**Can Rule 68 be Made a More Effective Tool for Settlement?**[1]

In the fall of 2014, the Chief Judge of the U.S. Court of Federal Claims (CFC) charged the Court's Advisory Council with the task of exploring new ways of alternative dispute resolution (ADR). One possible target of opportunity is presented in Court of Federal Claims Rule 68 (RCFC 68), the only rule of this Court solely addressed to settlement.[2] Wright & Miller recently observed that there has been a rekindled interest in amending Rule 68 based on "empirical work indicat[ing] that, despite misgivings about whether current Rule 68 actually accomplished what it was supposed to do, allowing both sides to make offers and magnifying the adverse consequences of rejection of offers would promote earlier settlements and save significant expense."[3]

While many proposals for improving RCFC 68's twin—Federal Rule of Civil Procedure 68—have been put forth over the years, this Court appears not to have addressed how those proposals might impact the cases lying within this Court's unique jurisdiction. Nor does it appear that the Court or the litigants have given RCFC 68 much thought at all. The CFC's recent examination of ADR presents a good opportunity explore whether Rule 68—either in its present form or with some enhancements—might in fact emerge as a valuable mechanism for resolving cases in this Court without resorting to trial.

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[2] The CFC's current Alternative Dispute Resolution procedures are set forth in Appendix H to the Court's Rules and General Order No. 44 issued by the Chief Judge in 2007.

[3] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3007 (2d ed. 2015).

Accordingly, this article first examines Rule 68 as it currently operates in this Court and in the district courts. Although this Court appears to have decided only one case construing Rule 68, a significant number of cases in the district court have laid out its mechanics. They have also identified a surprising number of ambiguities in the rule, which courts have not always interpreted in the same way.

In fact, while most commentators agree that the rule has not achieved its full potential as a settlement tool, they seem to vary widely in their explanations of why this is the case. Some believe the rule is not well-drafted; others believe parties will litigate no matter how elegantly an offer-of-judgment rule is written. And still others argue that the parties have a right to trial, and the court should not urge them to settle.

Yet over the years many proposals for improving Rule 68 have been put forward by the ABA, by rules committees, by prominent judges, and even by members of Congress. This article will examine the most thoughtful of those proposals in an effort to identify possible ways of improving Rule 68 to make it a more effective settlement mechanism.

Finally, this article will identify and discuss the pros and cons of the most prominent suggestions for improving Rule 68. Our hope is that this analysis will stimulate discussion within the Court and the bar that may point the way to improved alternative dispute resolution in the Court of Federal Claims.

## I. How Rule 68 currently operates

As one leading treatise on federal civil procedure describes Rule 68:

It is roundly agreed in the courts that Rule 68 was intended to encourage

settlements and avoid protracted litigation, although there is academic dissent. It permits a party defending against a claim to make an offer of judgment. If the offer is not accepted, and the ultimate judgment is not more favorable than what was offered, the party who made the offer is not liable for costs accruing after the date of the offer. Ordinarily, of course, a prevailing party will recover its costs of suit pursuant to Rule 54(d) unless the court exercises its discretion to deny costs. It has been said that Rule 68 gives the plaintiff the right to obtain "the equivalent of a default judgment," albeit on terms defined by the defendant.[4]

## A. Text of Rule 68

RCFC 68 provides:

**Rule 68. Offer of Judgment**

**(a) Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.** An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.** If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

[4] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 2015) (footnotes omitted).

### B. Mechanics of Rule 68

Under RCFC 68 the defendant (but not the plaintiff) may make an offer for judgment anytime more than 14 days prior to trial.[5] If the plaintiff accepts the offer in writing within 14 days, either party may file the documents with the Clerk, who then enters judgment per the accepted offer.[6] If the plaintiff does not accept the offer within 14 days, it is withdrawn and may not be introduced in evidence except in a hearing on costs.[7] And if the judgment the plaintiff then obtains is less favorable than the defendant's unaccepted offer (including a stipulated judgment), the plaintiff must pay defendant's costs accrued after the date of the offer.[8]

Because Rule 68 allows the defendant to make an "offer to allow judgment on specified terms, with the costs then accrued," a Rule 68 offer must include costs, either as a separate item or as part of the lump sum offered:

> Under well-established case law following the Supreme Court's decision in *Marek v. Chesny*, an offer must include costs.[27] Costs can be included as part of the offer (i.e., the defendant makes a lump-sum offer that is inclusive of costs) or costs can be included after the fact (i.e., the defendant makes an offer for a certain amount that is not inclusive of costs, thus allowing costs to be added later).[9]

Once the defendant makes the offer, automatic consequences begin to follow:

> Once a defendant makes a Rule 68 offer, the offer itself is non-negotiable. The offeree-plaintiff has only two choices: accept the offer on its face or

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[5] RCFC 68(a).
[6] RCFC 68(b).
[7] *Id.*
[8] RCFC 68(d).
[9] Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. 865, 873 (2007).

> reject it. Either way, a plaintiff must assess what exactly the offer is, because "a Rule 68 . . . offer has a binding effect when refused as well as when accepted." If the offer is accepted, Rule 68 operates automatically and without the court's discretion. As such, if the plaintiff accepts the offer, the court must enter judgment for the amount specified in the offer. The court may not second guess the terms of the offer, as "[e]ntry of a Rule 68 judgment is ministerial rather than discretionary."[10]

Having rejected the defendant's offer, if the plaintiff does not receive a more favorable judgment than offered, the court's duty to award post-offer costs to the defendant is mandatory:

> If the plaintiff chooses to reject the offer and instead elects to proceed to trial, the rule's cost-shifting mechanism is triggered if "the judgment finally obtained by the [plaintiff] is not more favorable than the offer." The cost-shifting mechanism is mandatory; under the rule, the plaintiff "must pay the costs incurred after the making of the offer." In practice, this means that the plaintiff must bear her own post-offer costs (that otherwise would be recoverable) and also must pay the post-offer costs of the defendant. The offer "stands as the marker by which the plaintiff's results are ultimately measured." That is, the offer becomes the benchmark a plaintiff must surpass at trial to avoid the shifting of costs—both her own and those of the defendant—under Rule 68.[11]

Although one Court of Federal Claims case cited the Government's Rule 68 offer as support for denying plaintiff post-offer attorneys' fees in a rails-to-trails taking case,[12] it is unclear how that offer came into evidence since Rule 68 provides that "[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs."[13]

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[10] *Id.*
[11] *Id.* at 874.
[12] *See Hubbert v. United States*, 62 Fed. Cl. 73 (2004).
[13] RCFC 68(b).

### C. History and purpose of Rule 68

While Rule 68 was included in the original Federal Rules of Civil Procedure adopted in 1938, there was no parallel Rule 68 in this Court until creation of the Claims Court in 1982:

> There was no Rule 68 in the Rules of the United States Court of Claims, our predecessor court. The Claims Court, however, does have a Rule 68, fashioned verbatim on Rule 68 of the Federal Rules of Civil Procedure (FRCP). The court is not aware of any Claims Court precedents relative to RUSCC 68. Accordingly, it is reasonable and sensible, under such circumstances, to look to case law precedents under FRCP 68 for guidance and assistance in our initial confrontational encounter with RUSCC 68.e."[14]

FRCP 68 has remained essentially unchanged since its adoption in 1938:

> Rule 68 has remained essentially unchanged from its form when originally adopted in 1938, although there have been periodic proposals to change it. But no significant changes have been made. In 2007, the language of Rule 68, along with the language of all the other Civil Rules, was amended as part of the general restyling of the Civil Rules to make them more easily understood. The objective of this effort was to be stylistic only; no changes in meaning were intended unless specifically noted.
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> Then in 2009, as part of a general revision of time periods shorter than 30 days in the civil rules, Rules 68(a) and 68(c) were amended to permit 14 instead of 10 days for actions under the rule. In addition, the language of these two subsections was clarified so that instead of focusing on when the trial or hearing "begins," they refer instead to "the date set for" the trial or hearing. If that date is reset, the date on which a Rule 68 offer may be served is similarly changed.[15]

[14] *State of Wash. v. United States*, 8 Cl. Ct. 693, 694 (1985).

[15] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 2015).

RCFC 68, too, has remained essentially the same since the Claims Court adopted it in 1982, having undergone only stylistic changes in 2002, 2008, and 2010 to conform to similar changes in the FRCP version of the rule.[16]

The Supreme Court described the purpose of Rule 68 in *Delta Airlines, Inc. v. August*:[17]

> The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.[18]

Although new to the federal courts, Rule 68 had its roots in existing state court procedures and deeper still in the inherent power of the court to deal with vexatious litigation:

> This device was entirely new to the federal courts when the Federal Rules were adopted in 1938. But it was familiar in the practice of some states. And the general principle, that even a prevailing party could be denied costs for persisting vexatiously after refusing an offer of settlement if it recovered no more than it had been previously offered, has been held to be within the powers of an equity court regardless of the existence of a rule such as this one.[19]

Rule 68 seems to have been little-used, and gained little attention, in its early years:

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[16] RCFC 68 Rules Committee Notes to 2002, 2008, and 2010 amendments.
[17] *Delta Airlines, Inc. v. August*, 450 U.S. 346 (1981).
[18] *Id.* at 352.
[19] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 2015).

> [I]t is not clear that very much thought was given to . . . Rule 68, at the time it was adopted. There is at least some reason to doubt that the rule was important in accomplishing these objectives during the years after the Civil Rules were adopted. The frequency of trials in civil cases was relatively low at the time the Civil Rules were adopted and has declined since then, perhaps suggesting that Rule 68 did accomplish its purpose of fostering settlement, but there seems little reason to credit that conclusion. To the contrary, the rule is largely thought to have had little effect. Thus, when the Advisory Committee on the Civil Rules proposed amendments to Rule 68 in 1983, its Note began by acknowledging that the rule "has rarely been invoked and has been considered largely ineffective in achieving its goals." In a 1984 memorandum, Judge Walter Mansfield, then chairman of the Advisory Committee, described Rule 68 as "dead letter." In the same year, Judge Richard Posner characterized it in an opinion as a "little known rule of court."[20]

In the 1980s, the Supreme Court twice focused attention on Rule 68 by deciding two cases that changed the course of Rule 68 practice. First, in *Delta Airlines v. August*, the Supreme Court decided that Rule 68 had no application in cases where the defendant prevailed, since the rule was triggered only when a plaintiff obtained a judgment, which was then measured for favorability against the defendant's Rule 68 offer:

> Rule 68 prescribes certain consequences for formal settlement offers made by "a party defending against a claim." The Rule has no application to offers made by the plaintiff. The Rule applies to settlement offers made by the defendant in two situations: (a) before trial, and (b) in a bifurcated proceeding, after the liability of the defendant has been determined "by verdict or order or judgment." In either situation, if the plaintiff accepts the defendant's offer, "either party may then file the offer ... and thereupon the clerk shall enter judgment." If, however, the offer is not accepted, it is deemed withdrawn "and evidence thereof is not admissible except in a proceeding to determine costs." The plaintiff's rejection of the defendant's offer becomes significant in such a proceeding to determine costs.[21]

Relying on the plain language of the rule, the Supreme Court rejected the

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[20] *Id.*

[21] *Delta Air Lines, Inc.*, 450 U.S. at 350.

defendant's argument that a judgment for defendant was more favorable than the offer, and thus triggered the application of the rule:

> If, as defendant argues, Rule 68 applies to defeated plaintiffs, any settlement offer, no matter how small, would apparently trigger the operation of the Rule. Thus any defendant, by performing the meaningless act of making a nominal settlement offer, could eliminate the trial judge's discretion under Rule 54(d). We cannot reasonably conclude that the drafters of the Federal Rules intended on the one hand affirmatively to grant the district judge discretion to deny costs to the prevailing party under Rule 54(d) and then on the other hand to give defendants—and only defendants—the power to take away that discretion by performing a token act.[22]

Four years later in *Marek v. Chesney*,[23] the Supreme Court decided two important issues of Rule 68 interpretation. First, the Supreme Court held that a Rule 68 offer, which must under the rule include costs accrued to the date of the offer,[24] was sufficient so long as it did not purport to exclude these rule-required costs:

> The critical feature of this portion of the Rule is that the offer be one that *allows judgment to be taken against the defendant for both the damages caused by the challenged conduct and the costs then accrued.* In other words, the drafters' concern was not so much with the particular components of offers, but with the *judgments* to be allowed against defendants. If an offer recites that costs are included or specifies an amount for costs, and the plaintiff accepts the offer, the judgment will necessarily include costs; if the offer does not state that costs are included and an amount for costs is not specified, the court will be obliged by the terms of the Rule to include in its judgment an additional amount which in its discretion, see *Delta Air Lines, Inc. v. August, supra* 450 U.S., at 362, 365, 101 S.Ct., at 1153, 1156 (POWELL, J., concurring), it determines to be sufficient to cover the costs. In either case, however, the offer has *allowed* judgment to be entered against the defendant both for damages caused by the challenged conduct and for costs. Accordingly, it is immaterial whether the offer recites that costs are included, whether it specifies the amount the

[22] *Id.* at 353.
[23] *Marek v. Chesny*, 473 U.S. 1 (1985).
[24] FRCP 68(a).

> defendant is allowing for costs, or, for that matter, whether it refers to costs at all. As long as the offer does not implicitly or explicitly provide that the judgment *not* include costs, a timely offer will be valid.[25]

The Court then went on to hold that the allowable costs under Rule 68 included not only taxable costs but, where the applicable statute defined "costs" to include attorneys' fees (as in the Civil Rights Act),[26] attorneys' fees were also to be awarded the defendant as costs:

> Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority. In other words, all costs properly awardable in an action are to be considered within the scope of Rule 68 "costs." Thus, absent congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, we are satisfied such fees are to be included as costs for purposes of Rule 68.[27]

## II. State statutory analogies to Rule 68

As noted, Rule 68 was inspired in part by existing state statutes.[28] Those statutes take many different forms, but all use the mechanism of penalizing an offeree who rejects a reasonable settlement offer and then obtains a less favorable judgment:

> [S]everal states allow plaintiffs as well as defendants to make offers of judgment. In addition, the state provisions include different triggering points for adverse cost-shifting consequences, different consequences, and differences on other matters of operation such as whether the offer itself should be filed.[29]

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[25] *Marek*, 473 U.S. at 6 (italics in original).
[26] 42 U.S.C. § 1988.
[27] *Marek*, 473 U.S. at 9.
[28] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3001 (2d ed. 2015).
[29] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3001.2 (2d ed. 2015).

According to a 1997 survey, twenty-eight states plus the District of Columbia have provisions substantially similar to Rule 68, another thirteen have provisions significantly different from Rule 68, and nine states have no such provision.[30] Many of these allow either party to make a settlement offer.

### A. California

California Code of Civil Procedure § 998, for example, allows either party to serve an offer of settlement, with the possible recovery of expert witness fees, along with costs, as the penalty for obtaining a less favorable judgment:

> (b) . . . any party may serve an offer in writing upon any other party to the action to allow judgment to be taken or an award to be entered in accordance with the terms and conditions stated at that time. . . .
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> (c) (1) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the plaintiff shall not recover his or her postoffer costs and shall pay the defendant's costs from the time of the offer. In addition, in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or arbitration, of the case by the defendant.
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> (d) If an offer made by a plaintiff is not accepted and the defendant fails to obtain a more favorable judgment or award in any action or proceeding other than an eminent domain action, the court or arbitrator, in its discretion, may require the defendant to pay a reasonable sum to cover postoffer costs of the services of expert witnesses, who are not regular employees of any party, actually incurred and reasonably necessary in either, or both, preparation for trial or arbitration, or during trial or

[30] Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 Ohio St. J. on Disp. Resol. 51, 64 (1997).

arbitration, of the case by the plaintiff, in addition to plaintiff's costs.

> (e) If an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, the costs under this section, from the time of the offer, shall be deducted from any damages awarded in favor of the plaintiff. If the costs awarded under this section exceed the amount of the damages awarded to the plaintiff the net amount shall be awarded to the defendant and judgment or award shall be entered accordingly.

With the limited exception of certain small wage claims, and absent other statutory authorization, in California attorney's fees are not part of recoverable costs under this statute.[31]

### B. Connecticut

Connecticut's equivalent to Rule 68 also allows either plaintiffs or defendants to make offers. Unlike California's statute, however, Connecticut's statute has a separate section for offers of compromise by a plaintiff.

Connecticut allows a defendant to file a written offer of compromise with the clerk of the court offering to settle the litigation for a specified amount,[32] after which the plaintiff has sixty days to file a written acceptance of the offer with the clerk of the court.[33] If the plaintiff does not accept the offer, then as with Rule 68, "[u]nless the plaintiff recovers more than the sum specified in the offer of compromise, with interest from its date, the plaintiff shall recover no costs accruing after the plaintiff received notice of the filing of such offer, but shall pay the defendant's costs accruing after the

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[31] Cal. Code of Civil Proc. §§ 998(a), 1031, 1032, 1033.5(10); *see also Mangano v. Verity, Inc.*, 167 Cal. App. 4th 944, 951 (Cal. Ct. App. 2008) ("[S]ection 998 does not grant greater rights to attorney's fees than those provided by the underlying statute.").
[32] C.G.S. § 52-193.
[33] C.G.S. § 52-194.

plaintiff received notice."[34] Unlike Rule 68, costs here "may include reasonable attorney's fees in an amount not to exceed three hundred fifty dollars."[35]

Plaintiffs may also file a written offer of compromise with the clerk of the court, after which the defendant has thirty days (sixty days for personal injury or wrongful death claims[36]) to file a written acceptance of the offer with the clerk of the court.[37] If the defendant does not accept the offer, then after trial "[i]f the court ascertains from the record that the plaintiff has recovered an amount equal to or greater than the sum certain specified in the plaintiff's offer of compromise, the court shall add to the amount so recovered eight per cent annual interest on said amount."[38] Again, the court may award "reasonable attorney's fees in an amount not to exceed three hundred fifty dollars."[39]

As with Rule 68, the purpose of Connecticut's offer of judgment statute is to "encourage pretrial settlements and consequently, to conserve judicial resources."[40]

**C. Ohio**

Currently, Ohio's Rule 68 only prohibits a refused offer of settlement from being considered in a proceeding to determined costs.[41] But there has been support to amend the rule to allow plaintiffs to offer settlement, and recover post-rejection costs, similar to Federal Rule 68. In 1996, the Ohio Supreme Court considered a proposal where if "the

[34] C.G.S. § 52-195(b).
[35] C.G.S. § 52-195(b).
[36] C.G.S. § 52-195(b).
[37] C.G.S. § 52-192a(a).
[38] C.G.S. § 52-192a(c).
[39] C.G.S. § 52-192a(c).
[40] *Stiffler v. Cont'l Ins. Co.*, 288 Conn. 38, 43 (2008) (quoting *Blakeslee Arpaia Chapman, Inc. v. El Constructors, Inc.*, 239 Conn. 708, 742 (1997)).
[41] Ohio Civ. R. 68.

plaintiff's unaccepted offer was more favorable than the relief obtained by the plaintiff at trial, then the plaintiff would be awarded double costs."[42] The proposal was ultimately withdrawn after a group of plaintiffs' attorneys objected that the proposal implied there were too many unnecessary trials.[43]

## III. Can Rule 68 Be Improved?

The general opinion seems to be that Rule 68 has not lived up to its potential as an effective tool of settlement:

> Many lawyers and judges believe that rule 68 has failed to encourage settlement. Two principal defects account for this apparent failure. First, rule 68 is a "one-way street"—only defendants can invoke the rule. Second, the sanction of post-offer 'costs' is usually too small to motivate parties to settle (except when costs are held to include attorneys' fees). These shortcomings have crippled the rule. Defendants seldom make rule 68 offers, and offers that are made are seldom accepted because the potential sanction is so mild.[44]

Beginning around the time the Supreme Court first considered the rule, there has been a continuing interest in amending the rule.

### A. A review of proposals for Rule 68 revision

Those proposals generally addressed five major topics:

> As a general matter, the proposals that have been made contained a number of similar features, some of which resemble features of state offer-of-judgment statutes or change interpretations of current Rule 68. These included: (1) authorizing offers by plaintiffs as well as defendants; (2) magnifying the consequences of rejection followed by a less favorable result to include some or all of the offeror's postoffer attorneys' fees; (3) excluding class and derivative actions from the operation of Rule 68; (4)

[42] Solimine & Pacheco, *State Court Regulation of Offers of Judgment and Its Lessons for Federal Practice*, 13 Ohio St. J. on Disp. Resol. at 66.
[43] *Id.*
[44] Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 6–7 (1985).

> allowing a longer period for the offeree to decide whether to accept the offer; and (5) allowing withdrawal of the offer.[45]

Although unadopted proposals for rule revision are generally of limited interest, the bench and bar have shown sustained interest in revising Rule 68 to make it more useful:

> Ordinarily unadopted proposals to amend the Civil Rules are of little ongoing interest to the bench and bar, but with Rule 68 there is reason to note the efforts to change the rule. There are certainly many grounds for unhappiness with the current provisions of the rule, and some see a consensus for changing it. For an extended period in the 1980s and 1990s, the Advisory Committee studied possible amendments, and twice published proposed amendments to the rule. Some courts even engaged in the highly questionable practice of citing those amendment proposals as authority in interpreting the present version of the rule.[3] Under these circumstances, some discussion of proposals to amend the rule is in order.[46]

Dovetailing with the Chief Judge's charge that the Advisory Council of this Court explore new and better mechanisms for achieving settlement in the Court of Federal Claims, the greater federal bar has also shown renewed interest in reinvigorating Rule 68:

> Part of the reason for rekindled interest in amending Rule 68 is that empirical work indicated that, despite misgivings about whether current Rule 68 actually accomplished what it was supposed to do,[7] allowing both sides to make offers and magnifying the adverse consequences of rejection of offers would promote earlier settlements and save significant expense.[8] Against this background, these past episodes loom as possible harbingers of future innovation.[47]

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[45] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3007 (2d ed. 2015).
[46] *Id.*
[47] *Id.*

Because Rule 68, with certain improvements, could become a more effective settlement tool in the Court of Federal Claims, we review in some detail the proposals made over the years to improve its efficacy.

### 1. 1983 and 1984 Advisory Committee Proposals

In 1983 the Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure proposed a substantial overhaul to FRCP 68:

> In 1983, the Advisory Committee circulated a proposal to amend Rule 68 to permit any party to make a Rule 68 offer, allow 30 days for response, and permit the court to authorize withdrawal during the 30 day period. The proposal directed that reasonable attorneys' fees and interest from the date of the offer should be awarded to the offeror unless the judgment finally entered was more favorable to the offeree, although the court could reduce that amount on the ground it was excessive under the circumstances. The proposal also directed that costs and expenses of the parties should not be considered in determining whether the ultimate judgment was more favorable, and that adverse consequences should not flow from rejection should the offer have been made in bad faith. *Reversing Delta Air Lines, Inc. v. August*, the proposed amendment would have imposed adverse consequences on plaintiff should defendant prevail.[48]

That proposal "provoked an outpouring of opposition, including predictions that it would destroy the contingency-fee system,"[49] leading proposal put forward the next year, 1984:

> The new proposal allowed any party to make an offer but required that it remain open for 60 days to have adverse effects for the offeree while allowing the offeror to withdraw the offer at any time before acceptance. Rather than look to whether the judgment finally entered was more favorable to the offeree, the 1984 proposal directed that the court could impose a sanction after entry of judgment on concluding that the offer was "rejected unreasonably, resulting in unreasonable delay and needless increase in the cost of the litigation," a determination that the court was to

[48] *Id.*
[49] *Id.*

> make in light of a number of specified circumstances.[1] Having found an unreasonable rejection, the court was directed to calibrate the resulting sanction, possibly including attorneys' fees, in light of a number of additional factors.[50]

But "[t]his proposal was met with many of the same objections as the 1983 proposal, and additional opposition based on the complexity of the determinations the court would have to make in deciding whether and how vigorously to sanction. Eventually the Advisory Committee abandoned further effort on this proposal."[51]

### 2. Judge Schwarzer's 1992 Proposal

Judge William W. Schwarzer, who served on the U.S. District Court for the Northern District of California and served as director of the Federal Judicial Center from 1990 to 1995, published an article in 1992 that sought to address criticisms of the 1983 and 1984 Advisory Committee proposals by placing limits on recovery and excluding claims subject to statutory fee shifting, while still permitting either plaintiffs or defendants to make offers of judgment and allowing recovery of attorney's fees.[52] Judge Schwarzer's proposal became the foundation of S. 585, a Senate bill introduced in the 103rd Congress in 1993,[53] but was never adopted. Judge Schwarzer would revise Rule 68 to state that: "[a]t any time, any party may serve upon an adverse party a written offer to allow judgment to be entered for the money or property or to the effect specified in the

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[50] *Id.*
[51] *Id.*
[52] William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992).
[53] Joshua P. Davis, *Toward a Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure* 68, 48 ALA. L. REV. 65, 69 n.16 (1996).

offer."[54]

Judge Schwarzer's proposal would have allowed recovery of reasonable attorney's fees by the offeror if the final judgment is not more favorable than the offer, with certain limitations. Recoverable costs cannot exceed the amount of the judgment and are further "limited to what is needed to make the offeror whole. That is, they would be reduced by the amount by which the offeror benefits from paying or receiving the judgment compared to what it would have paid or received under its offer."[55] In order to "make the offeror whole," the offeror can only recover his costs up to the difference between the final judgment and the offer, because the offeror should not be made better off than he would have been had the offer been accepted.[56] Non-monetary relief would exclude use of Rule 68 unless the offer contained all the non-monetary relief included in the final judgment.[57]

### 3. 1996 American Bar Association Proposal

In 1996, the American Bar Association proposed changes to Rule 68 and drafted a proposed rule for Congress and the states to adopt. The proposal provided that "any party may make an offer to an adverse party to settle all the claims between the offeror and another party in the suit and to enter into a stipulation dismissing such claims or to allow judgment to be entered according to the terms of the offer."[58] If the offer is rejected by

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[54] Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 151 (1992)
[55] *Id.* at 149.
[56] *Id.* at 150.
[57] *Id.* at 151–52.
[58] Am. Bar. Assoc., *Report on Offer-of-Judgment Legislation* § 1.

the adverse party, the adverse party would have to pay the offeror's costs, including reasonable attorney's fees if the final judgment in favor of the claimant is not better than the settlement offer, within a 25% threshold.[59] In other words, if a defendant rejects a plaintiff's offer and the court awards a final judgment to the plaintiff that is more than 125% of the offer, the defendant would have to pay the plaintiff's costs and attorney's fees incurred after the date of the offer. If a plaintiff rejects a defendant's offer and the court awards a final judgment to the plaintiff that is less than 75% of the offer, the plaintiff would have to pay the defendant's costs and attorney's fees incurred after the date of the offer. The ABA's proposal has, to date, been unsuccessful.

#### 4. Other proposals

In 1993 the United States District Court for the Eastern District of Texas adopted a local rule providing that "a party may make a written offer of judgment" and "if the offer of judgment is not accepted and the final judgment in the case is of more benefit to the party who made the offer by l0%, then the party who rejected the offer must pay the litigation costs incurred after the offer was rejected."[60] "Litigation costs" is defined to include "those costs which are directly related to preparing the case for trial and actual trial expenses, including but not limited to reasonable attorneys' fees, deposition costs and fees for expert witnesses."[61] "If the plaintiff recovers either more than the offer or

[59] *Id.* at § 11.
[60] UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN, Art. 6, § 9 (1994).
[61] *Id.*

nothing at trial, or if the defendant's offer is not realistic or in good faith, the cost shifting sanctions do not apply.[62]"

> Chief Judge Robert M. Parker reported that in the rule's first two years, hundreds of parties made offers of judgment, generally resulting in settlement at a subsequently negotiated figure. No sanctions had to be granted under the rule for failure of the offeree to have obtained a judgment less than 10% better than the offer. Some have raised the question, however, whether such a local federal rule is inconsistent with Rule 68, and similar modification of Rule 68 has not been followed in other local rules.[63]

Considering the 1984 Advisory Committee proposal, a professor at Washington University School of Law, Roy Simon, argued in 1985 that "[t]he proposal to allow all parties to make rule 68 offers is a critical component for a fair and effective rule and should remain in any future proposal."[64] Simon's proposal provided that "any party may serve upon any adverse party or parties (but shall not file with the court) a written offer, denominated as an offer under this rule, to settle a claim for the money, property, injunctive relief, declaratory relief, or other relief specified in the offer, and to enter into a stipulation dismissing the claim or allowing judgment to be entered according to the terms of the offer."[65] If rejected and final judgment entered that is not more favorable to the offeree than the rejected offer, the offeror may seek sanctions by filing a motion with the court. Sanctions, within the discretion of the court, prevent recovery of costs by the offeree under 28 U.S.C. § 1920 and require the offeree to pay the offeror ten times the

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[62] *Id.*
[63] Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 Tex. L. Rev. 1863, 1877 (1998).
[64] Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. at 32.
[65] *Id.* at 81.

costs under 28 U.S.C. § 1920, excluding attorney's fees, accrued after the date of the offer.[66]

In 1996, a professor at Willamette University College of Law, Joshua Davis, proposed changes to Rule 68 based in part on Judge Schwarzer's 1992 proposal.[67] As with Judge Schwarzer's proposal, Davis would allow a party to recover attorney's fees when the party makes an offer that is rejected by the opposing party and the offer is more favorable to the opposing party than the eventual final judgment.[68] But instead of making the offeror whole, Davis would award the offeror the average difference between the judgment and each party's most generous offer, or the offeror's attorney's fees, whichever is less.[69] In other words, add the difference between each party's offer and the award, and divide that sum by 2 to get the potential award. Davis also proposes another significant limitation: the maximum a party can owe is limited to the maximum that party spent on legal fees, thereby decreasing or potentially eliminating fee-shifting when a party is represented pro bono.[70]

In 1997, three former federal district court law clerks proposed a number of

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[66] Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. at 83.
[67] Joshua P. Davis, *Toward a Jurisprudence of Trial and Settlement: Allocating Attorney's Fees by Amending Federal Rule of Civil Procedure* 68, 48 ALA. L. REV. at 69.
[68] *Id.* at 84.
[69] *Id.* at 84–85.
[70] *Id.* at 89. Davis does not address a scenario in which a pro bono attorney seeks fees based on a standard hourly rate, or the converse scenario in which the opposing party seeks fees from a party represented by a pro bono attorney, based on a standard hourly rate. The EAJA, for example, provides for an hourly rate even when the client is represented pro bono. 28 U.S.C. § 2412.

changes to Rule 68, including use of the Rule by both plaintiffs and defendants.[71] At any time more than forty-five days after service of a complaint but less than twelve days before the beginning of trial, either "a defendant may serve a written offer to allow judgment to be taken against it, or a plaintiff may serve an offer to enter into a stipulation dismissing its claim."[72] Similar to Rule 68, if a party's offer is rejected and the rejector fails to obtain a more favorable judgment, the rejector would pay the other party's accrued costs.[73] Unlike Rule 68, this proposed rule includes reasonable attorney's fees in the definition of costs accrued.[74] And a final judgment would be deemed more favorable than an offer of judgment for a plaintiff if the final judgment is not more than 75% of the offer made by the defendant, or for the defendant, if the final judgment is not more than 125% of the offer made by the plaintiff.[75]

A law professor at Drake University, Danielle Shelton, proposed in 2007 to allow defendants to make either "lump-sum" (with costs and attorney's fees) or "damages only" (without costs or attorney's fees) offers.[76] This would, according to Shelton, "alert parties to the pivotal issues regarding costs and attorneys' fees" and "provide a clear test for litigants to determine whether courts would interpret a given offer as inclusive of

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[71] Lesley S. Bonney, Robert J. Tribeck & James S. Wrona, *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379 (1997).
[72] *Id.* at 427–28.
[73] *Id.* at 428.
[74] *Id.* at 427.
[75] *Id.*
[76] Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. at 923–924.

costs and fees."[77] Shelton does not, however, propose a change to allow plaintiffs to initiate Rule 68 offers.

If we assume that Rule 68—the only rule of court exclusively dedicated to settlement procedures—is not living up to its potential, then we should explore how it might be revised to enhance its effectiveness as a settlement tool. As noted earlier, proposals for revising Rule 68 have addressed five broad issues (though in a myriad of different ways). These five broad issue-areas serve as a satisfactory structure for discussing the pros and cons of possible Rule 68 revisions:

> (1) authorizing offers by plaintiffs as well as defendants; (2) magnifying the consequences of rejection followed by a less favorable result to include some or all of the offeror's postoffer attorneys' fees; (3) excluding class and derivative actions from the operation of Rule 68;[5] (4) allowing a longer period for the offeree to decide whether to accept the offer; and (5) allowing withdrawal of the offer.[78]

The benefits of Rule 68 are not universally recognized. As one commentator states, the debate over Rule 68 is a surrogate for a discussion of the proper role of the court in encouraging settlement:

> In essence, the debate over rule 68 is a debate over the extent to which court rules should encourage settlements by penalizing refusals to settle. Some favor strong penalties for those who spurn settlement offers. Others believe every litigant has a right to go to trial and that court rules should not penalize refusals to settle. Some even argue that stronger sanctions for rejecting settlement offers would be counterproductive and actually discourage settlements. Rule 68 has become the vehicle for debating these conflicting viewpoints.[79]

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[77] *Id.* at 923.

[78] 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 3007 (2d ed. 2015).

[79] Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. at 4.

Any exploration of possible improvements to Rule 68 must start with a recognition of the unique jurisdiction and procedures in the Court of Federal Claims. In some respects this limited jurisdiction makes application of Rule 68 easier; because the Court normally renders only money judgments,[80] a determination of whether the judgment was less favorable than the offer should be a straightforward dollar-to-dollar comparison. And because this Court lacks diversity jurisdiction, it need not struggle with conflicts between state substantive cost-or-fee-shifting statutes and the federal rules. On the other hand, the unique status of the sovereign United States as the sole defendant in the CFC does raise issues, such as sovereign immunity, that do not arise in litigation between private parties.

### B. Should plaintiffs be allowed to make Rule 68 offers?

Most proposals for revising Rule 68 have provided that any party may make an offer.[81] Amending Rule 68 to allow either party to make an offer of judgment would require text changes in two subsections of the current rule. First, the phrase "defending against a claim" would be deleted from Rule 68(a), so the rule would read:

> **(a) Making an Offer; Judgment on an Accepted Offer.** At least 14 days before the date set for trial, a party ~~defending against a claim~~ may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.[82]

[80] Except for bid protest cases, 28 U.S.C. § 1491(b).
[81] *See* Section I.D *infra*.
[82] RCFC 68(a).

Second, subsection (c) of the Rule would be changed to allow either party to make an offer of judgment once the court has determined liability:

> **(c) Offer After Liability Is Determined.** When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, ~~the party held liable~~ [either party] may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.[83]

### 1. Pros of allowing Plaintiffs to make a Rule 68 settlement offer

Rule 68 now operates to encourage settlement by providing the defendant a financial incentive to step forward with a settlement offer. That same penalty—the risk of paying defendant's post-offer costs—also provides an incentive for the plaintiff to accept a reasonable offer. And the defendant suffers no detriment for making the offer, since it may not be introduced in evidence (except in a hearing to tax costs).[84] These same incentives and penalties, if extended to include settlement offers by plaintiffs as well as defendants, should further encourage additional settlements by allowing the plaintiff to likewise make an offer.

Because the Court already has the authority to award costs against the United States when the plaintiff prevails, presumably no legislative change would be required to amend Rule 68 to allow plaintiffs, as well as the defendant, to make Rule 68 offers of judgment. Attorneys' fee awards would continue to be governed by statutes such as Equal Access to Judgment Act [85] and the Uniform Relocation Act,[86] which would not be

[83] RCFC 68(c).
[84] Fed. R. Evid. 408.
[85] RCFC 54(d); Equal Access to Justice Act, 28 U.S.C. § 2412.

affected by amending Rule 68 to allow plaintiffs to make offers of judgment.

The award of costs is a particularly strong incentive in the Court of Federal Claims because a prevailing CFC plaintiff seeking attorneys fees under the Equal Access to Act (EAJA) does not have the same assurance of a cost award that a district court plaintiff does. The Federal Circuit has held that while federal district "[c]ourts following Fed.R.Civ.P. 54(d)(1) have acknowledged in its language a presumption in favor of costs to the prevailing party and an obligation for a trial court to explain its variance from the presumption,"[87] the the opposite rule applies in the Court of Federal Claims in cases involving cost awards under EAJA:

> Far from a presumption in favor of costs, EAJA grants a trial court full discretion to award or refrain from awarding costs to a prevailing party. Moreover, the trial court need not provide a justification or explanation for its decision.[88]

This is because, the Federal Circuit explained, EAJA governs costs in civil actions brought "by or against the United States."[89] And

> the jurisdiction of the Court of Federal Claims embraces only civil actions brought against (or counterclaims by) the United States. Therefore, as long as EAJA remains in force, only the introductory exception of RCFC 54(d) would apply to cases before the Court of Federal Claims. With EAJA governing the award of costs in all cases within its jurisdiction, the Court of Federal Claims would not have occasion to apply the 'as a matter of course' directions in its rule 54.[90]

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[86] 28 U.S.C. § 2412; 42 U.S.C. § 4654.
[87] *Neal & Co. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997).
[88] *Id.* at 687.
[89] 28 U.S.C. § 2412(a)(1).
[90] *Neal & Co.*, 121 F.3d at 685.

### 2. Cons of allowing Plaintiffs to make a Rule 68 settlement offer

This amendment would, however, set this Court out-of-step with the district courts, raising some unaddressed issues regarding the Rule 68 process. The district courts have already resolved many of the questions surrounding timing, revocability, content, and interpretation of Rule 68 offers by defendants, but there is no similar law on the nonexistent plaintiff offers that this revision would authorize.

Offers by plaintiffs would also trigger Department of Justice requirements for evaluating settlement offers, creating additional work for DOJ trial counsel and their supervisors. DOJ's settlement process can be complicated, with multiple layers of review, adding to the burden on Government lawyers.

## C. Defining post-offer, nonrecoverable costs

An ambiguity exists in Rule 68's failure to define the recoverable, post-offer costs:

> The rule itself does not define costs but instead adopts the statutory definition of 28 U.S.C. § 1920, the federal taxation-of-costs statute. Under that statute, "costs" include clerk's court costs, court reporter fees, witness fees, and other incidental costs of trial. Attorneys' fees, on the other hand, are not considered costs within the meaning of § 1920. Even so, some statutes expand the § 1920 definition of costs to include attorneys' fees. In those cases in which costs are broadly defined, the practical effect is that "a plaintiff who refuses a Rule 68 offer may lose entitlement to some portion of attorneys' fees if the plaintiff does not recover more in the litigation than the defendant offered in settlement via Rule 68."[91]

The principal statutes under which this Court awards attorneys' fees, the EAJA and the Uniform Relocation Act, define costs separately from fees (and other expenses),

[91] Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. at 874–875.

so the *Marek v. Chesney* holding[92] (where the underlying statute defines fees as costs, Rule 68 applies) should have no application. In addition, only Congress may waive sovereign immunity to allow an award of attorneys' fees against the United States.[93] And it remains unclear whether the Rules Enabling Act[94] would allow the Court to adopt a rule altering the statutory attorneys' fee provisions adopted by Congress.[95] What would be helpful to litigants would be a clear definition of post-offer recoverable costs, e.g., by referencing 28 U.S.C. § 1920.

### D. Excluding class actions

There has been substantial litigation in the district courts over whether Rule 68 offers may be made to class representatives or putative class representative, either before or after certification.

> Additional issues arise where a defendant makes an offer of judgment to a class representative individually. An offer to a class representative individually after the class has been certified cannot moot the class action because it does not offer all of the relief that the "adverse party" - which is the entire class - could receive. For example, the Seventh Circuit suggested, in dicta, that a Rule 68 offer to a putative class representative would be inappropriate while class certification was pending. The Seventh Circuit reasoned "that before the class is certified, which is to say at a time when there are many potential party plaintiffs to the suit, an offer to one is not an offer of the entire relief sought by the suit." On the other hand, a Rule 68 offer at the trial level to a plaintiff after class certification has been denied is appropriate.
>
> Based upon similar reasoning, several courts have held that a Rule 68 offer to a putative class representative for everything that the would-be representative could recover individually before a class certification motion

[92] *Marek v. Chesny*, 473 U.S. 1 (1985).
[93] *United States v. Testan*, 424 U.S. 392, 399 (1976).
[94] 28 U.S.C. § 2503.
[95] *See Chesny v. Marek*, 720 F.2d 474, 479 (7th Cir. 1983).

> deprives the court of Article III jurisdiction. Under the reasoning of these courts, Rule 68 remains an effective tool for the defendant to bring an early end to small claims.
>
> At least two courts, however, have expressly rejected this approach on the grounds that a putative class action - whether the plaintiff has moved for class certification or not - may not be mooted by a Rule 68 offer to the class representative. Given the constitutional requirement for a case or controversy for the court to even proceed, the holding of these courts may be considered essentially the same as in Gay; Rule 68 does not apply in the class context.
>
> Seizing upon the distinction between whether the motion for class certification has been brought or not, a number of courts have held that a Rule 68 offer to a representative plaintiff cannot be made if the plaintiff has moved for certification. In a rash of cases brought under the Fair Debt Collection Practices Act, courts concluded that such an offer is inappropriate because the representative plaintiff is not in a position to accept the offer while the question of class certification is pending.[96]

The issue would appear to be the same, whether the class is opt-in, as required by the Rules of the Court of Federal Claims, or opt-out (as the FRCP generally provides). Under either rule, clarification that Rule 68 does not apply to putative class action representatives would seem to avoid a great deal of unnecessary litigation and uncertainty.[97]

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[96] Ian H. Fisher, *Federal Rule 68, A Defendant's Subtle Weapon: Its Use and Pitfalls*, 14 DePaul Bus. L.J. 89, 112–114 (2001).

[97] The Supreme Court may soon render this issue moot. The Court has granted the petition for certiorari in *Campbell-Ewald Co. v. Gomez*, a Telephone Consumer Protection Act (TCPA) class action. *Campbell-Ewald Co. v. Gomez*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3637 (No.14-857). The case raises two related questions that are the source of frequent litigation and circuit conflict in class actions: (1) whether a Federal Rule of Civil Procedure 68 offer of complete relief to a plaintiff moots the plaintiff's individual claim; and (2) whether that same offer of complete relief tendered before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23.

### E. Allowing more time for the offer

RCFC 68 currently contemplates a 14-day window before the settlement offer expires.[98] Allowing Plaintiffs to submit such offers would also trigger Department of Justice requirements for evaluating settlement offers. Because of the paperwork and supervisor review of such offers, 14 days is an unreasonably short amount of time for the Department of Justice to respond. A 30-day window would be better suited to the realities of litigation in the CFC without being so long as to allow unreasonable delay.

### F. Allowing withdrawal of the offer

RCFC 68 should also be clarified to allow withdrawal of a settlement offer during that 30-day period. This would solve a problem encountered by some federal courts where after an offer is made the offeror discovers information that would change the amount which the offeror is willing to settle the case for. For example, in *Richardson v. National Railroad Passenger Corporation*,[99] an employee injury case, the defendant, Amtrak, offered to settle the case for $150,000. While that offer was pending, Amtrak obtained additional information through discovery, which indicated that Richardson had not suffered one of his alleged injuries at all. Amtrak attempted to withdraw the settlement offer.[100] But the trial court would not allow Amtrak to withdraw the offer, and the Court of Appeals affirmed, holding that "a Rule 68 offer is simply not revocable during the 10-day period."[101] This, after "evidentiary hearings were held over a nine-

[98] RCFC 68(a).
[99] 49 F.3d 760 (D.C. Cir. 1995).
[100] *Id.* at 762.
[101] *Id.*

month period, during which time sixteen different experts testified in support of the defendant's revocation claim."[102] Allowing either party to withdraw a settlement offer for good cause would avoid such unnecessary—and unjust—outcomes.

## IV. Conclusion

RCFC 68 is currently an underutilized tool designed to encourage settlement. Some commentators believe that the Rule could reach its full potential with a few slight changes. These proposals—allowing either party to make an offer, allowing a 30-day window for the offeree to consider the offer, and allowing withdrawal of the offer for good cause—could serve to encourage parties before the U.S. Court of Federal Claims to objectively assess their claims and defenses in the interest of pursuing settlement.

[102] Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 Minn. L. Rev. at 885.