, 0 if not.

Table 3
Sample Means and Standard Deviations (N=170)

Variable	Mean	Standard Deviation
YEARS OF EXPERIENCE	12.90	8.73
MINUTES SPENT ON PROGRAM	20.26	19.29
CIVIL RIGHTS EXPERIENCE	0.50	0.50
TORT EXPERIENCE	0.89	0.32
MOSTLY PLAINTIFF CLIENTS	0.29	0.46
MOSTLY DEFENDANT CLIENTS	0.42	0.49
EAST	0.26	0.44
WEST	0.30	0.46
NORTH	0.16	0.37
SOUTH	0.28	0.45
PRIMARY RESPONDENT	0.82	0.39
PLNTS.' EXPECTED VERDICT	32982.07	21649.29
NO RULE MINIMUM DEMAND	24954.95	18502.65
RULE X MINIMUM DEMAND	22977.48	16831.03
RULE Y MINIMUM DEMAND	22292.79	16871.50
RULE Z MINIMUM DEMAND	20909.91	16612.32
X OFFERS ASCENDING	0.86	0.35
Y OFFERS ASCENDING	0.57	0.50
Z OFFERS ASCENDING	0.47	0.50
COUNTER X	0.85	0.36
COUNTER Y	0.80	0.40
COUNTER Z	0.87	0.33
X COUNTER AMOUNT	34388.73	22870.17
Y COUNTER AMOUNT	35077.48	24431.01
Z COUNTER AMOUNT	32931.08	23991.67
DEFS.' EXPECTED VERDICT	25991.53	14961.01
NO RULE MAXIMUM OFFER	22059.32	17161.27
RULE X MAXIMUM OFFER	18237.34	13128.76
RULE Y MAXIMUM OFFER	18542.39	13398.48
RULE Z MAXIMUM OFFER	19127.17	12139.11
ADVISE X	0.59	0.50
ADVISE Y	0.81	0.39
ADVISE Z	0.92	0.28
HIGHTECH	0.76	0.43

III. EMPIRICAL FINDINGS

The regression results from equations (1) and (2) are reported in Tables 4 and 5.[16] Lawyers with tort experience held out for superior positions relative to those with no tort experience. In contrast, lawyers with civil rights experience made relatively inferior offers and demands. Time spent on the survey had an insignificant negative effect on both sides. Also statistically insignificant were the results that lawyers who represented both defendants and plaintiffs in real life offered or demanded less than those who specialized in representing one side or the other, and lawyers representing the side of their specialty offered or demanded less than those acting out of role.

Table 4
Estimates of Log Minimum Demand Equation
(R^2 = 0.17, F = 6.04)

Variable	Coefficient	t - ratio
CONSTANT	10.08**	54.22
YEARS OF EXPERIENCE	-.0010	-0.16
CIVIL RIGHTS EXPERIENCE	-0.34**	-4.41
TORT EXPERIENCE	0.57**	4.99
NORTH	-0.26**	-2.37
EAST	-0.25**	-2.15
WEST	-0.16**	-1.65
HIGHTECH	-0.24**	-2.22
MOSTLY DEFENDANT CLIENTS	0.044	0.45
MOSTLY PLAINTIFF CLIENTS	0.021	0.18
MINUTES SPENT ON PROGRAM	-0.0010	-0.44
PRIMARY RESPONDENT	-0.24**	-2.71
RULE X	-0.12	-1.19
RULE Y	-0.14*	-1.43
RULE Z	-0.31**	-3.03

*Significant at the .10 level.
**Significant at the .05 level.

16. A Park test for heteroscedasticity suggested that the variance of the residuals might be proportional to the EXPERIENCE variable. We used a generalized least squares procedure to correct for this possibility under the assumption that $Var(\epsilon) = \sigma^2 \cdot EXPERIENCE$. Our general results regarding the effects of the three alternative rules are robust across regressions that assume $Var(\epsilon) = \sigma^2 \cdot EXPERIENCE^2$ and $Var(\epsilon) = \sigma^2/EXPERIENCE$, as well as ordinary least squares regressions. Pearson correlation coefficients between each pair of experience variables (civil rights experience, tort experience, and practice experience) were 0.21 or below, indicating that multicollinearity of these variables is not a problem.

Table 5
Estimates of Log Maximum Offer Equation
(R^2 = 0.13, F = 2.16)

Variable	Coefficient	t - ratio
CONSTANT	9.25**	32.55
YEARS OF EXPERIENCE	0.025**	2.83
CIVIL RIGHTS EXPERIENCE	0.13	1.09
TORT EXPERIENCE	-0.35**	-2.19
NORTH	0.15	0.89
EAST	-0.038	-0.22
WEST	0.15	1.01
HIGH TECHNOLOGY	0.16*	1.37
MOSTLY DEFENDANT CLIENTS	0.13	0.81
MOSTLY PLAINTIFF CLIENTS	0.17	1.21
MINUTES SPENT ON PROGRAM	-0.0012	-0.23
PRIMARY RESPONDENT	0.046	0.33
ADVISE	0.12	0.90
RULE X MAXIMUM OFFER	-0.25**	-1.82
RULE Y MAXIMUM OFFER	-0.18*	-1.34
RULE Z MAXIMUM OFFER	-0.094	-0.71

*Significant at the .10 level.
**Significant at the .05 level.

Defendants' lawyers from the North and West were willing to pay the highest settlements, and those from the East were willing to pay only the lowest. Plaintiffs' lawyers in the North demanded the lowest settlement values, and those in the South demanded the highest. The dummy variable indicating whether the respondent completed the simulation on a computer with a color monitor had a significant negative coefficient for plaintiffs' lawyers, possibly acting as a proxy for technical sophistication or comfort with computers.[17] Just as lawyers with more years of experience and experience in civil rights cases were willing to settle at relatively inferior maximum offer and minimum demand levels, lawyers with experience using advanced computers were similarly more amenable to such moderated settlements.

As hypothesized,[18] plaintiffs' bottom lines under Rules X, Y, and Z were lower than those in the absence of Rule 68. The regression analysis indicated that relative to levels under § 1988 with no Rule 68, minimum demand levels decreased 12% under Rule X, 14% under Rule Y, and 31% under Rule Z. The decrease under Rule X was larger than the 2% decrease predicted from

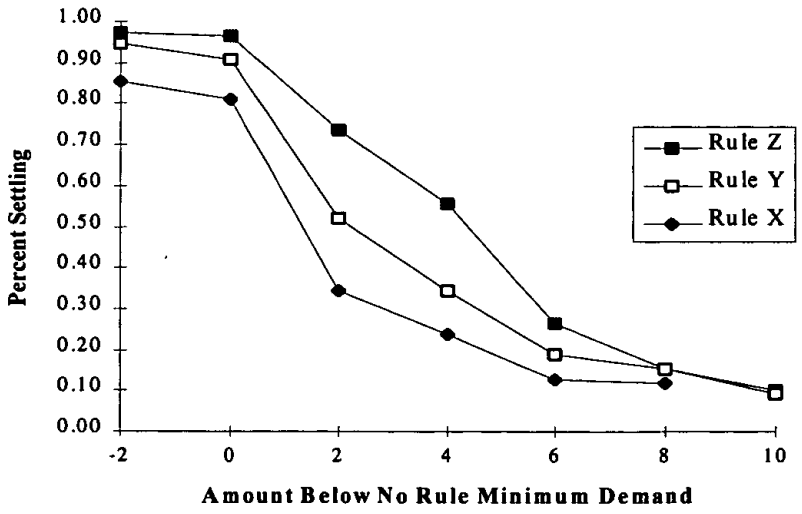
17. Although the program displayed text in color, this merely meant that the backgrounds were blue rather than the green or orange of a monochrome monitor.

18. *See supra* Part I.

a uniform density function for expected verdicts, although the decreases under Rules Y and Z were close to the predicted 15% and 25% changes. The simple averages of bottom lines under Rules X, Y, and Z were also lower than in the absence of Rule 68 for both sides. As the plaintiff's penalty for rejecting a Rule 68 offer increased, the minimum demand levels decreased under Rule Y relative to Rule X and under Rule Z relative to Rule Y. Figure 3 graphs the percentage of plaintiffs' lawyers willing to settle for various amounts below the no-Rule-68 minimum demand under each of the three rules.

This decrease in minimum demand levels as the two parties' threat points decreased was expected to mirror a decrease in maximum bid levels. However, as the defendants' position improved based on the result of a rejected Rule 68 offer that exceeded the verdict, the offers recommended by defense lawyers increased, rising from 25% below their no-Rule-68 bottom line under Rule X to 18% lower under Rule Y and just 9% below under Rule Z. This may reflect defense attorneys' aversion to having their clients pay the plaintiff's fees,[19] and the resulting effort to make an offer that will either be

Figure 3
Plaintiffs' Settlement Rates

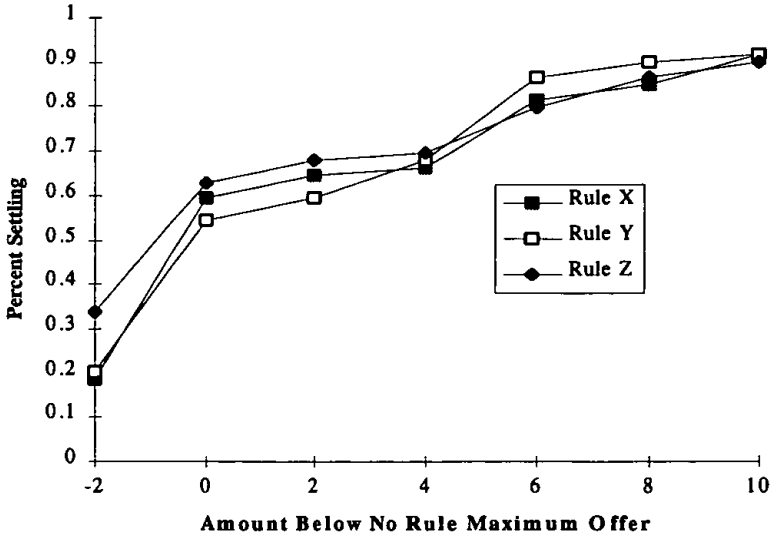


19. Anderson & Rowe, *supra* note 8, at n.30 ("defense counsel, not working on contingent fees, know all too well the readiness of clients to question fee billings. Client unhappiness can multiply when the bill is not just for the fees of one's own defeated champion, but also for the fees of a gallingly victorious plaintiff adversary").

accepted or exceed the verdict so as to trigger fee payments by the plaintiff. Under Rule Y, a rejected offer higher than the verdict will eliminate the defendant's need to pay the plaintiff's fees, and this outcome may distract lawyers from the objective of minimizing overall payments. Similarly, under Rule Z, the possibility of having all costs and fees paid by the plaintiff may appeal more to defense lawyers than cost minimization.

Further insight into the defense attorneys' actions can be gained from Figure 4, which graphs the percentage of defense lawyers willing to offer various amounts below their no-Rule-68 maximum bid. In theory, offers should be higher under Rule X than under Rule Y, and higher under Rule Y than under Rule Z because of the defendant's higher expected payment and the plaintiff's higher expected gain under the former rules. The main unexpected behavior in Figure 4 was that fewer lawyers advised Rule Y offers than advised Rule Z offers at zero and $2,000 below the no-Rule-68 minimum demand, and that subsequently more lawyers advised Rule Y offers than advised Rule X offers at $6,000, $8,000, and $10,000 below the no-Rule-68 minimum demand. It appears that a particularly large group of lawyers were willing to make offers close to their minimum demand levels under Rule Z due to the enticement of zero fee liability if a rejected offer exceeds the verdict, while the lesser incentives under Rules X and Y yielded the hypothesized relative offer levels. At more desirable (lower) levels, a large

Figure 4
Defendants' Settlement Rates



majority of respondents deemed offers reasonable regardless of the rule in effect, while the desire to avoid liability for the plaintiff's fees may have brought additional offers under Rule Y into that range.

Table 6 presents p-values for the relative and absolute effects of the three alternative rules. The null hypotheses are that each rule has no negative effect (i.e., a zero or positive effect) on settlement values, and that, between each pair of rules, the rule that appears to have the stronger effect actually has an equal or weaker effect than the other rule in the pair. The alternative hypotheses that Rules Y and Z have a negative effect on the minimum demand levels and that Rules X and Y have a negative effect on maximum offer levels can be accepted at the .10 significance level. The evidence that Rule X decreases minimum demand levels and that Rule Y decreases maximum offer levels is less decisive, with nominal p-values of 0.12 and 0.24, respectively. The contrast between the rules' effects on maximum offer levels is strongest between Rule Z and Rule X, and the contrasts in effects on minimum demand levels are particularly strong between Rule Z and both Rules X and Y. The contrasts between the effects of Rules X and Y on offer and demand levels are not statistically significant.

Table 6
P-Values for Rule Effects

Null Hypothesis	P-Value	
	Minimum Demand	Maximum Offer
Rule X has no negative effect	0.12	0.035
Rule Y has no negative effect	0.077	0.091
Rule Z has no negative effect	0.0013	0.24
Rule Z effect $\leq$ Rule X effect	0.034	-
Rule Z effect $\leq$ Rule Y effect	0.055	-
Rule Y effect $\leq$ Rule X effect	0.41	-
Rule X effect $\geq$ Rule Z effect	-	0.13
Rule Y effect $\geq$ Rule Z effect	-	0.26
Rule X effect $\geq$ Rule Y effect	-	0.30

If a particular rule has the same effect on both plaintiffs' and defendants' proposed settlement values, either in dollar or percentage terms, the opposing parties' settlement values will never come together. The likelihood of settlement increases when plaintiffs' minimum demand levels decrease by a greater percentage than defendants' maximum offer levels. A rule that decreases minimum demand levels by a large proportion and has little effect on maximum offer levels would clearly bring settlement values closer together and encourage settlement. The fact that Rule Z has been distinguished as the

strongest suppressant of minimum demand levels, and at the same time has a smaller (and statistically insignificant) effect on maximum offer levels, leads us to recommend this rule as the most likely means of bridging the settlement gap. Whether this gap-bridging effect is sufficient to justify adoption of Rule Z in the face of concerns about its possible severity in reducing recoveries, or its consistency with the Congressional intent behind § 1988, is another matter.

Undue optimism on the part of either party hinders settlement, leading litigants to expect divergent verdicts and, as a result, overlapping portions of the settlement gains. A comparison of verdicts expected by plaintiffs' and defendants' counsel serves as a measure of relative optimism. If plaintiffs' lawyers expect higher verdicts than defense lawyers given the same information, optimism on the part of one or both parties is evident. Table 3 above contains the means and standard deviations of expected verdicts from the simulation. Given identical case information and the same summaries of 15 recent trial outcomes in cases of similar nature, the average plaintiffs' lawyer expected a verdict $6,990.54 higher than the expectation of the average defendants' lawyer. This optimism effect exemplifies impediments to bargaining that should be addressed in settlement devices.

CONCLUSION

This study indicates that the interpretation of Rule 68's influence on § 1988 attorneys' fees can have a significant effect on litigation bargaining. To maximize out-of-court settlements, one should interpret Rule 68 "costs" to include post-offer attorneys' fees normally paid by plaintiffs under § 1988. Under this construction, plaintiffs would accept offers 31% below their no-Rule-68 bottom line, and defendants would make offers 9% below their no-Rule-68 bottom line. For parties unable to settle, the larger percentage is deducted from the plaintiff's relatively high demand, whereas the smaller percentage is deducted from the defendant's smaller offer. This can result in a substantial narrowing or elimination of the settlement gap—the battleground of greed and optimism that stands between the two parties' threat points. When Rule 68 is interpreted to affect only the plaintiff's fee entitlement, or to have no influence on fees, the rule has little or no effect, and settlement would not be encouraged compared to the absence of Rule 68. This conclusion follows from the finding that weaker versions of Rule 68 decreased the maximum bid levels advised by the defendant's lawyers by more than those versions decreased the minimum demand levels advised by the plaintiff's lawyers, thus *increasing* the settlement gap.