Journal of Air Law and Commerce

Volume 47 | Issue 3 Article 8

1982

Casenotes and Statute Notes

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Case Notes and Statute Notes

CLASS ACTION SUITS—COMMUNICATION BANS BETWEEN PARTIES AND POTENTIAL CLASS MEMBERS—Courts abuse their discretion in pending class action suits when they ban all communication by parties and their attorneys with potential class members, absent a clear record and specific findings of need. *Gulf Oil Co. v. Bernard*, 101 S. Ct. 2193 (1981).

In April, 1976, Gulf Oil Company (Gulf) and the Equal Employment Opportunity Commission (EEOC) entered into an extra-judicial conciliation agreement[1] whereby Gulf agreed to offer backpay to victims of alleged racial discrimination in return for a full release of their discrimination claims against the company.[2] Gulf began sending notices of the offer to the 643 employees affected at its Port Arthur, Texas plant.

Approximately one month later, on May 18, 1976, the plaintiffs filed a class action suit in a federal district court in Texas against Gulf and the local chapter of the Oil, Chemical, and Atomic Workers International Union[3] on behalf of all present and former black employees of the Port Arthur refinery, as well as those applicants who were rejected for employment on the basis of their race.[4] Seeking to vindicate the alleged rights of those employees currently receiving settlement offers from Gulf under the conciliation agreement, the plaintiffs re-

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[1] Gulf Oil Co. v. Bernard, 101 S. Ct. 2193, 2195 (1981). The conciliation agreement outlined several procedures Gulf would follow to alleviate alleged discrimination against black and female employees at the company's refinery in Port Arthur, Texas. *Id.*

[2] *Id.* In exchange for backpay, each employee was required to execute, within 30 days, a full release of all discrimination claims against Gulf for the relevant time period. *Id.*

[3] *Id.* at 2195-96.

[4] *Id.* Plaintiffs had been represented by local counsel in association with New York attorneys from the NAACP Legal Defense and Education Fund. *Id.*

quested injunctive, declaratory and monetary relief.[5]

Gulf subsequently filed a motion to limit the communication of parties and their counsel with class members.[6] The district court entered a temporary order prohibiting case-related communication with potential and actual class members,[7] but did not base its order on any findings of fact.[8] Gulf then moved for modification of the order so that the oil producer might continue soliciting releases in exchange for backpay.[9] In response, the district court exempted Gulf's communication involving the conciliation agreement and settlement process,[10] but ordered a complete ban of case-related communication[11] made without the court's prior approval.[12] The plaintiffs made a similar request so they could send notices to class members, which the court denied.[13] In reaching its decision, the district court neither made findings of fact nor wrote an explanatory opinion.[14]

A divided Fifth Circuit panel affirmed the district court

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[5] *Id.* at 2196.

[6] *Id.* Gulf asserted that an attorney for the plaintiffs attended a meeting of 75 class members on May 22, 1976, and recommended that the employees not sign releases under the conciliation agreement. Reportedly, the attorney advised the employees that they could at least double the amount received from Gulf in backpay if they returned the checks they received and joined the class action. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.* Gulf stopped mailing backpay offers and release forms to class members when it was served process in this case. At the time, 452 of the 643 employees entitled to backpay had already signed releases and been paid. *Id.*

[10] *Id.* at 2197.

[11] *Id.* at 2196-97. The court order was patterned after Sample Pretrial Order No. 15 in the MANUAL FOR COMPLEX LITIGATION (3rd ed. 1973) [hereinafter cited as MANUAL]. The *Manual* was compiled by legal experts as a recommendation for handling complex cases. *See* 1 J. MOORE, FEDERAL PRACTICE, pt. 2, ¶ 1.41 (2d ed. 1979).

[12] 101 S. Ct. at 2197.

[13] *Id.* at 2198. The notice urged class members to talk to a lawyer before signing Gulf's release. *Id.*

[14] *Id.* at 2197-98. The only justification offered by the court was the holding in the case of Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975), which was held to be inapplicable. Plaintiffs cited *Rodgers* in support of their contention that an order limiting communication with potential class members was constitutionally invalid. 101 S. Ct. at 2197. The district court upheld its order, which was based on a sample in the *Manual*, because this specifically exempted constitutionally protected communication when the substance of such communication was subsequently filed with the court. MANUAL, *supra* note 11.

opinion,[15] despite plaintiffs' argument that the limitations imposed by the district court were beyond the powers granted in Federal Rule of Civil Procedure 23(d) (Rule 23)[16] and were unconstitutional under the first amendment.[17] Upon review, the Fifth Circuit Court of Appeals reversed the panel decision insofar as it limited communication.[18] A majority opinion, joined by thirteen judges,[19] held the district court order to be an unconstitutional prior restraint on expression which was subject to first amendment protection.[20] The court found that there was not a sufficiently particularized showing of need to justify such a restraint, that the restraint was overbroad, and that it was not accompanied by the requisite procedural safeguards.[21] Gulf Oil subsequently appealed to the United States Supreme Court.[22] *Held, affirmed*: Courts abuse their discretion in pending class action suits when they ban all communication by parties and their attorneys with potential class members, absent a clear record and specific findings of need. *Gulf Oil Co. v. Bernard*, 101 S. Ct. 2193 (1981).

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[15] Bernard v. Gulf Oil Co., 596 F.2d 1249 (5th Cir. 1979), *rev'd*, 619 F.2d 459 (5th Cir. 1980), *aff'd*, 101 S. Ct. 2193 (1981). The panel majority held that the district court could have concluded that the need to limit communication outweighed any competing interests of the plaintiffs, particularly because the order merely required prior approval of communication, rather than prohibiting them altogether. The majority found that the order was not a prior restraint because it exempted unapproved communication whenever the parties or their counsel asserted a constitutional privilege in good faith. 596 F.2d at 1259.

[16] Rule 23(d) of the Federal Rules of Civil Procedure provides in relevant part: "In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (3) imposing conditions on the respresentative parties or intervenors . . . (and) (5) dealing with similar procedural matters." Fed. R. Civ. P. 23(d).

[17] U. S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[18] Bernard v. Gulf Oil Co., 619 F.2d 459, 478 (5th Cir. 1980), *aff'd*, 101 S. Ct. 2193 (1981).

[19] 101 S. Ct. at 2199.

[20] 619 F.2d at 466.

[21] *Id.* at 466-78.

[22] 101 S. Ct. at 2199.

I. LEGAL BACKGROUND

A. *The Manual for Complex Litigation*

Legal experts created the *Manual for Complex Litigation (Manual)*[23] in response to the unprecedented mass of multidistrict litigation that began in the 1960's.[24] Faced with a backlog of cases, judges and attorneys sought new and efficient procedures to improve the quality of justice without increasing the burden of litigants.[25] The experts compiled recommendations and assembled them into a flexible collection of procedures for dealing with complex civil and criminal actions.[26] Although the *Manual* is widely used today, its contents are merely "recommendations."[27]

Section 1.41 of the *Manual* contains a sample pretrial order[28] for preventing potential communicative abuses in class action suits.[29] The order forbids certain communication, including the solicitation of fees, expenses and legal representation from potential and actual class members who are not yet formal parties to the class action. It also forbids formal parties from soliciting requests by class members to get out of class actions under subparagraph (b)(3) of Rule 23.[30]

The sample order does not, however, expressly forbid com-

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[23] J. MOORE, FEDERAL PRACTICE, pt. 1, at xxvi-xxvii (2d ed. 1981).

[24] *Id.* at xi-xii. More than 1900 related treble damage and antitrust cases were filed in 35 district courts beginning in 1961. *Id.* at xii. *See generally* Neal and Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964); Peterson and McDermott, *Multidistrict Litigation: New Forms of Judicial Administration*, 56 A.B.A.J 737 (1970).

[25] *See generally* MANUAL, *supra* note 11, at xii.

[26] *Id.* at xxvi.

[27] *Id.*

[28] *Id.* at 226. The sample pretrial order prohibits all parties and their counsel from communicating about the suit, either directly or indirectly, orally or in writing, with any potential or actual class member not a formal party to the action. The obligations and prohibitions of the order are not exclusive. Court approval is required of the communication and the people to whom the communication is sent. *Id.* at 226-27.

[29] Gulf Oil Co. v. Bernard, 101 S. Ct. 2193, 2196 (1981). The district judge in *Gulf Oil Co. v. Bernard* based his court order on this model. *Id.*

[30] MANUAL, *supra* note 11, at 227. The sample pretrial order also affects communication which misrepresents the status, purposes and effects of the class action, or creates impressions tending, without cause, to reflect adversely on any party, counsel, the court, or the administration of justice. *Id.*

munication between an attorney and his client or a prospective client in two situations. First, it does not forbid such communication when the attorney is consulted on the initiative of the client or prospective client. Second, the order does not forbid communication that occurs in the regular course of business, or in the performance of the duties of a public office or agency that does not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and the orders within it.[31] The order stipulates that any party or counsel who asserts a constitutional right to communicate, and does so, shall file a copy of such communication with the court within five days after making the communication.[32]

The sample pretrial order has had its share of praise and criticism, which is best illustrated by the various court decisions cited in *Bernard*.[33] In the years preceding *Bernard*, comments on the sample pretrial order seem to have centered on the first amendment and Rule 23.

B. *First Amendment Protection For Class Action Communication*

Even though courts had access to several procedural arguments in the cases preceding *Bernard*, many court decisions used first amendment arguments as a foundation for denying communication bans with actual and potential class members. Most of these decisions concern attorney solicitation, and the courts held that only "compelling" state interests could justify limitations on first amendment freedoms of expression and association.[34] Although courts have not considered prior restraints on communication to be unconstitutional per se,[35]

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[31] *Id.*

[32] *Id.*

[33] *See* Coles v. Marsh, 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977); Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

[34] *E.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963).

[35] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

they have demonstrated a heavy presumption against their validity,[36] which has resulted in the drafting of regulations as narrowly as possible.[37]

NAACP v. Button[38] is a leading case providing for the constitutional protection of lawyers' solicitation practices. *Button* originated in companion suits filed by the NAACP and the NAACP Legal Defense and Education Fund to restrain enforcement of several Virginia statutes dealing with the state's right to regulate the solicitation of legal or professional business.[39] The Court held one statute[40] to be unconstitutional because its enforcement could smother all discussion by a minority group seeking to institute litigation.[41]

The *Button* decision has been interpreted in subsequent cases as holding that "collective activity undertaken to obtain meaningful access to the court is a fundamental right within the protection of the first amendment."[42] Constitutional protection was extended in *Button* to include "advising another

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[36] Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975); New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[37] Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1978); Cantwell v. Connecticut, 310 U.S. 296, 311 (1940).

[38] 371 U.S. 415 (1963).

[39] *Id.* at 417.

[40] VA. CODE ch. 33, § 54-78 (1950) (amended 1956) states in part:

> A 'runner' or 'capper' is any person, corporation, partnership or association acting in any manner . . . as an agent for an attorney-at-law or for any person, partnership, corporation, organization or association which employs, retains or compensates any attorney-at-law in connection with any judicial proceeding in which such person, partnership, corporation, organization or association is not a party and in which it has no pecuniary right or liability, in the solicitation or procurement of business for such attorney-at-law . . . .
>
> The fact that any person, partnership, corporation, organization or association is a party to any judicial proceeding shall not authorize any runner or capper to solicit or procure business for such person, partnership, corporation, organization or association or any attorney at law employed, retained or compensated by such person, partnership, corporation, organization or association.

Id.

[41] 371 U.S. at 434.

[42] United Transp. Union v. Michigan Bar, 401 U.S. 576, 585 (1971). *See also* Bates v. State Bar, 433 U.S. 350, 376 n.32 (1977).

that his legal rights have been infringed and referring him to a particular attorney or group of attorneys . . . for assistance."[43] Noting that the attorneys would not engage in the litigation for pecuniary gain,[44] the *Button* Court compared the proposed litigation to "political expression."[45] Interested individuals, therefore, were treated as persons engaged in association for the advancement of beliefs and ideas, as protected by the first amendment.[46]

Four years after *Button*, the Supreme Court expressly denied that the decision would apply only to political matters.[47] In *United Mine Workers v. Illinois State Bar Association*,[48] the Court held that a "very distant possibility"[49] of harm could not justify complete prohibition of communication between an attorney and potential litigants.[50] In this case, the Illinois Bar Association sued the Union for employing an attorney to represent any Union workmen's compensation claim before the Illinois Industrial Commission.[51] The Bar Association claimed that the attorney would be engaging in an unauthorized practice of law.[52] Noting that the attorney was on a set salary and not receiving pecuniary gain from the solicitation itself, the Court determined that his activities were protected under the first amendment freedoms of speech, assembly and petition.[53]

Not all constitutional challenges to solicitation practices have ended victoriously. In 1978, the United States Supreme Court, in *Ohralik v. Ohio State Bar Association*,[54] held that states could prohibit "in-person" solicitation for purely pecu-

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[43] 371 U.S. at 434.

[44] *Id.* at 443.

[45] *Id.* at 429

[46] *Id.* at 430. *See* U.S. CONST. amend. I (quoted at note 17 *supra*). *See also* NAACP v. Alabama, 357 U.S. 449, 460 (1958); Thomas v. Collins, 323 U.S. 516, 537 (1945).

[47] United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967).

[48] 389 U.S. 217 (1967).

[49] *Id* at 223.

[50] *Id.*

[51] *Id.* at 218.

[52] *Id.*

[53] *Id.* at 221-22.

[54] 436 U.S. 447 (1978).

niary gains, if the solicitation was likely to have adverse consequences.[55] Unlike its predecessors, *Ohralik* involved no questions of political expression, associational rights or racial discrimination.[56] The plaintiff's constitutional claim was based solely on the commercial speech doctrine,[57] or his constitutional right to disburse information on the availability and terms of routine legal services.[58]

The *Ohralik* Court distinguished in-person solicitation from constitutionally protected commercial speech, saying that lawyers engaged in the former were in a position to exert more pressure upon potential clients by demanding an immediate response.[59] The Court additionally noted that in-person solicitation encouraged clients to make uninformed decisions because it did not allow them adequate opportunities for reflection or comparison.[60] The Court determined that, although the right to freedom of speech was essential,[61] it was only a subordinate component of the lawyer's in-person solicitation of remunerative employment.[62]

On the same day the Supreme Court decided *Ohralik*,[63] it had another opportunity to interpret attorney solicitation rights in the case of *In re Primus*.[64] The *Primus* case involved a lawyer[65] who advised a gathering of women of their legal

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[55] *Id.* at 468. The Court held that states, in the furtherance of important interests, could regulate such solicitation in order to prevent "potential" harm. The Court recognized that states have compelling interests in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, overreaching, and other forms of vexatious conduct. *Id.* at 462.

[56] *See* NAACP v. Button, 371 U.S. 415 (1963); Konigsberg v. State Bar, 353 U.S. 252 (1957).

[57] 436 U.S. at 455. The United States Supreme Court has ruled that the justifications for prohibiting truthful, restrained advertising concerning routine legal services are insufficient to override the first and fourteenth amendments in assuring the free flow of commercial information. Bates v. State Bar, 433 U.S. 350, 384 (1977). *See also* Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976).

[58] 436 U.S. at 457.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] The decision in *Ohralik* was handed down on May 30, 1978, before *In re* Primus, 436 U.S. 412 (1978).

[64] 436 U.S. 412 (1978).

[65] *Id.* at 414. The lawyer in *Primus* was a cooperating attorney with the American

rights in relation to sterilization as a pre-condition for receiving public medical assistance.[66] The attorney subsequently sent a letter to one of the women informing her of the free legal assistance available from the ACLU.[67] A seven-member majority[68] in *Primus* found that an attorney's solicitation by letter, as contrasted with in-person solicitation, involved no appreciable invasion of privacy or significant opportunity for overreaching or coercion.[69] The Court added, however, that in certain circumstances[70] a state may regulate such activity if the regulation is not an "unnecessary abridgment"[71] of the associational freedoms of non-profit organizations that have characteristics like those of the NAACP or the ACLU.[72]

Despite the availability of these first amendment arguments, several circuit courts within the last decade have preferred to avoid dealing with the constitutional issues.[73] Thus, in dealing with the question of the validity of Rule 23 communication bans,[74] courts have focused their attention on proce-

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Civil Liberties Union (ACLU). *Id.* The ACLU was organized in 1920 by individuals who had worked in defense of the rights of conscientious objectors during World War I and political dissidents during the postwar period. It views itself as a "national nonpartisan organization defending our Bill of Rights for all without distinction or compromise." ACLU, PRESENTING THE AMERICAN CIVIL LIBERTIES UNION 2 (1948). The organizations' activities range from litigation and lobbying to educational campaigns in support of its avowed goals. *See* Robin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 211-12 (1976).

[66] 436 U.S. at 415-16. Several publications reported in 1973 that some pregnant women in Aiken County, South Carolina, had been sterilized or were being threatened with sterilization as a condition for receiving medical assistance under the Medicaid program. *See, e.g.*, 3 N.Y. Times, July 22, 1973, at 30, cols. 1-3.

[67] 436 U.S. at 459.

[68] *Id* at 413. The majority included Chief Justice Burger, and Justices Powell, Stewart, White, Blackmun and Stevens. Justice Marshall joined the majority in all but the first paragraph of Part VI of the opinion. *Id.*

[69] *Id.* at 435.

[70] *Id.* at 437. The Court recognized that states may regulate the solicitation activities of lawyers for the mere potential of conflict of interest or overreaching, if the speech simply "propose[s] a commercial transaction." *See* Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 385 (1973).

[71] 436 U.S. at 432 (quoting Buckley v. Valeo, 424 U.S. 1, 25 (1976)).

[72] 436 U.S. at 439.

[73] *See* Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972).

[74] *See* Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975); Weight Watchers of Philadelphia, Inc. v. Weight Watchers Int'l,

dural deficiencies. When the Supreme Court decided to address this same issue in 1981, it looked with favor upon the increasingly popular procedural policies used by the lower courts.

C. *Federal Rule 23 Limitations on Communication Bans*

Rule 23(d) of the Federal Rules of Civil Procedure expressly vests district courts with the power to render "appropriate"[75] orders for insuring the fair conduct of class action suits.[76] In searching for the meaning of "appropriate," courts often have premised their interpretations on procedural limitations. In *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*,[77] for example, the Second Circuit concluded that Rule 23 does not prevent the negotiation of settlements between defendants and potential class members,[78] but prohibits only the settlement of the class action itself without court approval.[79]

In *Weight Watchers*, the class action was brought on behalf of the franchisees of Weight Watchers, Inc.[80] against their franchisor for alleged antitrust violations.[81] The district court allowed the franchisor to communicate with potential franchisees "in connection with contract negotiations requested in each instance by the franchisee."[82] The court, however, denied the franchisees' request for the retraction of two letters the franchisor had previously sent to franchisees discouraging their participation in the class action.[83] The Second Circuit

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Inc., 455 F.2d 770 (2d Cir. 1972).

[75] FED. R. CIV. P. 23(d).

[76] *See supra* note 16.

[77] 455 F.2d 770 (2d Cir. 1972).

[78] *Id.* at 773.

[79] *Id. Cf.* Webster Eisenlohr, Inc. v. Kalodner, 145 F.2d 316, 320 (3d Cir.), *cert. denied*, 325 U.S. 867 (1944).

[80] 455 F.2d at 771. Weight Watchers, Inc. is comprised of franchises which promote standardized weight-reduction and weight-control programs. *Id.*

[81] *Id.* The complaint alleged that the franchisor had imposed a maximum limit that franchisees could charge as a class registration fee in violation of the Sherman Act, 15 U.S.C. § 1 (1970). It was alleged that such action caused the class $15 million worth of damage. 455 F.2d at 771.

[82] 455 F.2d at 772.

[83] *Id.* The letters, which were sent by Weight Watchers' president and chairman of

refused to overturn the lower court's decision, holding that some orders merely regulating the litigation process are best left to the unreviewable discretion of the district court.[84]

After the *Weight Watchers* decision, the Seventh Circuit was faced with a question that dealt specifically with the "solicitation of potential class members" in *Halverson v. Convenient Food Mart, Inc.*[85] In *Halverson*, the Seventh Circuit held that a lawyer may accept, but shall not seek, employment for the purpose of joining parties in a class action.[86] The case involved a lawyer who had been hired by an association of retail grocers to negotiate with their franchisor for advertising rebates. The franchisor accused the lawyer of soliciting the franchisees to bring suit against the franchisor and to pay attorneys' fees.[87] The appellate court reviewed the question from an ethical perspective, relying on the American Bar Association's *Code of Professional Responsibility*.[88] The court found the lawyer guilty of a slight breach of ethics,[89] but held that the minor nature of the misconduct should not prejudice the rights of his clients in this case.[90]

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the board, announced that the company was seeking evidence in order to defend the actions brought against it. In addition, the letters stated that "widespread publicity that any franchisees claim that they preferred to charge more money to a highly sensitive obese population would surely have a detrimental effect on the image of Weight Watchers." *Id.*

[84] *Id.* at 774.

[85] 458 F.2d 927 (7th Cir. 1972).

[86] *Id.* at 931. The appellate court held that any permissible pre-suit communication with prospective class members should be forthright and complete, and should indicate the advantages and disadvantages of litigation. *Id. But see* Ford, *Federal Rule 23: A Device for Aiding the Small Claimant*, 10 B.C. IND. & COM. L. REV. 501, 514 (1969).

[87] 458 F.2d at 929-30.

[88] DR2-104(a) of the American Bar Associations' Code of Professional Responsibility states:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: (1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR2-104(a) (1969).

[89] 458 F.2d at 931.

[90] *Id.*

One of the most frequently cited and controversial cases dealing with Rule 23 communication bans is *Rodgers v. United States Steel Corp.*[91] In *Rodgers*, the Third Circuit held that Rule 83[92] and 28 U.S.C. § 2071[93] never were intended to empower district courts to require prior judicial approval of communication between the participants in a lawsuit.[94] The court viewed discouragement of such participation as contrary to the purpose of Rule 23.[95] In *Rodgers*, the black employees of a steel company brought a class action suit against the company and steel workers' union for allegedly discriminating against them.[96] A local rule,[97] based on the *Manual for Complex Litigation*, required prior judicial approval of communication between the parties, their attorneys, and third parties.[98]

The *Rodgers* court limited its decision to cases in which

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[91] 508 F.2d 152 (3d Cir.), *cert. denied.* 423 U.S. 832 (1975).

[92] FED. R. CIV. P. 83 states:

> Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Id.

[93] 28 U.S.C. § 2071 provides: "The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." 28 U.S.C. § 2071 (1976).

[94] 508 F.2d. at 164.

[95] *Id.* at 163. The court recognized that the policy underlying Rule 23 favors consolidation in a single lawsuit of litigation in which common questions of law or fact prevail. *Id.*

[96] *Id.* at 155.

[97] In this case, the Western District of Pennsylvania had adopted Local Rule 34 which supplemented Rule 23 of the Federal Rules of Civil Procedure. It provided in pertinent part:

> (d) No communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an order may be entered by the Court approving the communication.

Id. at 155-56. *See also* 1 J. MOORE FEDERAL PRACTICE, pt. 1, ¶ 1.40-.41, at 27-32 (2d ed. 1974).

[98] 508 F.2d at 155-56.

communications were sought prior to the designation of the suit as a class action.[99] In dicta, the court noted that drafting a rule that would regulate the content of communication after a class action designation would require a careful consideration of overbreadth limitations.[100] The concurring opinion to the case stated that the local rule should be set aside as overbroad[101] in the area of civil rights actions.[102] The concurrence held that the district court should be allowed to enact rules similar to those suggested in the *Manual for Complex Litigation* for other situations involving communication during both the pre-certification and post-certification periods of class action suits.[103]

In *Waldo v. Lakeshore Estates, Inc.*,[104] the court held that a local rule[105] based on the *Manual for Complex Litigation* was not overbroad or vague.[106] The *Waldo* court denounced the *Rodgers* opinion by stating that any policy allowing "unfettered communication" intended to encourage participation in a class suit would be inconsistent with the purpose of Rule 23.[107] The court based its decision on the *Manual's* provision

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[99] *Id.* at 164.

[100] *Id.*

[101] *Id.* at 166 (Weis, J., concurring). The concurrence suggested that the court follow the local rule recommended by the *Manual for Complex Litigation*, which was more narrowly drawn than the rule being considered in *Rodgers*. The local rule in *Rodgers* had been enacted in 1971 before the *Manual* was amended to exempt communication protected by a constitutional right. *Id.*

[102] *Id.* The concurrence distinguished between civil rights litigation and a routine damage suit. It noted that Congress had indicated its concern for the effective presentation of civil rights cases by allowing counsel fees in many situations involving civil rights litigation. The concurrence stated that this action tended to negate any intention by Congress to authorize a local rule of court that unduly infringed upon free speech in this particular area. *Id.*

[103] *Id.*

[104] 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978).

[105] 433 F. Supp. at 789. Louisiana's Local Rule 2.12e was drawn verbatim from a "suggested local rule" in the *Manual for Complex Litigation*. It purports to eliminate the "solicitation of legal representation and/or fund contributions directed to those not formal parties to the action, solicitation of opting out of the class under Rule 23(b)(3) of the Federal Rules of Civil Procedure and misrepresentation of the status, purpose or effect of the action." *See* MANUAL, *supra* note 11.

[106] 433 F. Supp. at 793.

[107] *Id.* at 794. The district court found too many "potential abuses" attendant with unregulated communication. The court determined that unregulated communication

that allowed parties to communicate without prior restraint, if they thought they had a constitutional right to do so, as long as they filed a copy of the communication with the court.[108] The court recognized a need for the restriction of free expression when such speech potentially could endanger an individual's guarantee to a fair trial.[109] The court emphasized, however, that the restraints could not unnecessarily restrict constitutionally protected activity.[110]

In *Coles v. Marsh*,[111] the Third Circuit was given the opportunity to expand and defend its decision in *Rodgers*. Reiterating that district courts lack the power to impose any restraints on communication for the purpose of preventing the recruitment of additional party plaintiffs,[112] the court decided to limit the district courts' authority in two other areas as well. The Third Circuit denied district courts the ability (1) to restrain communication for the purpose of preventing solicitation of financial or other support to maintain the action,[113] and (2) to prevent the potential abuse of ethical standards,[114] like those contained in the American Bar Associations' *Code of Professional Responsibility*.[115]

The *Coles* case involved a class action brought by an employee against Blue Cross of Western Pennsylvania (Blue Cross) for allegedly discriminating against several employ-

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could "unnecessarily burden" judicial redress of class actions. It held that a local rule regulating communication in compliance with the federal class action procedure would not be an invalid overstepping of the rule-making authority of the district court. *Id.*

[108] *Id.* at 786-87.

[109] *Id.* at 791.

[110] *Id.*

[111] 560 F.2d 186 (3d Cir.), *cert. denied*, 434 U.S. 985 (1977).

[112] 560 F.2d at 189.

[113] *Id.*

[114] *Id.*

[115] MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1976). The court listed three requirements that must be met to avoid mandamus review of a court order banning communication. There must be (1) a specific showing by the moving party of the particular abuses by which is is threatened; (2) the court must find that the showing provides a satisfactory basis for relief; and (3) the relief sought must be consistent with Rule 23, thereby giving explicit consideration to the narrowest possible relief that would protect the parties. 560 F.2d at 189.

ees[116] in violation of Title VII of the Civil Rights Act of 1964.[117] The district court had entered an order prohibiting certain communication between the plaintiff or her attorney and certain third parties, including potential members of the class.[118] The order was taken verbatim from the *Manual for Complex Litigation*.[119] The Third Circuit held the district court's order invalid because the plaintiff's prior communication helped effectuate the purposes of Rule 23 by encouraging common participation in the litigation.[120]

A consolidated class action brought before the Seventh Circuit in 1980 gave judges a chance to set guidelines for how "complete"[121] communication must be once it is approved by the district court. In the case of *In re General Motors Corp. Engine Interchange Litigation*,[122] the Seventh Circuit held that the district court had wide discretion in determining the type of communication that parties to the action could mail to subclass members,[123] but emphasized that any communication dealing with offers to settle disputes must be balanced, complete and accurate.[124] In *In re General Motors*, the purchasers of 1977 Oldsmobiles sued General Motors.[125] Although the district court allowed General Motors to communicate an offer of settlement to subclass members on an individual basis,[126]

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[116] 560 F.2d at 187.

[117] Title VII of the Civil Rights Act of 1964 provides: "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin." Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2 (1964).

[118] 560 F.2d at 187.

[119] *Id.* at 188.

[120] *Id.* at 189.

[121] *In re* General Motors Corp. Engine Interchange Litigation, 620 F.2d 1190, 1197 (7th Cir. 1980). The court said the notices sent to class members should contain enough information to allow the recipient to determine whether to accept an offer to settle, the effects of settling, and the alternative if the class member decides not to settle. *Id.*

[122] 620 F.2d 1190 (7th Cir. 1980).

[123] *Id.* at 1197.

[124] *Id.*

[125] *Id.* at 1193.

[126] *Id. See In re* General Motors Corp. Engine Interchange Litigation, 594 F.2d 1106, 1139 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). The Seventh Circuit found that Rule 23(e) of the Federal Rules of Civil Procedure requires judicial approval of class action settlements, but not "offers" to settle with individual class members. Of-

the plaintiffs were not allowed to send out a separate memorandum detailing their objections to the offer.[127] Instead, the district court allowed the plaintiffs to insert a statement in the General Motors communication informing potential class members that rejecting the offer could lead to recovery of an amount substantially higher than the amount of money offered.[128] The Seventh Circuit found that the district court had not abused its discretion.[129]

Thus, prior to 1981, Rule 23(d) communication bans had been scrutinized on both first amendment and procedural grounds. Faced with decisions upholding both arguments, the United States Supreme Court was called upon to give its interpretation of the law in *Gulf Oil Co. v. Bernard.*[130]

II. GULF OIL CO. V. BERNARD - THE COURT'S ANALYSIS

The United States Supreme Court decided *Bernard*[131] from a purely procedural perspective, recognizing that, whenever possible, federal courts should use non-constitutional versus constitutional grounds in making a decison.[132] The Court limited its decision to determining whether the communication ban initiated by the lower court was consistent with the general policies embodied in Rule 23.[133] Noting that Rule 23 was introduced to minimize the abuses inherent in class action suits,[134] the Court said that district courts have broad, but not

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fers to settle leave individual class members free to reject the offer without destroying their right to continue in the federal class action. 594 F.2d at 1138-39.

[127] 620 F.2d at 1193. The district court objected to a separate notice in order to prevent a "war of letters" between parties. *Id.* at 1199.

[128] *Id.*

[129] *Id.*

[130] 101 S. Ct. 2193 (1981).

[131] Gulf Oil Co. v. Bernard, 101 S. Ct. 2193 (1981).

[132] *Id.* at 2199, 2201-02. *See also* Hagans v. Lavine, 415 U.S. 528 (1974); Ashwander v. TVA, 297 U.S. 288 (1926) (Brandeis, J., concurring).

[133] 101 S. Ct. at 2199.

[134] *Id.* at 2200. *See also* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980) (vindication of the rights of individuals which might not otherwise sue due to the tremendous costs of litigation); Waldo v. Lakeshore Estates, Inc., 433 F. Supp. 782 (E.D. La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978) (diminution of the confusion of class members and adverse effects on the administration of justice). *But see Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318 (1976); Miller, *Problems in Administering Judicial Relief in Class Actions under Federal Rule 23*

unlimited[135] authority, to enter "appropriate" orders governing the conduct of counsel and parties.[136]

In *Bernard,* the Court determined that the order limiting communication interfered with the plaintiffs' efforts to inform potential class members of the existence of the lawsuit and to discover information concerning the merits of the case.[137] The Court held that the effects may have been particularly injurious because employees were also being pressured by Gulf to decide whether to accept backpay in exchange for releasing Gulf from liability for discrimination.[138] With these potential problems in mind, the Court held that an order limiting communication between parties and potential class members should be based on a clear court record and specific findings of need.[139] The record should indicate that the lower court weighed the need for a limitation against the possibility of interferences affecting the rights of the parties involved.[140] Because the district court failed to provide such specificity, the Court avoided consideration of the first amendment challenges, stating that a first amendment analysis would have to await a case with a fully developed record.[141] The Court admitted, however, that the district court order imposed serious restraints on free expression.[142]

Based on the scant information available from the lower court, the Supreme Court stated that the order suggested by the *Manual* apparently had been adopted on the assumption that no particularized weighing of the circumstances of the case was necessary.[143] This assumption resulted in an order

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(b)(3), 54 F.R.D. 501 (1972).

[135] 101 S. Ct. at 2200. *See* Eisen v. Carlisle & Jacquelin, 417 U. S. 156 (1974).

[136] 101 S. Ct. at 2200.

[137] *Id.*

[138] *Id.* As it turned out, the court did not render its decision, concerning plaintiffs' efforts to inform potential class members of the suit, until two days after the employees had to decide whether they would accept Gulf's backpay offer. *Id.* at 2198.

[139] *Id.*

[140] *Id.* The court stated that only such specificity can insure that the policies of the Federal Rules of Civil Procedure are not being hindered. *Id. Cf. In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979).

[141] 101 S. Ct. at 2200 n.15.

[142] *Id.*

[143] *Id.* at 2201.

requiring prior judicial approval of all communication, except that which the communicating party thought to be protected by a constitutional right.[144] Nevertheless, the communicating party had to send a copy of the excepted communication to the court within five days.[145] Communicants, consequently, were exposed to the risk of a contempt citation if the court determined that the communication made was not constitutionally protected.[146]

In *Bernard*, the lower court refused the respondents' request for prior communication approval without giving any basis for its decision.[147] Because the record revealed no grounds for the district court's imposition of the order, the United States Supreme Court found the order to be an abuse of discretion.[148] Citing the earlier Third Circuit opinion in *Coles v. Marsh*,[149] the Court stated in dicta that the order should have been drawn to limit speech as little as possible.[150]

Although it is consistently recognized that lower courts have wide discretion in determining what are "appropriate" orders for insuring the fair conduct of class action suits,[151] their decisions face close scrutiny when a clear record and specific findings of need are not made.[152] Prior to *Bernard*, several courts premised scrutiny on the constitution's guaranteed freedoms of expression and association.[153] Prior restraints on communication were held to discourage common participation in lawsuits, a result that directly contradicted the purpose behind the adoption of Rule 23.[154] Many of those cases were distinguished from similar cases dealing with civil

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[144] *Id.*

[145] *Id.*

[146] *Id* at 2201 n.17.

[147] *Id.* at 2201.

[148] *Id.*

[149] 560 F.2d 186 (3d Cir. 1977), *cert. denied*, 434 U.S. 985 (1977).

[150] 101 S. Ct. at 2201.

[151] *See supra* note 16.

[152] Comment, *Judicial Screening of Class Action Communications*, 55 N.Y.U.L. REV. 671, 699 (1980) [hereinafter cited as Comment].

[153] *See* United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967); NAACP v. Button, 371 U.S. 415, 428-29 (1963).

[154] *See* 3B J. MOORE, FEDERAL PRACTICE, ¶ 23.02[1] (2d ed. 1982).

rights and political expression.[155] Although the civil rights charges alleged in *Bernard* also can be considered forms of political expression, the Court does not seem to give its determination such a narrow scope.[156]

Recognizing that courts must base their decisions on nonconstitutional grounds whenever possible,[157] the Supreme Court in *Bernard* found a communication ban to be "inappropriate" for purely procedural reasons.[158] Yet despite the absence of a clear record and specific findings, the Court found evidence indicating that the first amendment had been violated.[159] This evidence should have cautioned the lower court that such a ban might be unreasonable.[160] In dicta, the Court indicated that the restrictions on expression should have been drawn as narrowly as possible.[161]

The procedural and constitutional issues raise some serious questions concerning Sample Pretrial Order No. 15 in the *Manual for Complex Litigation*. The guidebook recommends that "timely action"[162] be taken to curb communication by order or local rule, without necessarily premising such action on the probability of class action abuse.[163] Thus, the Sample Pretrial Order sanctions communication bans to prevent "potential abuses," while acknowledging at the same time that such abuses are rare.[164] The effect of such a restriction allows courts to dictate what will be said, by whom, and under what circumstances.[165]

Rule 83 and Section 2071 of Title 28 of the United States Code give courts the power to enforce the *Manual's* recom-

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[155] *See supra* notes 38 & 57.

[156] 101 S. Ct. at 2199 n.9.

[157] *Id.* at 2199.

[158] *Id.* at 2200. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

[159] 101 S. Ct. at 2201-02.

[160] *Id.* at 2202.

[161] *Id.* at 2200-01.

[162] MANUAL, *supra* note 11, at 32.

[163] Comment, *supra* note 152, at 695.

[164] *Id.*

[165] *Id.* at 696 n.224. The *Manual* sets no specific time limits for approving or disapproving proposed communication affected by the order. In *Rodgers*, plaintiffs were prevented from communicating for over three years with potential and actual class members not formal parties to the suit. *Id.*

mendations.[166] Both require, however, that the implemented rules or orders be consistent with the Federal Rules of Civil Procedure.[167] In light of the *Bernard* decision, which holds that a total communication ban is inconsistent with Rule 23,[168] the *Manual's* recommended ban may be invalid.[169]

Appellate courts may find lower court orders inconsistent with the Federal Rules of Civil Procedure in two ways. First, the express wording of the order could be incompatible with the Federal Rules.[170] Second, the appellate court could find that the order would significantly obstruct the general purpose of the superior law.[171] In the latter situation, courts will balance the order's effect on the operation of the federal rule against the justifications for the order.[172]

III. Conclusion

In rendering the *Bernard* decision, the United States Supreme Court has put the floundering *Rodgers* decision back on a solid foundation. Although the district court in *Bernard* expressly found *Rodgers* to be inapplicable,[173] the Supreme Court decision virtually parallels the *Rodgers'* reasoning, and in some respects extends it. The effect of the *Bernard* decision

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[166] *See supra* notes 92-93.

[167] *Id.*

[168] 101 S. Ct. at 2202.

[169] *See* Comment, *supra* note 152, at 699. The *Manual* places tremendous discretionary power with the district courts, making it all too easy for them to defeat attempts to bring class actions and to frustrate legitimate class action conduct. This outcome is inconsistent with the purpose of Fed. R. Civ. P. 23. *See also Developments in the Law — Class Actions*, 89 HARV. L. REV. 1318, 1600 (1976).

[170] *See* Wingo v. Wedding, 418 U.S. 461 (1974) (local rule held invalid because inconsistent with the Federal Magistrates Act).

[171] Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977), *cert. denied*, 434 U.S. 985 (1977) (pretrial order held invalid because inconsistent with Fed. R. Civ. P. 23 when there was no specific showing of particular abuses); McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976) (local rule suggesting format for pretrial orders void because inconsistent with Fed. R. Civ. P. 16).

[172] *See* Coles v. Marsh, 560 F.2d 186, 189 (3d Cir. 1977), *cert. denied*, 434 U. S. 985 (1977). Basing its holding on the *Rodgers* case, the court struck down an order which significantly frustrated the operation of superior law without offering much tangible benefit to judicial efficiency. *See also* Rodgers v. United States Steel Corp., 508 F.2d 152, 163-64 (3d Cir.), *cert. denied*, 423 U.S. 832 (1975).

[173] 101 S. Ct. at 2197.

is to make total communication bans inappropriate in pending litigation situations, as well as in pre-trial cases, when a clear record and specific findings of need are not present.[174] The holding also brings into question the validity of applying verbatim Sample Pretrial Order No. 15 in the *Manual for Complex Litigation*.[175]

As the number of class actions increases, it is in the court's best interest to consolidate as many parties as possible. The *Bernard* decision will help to achieve this goal by encouraging the free flow of communication among actual and potential class members,[176] making discoverable information more available, and encouraging educated decision-making by potential class members. Thus the spirit of Rule 23 and the administration of justice will be served.

Once a court is able to meet all procedural requirements and to provide a clear record and specific findings of necessity for its ban on communication, its analysis should then turn to first amendment arguments. The Supreme Court in *Bernard* did not rule out the possible invalidity of such a ban as a prior restraint on expression.[177] The first amendment argument is a strong one,[178] and when coupled with a court order that withstands the procedural analysis, it may become the impetus for requiring major revisions of the model Pretrial Order No. 15 in the *Manual*.

Janet R. Brueggen

CIVIL PROCEDURE—OFFERS OF JUDGMENT—The cost-shifting provision of Rule 68 of the Federal Rules of Civil Procedure, which requires mandatory imposition of costs on plaintiffs who fail to obtain judgments in amount greater than previously rejected settlement offers, is inapplicable in cases in which the defendant ultimately prevails. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).

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[174] *Id.* at 2202.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *See supra* notes 34-74.

Rosemary August, a former Delta Air Lines, Inc. (Delta) stewardess,[1] filed an employment discrimination suit pursuant to Title VII of the Civil Rights Act of 1964[2] against Delta after the Equal Employment Opportunity Commission notified her that she had a right to sue.[3] She alleged that she had been discharged from her position as a flight attendant, solely because she was black[4]. As relief August sought reinstatement, approximately $20,000 in back pay, attorney's fees and costs.[5] Delta denied all substantive allegations.[6]

Approximately four months after the suit was filed, Delta

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[1] Delta Air Lines, Inc. v. August, 450 U.S. 346, 348 (1981). Rosemary August was employed by Delta from November 3, 1971, until her termination on August 27, 1975. August v. Delta Air Lines, Inc., No. 77-C-95 (N.D. Ill. June 9, 1978), *reprinted in* Brief for Petitioner at A25, Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

[2] Civil Rights Act of 1964, tit. VII, 78 Stat. 253 (codified in scattered sections of 5 & 42 U.S.C.). 42 U.S.C. § 2000e-2a (1976) provides in relevant part:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; . . . .

Id.

[3] The equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964 require that the Equal Employment Opportunity Commission (EEOC) attempt to obtain voluntary compliance with the Act's requirements through conciliation, conference or persuasion in an informal manner after the filing of a charge of employment discrimination. If the EEOC determines that the charge is subject to its jurisdiction, it notifies the alleged discriminator of the charges and begins a preliminary investigation of the charge. After the investigation is completed, the EEOC may encourage the parties to settle the charge on terms that are mutually agreeable. If these negotiations fail, the EEOC will proceed to determine whether there is reason to believe that the charge is true. The EEOC will then offer to conciliate the matter. Once the EEOC conciliation agreement is presented, all of the administrative procedures requisite to taking a claim to court will have been satisfied. If the alleged discriminator refuses to accept the conciliation agreement, the EEOC will notify the aggrieved party that he or she has a right to sue the alleged discriminator. *See* 1 EMPL. PRAC. GUIDE (CCH) ¶¶ 1950-70 (1980).

[4] 450 U.S. at 348. The reason given by Delta for August's termination was "poor job performance and attitude." Her employment record reflected numerous unexcused absenses from work and complaints about her work from fellow employees and passengers. August v. Delta Air Lines, Inc., No. 77-C-95 (N.D. Ill. June 9, 1978), *reprinted in* Brief for Petitioner at A26, Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

[5] 450 U.S. at 348.

[6] August v. Delta Air Lines, Inc., No. 77-C-95 (N.D. Ill. June 9, 1978), *reprinted in* Brief for Petitioner at A20, Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

offered to settle with August for $450.00[7] pursuant to Federal Rule of Civil Procedure 68 (Rule 68).[8] She rejected the offer and elected to proceed to trial.[9] At the conclusion of the 25-day bench trial, the district court entered judgment in favor of Delta and ordered each party to pay its own costs.[10] Delta notified the court of its settlement offer and requested that August be required to pay its costs pursuant to Rule 68.[11] The

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[7] 450 U.S. at 348. Delta presented the following offer of settlement to August:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

Id. at 348 n.2.

[8] 28 U.S.C. § 2072 (1976) vests the Supreme Court with the authority to promulgate rules to govern civil actions brought in the district courts and courts of appeals of the United States. FED. R. CIV. P. 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon the clerk shall enter judgment. 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.

Id.

[9] 450 U.S. at 348-49.

[10] *Id.* The district court found that, although August had produced some evidence tending to show racial discrimination, she had failed to carry the burden of proving racial discrimination in accordance with International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). August v. Delta Air Lines, Inc., No. 77-C-95 (N.D. Ill. June 9, 1978), *reprinted in* Brief for Petitioner at A24, Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

[11] 450 U.S. at 349.

district court denied the motion.[12] The court stated that, to be effective under Rule 68, a settlement offer must be made in good faith and be reasonable in view of the particular facts and circumstances of the case.[13] The court concluded that Delta's offer did not satisfy this criteria and, thus, did not trigger the Rule 68 cost-shifting provision.[14]

Delta appealed the denial of its Rule 68 motion.[15] The Court of Appeals for the Seventh Circuit affirmed the district court decision, holding that, if the final judgment obtained by a plaintiff in a Title VII case is less favorable than the defendant's Rule 68 offer, then the awarding of costs is discretionary.[16] Upon review, the Supreme Court concluded that the circuit court had failed to address the threshold question of whether the cost-shifting provision of Rule 68 was applicable in a case in which a defendant-offeror prevailed.[17] The Court concluded that the resolution of the case turned on the answer to this question. *Held, affirmed*: The cost-shifting provision of Rule 68 of the Federal Rules of Civil Procedure, which requires mandatory imposition of costs on plaintiffs who fail to obtain judgments in amounts greater than previously rejected settlement offers, is inapplicable in cases in which the defendant ultimately prevails.[18] *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).

I. The History of Rule 68

Offers of judgment were first introduced into the federal judicial system with the adoption of the Federal Rules of Civil

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[12] *Id.*

[13] August v. Delta Air Lines, Inc., No. 77-C-95 (N.D. Ill. Sept. 18, 1978) (order denying Delta's motion for reimbursement of costs), *reprinted in* Brief for Petitioner at A11, Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981).

[14] 450 U.S. at 349.

[15] *Id.* at 349.

[16] August v. Delta Air Lines, Inc., 600 F.2d 699, 702 (7th Cir. 1979). The Supreme Court restated the Seventh Circuit's holding: "[R]ule 68 [applies] only if the defendant's settlement offer was sufficient 'to justify serious consideration by the plaintiff.' " Delta Air Lines, Inc. v. August, 450 U.S. 346, 349 (1981).

[17] 450 U.S. at 350.

[18] *Id.*

Procedure adopted in 1938.[19] The Advisory Committee Note that accompanied Rule 68 offered no explanation of the rule's purpose.[20] It did, however, cite three state statutes that provided for offers of judgment and mandatory shifting of costs when an offeree recovered less than the amount of a rejected offer of judgment.[21] Since that time it has been readily ac-

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[19] *See* 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001, at 56 (1973) [hereinafter cited as WRIGHT & MILLER].

[20] The original Advisory Committee Note reads: "See, 2 Minn. Stat. (Mason 1927) § 9323; 4 Mont. Rev. Codes Ann. (1935) § 9770; N.Y. CIV. PRAC. ACT (1937) § 177." FED. R. CIV. P. 68 advisory committee note.

[21] *Id.* 2 MINN. STAT. § 9323 (1927) provided:

> At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him for the sum, or property, or to the effect therein specified, with costs then accrued. If within ten days thereafter such party shall give notice that the offer is accepted, he may file the same, with proof of such notice, and thereupon the clerk shall enter judgment accordingly. Otherwise the offer shall be deemed withdrawn, and evidence thereof shall not be given; and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor.

4 MONT. REV. CODES ANN. § 9770 (1935) provided:

> The defendant may, at any time before trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accepts the offer, and gives notice thereof within five days, he may file the offer, with proof of notice or acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer.

N.Y. CIV. PRAC. ACT § 177 (1937) provided:

> Before the trial, the defendant may serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him for a sum, or property, or to the effect, therein specified, with costs. If there be two or more defendants, and the action can be severed, a like offer may be made by one or more defendants against whom a separate judgment may be taken. If the plaintiff, within ten days thereafter, serves upon the defendant's attorney a written notice that he accepts the offer, he may file the summons, complaint, and offer, with proof of acceptance, and thereupon the clerk must enter judgment accordingly. If notice of acceptance be not thus given, the offer cannot be given in evidence upon the trial; but, if the plaintiff fail to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time.

The terms "settlement offer," "offer of settlement" and "offer of judgment" are used interchangeably throughout this paper.

cepted that the purpose of the rule is "to encourage settlement and to avoid protracted litigation."[22]

The citation of similar state statutes by the drafters of Rule 68 in the Advisory Committee Note suggests that Rule 68 was intended to operate as those statutes had operated in their respective states.[23] State court decisions rendered prior to the enactment of Rule 68 continually recognized that the cost-shifting provision, in rules similar to Rule 68, was mandatory when a plaintiff recovered less than a previously rejected offer of settlement.[24] In *Hammond v. Northern Pacific Railroad Co.*,[25] for example, the Oregon Supreme Court stated that "unless the plaintiff accepts [the offer], or recovers a more favorable judgment, the defendant is entitled to costs accruing subsequent to such offer."[26]

The 1944 Advisory Committee Comments on the Proposed Amendments to the Federal Rules of Civil Procedure provided further substantiation that the cost-shifting provision of Rule 68 is mandatory, when it is applicable.[27] The Committee stated in its report that a "[defendant's] first and only offer will operate to save him the costs from the time of the offer if the plaintiff ultimately obtains a judgment less than the sum offered."[28] This statement was reiterated in the Advisory

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[22] *See, e.g.*, Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp. 201 (E.D. La. 1975); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974); Staffend v. Lake Central Airlines, Inc., 47 F.R.D. 218 (N.D. Ohio 1969); Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240 (W.D. La. 1949), *rev'd on other grounds*, 181 F.2d 320 (5th Cir. 1950); 12 WRIGHT & MILLER, *supra* note 19, § 3001; Dobie, *The Federal Rules of Civil Procedure*, 25 VA. L. REV. 261, 304 n.195 (1939).

[23] *See 12* WRIGHT & MILLER, *supra* note 19, § 3001, at 56 n.5.

[24] *See, e.g.*, Yaeger v. Campion, 70 Colo. 183, 197 P. 898 (1921); Worden v. Bemis, 33 Conn. 216 (1866); Prather v. Pritchard, 26 Ind. 65 (1866); West v. Springfield Fire & Marine Ins. Co., 105 Kan. 414, 185 P. 12 (1919); Wachsmuth v. Orient Ins. Co., 49 Neb. 590, 68 N.W. 935 (1968); Herring Hall-Marvin Safe Co. v. Balliet, 44 Nev. 94, 190 P. 76 (1920); Hammond v. Northern Pac. R. Co., 23 Or. 157, 31 P. 299 (1892); Sioux Falls Adjustment Co. v. Penn Soo Oil Co., 53 S.D. 77, 220 N.W. 146 (1928); Newton v. Allis, 16 Wis. 210 (1862).

[25] 23 Or. 157, 31 P. 299 (1892).

[26] 31 P. at 301.

[27] *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 483 (1946).

[28] *Id.*

Committee's Note of 1946.[29]

Furthermore, the language of the cost-shifting provision in the rule itself is mandatory in nature.[30] Rule 68 states that the offeree *must* pay the costs incurred after the making of an offer of settlement, if the judgment obtained by the offeree is not more favorable than the offer that was rejected.[31] The drafter's choice of the word "must" indicates that once the cost-shifting provision is triggered, its application is mandatory.[32] Only three other Federal Rules of Civil Procedure contain the word "must."[33] In cases involving these three rules, the courts have considered the application of these provisions to be mandatory.[34] In *Berg v. Merchant*,[35] the Sixth Circuit Court of Appeals, commenting on Section 12080 of the General Code of Ohio,[36] stated that "the word 'must' is so imperative in its meaning that no case has been called to our attention where that word has been read 'may' ."[37]

Several federal courts that have interpreted Rule 68 have implicitly accepted the proposition that the cost-shifting provision of the rule is automatically triggered whenever an of-

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[29] FED. R. CIV. P. 1976 advisory committee note.

[30] *See supra* note 8.

[31] *Id.*

[32] *See* Note, *Rule 68: A "New" Tool For Litigation*, 1978 DUKE L.J. 889, 892-93.

[33] FED. R. CIV. P. 14(a) provides in pertinent part: "Otherwise he *must* obtain leave on motion upon notice to all parties . . . ." FED. R. CIV. P. 30(a) provides in pertinent part: "Leave of court, granted with or without notice, *must* be obtained . . . ." FED. R. CIV. P. 56(e) provides in pertinent part: "When a motion for summary judgment is made . . . an adverse party . . . *must* set forth specific facts . . . ." (Emphasis supplied).

[34] For cases construing Rule 14(a), see State Mutual Life Assurance Co. of Am. v. Arthur Andersen & Co., 65 F.R.D. 518, 521 (S.D.N.Y. 1975); Meilinger v. Metropolitan Edison Co., 34 F.R.D. 143, 145 (E.D. Pa. 1963). For cases construing Rule 30(a), see Brause v. Travelers Fire Ins. Co., 19 F.R.D. 231, 234 (S.D.N.Y. 1956); Park & Tilford Distillers Corp. v. Distillers Co., 19 F.R.D. 169, 171 (S.D.N.Y. 1956). For cases construing Rule 56(e), see Adickes v. S. H. Kress & Co., 398 U.S. 144, 160 (1970); Modern Home Inst., Inc. v. Hartford Accident & Indem. Co., 513 F.2d 102, 109 (2d Cir. 1975); Liberty Leasing Co. v. Hillsum Sales Corp., 380 F.2d 1013, 1015 (5th Cir. 1967).

[35] 15 F.2d 990 (6th Cir. 1926), *cert. denied*, 274 U.S. 738 (1927).

[36] Section 12080 of the General Code of Ohio (1910) provided: "[A]ll the devisees, legatees and heirs of the testator, and other interested persons, including the executor or administrator must be made parties to the action." *Id.*

[37] 15 F.2d at 990.

feree recovers less than the amount of a rejected offer of judgment.[38] In *Nabors v. Texas Co.*[39] the United States District Court for the Western District of Louisiana stated that all an offeror needs to do to activate the cost-shifting provision of Rule 68 is to show that the offeree's recovery was less than the offer tendered.[40] This interpretation of the cost-shifting provision was reiterated in *Staffend v. Lake Central Airlines, Inc.*,[41] in which the United States District Court for the Northern District of Ohio stated that, when applicable, the cost-shifting provision of Rule 68 is mandatory and that the court lacked discretion to modify the rule's application.[42] The most recent case to advocate this interpretation of the operation of the cost-shifting provision was *Dual v. Cleland.*[43] In *Dual*, the court stressed that the cost-shifting provision of the rule automatically charges the plaintiff with defendant's costs when the plaintiff obtains a judgment that is less than the defendant's offer of judgment.[44]

Other federal courts, while acknowledging the mandatory nature of the cost-shifting provision of the rule, have concluded that an offer must be found to have been reasonable before the cost-shifting provision will be applied. In *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*[45] the court held that "a preliminary finding is required that an appropriate offer of judgment has been made," and concluded that, because the offer "afforded the plaintiff substantially the relief prayed for in its complaint," it was a reasonable offer.[46] Similarly, in *Honea v. Crescent Ford Truck Sales*,[47] the court held that in a Title VII case a defendant's offer of judgment

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[38] *See, e.g.*, Truth Seeker Co. v. Durning, 147 F.2d 54, 56 (2d Cir. 1945); Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240, 242 (W.D. La. 1949), *rev'd on other grounds*, 181 F.2d 320 (5th Cir. 1950).

[39] 32 F. Supp. 91 (W.D. La. 1940).

[40] *Id.* at 92.

[41] 47 F.R.D. 218 (N.D. Ohio 1969).

[42] *Id.* at 220.

[43] 79 F.R.D. 696 (D.D.C. 1978).

[44] *Id.* at 697.

[45] 63 F.R.D. 607 (E.D.N.Y. 1974).

[46] *Id.* at 610.

[47] 394 F. Supp. 201 (E.D. La. 1975).

must be found to have been reasonable before it can activate the cost-shifting provision of Rule 68.[48]

Prior to *Delta Air Lines, Inc.*, the most recent case in which a court considered the reasonableness standard when determining whether an offer of judgment was effective to trigger the cost-shifting provision was *Gay v. Waiters' & Dairy Lunchmen's Union, Local No. 30*,[49] an employment discrimination class action suit, in which the United States District Court for the Northern District of California found for the defendants.[50] In *Gay*, the court determined that the defendants' settlement offers had been reasonable and made in good faith and thus complied with the formal requirements of Rule 68. Nevertheless, the court ordered the parties to bear their own costs.[51] In reaching its decision, the court considered the effect that mandatory application of Rule 68 would have on class actions.[52] The court found that a Rule 68 offer often creates a conflict between the individual interests of class representatives and the collective interests of the class, because the offer forces representatives to balance their potential liability for costs incurred by defendants after the offer is made against the benefits they may derive from a successful outcome.[53] Self-interest provides a strong incentive to accept such offers in cases involving novel and difficult legal questions when there is a large disparity between the financial benefits and burdens that may accrue to, or be borne by, the class representatives.[54] Based on these observations, the court determined that mandatory application of the cost-shifting provi-

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[48] *Id.* at 202-03.

[49] 86 F.R.D. 500 (N.D. Cal. 1980).

[50] *Id.* at 501.

[51] *Id.*

[52] *Id.* at 504. FED. R. CIV. P. 23 details the requirements for bringing a class action in federal court.

[53] 86 F.R.D. at 503.

[54] *Id.* The court noted that class action settlements must be approved by the court under Rule 23(e). It concluded, however, that court review would not remove the conflict of interest because "Rule 23(e) is not intended to place on the court the burden of deciding whether the class representative should or should not accept an offer" and stressed that the trial court should be resistant to substitute its own judgment for that of the class representatives' counsel. *Id.*

sion, in cases in which a defendant prevails, would thwart the effectiveness of class actions.[55] The court, therefore, concluded that it had discretionary power to refuse application of the cost-shifting provision of Rule 68 in such cases.[56]

The conclusion reached by the United States District Court for the Northern District of California in *Gay*, that a court has the discretionary power to refuse to apply the cost-shifting provision of Rule 68, was contrary to its decision in an earlier case, *Waters v. Heublein, Inc.*[57] In *Waters* the court held that Rule 68 eliminates the district court's discretionary power, generally available pursuant to Federal Rule of Civil Procedure 54(d),[58] to award costs. The court stated: "Rule 68 allows the court no discretion and supercedes Rule 54(d)."[59]

In *Dual v. Cleland*[60] the United States District Court for the District of Columbia reached the same conclusion announced by the United States District Court for the Northern District of California in *Waters* regarding the effect of Rule 68 on a court's discretion to award costs under Rule 54(d).[61] The court stated that "[i]n contrast to Rule 54(d), which invokes the [c]ourt's discretion, the 'offer of judgment' provision of Rule 68 automatically charges the plaintiff with the defendant's costs incurred after an offer of judgment when the requirements of the rule are satisfied."[62] Accordingly, the court

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[55] *Id.* at 504.

[56] *Id.*

[57] 485 F. Supp. 110 (N.D. Cal. 1979).

[58] *Id.* at 113. FED. R. CIV. P. 54(d) provides:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

In most federal civil cases in which a Rule 68 offer is not made, the awarding of costs is governed by Rule 54(d). The discretionary power available to the trial judge under Rule 54(d) has been exercised only in special circumstances. *See generally* 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.70 (2d ed. 1981) (discussing Rule 54(d)).

[59] 485 F. Supp. at 113.

[60] 79 F.R.D. 696 (D.D.C. 1978).

[61] *Id.* at 697.

[62] *Id.*

vacated a provision in an earlier order requiring each party to bear its own costs, and amended the order to require the plaintiff to pay the costs incurred by the defendant after the date of his settlement offer.[63] Courts have not limited application of the cost-shifting provision of Rule 68 to cases in which plaintiffs were afforded some relief, but failed to recover more than the amount of rejected settlement offers. They have also applied the cost-shifting provision in cases in which defendants whose settlement offers were rejected, ultimately prevailed.[64] Courts that have applied the provision in this situation have not questioned its applicability to such cases.[65]

The Impact of Attorneys' Fees Statutes on the Operation of Rule 68

Federal attorneys' fee statutes[66] that award attorneys' fees

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[63] *Id.*

[64] *See, e.g.*, Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978).

[65] *Id.*

[66] Citations for ninety of these statutes are compiled in SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS, SENATE COMM. ON THE JUDICIARY, 94TH CONG., 2D SESS., CIVIL RIGHTS ATTORNEYS' FEES AWARDS ACT OF 1976: SOURCE BOOK 303-313 (Comm. Print 1976). The following are among the statutes which provide for attorneys' fees:

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) (1976) provides:

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

Clayton Act, 15 U.S.C. § 15 (1976) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including reasonable attorney's fees.

Consumer Product Safety Act, 15 U.S.C. § 2059(e)(4) (1976) provides:

> In any action under this subsection the court may in the interest of justice award the costs of suit, including reasonable attorneys' fees and reasonable expert witnesses' fees. Attorneys' fees may be awarded against the United States (or any agency or official of the United States) without regard to section 2412 of title 28, or any other provision of the law. For purposes of this paragraph and sections 2060(c), 2072(a), and 2073 of this title, a reasonable attorney's fee is a fee (A) which is based upon (i) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this subsection, and (ii) such reasonable expenses as may be incurred by the attorney in the provi-

to parties litigating certain claims in federal courts have had an impact on the operation of the cost-shifting provision of Rule 68.[67] Most of these statutes provide for assessment of awarded attorneys' fees as costs.[68] Several federal district courts have concluded that the attorney's fee statutes come within the purview of the cost-shifting provision of Rule 68.

In *Perkins v. New Orleans Athletic Club*[69] the United States Court for the Eastern District of Louisiana stated that "[t]here is no reason why this rule [68] should not be extended by analogy to statutes allowing attorney fees to the 'prevailing party' "[70] The plaintiff in *Perkins* did not prevail on the major part of his claims based on Title II of the Civil Rights Act of 1964.[71] He was, however, granted an injunction

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sion of such services, and (B) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee.

Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988 (Supp. II 1978) provides:

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of section 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], or in any civil action or proceedings, by or on behalf of the United States of America to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[67] *See*, Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 898-902.

[68] *See supra* note 60.

[69] 429 F. Supp. 661 (E.D. La. 1976).

[70] *Id.* at 667.

[71] *Id.* at 666.

under Title II.[72] Because the plaintiff prevailed on one of his Title II claims, the court exercised the discretion available to it under the Civil Rights Act of 1964[73] and ordered the defendant to reimburse the plaintiff for those attorneys' fees required to pursue his successful Title II claim.[74] The court reasoned that there was no injustice in requiring "[t]hose who elect a militant defense in the face of a statute allowing attorney's fees if they are defeated . . . to pay the legal fees incurred so far as they were requisite to the issues on which the plaintiff did prevail."[75]

In *Waters v. Heublein, Inc.*,[76] another employment discrimination suit, the plaintiff prevailed, but recovered less than the amount of a rejected settlement offer.[77] The United States District Court for the Northern District of California concluded that "the only reasonable accommodation of Rule 68 and the fees provision of Title VII[78] involve[d] treating . . . [a settlement offer] as including [attorneys'] fees and finding, in this context, that such an offer, if it exceeded the judgment finally obtained, barr[ed] the recovery of the relevant fees."[79] Therefore, the court held that the defendant's Rule 68 offer precluded recovery of attorney's fees by plaintiff's counsel, for services rendered after the date on which the settlement offer had been rejected.[80]

The decision in *Waters v. Heublein, Inc.* was consistent with the decision of the United States District Court for Colorado in *Scheriff v. Beck*,[81] another civil rights action. As in *Waters*, the plaintiff in *Scheriff* prevailed, but recovered less

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[72] *Id.*

[73] 42 U.S.C. § 2000e-5(K) (1976) provides: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

[74] 429 F. Supp. at 666-67.

[75] *Id.* at 667.

[76] 485 F. Supp. 110 (N.D. Cal. 1979).

[77] *Id.* at 113-16.

[78] *See supra* note 70.

[79] 485 F. Supp. at 114.

[80] *Id.*

[81] 452 F. Supp. 1254 (D. Colo. 1978).

than the amount of a rejected settlement offer.[82] In *Scheriff*, however, the defendant specifically excluded attorneys' fees from the settlement offer he submitted to the plaintiff.[83] The court found the settlement offer fatally defective because of this exclusion and refused to award the defendant costs accrued subsequent to date of his settlement offer.[84] The court concluded that the language of "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay."[85]

II. THE DECISION IN DELTA AIR LINES, INC. v. AUGUST

The Supreme Court in *Delta Air Lines, Inc. v. August*[86] held that the cost-shifting provision of Rule 68 was not applicable in cases in which the court enters judgment in favor of a defendant-offeror.[87] In so holding the Court rejected Delta's assertion that the language of Rule 68 mandated cost-shifting whenever the plaintiff-offeree failed to obtain more by judgment than the defendant's settlement offer.[88] The Court based its holding on the language, purpose and history of Rule 68.[89]

The Court initially examined the text of Rule 68 to determine the mechanics of its operation.[90] The Court noted that the provisions of the rule are applicable when a defendant makes a formal settlement offer to a plaintiff more than ten days before a trial begins or after determination of liability, if the amount or extent of liability is not yet determined.[91] The Court observed that, if an offer was accepted in either of these situations, judgment would be entered for the plaintiff.[92] The Court then noted that, although the rule treats a rejected settlement offer as if it had been withdrawn, the amount of the

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[82] *Id.* at 1259.
[83] *Id.*
[84] *Id.* at 1260.
[85] *Id.*
[86] 450 U.S. 346 (1981).
[87] *Id.* at 352.
[88] *Id.* at 353.
[89] *Id.* at 356.
[90] *Id.* at 350.
[91] *Id.*
[92] *Id.* For text of FED. R. CIV. P. 68, see *supra* note 8.

rejected offer may play a crucial role in determining which party ultimately recovers costs.[93] The rule requires a plaintiff-offeree to pay costs incurred after the date of the offer when the "judgment finally obtained by the offeree [is] not more favorable than the offer."[94]

The Court next addressed the question of what type of judgment is encompassed by the language "judgment finally obtained by the offeree . . . not more favorable than the offer."[95] The Court noted it was obvious that this language does not include a judgment for the plaintiff in an amount greater than the defendant's settlement offer.[96] It was equally clear to the Court that a judgment in favor of defendant was not encompassed by this language.[97] The Court stated that the language *judgment obtained by the offeree*, unlike language such as *any judgment*, could not be properly interpreted to mean a judgment in favor of a defendant-offeror.[98]

In addition, the Court found support for this conclusion in other language contained in the rule, which provides that "a party defending against a claim may serve upon the adverse party an offer to allow *judgment* to be *taken against him* . . . ."[99] The Court reasoned that "[b]ecause the rule obviously contemplates that a 'judgment taken' against a defendant is one favorable to the plaintiff it follows that a judgment 'obtained' by the plaintiff is also a favorable one."[100] On the basis of this analysis, the Court concluded that only a judgment in favor of the plaintiff in an amount less than the defendant's settlement offer is encompassed by the Rule 68 language "judgment finally obtained by the offeree . . . not more favorable than the offer."[101]

After noting its interpretation of the cost-shifting provision

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[93] A presumption in favor of the prevailing party as to the awarding of costs is incorporated into Rule 54(d). *See supra* text accompanying notes 57-59.

[94] 450 U.S. at 351.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.* (emphasis supplied). *See supra* note 8.

[100] 450 U.S. at 351.

[101] *Id.* at 352.

of Rule 68 to be consistent with the rule's purpose of promoting settlement and discouraging protracted litigation,[102] the Court examined the effect the cost-shifting provision of Rule 68 has on the trial judge's discretion to award costs under Rule 54(d).[103] Initially, the Court observed that, when the cost-shifting provision is applicable, Rule 68 deprives the district judge of his discretionary power in awarding costs by requiring that costs be assessed against the plaintiff.[104] Were Delta's argument to be accepted, that the cost-shifting provision of Rule 68 is applicable in a case in which the defendant offeror prevails,[105] the Court determined that a defendant could eliminate a trial judge's discretion under Rule 54(d) by making a nominal settlement offer.[106]

The Court found it untenable that a frivolous settlement offer could enable a prevailing defendant to transform his discretionary right to costs pursuant to Rule 54(d) into an absolute right to costs incurred after the date of the offer.[107] After noting that plaintiffs have not been granted a similar means of divesting a district judge of his Rule 54(d) discretion,[108] the Court concluded that it would be required to assume the drafters had incorporated a bias in favor of defendants into the Federal Rules, in order to uphold application of the cost-shifting provision when defendant-offerors prevail. The Court determined that the unreasonableness of this assumption strengthened its conclusion that the cost-shifting provision of the rule is only applicable in cases in which plaintiffs prevail, but recover less than the amount of a rejected offer of settlement.[109]

By limiting the applicability of the cost-shifting provision of Rule 68 to cases in which a plaintiff prevailed, but recovered less than the amount of a rejected settlement offer, the Court

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[102] *Id.*
[103] *Id.* For text of Rule 54(d), see *supra* note 58.
[104] 450 U.S. at 352.
[105] *Id.* at 353-54 n.12.
[106] *Id.* at 353.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 354.

found it unnecessary to read a reasonableness requirement into Rule 68.[110] The Court noted that the inequity of permitting a prevailing defendant's sham offer to control the awarding of costs had prompted courts to condition the applicability of the cost-shifting provision of Rule 68 on a finding that the settlement offer was reasonable.[111] Under the Court's interpretation of Rule 68, sham offers could be of no consequence in cases in which defendant offerors prevail, because in such cases the cost-shifting provision is inapplicable.[112] Therefore, the Court concluded that it was unnecessary to read a reasonableness requirement into the rule.[113]

After emphasizing that the history of Rule 68 supported its interpretation of the cost-shifting provision of the rule,[114] the Court observed that the three state statutes,[115] cited in the Advisory Committee Note[116] accompanying the original version of Rule 68, required a plaintiff, who fails to recover a judgment more favorable than a previously rejected settlement offer, to pay the defendant's costs from the date of the offer.[117] Because these states also had statutes allowing prevailing defendants to recover costs,[118] the Court reasoned that "the only purpose served by [the] state offer of judgment rules was to penalize prevailing plaintiffs who had rejected

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[110] *Id.* at 355.

[111] *Id.* In its opinion, the Seventh Circuit Court of Appeals emphasized that only a "reasonable" offer of judgment could trigger the cost-shifting provision of Rule 68. It stated:

> In a Title VII case the trial judge may exercise his discretion and allow costs under Rule 68 when viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in *good faith* and to have had some *reasonable* relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

August v. Delta Air Lines, Inc., 600 F.2d 699, 702 (7th Cir. 1979) (emphasis supplied).

[112] 450 U.S. at 354.

[113] *Id.* at 355.

[114] *Id.* at 356. *See supra* notes 19-85 and accompanying text.

[115] *See supra* note 20.

[116] *Id.*

[117] Delta Air Lines, Inc. v. August, 450 U.S. 346, 356-57 (1981).

[118] 450 U.S. at 358 n.21 (citing 2 MINN. STAT. § 9471 (Mason 1927); 4 MONT. REV. CODES ANN. §§ 9787-9788 (1935); N.Y. CIV. PRAC. ACT §§ 1470-1473, 1475 (Cahill 1937)).

reasonable settlement offers without good cause."[119]

As further support of its interpretation of Rule 68, the Court cited the Advisory Committee's Note to the 1946 Amendment of the rule.[120] The Note suggests that the purpose of the cost-shifting provision is to "save" the defendant from paying costs incurred by a prevailing plaintiff after the date of a settlement offer.[121] In view of the language, purpose and history of Rule 68, the Court concluded that the cost-shifting provision of the rule is applicable only in cases in which a plaintiff ultimately prevails, but recovers less than a previously rejected settlement offer.[122]

Justice Powell found it anomalous,[123] as did the dissenting justices,[124] that "under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses* entirely."[125] Justice Powell concurred with the result of the decision, however, because he found that the terms of Delta's offer of judgment[126] failed to comply with the requirements of Rule 68.[127] After observing that Title VII generally requires that a prevailing party be reimbursed for reasonable attorney's fees as costs,[128] Justice Powell reasoned that a Rule 68 offer in a Title VII case must include reasonable attorney's fees that have accrued

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[119] 450 U.S. at 358.

[120] *Id.* at 360. Quoting the 1946 Advisory Committee Note on FED. R. CIV. P. 68 the Court stated:

> It is implicit, however, that as long as a case continues—whether there be a first, second or third trial—and the defendant makes no further offer, his first and only offer will operate to save him the costs from the time of that offer if the plaintiff ultimately obtains a judgment less that the sum offered. In the case of successive offers not accepted, the offeror is saved the costs incurred after the making of the offer which was equal to or greater than the judgment ultimately obtained.

Id. n.26 (quoting FED. R. CIV. P. 68 1946 Advisory Committee Note).

[121] 450 U.S. at 360.

[122] *Id.* at 361.

[123] *Id.* at 362.

[124] Chief Justice Burger and Justice Stewart joined with Justice Rehnquist in dissenting.

[125] 450 U.S. at 362 (Powell, J., concurring) (emphasis supplied).

[126] *See supra* note 7.

[127] 450 U.S. at 362.

[128] *See supra* note 77. *See also*, Christianburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978); Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 401-02 (1968).

to the date of the offer.[129] Based on this reasoning, Justice Powell concluded that the terms of an offer of judgment in a Title VII case must leave to the discretion of the court the amount of costs and attorney's fees awarded.[130] Because the terms of Delta's offer of judgment did not leave the recovery of attorney's fees to the discretion of the trial judge, Justice Powell found the offer ineffective.[131]

The dissenting justices[132] criticized the Court for failing to confront squarely the issue on which certiorari was granted: "Whether the Court of Appeals erred in nullifying a clear and unambiguous mandatory imposition of costs under Rule 68?"[133] Because the Court affirmed the decision of the Court of Appeals, the dissimilarity between the substance of the appellate court's opinion and that of the Supreme Court concerned the dissenting justices.[134] They noted that two of the three reasons the Seventh Circuit had given in support of its holding were negated by the reasoning in the Court's opinion.[135] First, the "plain language" of the Federal Rules of Civil Procedure and Title VII does not suggest that costs for a Title

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[129] Justice Powell stated: "A rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party. It follows therefore, that the 'costs' component of a Rule 68 offer . . . must include reasonable attorney's fees accrued to the date of the offer." 450 U.S. at 363 (Powell, J., concurring). Justice Powell's reasoning was based in part on that of the United States District Court for Colorado which found an offer of judgment in *Scheriff v. Beck* defective because it failed to include attorney's fees then accrued. *See supra* notes 83-88 and accompanying text.

[130] 450 U.S. at 365 (Powell, J., concurring). Justice Powell asserted that an offer of judgment in a Title VII case must include two separate elements: (1) the substantive relief proposed; and (2) costs, including reasonable attorney's fees. *Id.* Justice Powell emphasized that attorney's fees awarded are within the discretion of the trial court unless the parties agree otherwise. *Id.*

[131] Justice Powell stated that "Delta's offer would have complied with Rule 68—and the company now would be entitled to the costs it seeks—if the offer had specified some amount of substantive relief, plus costs and attorney's fees to be awarded by the trial court." 450 U.S. at 366 (Powell, J., concurring).

[132] Justice Rehnquist was joined by Chief Justice Burger and Justice Stewart in dissent.

[133] 450 U.S. at 366 (Rehnquist, J., dissenting).

[134] *Id.* at 366-67. The opinion of the Seventh Circuit Court of Appeals centered on the issue of whether the awarding of costs under Rule 68 is mandatory or discretionary when a plaintiff recovers less than a rejected offer of settlement. August v. Delta Air Lines, Inc., 600 F.2d 699, 700 (7th Cir. 1979).

[135] 450 U.S. at 368 (Rehnquist, J., dissenting).

VII lawsuit should be accorded special treatment.[136] Secondly, the drafters of Rule 68 had not incorporated the requirement that an offer be "reasonable" and in "good faith" into the "plain language" of Rule 68.[137]

The dissenting justices strongly disagreed with the Court's conclusion that the "plain language" and history of Rule 68 compelled a finding that the cost-shifting provision of the rule is not applicable in cases where a defendant-offeror prevails.[138] Noting that "judgment" was defined in Federal Rule of Civil Procedure 54(a)[139] as a "decree and any order from which an appeal lies," they reasoned that August had obtained a judgment less favorable than Delta's offer of settlement.[140] Based on this reasoning, the dissenting justices concluded that the mandatory cost-shifting provision of Rule 68 is applicable in cases in which defendant-offerors prevail.[141] Unlike the majority, they had no difficulty reconciling their interpretation of Rule 68's cost-shifting provision with Rule 54(d).[142] They concluded that Rule 68 falls within the class of express provisions specifically excepted by Rule 54(d) from trial court discretion.[143]

The original wording of the Rule 68 cost-shifting provision[144] and the state statutes[145] in the 1938 Advisory Commit-

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[136] *Id.* The dissenting justices observed that FED. R. CIV. P. 1 provides that the Federal Rules of Civil Procedure "govern the procedure in the United States district courts in all suits of a civil nature . . . with the exception stated in Rule 81." Proceedings brought under Title VII are not one of the exceptions listed in Rule 81. 450 U.S. at 368.

[137] *Id.* at 369. *See supra* note 103.

[138] *Id.* at 370-71.

[139] FED. R. CIV. P. 54(a) provides that: "Judgment as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."

[140] 450 U.S. at 371. (Rehnquist, J., dissenting).

[141] *Id.*

[142] *Id.* at 374.

[143] *Id. See supra* text accompanying note 62.

[144] The original cost-shifting provision of FED. R. CIV. P. 68 read: "If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time." *Advisory Committee Report on Proposed Amendments to the Rules of Civil Procedure*, 5 F.R.D. 433, 483 (1946).

[145] *See supra* note 21 and accompanying text.

tee Note was cited by the dissenting justices as additional support for their interpretation.[146] They also observed that several lower courts have awarded costs under Rule 68 to prevailing defendant-offerors.[147] The absence of any evidence suggesting that Congress "intended to immunize plaintiffs from the operation of the Rule and the concomitant costs it imposes simply because they lost their cases on the merits" was also emphasized.[148] They were unpersuaded by the policy considerations the Court presented.[149] The dissenting justices could not conceive that a plaintiff who prevails, but recovers less than the amount of a previously rejected settlement offer, should be placed in a worse position than a plaintiff who rejects an offer and recovers nothing.[150]

At the conclusion of their opinion, the dissenting justices rebutted Justice Powell's assertion that attorney's fees were encompassed by the "cost" provision of Rule 68.[151] After noting that, at the time Rule 68 was promulgated, the commonly accepted definition of "costs" did not include attorney's fees,[152] they observed that the drafters of the Federal Rules of Civil Procedure specifically mentioned attorney fees when they intended for them to be recoverable.[153] They concluded that, if attorney's fees were a component of Rule 68 "costs" in a Title VII case, then a plaintiff who recovered less than the amount of a rejected settlement offer would be liable for the defendant's legal fees, a result that would seriously undermine the purpose of attorney fee statutes.[154]

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[146] 450 U.S. at 372 (Rehnquist, J., dissenting).

[147] Dual v. Cleland, 79 F.R.D. 696 (D.D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974). *See also*, Gay v. Waiters & Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500 (N.D. Cal. 1980). Although the court in *Gay* refused to impose costs on plaintiffs in a class action employment discrimination suit in which defendant-offerors prevailed, the court assumed that the cost-shifting provision of Rule 68 generally applies in such cases. *Id.* at 503-04.

[148] 450 U.S. at 374 (Rehnquist, J., dissenting).

[149] *Id.* at 375. *See supra* notes 66-67, 94-97 and accompanying text.

[150] 450 U.S. at 375. (Rehnquist, J., dissenting).

[151] *Id.*

[152] *Id.* at 377.

[153] *Id. See, e.g.*, FED. R. CIV. P. 37 which generally provides for recovery of "reasonable expenses . . . including attorney's fees," as a sanction for discovery abuses.

[154] 450 U.S. at 378 (Rehnquist, J., dissenting).

III. ANALYSIS AND IMPLICATIONS OF DELTA AIR LINES, INC. v. AUGUST

In *Delta Air Lines, Inc. v. August* the Court identified and settled the previously unresolved issue of whether the cost-shifting provision of Rule 68 is applicable to cases in which defendant-offerors prevail.[155] Because the Court considered the threshold question to be whether the rule applies to cases in which defendant-offerors prevail, it found it unnecessary to determine whether application of the cost-shifting provision is discretionary or mandatory.[156] If the Court had addressed that issue, however, its analysis of the threshold question strongly suggests that the Court would have held the cost-shifting provision to be mandatory whenever a plaintiff prevails but recovers less than the amount of a rejected settlement offer.[157]

The Court's analysis of the relationship between the operation of Rule 68 and Rule 54(d) strongly supports its conclusion that the cost-shifting provision is not applicable when a defendant-offeror prevails.[158] It does not seem logical that the drafters of Rule 68 would have given defendant-offerors such a risk-free method of depriving trial judges of their Rule 54(d) discretion.[159] Removing the Court's discretion would not contribute anything to the "just, speedy and inexpensive" determination of a case.[160]

The dissenting justices' assertion, that the Court's holding places a plaintiff who prevails but recovers less than the amount of a rejected settlement offer in a worse position than a plaintiff who rejects a settlement offer and recovers nothing, appears to be unfounded.[161] Under the Court's holding, a plaintiff who recovers nothing after rejecting a defendant's offer, will rarely, if ever, be in a better position than one who

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[155] 450 U.S. at 352.

[156] *See supra* text accompanying note 17.

[157] *See supra* notes 86-121 and accompanying text.

[158] *See supra* notes 103-09 and accompanying text.

[159] *See* 450 U.S. at 353.

[160] FED. R. CIV. P. 1 provides in pertinent part that the "[Federal Rules of Civil Procedure] shall be construed to secure a just, speedy, and inexpensive determination of every action."

[161] *See supra* note 149 and accompanying text.

prevails, but recovers less than the amount of a rejected settlement offer, because in most cases a prevailing defendant will be entitled to costs pursuant to Rule 54(d).[162] When a prevailing defendant is not entitled to costs he should not be able to employ Rule 68 to prevent the trial judge from exercising his Rule 54(d) discretion.[163]

Although dictum, the Court's conclusion that it is unnecessary to read a reasonableness requirement into Rule 68 will probably have a more significant impact on district court application of Rule 68 than any other part of the Court's decision. The refusal to read a reasonableness requirement into the rule eliminates the need to prolong litigation to decide whether an offer of judgment was reasonable.[164] The Court concluded that the Seventh Circuit employed a reasonableness standard in its determination of whether the cost-shifting provision was applicable, because it had "[perceived] the anomaly of allowing defendants to control the discretion of district judges by making sham offers . . . ."[165] While the Court's perception of the circuit court's basis for the incorporation of a reasonableness requirement into the rule is probably correct, there may be other reasons to incorporate such a requirement into Rule 68.[166] Additionally, courts have not limited the imposition of a reasonableness requirement to cases in which defendant-offerors prevailed.[167]

Overall, the Court's interpretation of the operation of the cost-shifting provision of Rule 68 seems to be consistent with the language, purpose and history of the rule. By holding that the cost-shifting provision is not applicable to cases in which a defendant-offeror prevails, the Court eliminated the possibility of a defendant using a Rule 68 offer as cheap insurance for recovery of costs.[168] In most cases this means that a defendant

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[162] *See supra* note 58.

[163] *See* Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 895.

[164] *Id.* at 896.

[165] 450 U.S. at 355.

[166] *See infra* note 167.

[167] *See supra* notes 45-65 and accompanying text.

[168] *See* Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889, 895 (1978).

will be able to benefit from the operation of the cost-shifting provision of the rule only by making a realistic settlement offer.[169]

When viewed from a broader perspective, however, it becomes clear that the Court's holding in *Delta Air Lines, Inc. v. August* does not resolve the more pronounced problems with the application of Rule 68 which were not at issue in the case. It is not clear what standard should be applied to determine whether a judgment "is not more favorable than" a Rule 68 settlement offer when nonmonetary relief is at issue. Also, there is an inherent conflict between the Rule 23(e) requirement that class action settlements must be approved by the Court, and the application of the Rule 68 cost-shifting provision, in a case in which the amount of the judgment the plaintiffs obtained is less than a settlement offer the court refused to approve.

Finally, one must ask whether the provisions of Rule 68 really act as an effective catalyst for promoting settlement and discouraging litigation. Since the rule was enacted, litigation has become increasingly more complex, and costs attendant to it have escalated significantly. Generally, the largest percentage of these costs is attributable to legal fees. From this fact it can be concluded that, in most cases, the legal fees associated with the litigation will be a crucial factor in a party's determination of whether to accept a settlement offer. Consideration of general costs will most often be incidental by comparison. Because the term *costs* as used in Rule 68, usually has been construed to include only general costs, Rule 68 realistically

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> An offer by a defendant of ten dollars at the beginning of a difficult and complex case, or case based on a novel legal theory, is not likely to produce an early settlement of the case, which is the purpose of Rule 68. Yet if the rule is not limited to cases in which the plaintiff prevails, the ten dollar offer will have the effect of assuring that the defendant is awarded practically all of his costs if he prevails, even if there is good reason why he should not be awarded his costs.

Id.

[169] *See* Delta Air Lines, Inc. v. August, 450 U.S. 346, 355 (1981).

plays a rather insignificant role in promoting settlement and discouraging protracted litigation.

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