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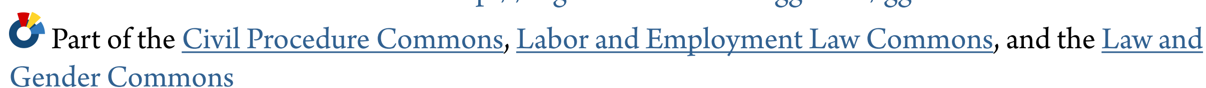
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THE 'OFFER OF JUDGMENT' RULE IN EMPLOYMENT DISCRIMINATION ACTIONS: A FUNDAMENTAL INCOMPATIBILITY

Maureen Malvern*

Attorneys for plaintiffs in employment discrimination cases have recently been encountering a new defense strategy: the "offer of judgment" under rule 68 of the Federal Rules of Civil Procedure.[1] Although the use of rule 68 in employment discrimination actions is recent, the rule itself goes back to 1938, when the Federal Rules were first enacted, and has since been subject to only minor modifications.[2] A defendant may make a rule 68 offer

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1. Rule 68 reads as follows:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against 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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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.

FED. R. CIV. P. 68.

2. The main change was the addition of the last sentence, but even this amendment

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at any time up to ten days before trial, and a plaintiff then has ten days in which to decide whether to accept this "take-it-or-leave-it" offer. If the plaintiff does *not* accept it, and "[i]f 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."[3] It has been stated that the purposes of rule 68, which is modeled on similar state rules,[4] are "to encourage early settlements"[5] and "to fix responsibility for costs" incurred after making the offer.[6] The rule has frequently been used, for example, in actions to collect on an insurance policy and in actions for patent or copyright infringement.[7]

A popular text on employment discrimination urges defendants to "make a much greater use of rule 68 offers of judgment than has heretofore been the case in employment discrimination litigation" because such an offer is "an effective defendant's technique for introducing some risk element into a case where a plaintiff is likely to prevail to some degree."[8] But the "risk element" introduced by a rule 68 offer is entirely inappropriate in an employment discrimination case, particularly in a class action. This paper will argue that the chilling effect of rule 68 is inconsistent with the statutory objectives of Title VII of the Civil Rights Act of 1964, amended 1972,[9] and that the rigid procedures of rule 68 are inconsistent with the procedural safe-

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merely clarified the implications of the original rule. *See* note 164 *infra*.

3. FED. R. CIV. P. 68.

4. The history of rule 68 is scanty. The 1938 Advisory Committee Note merely refers to statutory provisions of Minnesota, Montana, and New York, but many other states have similar rules. *See, e.g.*, former CAL. CODE CIV. PROC. § 997 (West 1955) (replaced in 1971 by CAL. CODE CIV. PROC. § 998 (West Supp. 1980), which allows either party to make such an offer).

5. Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969) (personal injury action).

6. Nabors v. Texas Co., 32 F. Supp. 91, 92 (W.D. La. 1940) (suit for annulment of mineral leases and for damages).

7. For insurance policy cases, *see, e.g.*, Cruz v. Pacific Am. Ins. Corp., 337 F.2d 746 (9th Cir. 1964); Home Ins. Co. v. Kirkevold, 160 F.2d 938 (9th Cir. 1947); 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). For patent and copyright infringement cases, *see, e.g.*, Cover v. Chicago Eye Shield Co., 136 F.2d 374 (7th Cir.), *cert. den.*, 320 U.S. 749 (1943); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974); Gamlen Chem. Co. v. Dacar Chem. Prods. Co., 5 F.R.D. 215 (W.D. Pa. 1946).

8. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1145 (1976).

9. 42 U.S.C. §§ 2000e to e-17 (1976). Title VII forbids employment discrimination on the basis of race, color, religion, sex, or national origin. *See* § I *infra*.

Malvern: Offer of Judgment Rule

guards for class actions provided in rule 23.[10] Title VII plaintiffs who encounter a rule 68 ploy first should consider pursuading the court that a rule 68 offer is inappropriate in any Title VII action because of these inconsistencies.[11] If this direct challenge fails, they may have recourse to more limited strategies, arguing that the defendant's offer is not a proper one under rule 68,[12] or that in any event no more than minimal costs should be imposed under the rule.[13]

I. INCONSISTENCY OF RULE 68 WITH TITLE VII POLICY

Plaintiff's first argument that a rule 68 offer is inappropriate in a Title VII case, and that therefore the rule's sanctions should be suspended, derives from the purpose of Title VII itself and applies both to individual actions and to class actions. The courts have declared that Title VII was designed to accomplish two "broad remedial purposes":[14] "to achieve equality of employment opportunities"[15] and "to make persons whole for injuries suffered on account of unlawful employment discrimination."[16] In order to encourage private litigants to help enforce the Act, Congress provided courts with discretion to award reasonable attorney's fees to the prevailing party (other than the Equal Employment Opportunity Commission [EEOC] or the

10. FED. R. CIV. P. 23. *See* § II *infra.*

11. In a recent Title VII class action, plaintiffs' attorneys responded to defendants' rule 68 offer by filing a "Motion to Determine Whether an Appropriate Offer of Judgment Has Been Made," and both sides briefed and argued the appropriateness of rule 68 offers in Title VII class actions. Hunter v. United Air Lines, No. C72-170 AJZ (N.D. Cal. 1979). However, on the day scheduled for ruling on the issue, defendants made a new offer which led to serious settlement negotiations and, ultimately, to a consent decree which was approved by the judge. Both sides decided that a ruling on the rule 68 issue had become unnecessary, and proceeded with negotiations without further reference to the rule or to its sanctions. Conversation with John Hansen, plaintiffs' attorney, in San Francisco (Nov. 7, 1979).

12. *See* § III A *infra* for discussion of a proper offer.

13. *See* § III B *infra* for discussion of allowable costs.

14. The trial court "must consider the broad remedial purposes of Title VII . . . ." Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330, 1334 (9th Cir. 1977) (reversing denial of class certification in Title VII race discrimination suit).

15. Griggs v. Duke Power Co., 401 U.S. 424, 429 (1971) (holding unlawful a test not shown related to job performance that operated to exclude Blacks, notwithstanding the employer's lack of discriminatory intent).

16. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (holding that victims of racial discrimination in employment should be granted pay notwithstanding the employer's good faith).

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United States).[17] However, this congressional purpose of encouraging private litigants to accomplish the objectives of the Act is undermined if costs are shifted to plaintiffs under the mandatory provisions of rule 68. Plaintiffs' attorneys may argue that rule 68 has a chilling effect on Title VII litigation 1) because of its inflexibility as compared with the general rule on costs, rule 54(d), so that plaintiffs may be deterred from asserting a meritorious claim, and 2) because of the uncertain scope of "costs" and the uncertain meaning of "more favorable judgment," so that it is difficult for plaintiffs to know ahead of time exactly what they are risking if they refuse defendant's offer.

Recently the Seventh Circuit faced the question of rule 68's effect on a Title VII action and held that mandatory cost shifting was inconsistent with the statutory purpose.[18] The court's reasoning was based on precedents dealing with the award of attorney's fees in Title VII cases.[19] There are few opinions dealing directly with taxation of costs in Title VII litigation,[20] but the leading Supreme Court cases on the award of attorney's fees under the Civil Rights Act of 1964, *Newman v. Piggie Park Enterprises, Inc.*[21] and *Christiansburg Garment Co. v. EEOC*,[22] imply that the trial court's assessment of litigation expenses in Title VII cases should be consistent with the statutory purpose of encouraging private litigants to enforce the Act by asserting meritorious claims.

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17. 42 U.S.C. § 2000e-5(k) (1976) reads in part: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs . . . ."

18. August v. Delta Air Lines, Inc., 600 F.2d 699 (7th Cir. 1979) (individual Title VII action alleging racial discrimination in discharge), *cert. granted*, 100 S. Ct. 1833 (1980).

19. *Id.* at 701.

20. Decisions on taxation of costs are rarely appealed, partly because of expense and partly because of appellate court reluctance to overturn the trial court's discretionary decision. Comment, *Taxation of Costs in Federal Courts—A Proposal*, 25 AMER. U.L. REV. 877, 883-884 (1976).

21. 390 U.S. 400 (1968) (class action under Title II of the Civil Rights Act of 1964, to enjoin racial discrimination in restaurants).

22. 434 U.S. 412 (1978) (Title VII action brought by EEOC on behalf of woman alleging racial discrimination).

A. Chilling Effect of Rule 68 Cost Shifting on Title VII Litigation

The general rule with regard to costs in the federal courts is found in rule 54(d): "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."[23] This general rule allows for exceptions where other rules apply, and the situation resulting from a rejected offer of judgment constitutes one such exception. Rule 68 differs from rule 54(d) primarily in two ways. First, rule 68 allows costs even to a *losing* defendant if plaintiff's judgment is not more favorable than defendant's offer. Second, rule 54(d) gives the trial court discretion not to award costs to the prevailing party if such an award would be inequitable, but the terms of rule 68 are mandatory, not discretionary: the offeree who fails to obtain a more favorable judgment "*must* pay the costs incurred after the making of the offer."[24]

Uncertain Meaning of "Costs"

Under rule 68, even a plaintiff who has a meritorious claim with a reasonable chance of prevailing risks not only losing her own costs of litigation, but having to pay costs incurred by the defendant from the time the offer of judgment is made. Because Title VII cases are often expensive,[25] and plaintiffs often have

23. Fed. R. Civ. P. 54(d).

24. (Emphasis added). "[T]he express language of the rule, and certain pertinent cases, leave no doubt that costs must be awarded once a proper offer of judgment has been made." Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974) (plaintiff who lost patent infringement action ordered to pay defendant's costs incurred after making offer of judgment).

> In contrast to Rule 54(d), which invokes the Court'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 . . . . The plain language of the rule eliminates the Court's discretion.

Dual v. Cleland, 79 F.R.D. 696, 697 (D.D.C. 1978) (plaintiff who lost Title VII action ordered to pay defendant's costs incurred after making offer of judgment).

25. A commentator has suggested that one reason for increased use of rule 68 by defendants "is that the amount of costs that may be assessed, particularly in complex litigation, is increasing." Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 891. He adds that the rule may be especially useful in "complex litigation in which the damages requested are low and the costs therefore become financially significant," such as civil rights suits. *Id.* n.15.

limited resources,[26] this risk may be a considerable deterrent. The chilling effect is accentuated by plaintiffs' uncertainty as to the amount of costs that may be assessed against them.[27] Not all expenses are taxable as costs, but depending upon the customs of a particular district, the predilections of a particular judge, and the circumstances of a particular case, costs can range from minimal to staggering.[28]

Defendants may further threaten plaintiffs that among the litigation expenses at risk under rule 68 are attorney's fees, since these are authorized by Title VII to be taxed "as part of the costs."[29] Here, however, defendants' argument would be particularly weak. The Supreme Court has held that attorney's fees are to be awarded only when authorized by statute (except in limited equitable circumstances not applicable here).[30] The statutory authorization in Title VII expressly makes the award of attorney's fees *discretionary* and provides that they may be awarded *only* to the prevailing party, making the statutory award of attorney's fees consistent with rule 54(d) rather than with rule 68. Indeed, it appears that in no reported case have attorney's fees been taxed as costs under rule 68.[31] To award at-

26. The Senate Report accompanying the Civil Rights Attorney's Fees Awards Act of 1976 stated that "[i]n many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." S. REP. No. 94-1011, 94th Cong., 2nd Sess. 2 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5910 [hereinafter cited as SENATE REPORT].

27. The Clerk of the U.S. District Court for the District of Nebraska has pointed out that costs often become "a surprise issue" at the end of a lawsuit, "consuming too much time in their resolution and possessing a pesky tendency to invite conflict well out of proportion to the main issues of the original controversy." Peck, *Taxation of Costs in U.S. District Courts*, 37 F.R.D. 481, 482 (1965) (discussing taxation of costs under rule 54(d)).

28. *See* § III B *infra* for further discussion of allowable costs.

29. 42 U.S.C. § 2000e-5(k) (1976).

30. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (reversing award of attorney's fees to environmental organizations who attempted to prevent issuance of permits to construct the trans-Alaska oil pipeline). Rejecting the judicially created "private attorney general" exception to the general American rule, the Court held that courts have discretion to award attorney's fees without statutory authorization only in favor of a party recovering or preserving a common fund or against a losing party who has acted in bad faith. *Id.* at 247.

31. There are dicta in Perkins v. New Orleans Athletic Club, 429 F. Supp. 661, 666-67 (E.D. La. 1976) (civil rights action for denial of admittance to an athletic club because of race) and Honea v. Crescent Ford Truck Sales, Inc., 394 F. Supp., 201, 202-03 (E.D. La. 1975) (Title VII action for sex discrimination) indicating that, had defendants made a rule 68 offer, they might not have been assessed the attorney's fees of plaintiffs who

torney's fees to a losing defendant would be a violation of the terms of the attorney's fees provision of Title VII, and to deny attorney's fees to a plaintiff who prevails to some degree, unless special circumstances make the award unjust, would fly in the face of settled precedent for Title VII litigation.[32]

The usefulness of rule 68 to defendants and the threat of the rule to plaintiffs depend in part on whether the court may tax as costs only such minimal sums as docket fees and statutory witness fees,[33] or whether it may also award expenses for trial preparation, expert fees, and even attorney's fees. Moreover, even if plaintiffs think it unlikely that they will be compelled to pay most of defendants' costs, the risk of being denied reimbursement for their *own* costs when they prevail may be sufficient to have a chilling effect on Title VII litigation.

Uncertain Meaning of "More Favorable Judgment"

Rule 68 seems best suited to actions for monetary damages, such as actions on insurance policies or promissory notes. In such a case, there is no difficulty in determining whether the plaintiff received at trial a money judgment larger than defendant's judgment offer. Where the relief sought is in whole or in part equitable, however, comparison of outcome to offer becomes more difficult and may itself result in prolonging the litigation,[34] thereby completely defeating the purpose of the rule. For example, what if plaintiff rejects an offer of back pay, and then obtains reinstatement but no back pay? What if plaintiff rejects an offer of promotion and then obtains an injunction to post job openings but receives no promotion?

One state supreme court has refused to apply a state rule resembling rule 68 in a type of case deemed inappropriate for such a rule (a divorce action) partly because of the difficulty in comparing offer and outcome: "[W]here far more may be at

prevailed to some degree. However, the question was not actually before the court, since no such offer had been made in either case. The court's emphasis in both cases was on the defendant's failure to make any reasonable settlement offer.

32. *See* § I C *infra* for discussion of attorney's fees precedents.

33. 28 U.S.C. §§ 1821, 1923 (1976).

34. Leeming v. Leeming, 87 Nev. 530, 535, 490 P.2d 342, 345 (1971) (refusal to apply a state rule similar to rule 68 in a divorce proceeding). *See* Note, *supra* note 25, at 902-03.

stake than the mere dollar amount . . ., an 'offer of judgment' can seldom be comprehensive, and an offer's 'favorable' character will often depend on the parties' personal goals."[35]

Similarly, rule 68 is highly inappropriate in a Title VII case, where far more is at stake than a dollar amount. Title VII litigation exemplifies what has been called "public law litigation," where "[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of a public policy."[36] Consequently, the relief in Title VII cases also is likely to differ from the relief in more traditional kinds of cases. In public law litigation, the relief is essentially equitable: "[I]t is forward looking, fashioned ad hoc on flexible and broadly remedial lines, often having important consequences for many persons including absentees."[37]

Title VII explicitly provides for a broad range of equitable remedies, including not only injunctions against unlawful employment practices,[38] but also orders for "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate."[39] With such an array of potential remedies, it is more diffi-

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35. Leeming v. Leeming, 87 Nev. 530, 535, 490 P.2d 342, 345 (1971).

36. Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1302 (1976) (discussing a new model of adjudication emerging in such litigation as civil rights and antitrust suits, particularly class actions).

37. *Id.* Relief in public law litigation "is not a terminal, compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved." *Id.* at 1294.

38. Rule 68 has been appropriately used in simple patent cases where the primary relief sought is an injunction against use of a particular product. *See, e.g.,* Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974). However, the relief in Title VII cases is often much more complex, including provisions for hiring quotas, training programs, and recruitment policies.

39. 42 U.S.C. § 2000e-5(g) (1976). These provisions "are intended to give the courts wide discretion in exercising their equitable powers to fashion the most complete relief possible." 118 CONG. REC. 7166, 7168 (1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972).

The Supreme Court, quoting from Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941), has declared that "attainment of a great national policy . . . must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies." Franks v. Bowman Transp. Co., 424 U.S. 747, 778 (1976) (class action finding requirement of hiring, without grant of retroactive seniority, was inadequate relief for applicants who had been denied employment because of race).

cult than in an ordinary tort or contract case, for example, to calculate whether plaintiffs' judgment at trial is likely to improve upon defendants' offer. Yet not only do plaintiffs have a right to seek the best relief possible, the statutory purposes will not be achieved unless they exercise that right.[40]

The comparison of offer to probable outcome becomes still more difficult in the case of class actions. In connection with court review of class action settlements,[41] it has been pointed out that "[t]he problems can multiply when the available remedies include a mixture of structural change and compensatory relief, and the settlement involves trading off one form of relief against the other."[42] Indeed, the plaintiffs themselves "may disagree as to the proper institutional change which the court should order."[43] In comparing outcome and offer, one must also ask: More favorable to whom? To the named plaintiffs, or to the class as a whole? To discharged employees, or to present employees? Such questions can only add to litigation, not reduce it.[44]

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40. The Supreme Court has declared that

> in enacting Title VII, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin . . . and ordained that its policy of outlawing such discrimination should have the "highest priority" . . . . [O]ne of the central purposes of Title VII is "to make persons whole for injuries suffered on account of unlawful employment discrimination." . . . To effectuate this "make whole" objective, Congress . . . vested broad equitable discretion in the federal courts . . . .

Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976).

41. FED. R. CIV. P. 23(e).

42. *Developments in the Law—Class Actions,* 89 HARV. L. REV. 1318, 1554 (1976) [hereinafter cited as *Class Actions*].

43. *Id.* at 1553.

44. An example of the potential for confusion introduced by a rule 68 offer in cases featuring complex equitable relief appears in Meisel v. Kremens, 405 F. Supp. 1253 (E.D. Pa. 1975). This class action challenged the constitutionality of a Pennsylvania statute providing for summary revocation by directors of state mental health facilities of leaves of absence granted mental patients. The plaintiffs rejected defendants' rule 68 offer, and the defendants rejected plaintiffs' proposed consent decree. *Id.* at 1258. The court found that the summary revocations were a violation of due process and asked counsel to submit proposed recommitment procedures which would be constitutional. *Id.* at 1258. However, no final order was entered because repeal of the statutory provisions in question led to dismissal of the action as moot. Meisel v. Kremens, 80 F.R.D. 419, 421 (1978). No mention of defendant's rule 68 offer is made by the court while assessing fees and costs against defendants, but this is an instance where comparison of outcome to offer could

Within ten days, then, plaintiffs must assess whether the outcome at trial is likely to be more favorable than defendants' offer and, if they are not absolutely certain of a more favorable outcome, what monetary penalty they risk incurring. It is no wonder that rule 68 has been recommended as "a defendant's device to bring risk exposure and pressure on the [employment discrimination] plaintiff somewhat commensurate to that which exists in litigation in other areas."[45] However, Congress and the courts have indicated that there are statutory reasons for making the "risk exposure to and pressure on" Title VII plaintiffs *different* from that which exists in other kinds of litigation.

B. NEED FOR DISCRETION IN TITLE VII COST AWARDS: AUGUST V. DELTA AIR LINES, INC.

A recent Seventh Circuit decision, *August v. Delta Air Lines, Inc.*,[46] directly addressed the question of whether the awarding of costs is mandatory under rule 68 if the final judgment obtained by a Title VII plaintiff is less favorable than the defendant's offer. In *August*, the plaintiff failed to prove that she had been discharged from her job as a stewardess because of race discrimination.[47] Defendants had made a rule 68 offer of only $450, although plaintiff had alleged actual damages of $20,000, not including costs and attorney's fees.[48] Defendants argued that the language of the rule clearly makes defendants' cost award mandatory, and further that "unless Rule 68 is rigidly followed, the rule will overlap the trial judge's express discretion under Rule 54(d), which provides costs to the prevailing party unless the court directs otherwise."[49] The court was not persuaded by these arguments:

> Title VII embodies a basic national policy given a high priority by Congress and contains an authorization for the award of attorney's fees intended to encourage aggrieved individuals to seek redress for violations of their civil rights . . . . *We do not propose to permit a technical interpretation of a*

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have proved quite troublesome.

45. B. SCHLEI & P. GROSSMAN, *supra* note 8, at 1146.

46. 600 F.2d 699 (7th Cir. 1979), *cert. granted,* 100 S. Ct. 1833 (1980).

47. *Id.* at 700.

48. *Id.* at 700-01.

49. *Id.* at 701.

> *procedural rule to chill the pursuit of that high objective.*[50]

The court refused to award defendants their costs even though they had made a rule 68 offer that was refused and had gone on to prevail at trial. The court cited as its reasons for its decision that plaintiff's claim was "not frivolous" and that the offer was so insignificant compared to the relief requested as not "to justify serious consideration by the plaintiff."[51] The court held that the ultimate outcome in a Title VII action is not decisive as to the effect of a rule 68 offer. Rather,

> 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.[52]

The *August* court held that in a Title VII action rule 68 must be read liberally, not technically.[53] How much of rule 68 is left after this "liberal" reading is somewhat unclear, but the court recognized that no procedural rule should be allowed to "chill the pursuit of [the] high objective" of Title VII.[54] In reaching this conclusion, the court relied on case law interpreting the attorney's fees provisions of Titles II and VII of the Civil Rights Act of 1964,[55] as developed in *Newman* and *Christiansburg.*

C. Congressional Encouragement of Title VII Litigation: Attorney's Fees Precedents

Most case law concerning the relationship between the award of litigation expenses and the purposes of Title VII and other civil rights laws may be found in cases dealing with the award of attorney's fees. Ordinarily under American law each party bears its own expenses for attorney's fees; and the award

50. *Id.* (emphasis added).
51. *Id.*
52. *Id.* at 702 (emphasis added).
53. *Id.*
54. *Id.* at 701.
55. *Id.*

of costs does *not* include attorney's fees.[56] However, many federal statutes—including the accommodations[57] and employment[58] sections of the Civil Rights Act of 1964 (Titles II and VII)—contain an authorization for the award of attorney's fees. In 1976 Congress passed the Civil Rights Attorney's Fees Awards Act,[59] providing for discretionary award of attorney's fees to the prevailing party in *all* civil rights cases.

Although the statutory language is neutral, giving the court discretion to award fees to the "prevailing party,"[60] the Supreme Court in *Newman* and *Christiansburg* formulated guidelines for trial courts' discretion that differentiate between a prevailing plaintiff and a prevailing defendant. Prevailing plaintiffs are to be awarded their attorney's fees "in all but very unusual circumstances."[61] Prevailing defendants are to be awarded their attorney's fees only when the court finds that plaintiffs' claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[62] Justification for

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56. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975).

57. 42 U.S.C. §§ 2000a to a-6 (1976).

58. 42 U.S.C. §§ 2000e to e-17 (1976).

59. 42 U.S.C. § 1988 (1976).

60. The pertinent language is identical for Titles II and VII of the Civil Rights Act of 1964 and for the Civil Rights Attorney's Fees Awards Act of 1976: "[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. §§ 1988, 2000a-4(b), 2000e-5(k) (1976).

61. Albemarle Paper Co. v. Moody, 422 U.S. 405, 415 (1975) (a Title VII case), *citing* Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (a Title II case). As *Albemarle* summarizes *Newman*, "the great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances." 422 U.S. at 415. The *Newman* court explained that "[w]hen the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law." 390 U.S. at 401. Because Congress provided attorney's fees in order to encourage the victims of discrimination to seek judicial relief, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 402.

62. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978). Before *Christiansburg*, the standard for award of attorney's fees to prevailing defendants had been uncertain. A commentator writing before the *Christiansburg* decision divided the cases awarding attorney's fees to prevailing defendants into four general categories:

> (1) Those where the plaintiffs have simply lost, notwithstanding the possible merits of the claim at the time suit was brought; (2) those where plaintiff's claim was without merit when filed; (3) those where the plaintiff was guilty of bad faith, harrassment, or similar misconduct; and (4) those which

this dual standard in fee shifting derives from the respective positions of the litigants within the statutory scheme. The prevailing plaintiff is seen as a vindicator of the congressional policy against discrimination, while the losing defendant is seen as a violator of federal law. On the other hand, the prevailing defendant merely asserts private rights, as in any ordinary tort or contract case, while the losing plaintiff has violated no law.[63]

The legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 corroborates the Court's interpretation that the Civil Rights Act of 1964 mandated a dual standard for fee shifting.[64] The 1976 Act did not represent a *new* policy but rather a response to the Supreme Court's holding that attorney's fees could not be awarded without statutory authorization. By filling anomalous gaps in the statutes, the 1976 Act effectuated the traditional policy that attorney's fees should be available in all civil rights cases.[65] Thus the policy behind the 1976 Act was the same as the policy behind the 1964 Act: "All of these civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Con-

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> involved a combination of baseless claims and plaintiff misconduct.

Heinsz, *Attorney's Fees for Prevailing Title VII Defendants: Toward a Workable Standard,* 8 U. TOL. L. REV. 259, 274-75 (1977). *Christiansburg* clearly rejected the first category of cases and insisted that the award of attorney's fees must be consistent with the statutory purpose of encouraging vigorous enforcement. 434 U.S. at 422.

63. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 418-19 (1968). A commentator on pre-*Christiansburg* cases explained that

> [t]he difficulty which the courts have with defendant recoveries under [the attorney's fees section of Title VII] is simply that the two congressional purposes embodied in that section—encouraging private enforcement of Title VII and discouraging baseless litigation—are not readily accommodated with one another when a defendant prevails. To be sure, an award of attorney's fees against a losing plaintiff does operate to restrain the filing of baseless suits. The danger is that the award may also operate to inhibit plaintiffs with meritorious or possibly meritorious claims. To the extent that that happens, the private enforcement objective suffers.

Heinsz, *supra* note 62, at 274. The *Christiansburg* guidelines seek to resolve this tension between the two statutory purposes. *See Christiansburg,* 434 U.S. at 420-22.

64. SENATE REPORT, *supra* note 26, at 4-5, [1976] U.S. CODE CONG. & AD. NEWS at 5912.

65. *Id.* at 2, [1976] U.S. CODE CONG. & AD. NEWS at 5909.

gressional policies which these laws contain."[66] The congressional purpose is fulfilled by the dual standard for fee shifting developed in case law.[67]

As the *August* court noted, attorney's fees cases demonstrate that the award of litigation expenses must be consistent with the objectives of Title VII.[68] With respect to the award of attorney's fees themselves (not at issue in *August*), the law seems settled. First, attorney's fees may be awarded only to a *prevailing* party,[69] not to a *losing* defendant who has made a rule 68 offer that plaintiff rejected and failed to surpass. Second, a *prevailing* defendant (even one who has made a rule 68 offer) may be awarded attorney's fees only if plaintiff's claim was "frivolous, unreasonable, or groundless," or if the "plaintiff continued to litigate after it clearly became so."[70] Third, a prevailing plaintiff (even one who has failed at trial to equal or exceed a rule 68 offer) may be denied attorney's fees only if "special circumstances would render such an award unjust."[71] Even a commentator who urges greater defendant use of rule 68 admits that the rule should be subordinate to the congressional objective of the attorney's fees provisions:

> [S]hifting the attorneys' fees to a defendant, or merely denying them to a plaintiff, has a chilling effect on the very litigation which Congress sought to encourage . . . . It is difficult to support the proposition that the purpose of rule 68, encouraging settlements, should outweigh the congressional purpose embodied in the Civil Rights Attorneys' [*sic*] Fees Awards Act [or in the

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66. *Id.* at 5, [1976] U.S. CODE CONG. & AD. NEWS at 5912.

67. The Senate Report cites *Newman* for the proposition that the successful civil rights plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust," and cites other cases for the proposition that the unsuccessful plaintiff "could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes." *Id.* at 4-5, [1976] U.S. CODE CONG. & AD. NEWS at 5912. The congressional wording here is actually stronger than the subsequent *Christiansburg* guidelines, indicating a fundamental "bad faith" criterion for assessment of fees against plaintiffs. "This bill thus deters frivolous suits by authorizing an award of attorney's fees against a party shown to have litigated in 'bad faith' . . . ." *Id.*

68. 600 F.2d at 701.

69. 42 U.S.C. § 2000e-5(k) (1976).

70. Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).

71. Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968).

> Civil Rights Act of 1964], of encouraging the vindication of civil rights.[72]

The law is less settled regarding the application of the *Newman-Christiansburg* guidelines to litigation expenses other than attorney's fees. Some courts have looked to attorney's fees precedents in exercising their discretion whether to award costs to the prevailing party under rule 54(d),[73] and some have not.[74] Some courts have also looked to the attorney's fees provisions for authority to assess litigation expenses beyond those ordinarily taxable as costs,[75] and some have not.[76] It would appear that the courts that have disregarded the attorney's fees cases in their taxation of costs felt free to do so because they believed the costs involved were low enough not to deter the enforcement of Title VII.[77] Although case law is unsettled, there seems to be no reason why the statutory objectives which govern fee shifting should apply differently to cost shifting. Indeed, the congressional rationale for fee shifting in civil rights cases applies equally well to cost shifting: "If the cost of private enforcement

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72. Note, *supra* note 25, at 901.

73. *See* August v. Delta Air Lines, Inc., 600 F.2d 699, 701 (7th Cir. 1979); Dual v. Cleland, 79 F.R.D. 696, 697 (D.D.C. 1978). The *Dual* court cited Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) and Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) as support for the "special considerations" required in the trial court's exercise of its discretion in making cost awards in Title VII cases, and concluded that "[u]nless the plaintiff has brought an action that is frivolous, unreasonable, or without foundation, costs should not be imposed on an unsuccessful Title VII employee-plaintiff under Rule 54(d)." 79 F.R.D. at 697.

74. *See* Jones v. City of San Antonio, 568 F.2d 1224, 1226 (5th Cir. 1978) (unsuccessful Title VII suit for race and sex discrimination, no abuse of discretion for costs to be assessed against plaintiff); Maldonado v. Parasole, 66 F.R.D. 388, 390 (E.D.N.Y. 1975) (unsuccessful civil rights action against former police officer for alleged illegal assault and arrest, assessing costs against plaintiff). However, *Maldonado* was decided while the standard for award of attorney's fees to successful defendants was still unsettled, and although *Jones* was decided shortly after Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), the court does not refer to the *Christiansburg* standard.

75. *See, e.g.*, Payne v. Travenol Laboratories, Inc., 74 F.R.D. 19, 21 (N.D. Miss. 1976).

76. *See, e.g.*, Skehan v. Board of Trustees, 436 F. Supp. 657, 667 (M.D. Pa. 1977).

77. *See, e.g.*, Maldonado v. Parasole, 66 F.R.D. 388, 392 (E.D.N.Y. 1975):

> When both parties are penurious and there is a verdict in favor of the defendant, there appears no reason why the general rule, awarding costs to the prevailing party should not be followed . . . . Compared to English fees and costs, ours are modest indeed . . . . There is no reason to believe that assessing them in a case such as the one before us will inhibit the bringing of bona fide claims for civil rights violations in the future.

actions becomes too great, there will be no private enforcement."[78]

D. Precedence of Statute over Inconsistent Rule

Thus far only two reported cases have addressed the conflict between the chilling effect of rule 68 and the objectives of Title VII, and these cases have reached opposite results. In *August,* the more recent case, the Seventh Circuit tried to reconcile rule with statute by bending rule 68 to allow room for the court's discretion.[79] In the earlier case of *Dual v. Cleland,* the district court followed the rule in spite of the statute, holding that although "the plaintiff had a good faith claim, and in the interests of justice . . . should not be forced to bear the defendant's costs," the court was nevertheless compelled to assess costs against her because rule 68 eliminated all discretion.[80] Although the *Dual* court recognized that the discretion afforded by rule 54(d) should be governed by the objectives of Title VII,[81] it failed to recognize that these same objectives should overrule the *lack* of discretion mandated by Rule 68.[82]

Where procedural law is allowed to frustrate the purposes of substantive law, the tail wags the dog. Instead, as pointed out by a recent commentator on the relationship between Title VII suits and the federal rules for class actions, the "substance/procedure dynamic" should work the other way around, with the public policy against discrimination molding its own procedures to conform to the substantive requirements.[83] The Supreme Court derives its rule-making authority from the Rules Enabling Act of 1934,[84] which provides that "[s]uch rules shall not

78. Senate Report *supra* note 26, at 6, [1976] U.S. Code Cong. & Ad. News at 5913.

79. 600 F.2d 699, 702 (7th Cir. 1979).

80. 79 F.R.D. 696, 697 (D.D.C. 1978).

81. *Id.*

82. It is unclear from the district court's one-page opinion whether the plaintiff, in opposing the defendant's motion to tax costs, raised the argument that the statute should prevail over the inconsistent rule.

83. "[T]he public policy against discriminatory practices has molded its own procedural rule to conform to the concept of class inherent in the substantive antidiscrimination law." Note, *Antidiscrimination Class Actions under the Federal Rules of Civil Procedure: The Transformation of Rule 23(b)(2),* 88 Yale L.J. 868, 870 (1979).

84. Enabling Act of 1934, Pub. L. No. 415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1976) (as amended)). "The Supreme Court shall have the power to prescribe by

abridge, enlarge or modify any substantive right . . . ."[85] Because the Supreme Court derives its rule-making authority from statutory authorization, it exercises "delegated legislative authority just as an administrative agency, and rules so issued are comparable to administrative regulations with respect to their relative standing in the hierarchy of law."[86] Although the federal rules have "the force and effect" of federal statutes insofar as they prevail over state statutes[87] and over earlier acts of Congress,[88] the legislature's delegation of power does not remove its own power to enact laws governing litigation in the federal courts. "Because the law-making power of the legislature remains entire and unimpaired by the enactment of a statute delegating authority to another agency to act for it on a given subject matter, rules of court issued under statutory authority can always be superceded by direct action of the legislature itself . . . ."[89] Where Title VII conflicts with rule 68, then, the statute should be given effect instead of the rule.[90]

August, unlike *Dual,* recognizes that statutory objectives take precedence over procedural objectives; however, the scope of the court's discretion under *August* is not altogether clear. Apparently the district court *may* (not *must*) award defendants

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general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . ." *Id.*

85. *Id.*

86. 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 36.06, at 51-52 (4th ed. 1972).

87. *See, e.g.*, Roper v. Consurve, Inc., 578 F.2d 1106, 1115 (5th Cir. 1978) (state law regarding aggregation of usury claims subordinate to rule 23 of FED. R. CIV. P.).

88. The Enabling Act provided that the rules, upon taking effect, would supercede prior conflicting statutes. 28 U.S.C. § 2072 (1976). *See, e.g.*, Winsor v. Daumit, 179 F.2d 475, 477 (7th Cir. 1950) (federal rules pertaining to appeals take precedence over former procedure).

89. 2 C. SANDS, *supra* note 86, § 36.06 at 52. For example, if rule 54(d) included a statement that attorney's fees could never be awarded by the court, the obvious conflict with 42 U.S.C. § 2000e-5(k) (1976) would render the rule of no force in Title VII cases.

90. *Cf.* Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 363 (1949) (holding NLRB may not violate letter and spirit of provisions of National Labor Relations Act): The statutory policy

> cannot be defeated by the Board's policy, which would make an unfair labor practice out of that which is authorized by the Act . . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.

Id. at 363.

their costs under rule 68 when they have made a "reasonable" offer,[91] but whether there is consistency between the *August* guidelines and the *Christiansburg* guidelines is unclear. Under *Christiansburg*, prevailing Title VII defendants may (not must) be awarded their attorney's fees when plaintiffs have continued the litigation "unreasonabl[y],"[92] but it is not necessarily unreasonable to refuse a reasonable offer. As *Christiansburg* points out, the court must be wary of hindsight judgments:

> In applying these criteria [determining whether plaintiff's action was "frivolous, unreasonable, or without foundation"], it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.[93]

The Supreme Court's reasoning with regard to the Title VII plaintiff's decision to bring an action applies with equal force to the plaintiff's decision not to accept a settlement offer; if it is difficult for the Title VII plaintiff to predict success or failure with any certainty, it is at least as difficult to predict whether the outcome will be more advantageous than defendant's offer. The Supreme Court further declares that Title VII's allowance of

> fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bring-

91. 600 F.2d 699, 702 (7th Cir. 1979).
92. 434 U.S. at 422.
93. *Id.* at 421-22.

> ing of claims that have little chance of success. To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII.[94]

Likewise, under rule 54(d) costs may be awarded only to a prevailing party, discouraging plaintiffs from pursuing fruitless claims. To assess defendants' costs against plaintiffs merely "because they do not finally prevail," or because even if they *do* prevail, they fail to equal or exceed defendants' offer, "would undercut the efforts of Congress to promote the vigorous enforcement of the provisions to Title VII."[95]

Of course, it is consistent with the objectives of Title VII for plaintiffs to negotiate a settlement, but the plaintiff's role as enforcer of the public policy against discrimination requires that this settlement be the result of careful, arm's-length bargaining for the best relief possible. Title VII plaintiffs inevitably feel some pressure to settle because of the expense of a Title VII action. But Congress sought to remove some of this financial pressure, where plaintiffs are likely to prevail to some degree, through the provision for attorney's fees. The introduction of additional financial pressure to settle might be acceptable in litigation where only private interests are at stake, but it is entirely inconsistent with the attorney's fees provisions and overall objectives of Title VII.

Penalizing plaintiffs who unreasonably refuse settlement may be consistent with the objectives of Title VII, but rule 68 is far too heavy a club for this purpose in light of the statutory objectives.[96] Where plaintiffs are unlikely to prevail, there are

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94. *Id.* at 422.

95. *Id.*

96. A commentator on pre-*Christiansburg* awards of attorney's fees to prevailing defendants indicates why a plaintiff's claim may be meritorious, in light of Title VII's objectives, even if there is substantial risk of not prevailing:

> The reporters are filled with cases of first impression, splits among appellate courts, and questions in a state of flux. Simply getting such issues litigated and adjudicated, even if the resolution is against the plaintiff, is an essential element of Title VII's private enforcement objective. To the extent that a

adequate incentives to settle apart from rule 68—incentives under the attorney's fees provision of Title VII and under the costs provision of rule 54(d)—which are consistent with the statutory objectives. For example, in *Crutcher v. Joyce*[97] the Tenth Circuit held that the court could use its discretion under rule 54(d) to deny costs and attorney's fees to prevailing plaintiffs who had refused settlement, sued "more or less vexatiously," and recovered practically the same amount that defendant had offered.[98]

Although *Crutcher* did not involve rule 68, the *August* court felt that *Crutcher* enunciated the general principle behind the rule, and that "[a]t least in cases such as [*Crutcher*], rule 68 [provided] a just and fair procedure to all concerned parties."[99] What this amounts to, however, is finding rule 68 acceptable precisely where it is unnecessary. If plaintiffs' refusal of a settlement offer constitutes vexatious litigation or is entirely unreasonable, the "special circumstances" required by *Newman* exist for denying prevailing plaintiffs their costs and attorney's fees,[100] and the "frivolous, unreasonable, or groundless" criteria

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> fear of . . . liability [for defendant's attorney's fees] discourages plaintiffs from exploring the legal frontiers of Title VII, private enforcement is defeated. This danger is reduced somewhat by a focus on whether the plaintiff should have recognized the meritless character of his claim. However, the difficulty in such a standard is that assessing what a plaintiff should have recognized can be unduly influenced by hindsight. This is especially the case in Title VII where a particular court's decision on new questions often becomes a minority view shortly thereafter . . . . Where the law is unsettled, or even unexplored, there is no reason to discourage suits and every reason to encourage private actions to resolve the questions.

Heinsz, *supra* note 62, at 281-82.

97. 146 F.2d 518 (10th Cir. 1945) (action against a trustee for an accounting and other relief).

98. *Id.* at 520.

99. 600 F.2d at 701 n.4.

100. For example, in Naprstek v. City of Norwich, 433 F. Supp. 1369 (N.D.N.Y. 1977), plaintiffs who succeeded in having a curfew ordinance declared unconstitutional were denied their attorney's fees under 42 U.S.C. § 1988 (1976). Although the court thought this case too insignificant to be decided under the *Newman* standard, it found denial justified even under that standard because plaintiffs' grounds for attacking the rarely enforced ordinance were "more contrived than real" and plaintiffs had refused an opportunity to discuss redrafting the ordinance in order to correct its deficiencies. *Id.* at 1370-71, cited with approval in Nadeau v. Helgemore, 581 F.2d 275, 279 n.3 (1st Cir.

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of *Christiansburg* are met for granting prevailing defendants their costs and attorney's fees. These are adequate sanctions to encourage settlement in Title VII cases. To add further pressure—such as the ten-day period for reply to an offer, the uncertain scope of the court's discretion under *August*, and the additional sanction that plaintiffs who *prevail* may be assessed defendants' costs—would violate the statutory objectives. Moreover, not every court feels comfortable playing Humpty Dumpty and reading "must" as "may." As a consequence, some courts, like the *Dual* court, may be induced to follow the rule blindly, regardless of where justice lies.

II. INCONSISTENCY OF RULE 68 WITH CLASS ACTION PROTECTIONS

In a Title VII class action, plaintiffs' attorneys have additional arguments for holding rule 68 offers improper. Not only are the policy arguments stronger in the context of a class action, since class actions are favored means to accomplish the objectives of Title VII,[101] but also the Federal Rules themselves provide procedural safeguards for class actions which are completely inconsistent with the procedures prescribed by rule 68.[102]

1978).

101. *See, e.g.*, Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330, 1333 (9th Cir. 1977) (reversing denial of class certification in race discrimination suit: "Employment discrimination based on race, sex, or national origin is by definition class discrimination . . . . [C]lass actions are consistent with the broad remedial purpose of Title VII"); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968) (holding that each member of a class bringing a Title VII action need not file a charge with the EEOC as a prerequisite to joining as co-plaintiffs). *See also* S. REP. No. 92-415, 92d Cong., 1st Sess. 27 (1971) (recommending retaining class actions in Equal Employment Opportunity Act of 1972: "The committee agrees with the courts that Title VII actions are by their very nature class complain[t]s, and that any restriction on such actions would greatly undermine the effectiveness of Title VII"); 118 CONG. REC. 7168 (1972) (Senator Harrison Williams' section-by-section analysis of 1972 amendments to Title VII, recognizing the need for class actions in Title VII litigation).

102. Although a rule 68 offer is mentioned in a few reported class action cases, its role is never an issue. In Cotton v. Hinton, 559 F.2d 1326 (5th Cir. 1977) (upholding district court's approval of a settlement in a race discrimination class action under Title VII), defendants made an offer of judgment after three pre-trial conferences and considerable negotiation. The offer was followed by several conferences between the parties and the court, and more than a month later a settlement was reached to which the court gave tentative approval. *Id.* at 1329. After notice to the class and hearing of objections, the decree was modified according to the court's suggestions. There is no indication that plaintiffs objected to use of a rule 68 offer, nor that they accepted it under the terms of rule 68. In fact, the ordinary class action settlement procedures were followed, apparently without reference to rule 68 at all.

The procedures for class actions are formulated in Federal Rule of Civil Procedure 23. This rule was completely revised shortly after passage of the Civil Rights Act of 1964, partly in order to facilitate the bringing of civil rights class actions.[103] The general purposes of the new rule 23 were summarized by its formulators:

> The amended rule describes in more practical terms the occasions for maintaining class actions; provides that all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not judgment is favorable to the class; and refers to the measures which can be taken to assure the fair conduct of these actions.[104]

Freitag v. Carter, 489 F.2d 1377 (7th Cir. 1973) (holding that denial of chauffeur's license to former mental patient without notice and hearing was violation of due process), although nominally a class action, was treated essentially as an individual action, with damages sought for the named plaintiff only. In this instance the plaintiff accepted an offer of judgment contingent on his prevailing on appeal (although such offers are properly unconditional, *see* note 145 *infra*). Having prevailed he was entitled to receive "the stipulated damages." *Id.* at 1384. In Meisel v. Kremens, 405 F. Supp. 1253 (E.D. Penn. 1975) (finding unconstitutional the summary revocation of leaves of absence granted mental patients), plaintiffs rejected a rule 68 offer and went on to prevail at trial. There is no indication that defendants claimed costs.

In an unreported sex discrimination case, Taberoff v. Farmers Group, Inc., No. 74-1108 WPG (C.D. Cal. 1977), a rule 68 offer was made and accepted after long and drawn-out settlement negotiations and extensive discovery, when all that remained in dispute was the dollar amount. Interview with Laura Stevens, plaintiffs' attorney, in San Francisco (Oct. 16, 1979).

Cf. Hunter v. United Air Lines, No. C72-170 AJZ (N.D. Cal. 1979) (in which rule 68 offer initiated settlement negotiations).

103. Rule 23(b)(2) provides for class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The rule is said to have been enacted "in part for the specific purpose of assuring that the class action device would be available as a means of enforcing the civil rights statutes." 3B J. MOORE FEDERAL PRACTICE § 23.02 [2.-6] at 23-52 (2d ed. 1979). *See* Pearson v. Townsend, 326 F. Supp. 207, 211 (D.S.C. 1973); 28 U.S.C. app.—Rules of Civil Procedure, at 429 (1976) (1966 Advisory Committee Note commenting on rule 23(b)(2)) [hereinafter cited as Advisory Note].

104. Advisory Note, *supra* note 103, at 427. The provisions of rule 23 are as follows:

Section "a" lists the general requirements of all class actions: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties will fairly and adequately protect the interests of the class."

Section "b" lists three situations where class actions are maintainable, provided all rule 23(a) requirements are met: (1) where there is danger of inconsistent adjudications

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A primary purpose of rule 23 is to provide protection for absent class members, since they will be bound by the judgment.[105] In fact, if the class members are *not* adequately protected, it is a violation of constitutional due process to bind them by the judgment.[106]

Class action protections require that plaintiffs' attorneys adequately represent class members throughout the litigation;[107] that class members be notified of any tentative settlement and be given an opportunity to respond;[108] and that any settlement be approved by the judge as the fair, reasonable, and adequate result of arm's-length bargaining.[109] On the other hand, rule 68 requires that defendants make a definite and unconditional offer; that plaintiffs have only ten days in which to accept; and that either party may file offer and notice of acceptance with the clerk, who then enters judgment.[110] The contrast between the crude simplicity of rule 68 and the delicate machinery of a class action settlement is stark indeed.

A. Obligation of Plaintiffs' Attorneys to Represent Class Members

Perhaps the most fundamental difficulty with using a rule 68 offer in a class action is that attorneys for the class must not consider only the interests of named plaintiffs in deciding whether or not the offer is acceptable.[111] One of the prerequisites

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with respect to class members; (2) where injunctive relief is primary; and (3) where common questions of law or fact predominate over individual questions.

Section "c" provides for the court to determine whether a class action is maintainable; for notice to be sent to 23(b)(3) class members, with the opportunity for them to opt out; and for the judgment to bind all class members.

Section "d" provides for the court to make appropriate orders to promote efficiency and fairness, and section "e" lays down procedures for settlement.

105. "Since the new Rule 23 greatly increases the binding effect of judgments in class actions the courts should be particularly alert to protect the interests of absent class members." 3B J. Moore, *supra* note 103, at § 23.70. *See* Advisory Note, *supra* note 103, at 427: "[T]he original rule did not squarely address itself to the measures that might be taken during the course of the action to assure procedural fairness . . . ."

106. Hansberry v. Lee, 311 U.S. 32, 40-42 (1940) (outlining principles of due process as applied to class actions); Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 533 (W.D. La. 1976) (race and sex discrimination class action).

107. Fed. R. Civ. P. 23(a)(3); *see* § II A *infra.*

108. Fed. R. Civ. P. 23(e); *see* § II B *infra.*

109. Fed. R. Civ. P. 23(e); *see* § II C *infra.*

110. Fed. R. Civ. P. 68.

111. In fact, by bringing a class action, named plaintiffs disclaim "any right to a

for bringing a class action is that "the representative parties will fairly and adequately protect the interests of the class."[112] This requirement has been called "the most important aspect of the class status determination."[113] In deciding to certify a class action, the judge must find that this "representativity" requirement is met.[114] Judges generally look to the experience of named plaintiffs' counsel, the opportunity for collusion between the class representative(s) and the defendant, and the existence of class interests antagonistic to those of the representative plaintiffs.[115] Furthermore, the judge may later revoke class certification if the representation becomes inadequate, a situation which occurred in *Johnson v. Shreveport Co.*[116] In *Johnson,* the Fifth Circuit held that unless absent class members "are represented adequately at every stage in the proceeding, the Court is powerless to bind them to a judgment."[117]

Even without the pressures of a rule 68 offer, settlement negotiations present particular dangers of inadequate representation of class members.[118] Among the dangers which have been

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preferred position in the settlement." Flinn v. FMC Corp., 528 F.2d 1169, 1176 (4th Cir. 1975).

112. FED. R. CIV. P. 23(a)(4).

113. Johnson v. Shreveport Garment Co., 422 F. Supp. 526, 531 (W.D. La. 1976).

114. "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits." FED. R. CIV. P. 23(c)(1).

115. The "representativity" requirement under rule 23(a)(4) is discussed in Note, *The Class Action Device in Title VII Civil Suits,* 28 S.C.L. REV. 639, 670-671 (1977) (surveying common procedural problems which arise in Title VII class actions). The commentator points out that the third aspect of representativity (avoiding conflicts of interest) overlaps with the "typicality" requirement under Rule 23(a)(3).

116. 422 F. Supp. 526, 541 (W.D. La. 1976).

117. *Id.* at 533. "The implication of the cases concerning adequacy of representation is that a party who wishes to prosecute an action on behalf of a class must protect the rights and interests of absent class members vigorously, tenaciously and effectively. He must meet the standard at every stage of the proceeding, including preparation of pleadings, pretrial motions, discovery, the trial itself, including the presentation of evidence, any post-trial briefing and appeal." *Id.* at 534-535.

118. The threats presented by settlement negotiations to realization of the substantive policies which class litigation is meant to achieve are discussed in *Class Actions, supra* note 42, at 1536-37:

> Private negotiations of class action issues raise a particularly great danger of inadequate representation because the attorney negotiating on behalf of the class must ordinarily forego some relief beneficial to some or all class members in order to avoid the need for trial and must therefore rank pos-

pointed out are "conflict between the attorney and the class; conflict between the representative plaintiff and the rest of the class; and conflict among competing interests within the class."[119] During settlement negotiations plaintiffs' attorneys are responsible for combating these dangers by taking into account the best interests not only of the named plaintiffs but of every class member.[120] As pointed out by attorneys experienced in Title VII litigation, "the clever defense attorney will make a proposal as attractive as possible" to named plaintiffs and their attorneys "while offering little to the other members of the class."[121] It is clearly improper to accept such a bribe, and where the court finds that class members are not adequately compensated for the release of their claims, it must disapprove the settlement.[122] Furthermore, plaintiffs' attorneys must not ignore the interests of any subgroups among the class. In *Mandujano v. Basic Vegetable Products, Inc.*,[123] a leading Title VII case in the Ninth Circuit, the court recognized "that the class attorney may

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> sible outcomes in order of preference. During bargaining the class attorney may be forced to rely more heavily than usual upon the named plaintiff to determine class desires. A plaintiff and his attorney may erroneously conclude that the representative party's views mirror those of the class, leading them to make concessions which are disproportionately costly from the perspective of absentees. Moreover, the danger will exist that a plaintiff and his attorney will deliberately shift the burden of a compromise to parties not before the court. In its crudest form, this sort of compromise involves a sell-out by the named plaintiff and the class attorney, in which they agree to discontinue the class suit in return for personal reward.

[footnote omitted].

119. *Id.* at 1552.

120. The need in public law litigation for the negotiating process to respond to a wide range of interests has been emphasized in Chayes, *supra* note 36, at 1310. Nor should the representation of absent interests be left to the judge: "The negotiating process ought to minimize the need for judicial resolution of remedial issues." *Id.* at 1299.

121. 21 AM. JUR. TRIALS 1, 209 (1974) (general outline of an employment discrimination action under the federal civil rights acts).

122. *See, e.g.*, Jamison v. Butcher & Sherrerd, 68 F.R.D. 479 (E.D. Pa. 1975) (disapproving settlement of class action for violation of federal securities regulations): "[T]he burden is on the proponents of a settlement to persuade us that it is fair and reasonable. . . . [W]e cannot say that this settlement adequately compensates the class members for the release of their claims against defendants." *Id.* at 482. The court adds that "[t]he present arrangement leaves the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation to plaintiffs' counsel." *Id.* at 484.

123. 541 F.2d 832 (9th Cir. 1976) (holding inadequate the procedures followed in approving settlement of Title VII class action alleging racial, ethnic, and sex discrimination): "The class attorney continues to have responsibility to each individual member of the class even when negotiating a settlement." *Id.* at 835.

be tempted to sacrifice the interests of certain members of a Rule 23(b)(2) class in an effort to achieve the 'greatest good for the greatest number.' "[124] The court reversed the trial court's approval of a class action settlement partly because of its "genuine concern . . . regarding the manner in which the settlement responded to certain potential conflicts between members of the class."[125] Negotiation of a class action settlement, then, requires careful balancing of a complex array of interests.

A rule 68 offer upsets this delicate balance. First, aside from any bribe to named plaintiffs that the particular offer may contain (a danger in any settlement offer), there is the inherent threat to named plaintiffs that if they do not accept, they may be responsible for paying not only their own but also defendants' costs. Because absent class members ordinarily are not responsible for costs,[126] this threat creates a new conflict between representative plaintiffs and absent class members, creating a danger that the representative plaintiffs may be induced to accept a settlement which is not in the best interest of the class.[127]

Second, plaintiffs have only ten days in which to respond. Such time pressure is hardly conducive to the careful weighing of interests of all class members that plaintiffs' attorneys are ob-

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124. *Id.*

125. *Id.* at 837.

126. The leading case on assessment of costs against class members is Lamb v. United Security Life Co., 59 F.R.D. 44 (S.D. Iowa 1973) (action under federal securities laws, held class members may not be assessed costs). However, at least one case has held that 23(b)(3) class members may be assessed costs and should be so informed in the notice of pending action giving them an opportunity to opt out. Katz v. Carte Blanche Corp., 53 F.R.D. 539, 548 (W.D. Pa. 1971), *rev'd on other grounds*, 496 F.2d 747 (3d Cir. 1974) (action by credit card holders alleging violation of Truth in Lending Act). It seems unlikely that any court would hold costs assessable against absent class members in 23(b)(2) actions (the usual type of Title VII class action), where class members have no opportunity to opt out. *See* 2 H. NEWBERG, CLASS ACTIONS § 2475(h) (1977): "[I]t is becoming settled law, with a few decisions to the contrary, that absent class members are not liable for costs of litigation or attorneys' fees in the event of an adverse judgement [*sic*] against the class." *Id.* at 153-54.

127. Of course, named plaintiffs are already responsible for their own costs and attorneys' fees, but they may consider that fact, together with the possibility of shifting costs and fees to defendants upon prevailing, in deciding whether to bring an action. The uncertainties created by a rule 68 offer upset these calculations. In fact, class certification may be denied for inadequacy of representation if plaintiffs seek a settlement out of financial pressure. *See* Held v. Missouri Pac. R.R., 64 F.R.D. 346, 350 (S.D. Tex. 1974) (sex discrimination Title VII action).

ligated to undertake. Moreover, defendants may add to the pressure by serving the offer at inopportune times: before discovery is completed (or even begun), shortly after a new attorney has taken over plaintiffs' case, or at a time when plaintiffs' attorney is engaged in trial of another action. Yet it has been held that the ten-day period for response to a rule 68 offer may not be extended under any circumstances.[128]

Finally, the nature of an "offer of judgment" itself precludes the give-and-take of good faith bargaining. It is a *final* offer, not a stage in the bargaining process.[129] If plaintiffs make a counter-offer they do so at the risk that they still may be held ultimately liable for costs if defendants reject it.[130] Instead of encouraging responsible negotiation of a compromise that is fair, reasonable, and adequate for all members of the class, the whole purpose of rule 68 is to put an immediate end to litigation.[131]

B. Notification of Class Members

Settlement of class actions requires particular procedures to ensure that absent class members receive due process:

> The Federal Rules recognize that settlement in class suits presents exceptional problems not present in traditional binary litigation where settlement is not only freely allowed, but actually encouraged as a method of managing complex

128. Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218 (N.D. Ohio 1969) (individual personal injury action) held that the language and purpose of rule 68 indicate that the court "has no authority to hold the defendants' Offer of Judgment in abeyance," and "an acceptance must occur within ten days" or the offer is deemed withdrawn and the plaintiff risks having to pay defendant's costs. *Id.* at 219-20. A state case, citing *Staffend* and interpreting a similar state rule, held that the trial court may not relieve a party of the sanctions imposed by the rule even if, "because [defendants] are in default in discovery matters, [plaintiff] is unable to intelligently respond to the offer of judgment . . . ." Twin City Constr. Co. v. Cantor, 22 Ariz. App. 133, 134, 524 P.2d 967, 968 (1974) (individual contract action). "The trial court may not either extend the time within which an offer may be accepted or rejected or relieve a nonaccepting party from the sanctions imposed by the rule. To relieve a plaintiff of the sanctions imposed is to thwart the basic purpose of the rule." *Id.* at 135, 524 P.2d at 969.

129. If plaintiff accepts an offer, the clerk enters judgment. If plaintiff rejects or does not respond in time, the offer is deemed withdrawn and plaintiff is subject to the rule's sanctions. Fed. R. Civ. P. 68.

130. Under well known contract law principles, a counter-offer operates as a rejection. 1 A. Corbin, Contracts § 90 (1963).

131. "Rule 68 is intended to encourage early settlements of litigation." Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 219 (N.D. Ohio 1969).

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> cases. . . . The challenge is to create procedures that will foster settlements which adequately protect absentees' interests, or at least serve to identify unfair outcomes when they are presented to the court.[132]

In the leading case of *Mandujano*, the Ninth Circuit has stressed that such procedural safeguards acquire even greater importance in a Title VII class action: "The interests Title VII is designed to secure are sufficiently important to warrant procedures which minimize the risk of those interests being prejudiced by the normal pressures to settle complex litigation affecting a substantial part of the work force of an employer."[133]

The Federal Rules require that no class action be settled without notice to class members and approval of the court.[134] It has frequently been pointed out that notice to class members is required by due process,[135] that it must be given in a manner reasonably designed to reach the class members,[136] that it must inform the class members of the proposed settlement terms and of their option to contest the proposed settlement,[137] and that the class members must be given a reasonable time in which to respond.[138]

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132. *Class Actions, supra* note 42, at 1538-39.

133. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 836 (9th Cir. 1976).

134. Fed. R. Civ. P. 23(e).

135. *See, e.g.*, Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975) (antitrust class action): "By virtue of the fact that an action maintained as a class suit under Rule 23 has res judicata effect on all members of the class, due process requires that notice of a proposed settlement be given to the class." *Id.* at 120.

136. Notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1949) (action for judicial settlement of accounts of common trust fund); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 832 (3d Cir. 1973) (class action alleging violation of federal securities laws).

137. "As a general rule, the contents of a settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings." Grunin v. Int'l House of Pancakes, 513 F.2d 114, 122 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

138. The notice "must afford reasonable time for those interested to make their appearance." Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1949); Grunin v. Int'l House of Pancakes, 513 F.2d 114, 120 (8th Cir.), *cert. denied* 423 U.S. 864 (1975); Greenfield v. Villager Indus., Inc., 483 F.2d 824, 834 (3d Cir. 1973).

The notice requirement would be meaningless if the court were not required to consider objectors' views in some manner before approving a class action settlement.[139] The Ninth Circuit has elaborated specific guidelines for considering objectors' views in settling a Title VII class action: 1) The notice to the class must indicate that members may object; 2) each objection becomes part of the record reviewed by the court; 3) anyone voicing substantial objections must be afforded a hearing sufficient for the court to set forth in the record a reasoned response, with findings of fact and conclusions of law in support; 4) if the court thereupon determines that the settlement should be modified, the objectors should participate in further negotiations.[140]

The panoply of notice and hearing procedures which are prerequisites to court approval of a class action settlement cannot be provided within ten days. Yet rule 68 requires plaintiffs to accept or reject an offer of judgment within that time, and the period may not be extended. As one court put it, the language of the rule is such that "[t]here does not seem to be any area present in which adjustment by the court is possible."[141] The rigidity of rule 68 is antithetical to the flexibility required for class action settlements. The very terms "offer of judgment" and "entry of judgment"[142] suggest a finality, a form of unconditional agreement, that is inconsistent with the procedures whereby a tentative class action settlement is submitted for notice to the class and final approval by the court.

C. Approval by the Court

By its terms, rule 68 appears not to have been designed with

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139. *See* Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832 (9th Cir. 1976). It is a violation of due process for a court to approve a class action settlement without being fully informed of objectors' views. *Id.* at 835. *See also* Girsh v. Jepson, 521 F.2d 153 (3d Cir. 1975) (vacating settlement of class action alleging violation of federal securities regulations, holding objector was not given an adequate opportunity to develop a record): "[T]he district court must at least evaluate all the contentions of the parties and provide any objectors with an opportunity for meaningful exposition of their positions." *Id.* at 160.

140. Mandujano v. Basic Vegetable Prods., Inc., 541 F.2d 832, 835-36 (9th Cir. 1976).

141. Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 220 (N.D. Ohio 1969). *See* note 128 *supra*.

142. The defendant serves "an offer to allow judgment to be taken against him," and when the accepted offer is filed with notice of acceptance and proof of service, "the clerk shall enter judgment." Fed. R. Civ. P. 68.

class action procedures in mind. Rule 23(e) requires that every class action settlement be presented to the court for approval,[143] but a rule 68 offer is not presented to the court except in a proceeding to determine costs.[144] Rule 23(e) requires tentative settlements to be contingent upon court approval, but an offer of judgment must be unconditional.[145]

A further anomaly is that although the court, not plaintiffs, has final say as to the acceptability of a class action settlement, plaintiffs still could be subject to rule 68's sanctions if the court disapproved a rule 68 offer:

> Suppose a defendant offers judgment for an amount that the class representative considers acceptable, but that the judge, exercising his authority under rule 23(e), determines is insufficient. If the case proceeds to trial and the plaintiff class recovers less than the offer, the current rule 68 read literally requires that the plaintiff class pay costs, even though it was compelled

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143. FED. R. CIV. P. 23(e).

144. *See* Tansey v. Transcontinental W. Air, 97 F. Supp. 458 (D.D.C. 1949) (personal injury action), holding it error to file an offer of judgment with the court: "Under Rule 68 the pleading filed as an offer of judgment is not a part of the record and having been filed as such in this case, it must be stricken." *Id.* at 459. It appears that the only occasion for disclosing an offer of judgment to the court, other than in a proceeding to determine costs, is in a motion to determine that the offer was improper. *See* note 171 *infra*.

145. Davis v. Chism, 513 P.2d 475, 481 (Alaska 1973). *See* 7 J. MOORE, *supra* note 103, § 68.01, at 68-9; 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3002 at 57 (1973). For example, "an offer which is subject to the provisions of an instrument which can only be determined by judicial action is not such an offer." 7 J. MOORE, *supra* note 103, at 68-69.

A California case held that defendant's offer under a state statute similar to rule 68 was improper because the offer was to become effective only if accepted by both plaintiffs: "The statute at issue does not by its terms contemplate a conditional settlement offer . . . . Instead, its benefits purport to apply where there is served an unconditional offer upon each of the adverse parties." Hutchins v. Waters, 51 Cal. App. 3d 69, 73, 123 Cal. Rptr. 819, 821 (1975) (consolidated personal injury actions; defendant made offer of compromise for aggregate sum with apportionment between plaintiffs given but which had to be accepted by both plaintiffs). *But see* Tucker v. Shelby Mut. Ins. Co., 343 So.2d 1357, 1359 (Fla. 1977) (personal injury action by father and daughter) holding that a Florida statute requiring court approval of a settlement offer to a minor did not conflict with the state rule similar to rule 68. However, the court approval requirement for protection of a minor is less likely to lead to indefiniteness and uncertainty than the same requirement in a class action, where the court must become informed of the needs of all class members and weigh all their interests in deciding whether to approve the settlement.

to reject the offer by the order of the court.[146]

Finally, it is doubtful that the court could find any settlement resulting from the pressure of a rule 68 offer to be the "fair, reasonable and adequate"[147] outcome of good faith bargaining. The district court is obligated to determine "whether the proposed settlement is fair and adequate to all concerned,"[148] and many cases have spelled out criteria for approval of a class action settlement.[149] As summarized in a recent case, the court must be convinced that "(1) the settlement was not collusive but was made after negotiations at arm's length; (2) counsel are experienced in similar cases; (3) sufficient discovery has occurred to enable counsel to act intelligently; and (4) the number of objectants is small."[150] In justifying court acceptance of a settlement offer, it has been said that "[t]he most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement."[151] But the court's ability to weigh the case for plaintiffs on the merits is limited by the fact that "the settlement hearing must not be turned into a trial or a rehearsal of the trial."[152] In practice it seems inevitable that the court will have to accord great weight to the recommendation of counsel.[153]

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146. Note, *supra* note 25, at 903-04.

147. For the phrase "fair, reasonable and adequate," *see, e.g.,* Alaniz v. California Processors, Inc., 73 F.R.D. 269, 269 (N.D. Cal. 1976) (Title VII class action alleging race, sex, and national origin discrimination).

148. Norman v. McKee, 431 F.2d 769, 774 (9th Cir.), *cert. denied,* 401 U.S. 912 (1970) (class action alleging violation of federal securities laws).

149. For a leading case on guidelines for court approval of class action settlements, *see* City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974).

150. George v. Parry, 77 F.R.D. 421, 424 (D.C.N.Y.), *aff'd,* 578 F.2d 1367 (2d Cir. 1978) (class action alleging improper pressure on welfare recipients). The court stressed the importance of hard bargaining as indicating lack of collusion: "Each side repeatedly challenged the other's proposals in the preceding negotiations, indicating conclusively that hard bargaining and adversary interests, rather than collusion, permeated the negotiations." *Id.*

151. City of Detroit v. Grinnell Corp., 495 F.2d 448, 455 (2d Cir. 1974).

152. *Id.* at 462.

153. "The recommendation of acceptance by experienced and competent counsel is a fact entitled to great weight." Held v. Missouri Pac. R.R., 64 F.R.D. 346, 348 (S.D. Tex. 1974) (Title VII sex discrimination action; class certification denied after named plaintiff reached tentative settlement with defendants). An example of the court's need to rely on counsel's recommendation is found in Alaniz v. California Processors, Inc., 73 F.R.D. 269 (N.D. Cal. 1976) where the court noted that "without expertise of its own, it was called upon to approve as fair, reasonable, and adequate a Conciliation and Settlement Agreement . . . affecting working conditions of thousands of workers in 74 canneries and food processing facilities throughout Northern California." *Id.* at 269.

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For the court to be able to rely on counsel's approval of the settlement, there must be proof that it resulted from good faith bargaining.[154] For example, counsel's recommendation was given great weight where

> settlement discussions were not even seriously initiated until years of arduous discovery had been completed, and counsel were truly in a position to analyze objectively the strength of plaintiffs' case on the merits, and to balance that strength against the amount offered in settlement and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise. . . . In addition, there is not even the slightest hint that this settlement was the result of anything but zealously advocated, arm's-length negotiation.[155]

Because of the many interests which must be considered in negotiation of a class action settlement, no such settlement may be "hastily arrived at."[156] Yet a settlement accepted under the gun of a rule 68 offer is hardly the fruit of careful negotiation in the best interests of the class.[157] Plaintiffs' grudging acceptance of a

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154. *See, e.g.*, Stull v. Baker, 410 F. Supp. 1326 (S.D.N.Y. 1976) (class action alleging violation of securities laws):

> In considering the merits of a settlement, the court should consider the recommendation of counsel . . . . However, the weight to be given that recommendation and the accompanying presumption of reasonableness which attaches to a proposed settlement will depend upon the caliber of counsel and their experience in matters similar to that which is before the court, as well as proof that the settlement was the product of arm's-length bargaining entered into after there had been sufficient discovery to enable counsel to act intelligently.

Id. at 1332. *See also* George v. Parry, 77 F.R.D. 421, 424 (D.C.N.Y.), *aff'd*, 578 F.2d 1367 (2d Cir. 1978); Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972) (class action alleging violation of Securities Exchange Act): "The proponents of the settlement should have the burden of proving: (1) that it is not collusive but was arrived at after arm's length negotiation . . . ." *Id.* at 174-75.

155. Stull v. Baker, 410 F. Supp. 1326, 1333 (S.D.N.Y. 1976).

156. *See, e.g.*, Flinn v. FMC Corp., 528 F.2d 1169 (4th Cir.), *cert. denied*, 424 U.S. 967 (1975) (Title VII sex discrimination class action): "The settlement as approved was not hastily arrived at. It followed protracted discussions." *Id.* at 1174.

157. The possible function of procedures as "bargaining weapons" and the need for class action procedures to promote "full realization of substantive policies underlying the causes of action" are discussed in *Class Actions*, *supra* note 42, at 1381-82:

> No procedure should make class litigation so onerous that a party has no alternative but to accede to an opponent's de-

take-it-or-leave-it offer, often the result of financial and time pressures, does not provide the reasoned decision of counsel on which the district court may rely.[158]

D. PRECEDENCE OF RULE 23 OVER RULE 68

In summary, the provisions of rule 68 violate the protections afforded absent class members by rule 23: the requirements of adequate representation, notice, and active participation by the court. Furthermore, all the procedural requirements of rule 23, and particularly those governing settlements, must be read in the light of the purposes of Title VII—to eliminate employment discrimination in society and to "make whole" those who have suffered such discrimination.[159] Because of the public policy vindicated by Title VII, the Ninth Circuit has declared that "a trial court must consider the broad remedial purposes of Title VII and must liberally interpret and apply rule 23 so as not to undermine the purpose and effectiveness of Title VII in eradicating class-based discrimination."[160]

Particularly in a Title VII action, the conflict between rule 68 and rule 23 is irreconcilable. This being so, rule 23 must prevail for several reasons. Under the principles of statutory construction, which apply equally to construction of rules,[161] a later

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> mand . . . . If bargaining in the context of a pending class suit is to be regulated to reduce adventitious elements of bargaining power, the trial judge must assume chief responsibility and must not be bound by inflexible procedures regulating the timing or form of procedural orders.

158. For example, in the recent case of Hunter v. United Air Lines, Inc., No. C72-170 AJZ (N.D. Cal. 1979), plaintiffs' attorney felt compelled, at the same time that he was challenging defendant's rule 68 offer as improper and unfair, to "conditionally accept" the offer on behalf of absent class members "who hereafter ratify or are deemed by the Court to have ratified this acceptance . . . ." *Id.*, Notice of Service of "Offer of Judgment," Notice of Conditional Acceptance Thereof on Behalf of Absent Class Members, and Request for Notice to Class Upon Approval of the Court. Such a "conditional acceptance," accompanied by arguments that the particular offer did not constitute a reasonable settlement, makes no sense either under rule 68 or under rule 23, but it does glaringly expose the incongruity between the two rules.

159. Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975).

160. Gay v. Waiters' & Dairy Lunchmen's Union, 549 F.2d 1330, 1334 (9th Cir. 1977).

161. 3 C. SANDS, *supra* note 86. *See, e.g.*, District of Columbia v. Pace, 320 U.S. 698 (1944) (holding provisions for review in act creating Board of Tax Appeals for District of Columbia not superseded by FED. R. CIV. P. 52): "This general rule, even if it were thought to modify the previous rule as to review of findings of fact in equity cases, would hardly supersede a special statutory measure of review applicable to a special and local

rule prevails over a conflicting earlier rule, so that the second will be regarded as an exception to the first.[162] Rule 23 was completely rewritten in 1966,[163] while any changes in rule 68 after 1938 merely clarified the language.[164] Another principle of statutory construction is that, where there is conflict between two rules, the more specific prevails over the more general.[165] By its terms, rule 68 appears to apply to all types of actions; it is written very generally. Rule 23, on the other hand, deals specifically with *class* actions, and the procedural requirements for class actions are spelled out in considerable detail. Finally and most importantly, rule 23 was formulated partly in response to the needs of Title VII class actions,[166] and a rule which is harmonious with the mandate of Congress must prevail over one which is discordant with that mandate.[167]

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tribunal." *Id.* at 703. Here the Court found that the principle that a later enactment prevails over an earlier one was outweighed by the principle that a specific enactment prevails over a general one.

162. For the principle that a later statute prevails over an earlier one, *see, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 451 F.2d 1211, 1214 n.5 (4th Cir. 1971) (holding private swimming club not covered by Civil Rights Act: "[T]o the earlier general statute, which might arguably prohibit the defendant's conduct, is added a later one which expressly protects it"); Thompson v. St. Louis-S.F. Ry., 5 F. Supp. 785, 791 (N.D. Okla. 1934) (upholding removal of cause of action against federal receiver to federal court: Where two statutes conflict, both "being special in that they pertain to definite matters and situations, under a well-established rule of statutory construction, the latest enactment will control, and will be regarded as an exception to, or qualification of, the prior statute"); 2A C. SANDS, *supra* note 86, § 51.02: "[I]f there is an irreconcilable conflict between the new provision and the prior statutes relating to the same subject matter, the new provision will control as it is the later expression of the legislature."

163. *See* 28 U.S.C. app.—Rules of Civil Procedure, at 427 (1976).

164. *Id.* at 499. The 1966 amendment merely added the last sentence as a "logical extension" of the original concept. *Id.* at 500. In fact, since a well known early decision had interpreted the original rule to include the situation expressly described in the amended rule, and this interpretation was cited approvingly in the 1946 Advisory Committee Note, "it is doubtful that the 1966 amendment was an 'extension.'" 12 C. WRIGHT & A. MILLER, *supra* note 145, § 3003 at 59 n.17. *See also* Cover v. Chicago Eye Shield Co., 136 F.2d 374 (7th Cir.), *cert. denied,* 320 U.S. 749 (1943).

165. "It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which may otherwise prove controlling." Buffum v. Chase Nat'l Bank, 192 F.2d 58, 61 (7th Cir. 1951) (prior venue statute regarding national banks remained an exception to later general venue statute); People v. Breyer, 139 Cal. App. 547, 550, 34 P.2d 1065, 1066 (1934). See 1A C. SANDS, *supra* note 86, § 23.16 at 248-49.

166. 3B J. MOORE, *supra* note 103, § 23.02 [2.-6] at 23-52.

167. *See* 2 C. SANDS, *supra* note 86, § 36.06 at 52 (statutes take precedence over inconsistent rules).

III. MORE LIMITED STRATEGIES AGAINST A RULE 68 OFFER

Until the courts have settled the issue of whether rule 68 is ever appropriate in a Title VII action, or particularly in a Title VII class action, the cautious plaintiffs' attorney may wish to adopt alternative strategies in addition to the broad policy arguments which have been outlined above. Although a particular district court judge may not be sufficiently bold, or sufficiently interested in legal theory, to make a general ruling on the appropriateness of rule 68 in Title VII actions or in class actions, the judge may be more comfortable determining whether the defendant's *particular* offer is "proper" under rule 68.

Even if plaintiffs' attorneys lose on a pretrial motion to determine that the offer is improper, they should refuse to be coerced into an unreasonable settlement. If they go to trial and prevail to any extent they may be able to argue that the outcome is more favorable than the offer. For example, if the offer denied any liability,[168] a liability determination in itself may be sufficient to constitute a "more favorable" judgment.[169] If offer and judgment involve different claims procedures, or different types of equitable relief, defendants will be hard-pressed to establish that plaintiffs failed to surpass their offer.

If plaintiffs lose at trial, or if the judgment is clearly no better than the offer, plaintiffs may invoke *August* for the rule that the trial judge retains discretion as to award of costs in a Title VII case, even when a proper rule 68 offer has been refused, and that this discretion should be exercised in accordance with Title VII policy. Finally, if the judge does award defendants their costs, plaintiffs may argue that costs under rule 68 should include only costs explicitly made taxable by statute or local court rule, rather than all out-of-pocket expenses.

A. Requirement of a Proper Offer

Good Faith and Reasonable

The courts have already begun to fashion a loophole for

168. On the question of whether an offer denying liability is "proper," see notes 183-86 *infra* and accompanying text.
169. *See* Note, *supra* note 25, at 904-05.

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plaintiffs by requiring that defendants make a "proper" offer before cost shifting may be imposed under rule 68. In *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*,[170] the court declared: "If costs are to be imposed pursuant to the provisions of Rule 68 a preliminary finding is required that an appropriate offer of judgment has been made in compliance with that rule."[171] According to *Mr. Hanger*, cost shifting under rule 68 is mandatory only if defendant's offer of judgment is a "proper offer."[172] The offer must not be a "sham and in bad faith," that is, it must be one that plaintiffs could reasonably be expected to accept.[173]

The *August* court picked up the "good faith" language from *Mr. Hanger* and imposed an explicit requirement that the offer must be "reasonable."[174] In *August*, the plaintiff alleged actual

170. 63 F.R.D. 607 (E.D.N.Y. 1974) (individual patent infringement action).

171. *Id.* at 610. In this instance the rejected offer was held proper as part of the post-trial proceedings to assess costs. However, plaintiffs may attempt to have the trial judge make such a "preliminary finding" before the offer is either accepted or rejected. In Tansey v. Transcontinental W. Air, 97 F. Supp. 458 (D.D.C. 1949), the trial court apparently granted both parts of plaintiffs' pretrial "motion to strike defendant's pleading purporting to be an offer of judgment or, in the alternative, to suspend application of Rule 68 . . . insofar as future costs is concerned." *Id.* at 459. Besides striking the improperly filed offer, the court found that the content of the offer did not comply with the requirements of rule 68 "and therefore the offer [did] not prevent consideration by the court of plaintiff's costs [thereinafter] incurred." *Id.*

Furthermore, in a class action, the court has wide discretion under rule 23(d) to make orders in the conduct of the action so as to insure that fair procedures are maintained. In Hunter v. United Air Lines, No. C72-170 AJZ (N.D. Cal. 1979), for instance, plaintiffs moved the court "for an order determining whether Rule 68 applies in Rule 23 class actions and/or whether the Offer of Judgment served herein on plaintiffs complies with Rule 68," and the court entertained the motion. *Id.*, Motion to Determine Whether an Appropriate Offer of Judgment Has Been Made Pursuant to Rules 23 and 68, Fed. R. Civ. P. *See* note 11 *supra*.

172. 63 F.R.D. at 610.

173. *Id.* In this instance the offer was held not a sham. Although the dollar amount was low ($25), the offer "constituted an acknowledgment of the plaintiff's rights and an admission of the infringement. Furthermore, defendants' promise to desist in the infringing practice was valuable consideration, and afforded the plaintiff substantially the relief prayed for in its complaint." *Id.*

174. "While there is little authority on the point, this court is satisfied that in order to be effective, a Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable." August v. Delta Air Lines, 600 F.2d 699, 700 n.3 (7th Cir. 1979). The court disagreed with defendants' argument that even an offer of $10 would have sufficed to shift costs under rule 68: "If that were so, a minimal Rule 68 offer made in bad faith could become a routine practice by defendants seeking cheap insurance against costs." Such a practice would be inconsistent with rule 68's purpose of encouraging settlement. *Id.* at 701.

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damages in excess of $20,000 (not including attorney's fees and costs), and sought reinstatement as a flight attendant. Because the court felt that the plaintiff's claim was "not frivolous," the defendant's settlement offer of less than $500 was "not of such significance . . . to justify serious consideration by the plaintiff."[175] The *August* court used the notion of a proper offer to read into rule 68 considerable room for the court's equitable discretion. Besides weighing the offer against plaintiff's claim rather than simply against the outcome at trial, the court brought to bear other equitable considerations in determining whether defendant's offer was proper. The court considered several factors, among them that plaintiff's claim was not totally meritless, that she was given encouragement by the EEOC, and that successful Title VII plaintiffs are generally entitled to attorney's fees. All of these facts, together with the small dollar amount, were reasons why defendant's offer "did not constitute an effective offer."[176]

Definite and Unconditional

Case law under rule 68 has also developed the requirement that defendant's offer be "unconditional"[177] and "definite." The court may forego the application of rule 68 if defendant's offer fails to "specify a definite sum to be entered as judgment which plaintiff can either accept or reject."[178] This "definite and unconditional" requirement has been traced both to basic principles of contract law, requiring a meeting of the minds,[179] and to the need for certainty in the operation of rule 68:

> Once an offer of judgment has been accepted, the trial court should have to make no further determinations that might require extensive factual findings . . . .
>
> By our holding, some certainty in the opera-

175. *Id.* at 701.

176. *Id.* n.3.

177. *See* note 145 *supra.*

178. Tansey v. Transcontinental W. Air, 97 F. Supp. 458, 459 (D.D.C. 1949); 12 C. Wright & A. Miller, *supra* note 145, § 3002 at 57.

179. A state case interpreting a state rule similar to rule 68, drawing upon federal precedents, explains that "[a]n offer of judgment and acceptance thereof is a contract. The amount of the offer of judgment must be definite so that it is clear the parties have come to a meeting of the minds on an essential term of the contract." Davis v. Chism, 513 P.2d 475, 481 (Alaska 1973) (individual personal injury action, holding pre-judgment interest not included in offer unless expressly included by defendant).

> tion of Rule 68 will be achieved. Both parties will know at the time of the offer that the amount specified is all that the plaintiff will receive in the way of damages and all that the defendant will be liable for.[180]

Rule 68 cannot achieve its purpose of encouraging immediate settlement unless each plaintiff is confronted with a clear choice between defendant's certain offer and the uncertain outcome of a trial. For example, a California case interpreting a statute similar to rule 68 found defendant's offer "a nullity" where it was made jointly to all plaintiffs without designating how the sum was to be divided among them.[181] Because plaintiffs have only ten days to assess the uncertainties of trial in order to compare offer to expected outcome, it would be unreasonable and unfair to require them to assess the uncertainties of defendant's offer as well.

An example of a properly "definite and unconditional" offer is provided in *Mr. Hanger,* where defendant offered a specific sum and a promise to stop using the type of hanger in question.[182] In contrast, an offer to a class of an aggregate sum, with each class member's damages to be ascertained through some type of claims procedure, is neither definite nor unconditional. Indeed, *no* offer in a class action can be unconditional, since it must be subject to all the procedures required by due process and by rule 23 (notice to the class, hearing of substantial objections, and court approval). The tentativeness and flexibility essential to class action settlements violate rule 68's requirement of a definite and unconditional offer.

Implication of Liability

Finally, rule 68 speaks of an offer of "judgment," not of an offer of "compromise."[183] It is questionable whether an offer which expressly disclaims liability, as settlement offers fre-

180. *Id.* at 482.

181. Randles v. Lowry, 4 Cal. App. 3d 68, 74, 84 Cal. Rptr. 321, 325 (1970) (multiparty personal injury action).

182. 63 F.R.D. 607, 608 (E.D.N.Y. 1974).

183. Rule 68 permits a defendant to serve on a plaintiff "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." FED. R. CIV. P. 68.

quently do, may properly be termed an "offer to allow judgment to be taken" against oneself. In *Mr. Hanger*, the court assumed that an offer of judgment under the Federal Rules implicitly contains an admission of liability,[184] and a New York court interpreting a similar state rule expressly held that, where a defendant had allowed judgment to be taken against himself in an action for property damage, his negligence was thereby established in a subsequent action for personal injuries.[185] The term "offer of judgment," then, may have collateral estoppel consequences,[186] and a defendant who seeks to avoid such consequences may be held to have made an improper offer.

B. Limitation to Minimal Costs

Should all else fail, and plaintiffs find themselves facing a trial court which holds defendant's offer to be proper, the judgment at trial to be less favorable than the offer, and costs to be shifted to plaintiff under rule 68, plaintiffs may still argue that these costs should be minimal. In the first place, the question of whether defendants pay plaintiffs' attorney's fees, plaintiffs pay defendants' attorney's fees, or each party bears its own attorney's fees, is an entirely separate matter answered not by looking to the Federal Rules, but to the provisions for attorney's fees laid down in Title VII and interpreted by the Supreme Court in *Newman* and *Christiansburg*.

Moreover, there is no indication either in the rule itself or in the case law that the meaning of "costs" under rule 68 has any wider scope than the meaning of "costs" under rule 54(d).[187]

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184. "The offer of twenty-five dollars constituted an acknowledgement of plaintiff's rights and an admission of the infringement." Mr. Hanger, Inc., v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610 (E.D.N.Y. 1974). One commentator disagrees with this interpretation of the rule, primarily on the ground that it may discourage defendants from making such offers. Note, *supra* note 25, at 904-05.

185. Card v. Budini, 29 A.D.2d 35, 285 N.Y.S.2d 734 (App. Div. 1967).

186. "There is no longer any doubt as to the propriety of the affirmative use of a prior judgment to establish a right of recovery; the New York Court of Appeals having expressly held that there exists 'no reason in policy or precedent to prevent the "offensive" use of a prior judgment.' " *Id.* at 38, 285 N.Y.S.2d 736-37. It should be pointed out, however, that the collateral estoppel implications of the federal rule are less clear, since no case has directly addressed the question.

187. Under Rule 54(d), although "generally costs shall be allowed as of course to the prevailing party, it is discretionary with the court whether particular items when objected to should be allowed." Hill v. Gonzales, 53 F.R.D. 1, 3 (D. Minn. 1971) (medical malpractice action).

Even if the court feels it lacks discretion to decide *whether* to tax costs against plaintiffs under rule 68, it still retains the discretion given it by statute and local rule or custom in deciding *which* expenses are taxable as costs.[188] The statutory authorization for most of the costs assessable in the federal courts is found in 28 U.S.C. section 1920.[189] The wide variation in reported cases leaves no doubt that this section allows considerable leeway for the trial court's discretion.[190] Even if the trial

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188. For example, a Florida appellate court left to the trial court's discretion the decision whether to tax deposition costs under a state rule similar to rule 68: "[T]he Court, in its discretion, could allow the cost of depositions if they served a useful purpose." Insurance Co. of N. Am. v. Twitty, 319 So.2d 141, 143 (Fla. 1975) (personal injury action).

A New York case under a similar rule distinguished between "costs" as specified by applicable statute and "disbursements," *i.e.*, other out-of-pocket expenses, holding that no expenses besides the costs provided by statute may be awarded under the rule in question: "Because no mention is made of disbursements in Rule 3221, the Court cannot allow defendant to include these in his bill of costs." Tusch v. Linquist, 69 Misc.2d 835, 837, 331 N.Y.S.2d 147, 150 (Civ. Ct. Roch. 1972) (negligence action). In this instance, the court found no statutory authorization for any costs award beyond the statutory minimum of $10. *Id.*

189. 28 U.S.C. § 1920 (1976) provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

A 1978 amendment added a sixth item: "(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." *Id.* (1978 Supp.).

190. In deciding costs defined in § 1920 judges are

> forced to exercise their sound discretion. Section 1920 is written in broad and ill-defined terms. Such language often is the cause of conflicting decisions, since individual judges have often applied differing definitions to the section's provisions. In addition, there is no consensus among the judiciary concerning the test to be used in determining if a taxable item is "necessarily obtained for use in the case."

Comment, *Taxation of Costs in Federal Courts—A Proposal*, 25 AM. U.L. REV. 877, 883 (1976). This commentator proposes amending the federal rules so that a party anticipating taxable costs in excess of $500 would have to "petition the court for an order specifying the extent to which certain items would be taxable as costs. . . . This pretrial deter-

court chooses to follow the mandatory language of rule 68 in deciding to tax costs against the plaintiff, it must surely consider the policy objectives of Title VII in exercising its discretion whether to allow defendant a particular item of expense as "costs."

Section 1920 provides that federal courts may tax the following as costs: marshal's fees, clerk's fees, docket fees, court reporter fees for transcripts "necessarily obtained for use in the case," witness fees, printing expenses, "fees for exemplification and copies of papers necessarily obtained for use in the case," compensation of court-appointed experts, and compensation of interpreters.[191] The amounts for marshal's fees, docket fees, and witness fees (per diem, travel, and subsistence expenses) are prescribed by statute and are relatively low.[192] As for other expenses, costs generally are allowable for items "necessarily obtained for use in the case." What this phrase means partly depends on local rule: in two California districts, an item may be taxed if it is admitted into evidence;[193] in another, the item must be "reasonably necessary to assist the jury or the court in understanding the issues."[194] However, even if somewhat restricted by local rules, trial courts retain considerable discretion in applying the provisions of section 1920,[195] and there is wide variation in the extent to which expenses such as preparing depositions, exhibits, and transcripts are allowed as costs.[196]

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mination [would] prevent a party from using the threat of exorbitant costs as a sword against a poor opponent, and [would] result generally in federal judges reaching more equitable results in their taxation cases." *Id.* at 879. However, it might be difficult for the judge to make a pretrial determination of an item's necessity for trial, as required by section 1920, or of the merits of the case, as required by the *August* court for the exercise of the court's discretion.

191. 28 U.S.C. § 1920 (1976 & 1978 Supp.).

192. 28 U.S.C. § 1921 (1976) lists marshals' fees, and § 1923 lists docket fees. Witness fees are fixed by § 1821.

193. C. D. CAL. CT. R. 15(b) (70); S. D. CAL. CT. R. 265-8.

194. N.D. CAL. CT. R., Appendix A, Standards for Taxing Costs.

195. *See* Comment, *supra* note 190, at 883.

196. For example, *compare* Koppinger v. Cullen-Schiltz & Assocs., 513 F.2d 901, 911 (8th Cir. 1975) (trial court taxed expense of depositions not used at trial) *with* Johnson v. Baltimore & O. R.R., 65 F.R.D. 661, 674 (N.D. Ind.), *aff'd*, 528 F.2d 1313 (7th Cir. 1974) (trial court refused to tax expense of deposition not used at trial). *Compare* Mikel v. Kerr, 64 F.R.D. 93, 95 (E.D. Okla.), *aff'd*, 499 F.2d 1178 (10th Cir. 1973) (trial court taxed expenses incurred in preparing illustrative aerial photographs) *with* Advance Business Syss. & Supply Co. v. SCM Corp., 287 F. Supp. 143, 164 (D. Md. 1968), *aff'd and remanded on other grounds*, 415 F.2d 55 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970) (trial court refused to tax cost of exhibits illustrative of expert testimony). *Com-*

In addition to the discretion inherent within the provisions of section 1920, the court also has some discretion to tax costs not provided by statute. The extent of this discretion may be circumscribed by local rule. In California, for example, the Eastern District includes a catch-all provision for "[o]ther items allowed by any statute or rule or by the court in the interests of justice,"[197] while the Northern District has no such catch-all phrase and specifically excludes fees for expert witnesses.[198]

The Supreme Court has held that the district judge's discretion to tax costs "should be sparingly exercised with reference to expenses not specifically allowed by statute . . . in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation."[199] An unrestrained discretion to reimburse litigants for every expense would endanger our system of jurisprudence by allowing "litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be."[200] The Court's rationale for keeping taxable costs low—to avoid discouraging litigants from bringing good faith lawsuits—particularly applies to costs assessed against plaintiffs and applies with greatest force in cases where Congress has authorized award of attorney's fees in order to encourage the bringing of such suits.[201]

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pare Kaiser Indus. Corp. v. McLouth Steel Corp., 50 F.R.D. 5, 9 (D. Mich. 1970) (trial court taxed costs of daily transcript of trial and final arguments) *with* Chemical Bank v. Kimmel, 68 F.R.D. 679, 683 (D. Del. 1975) (trial court refused to tax costs of some portions of trial transcript, while allowing others).

197. E.D. CAL. CT. R. 122(e)(8).

198. N.D. CAL. CT. R., Appendix A, Standards for Taxing Costs.

199. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964) (action for breach of employment contract). The Court approved the district judge's elimination of defendant's expenses for transporting witnesses from Arabia to New York and for overnight transcripts of the daily trial proceedings. It has also been suggested that "[w]hen items not listed in the statute are sought, the proper procedure would be an application to the court for an approving order in advance of trial." Hill v. Gonzales, 53 F.R.D. 1, 3 (D. Minn. 1971).

200. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964).

201. Successful plaintiffs in "public law litigation," on the other hand, are frequently awarded many of their expenses. For example, pretrial investigation expenses and expert witness fees were awarded plaintiffs in a successful class action suit seeking declaratory and injunctive relief regarding treatment and conditions in facilities for the mentally retarded. Welsch v. Likins, 68 F.R.D. 589, 596-97 (D. Minn. 1975).

Expenses for expert witness fees, research assistants, key punching services, and other "special" costs were also awarded to plaintiffs who negotiated a consent decree

Consequently, plaintiffs may properly object to all items in defendants' bill of costs which are within the trial court's statutory discretion, such as costs of depositions, transcripts, and exhibits. Plaintiffs may also object to items not authorized by statute, such as expenditures for non-court-appointed expert witnesses and for statistical compilations. In exercising its discretion whether to allow a particular item as a taxable cost, the court should look to the objectives of Title VII and not allow costs to mount so high as to discourage good faith plaintiffs from litigating their claims, for "[t]he extent to which actual expenses are allowed as costs can have a significant effect upon the encouragement or discouragement of litigation."[202]

Some courts have looked to the attorney's fees precedents in Title VII and other civil rights cases as authorization for awarding successful plaintiffs their litigation expenses beyond those listed in section 1920.[203] Other courts have insisted that, because the statutory provisions for attorney's fees do not mention any other expenses, they are restricted to those costs listed in section 1920.[204] At the very least, however, courts which do exercise discretion to tax nonstatutory expenses should bear in mind the purposes of Title VII in assessing *defendants'* costs against *plaintiffs*. Unless plaintiffs' refusal of defendants' offer of judgment was "frivolous, unreasonable, or groundless,"[205] plaintiffs should not be burdened with all of defendants' expenses. Other-

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after long and complex litigation challenging on racial grounds the hiring and promotional practices of the Police Department of the City of Philadelphia. Pennsylvania v. O'Neill, 431 F. Supp. 700, 713-17 (E.D. Penn. 1977), *aff'd*, 573 F.2d 1301 (3d Cir. 1978). The statutory costs awarded plaintiffs in this case amounted to $8,011.20 and the "special" costs to $15,521.24. *Id.* at 717.

202. 6 J. MOORE, *supra* note 103, § 54.70(2) at 1303-04.

203. *See, e.g.*, Payne v. Travenol Laboratories, Inc., 74 F.R.D. 19 (N.D. Mont. 1976) (Title VII class action for racial discrimination, allowed $36,467.49 in out-of-pocket expenses): "[R]easonable out-of-pocket expenses necessarily incurred in preparing for and conducting the litigation are recoverable." *Id.* at 21. The court distinguished the question of what expenses should be allowed along with attorney's fees from the question of what expenses are allowed under section 1920.

204. *See, e.g.*, Skehan v. Board of Trustees, 436 F. Supp. 657 (M.D. Pa. 1977) (found that termination of faculty member's employment violated due process, but his "unclean hands" prevented full reinstatement): "Such expenses as telephone calls and travel to consult with attorneys are not authorized by the Civil Rights Attorney's Fees Award Act of 1976 and do not come within the definition of costs as that term is used in the Federal Rules of Civil Procedure. Consequently, Skehan's request for expenses will be denied." *Id.* at 667.

205. *See* note 62 *supra* and accompanying text.

wise, the victims of discrimination in employment will be discouraged from seeking redress in the courts.

IV. CONCLUSION

Plaintiffs who have received an offer of judgment may be required to litigate the questions of whether the offer is proper, whether their judgment is less favorable than the offer, and which costs are assessable to defendants. Such litigation is inevitable if the courts continue to apply rule 68 in Title VII cases because courts will be forced, as in *August*, to balance the mandate of the rule against the mandate of Title VII even though such a balance is completely antithetical to the purpose of rule 68, which is to *quiet* litigation, not prolong it. Moreover, litigation of rule 68 issues consumes time, energy, and money better spent on the central issues of the case. The courts should resolve the issue once and for all by declaring that rule 68 was not designed for and is inapplicable to a Title VII action. Its potentially chilling effect on enforcement of the law is inconsistent with the remedial purposes of Title VII and with the allocation of litigation expenses mandated by the statutory provision for award of attorney's fees. In a class action, its rigid procedures and mandatory terms are inconsistent with the safeguards for absent class members mandated by rule 23 and by due process. Resolving these inconsistencies by reading discretion into the rule, as in *August*, only invites more litigation, more uncertainty, and more waste of litigants' often scarce resources.*

* While this article was at the printer, a district court held that rule 68 is not mandatory when the party who refused the offer of judgment was a class representative. Gay v. Waiters' Union, 22 FEP Cases 1249 (N.D. Cal. 1980) (unsuccessful class action claiming race discrimination in employment, brought under 42 U.S.C. § 1981). Judge Schwarzer's opinion cogently analyzes the "potential conflict between the named party's self-interest and his fiduciary duty to the class," and concludes that "enforcement of Rule 68 may, in cases such as this, conflict with the policies and principles underlying Rule 23 and statutes enforced by class actions." *Id.* at 1252.

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