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Delta Air Lines, Inc. v. August, 101 S. Ct. 1146 (1981)

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CASE NOTES

Civil Procedure—FEDERAL RULE OF CIVIL PROCEDURE 68—WHEN IT COMES DOWN TO COSTS, IT'S NOT HOW YOU PLAY THE GAME, IT'S WHETHER YOU WIN OR LOSE—*Delta Air Lines, Inc. v. August*, 101 S. Ct. 1146 (1981).

I. INTRODUCTION

With the adoption of the Federal Rules of Civil Procedure in 1938,[1] a system was established in the federal courts to allow a party defending a claim to propose a settlement by offering to allow judgment to be taken against it.[2] This procedure, adopted from the law in force in several states,[3] is governed by Rule 68 of the Federal Rules of Civil Procedure.[4]

The purpose of Rule 68 is to avoid costly and protracted litigation by encouraging settlement of lawsuits prior to trial.[5] Under the rule, a defendant[6] who recognizes the merits of the plaintiff's claim may make a formal offer of judgment to the plaintiff as the basis for terminating the litigation.[7] The offer must be made at

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1. 28 U.S.C. app. at 388 (1976).
2. FED. R. CIV. P. 68.
3. 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001 (1973).
4. FED. R. CIV. P. 68. Rule 68 provides:

   Offer of Judgment. 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 An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.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. (emphasis added).

5. Advisory Comm. Notes on FED. R. CIV. P. 68, 28 U.S.C. app. at 499-500. 12 C. WRIGHT & A. MILLER, *supra* note 3.
6. *Id.* at n.7. The term "defendant" includes a plaintiff defending against a counterclaim.
7. *Id.* at § 3005. A written notice of acceptance and proof of service may be filed by either party together with the offer, which allows the clerk to enter judgment as provided in

least 10 days prior to trial[8] and include payment of the plaintiff's costs up to the date the offer is made.[9]

The benefits of the rule may be substantial to a defendant-offeror in the event that the offer is rejected by the plaintiff. By the terms of Rule 68, a plaintiff who rejects an offer of judgment and subsequently recovers an amount less than the amount of the offer is required to pay the defendant's costs from the date the offer was made.[10] A correct assessment of the plaintiff's potential recovery and an offer of judgment tailored to that assessment may indemnify the defendant-offeror for the costs of going to trial.[11] If the plaintiff rejects the offer based on an optimistic assessment of potential recovery, the defendant is not forced to pay the price for the plaintiff's error in judgment.

II. DEVELOPMENT OF THE CASE

In *Delta Air Lines, Inc. v. August*,[12] a sharply divided United States Supreme Court held that the benefits of Rule 68 do not inure to defendants who make an offer of judgment which is rejected, if the judgment is entered in favor of the defendant.[13] Under this decision, in order to be able to recover costs[14] from the plaintiff-offeree under the rule, the defendant must lose the case and judgment must be entered for the plaintiff in an amount less than the defendant's offer.[15] This note will examine the Court's reasons for excluding from the benefits of Rule 68 defendants who, after having an offer of judgment rejected by the plaintiff, put on a vigorous and successful defense. It will be suggested that in doing so, the Court has made a policy decision to dilute the effectiveness of Rule 68 by lessening the pressure placed upon plaintiffs to accept the defendant's pre-trial economic analysis of the case.

Rosemary August (plaintiff) filed a complaint against Delta Air Lines, Inc. (defendant), alleging that her employment was unlaw-

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the offer.

8. *E.g.*, Greenwood v. Stevenson, 88 F.R.D. 225, 226 (D. R.I. 1980).

9. Maguire v. Federal Crop Ins. Corp., 181 F.2d 320, 322 (5th Cir. 1950).

10. FED. R. CIV. P. 68.

11. *See, e.g.*, Gay v. Waiters' & Dairy Lunchman's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980).

12. 101 S. Ct. 1146 (1981).

13. *Id.* at 1150.

14. The court noted that no issue was presented as to what was included in recoverable costs. 101 S. Ct. at 1149 n.6.

15. *Id.* at 1149-50.

fully terminated because of her race.[16] In response to August's claim for $20,000 plus attorney fees and costs, the defendant filed an offer of judgment under Rule 68 for $450.[17] The plaintiff rejected the defendant's offer, and when the case went to trial, judgment was entered for the defendant.[18] The trial judge, in exercising his discretion under Rule 54(d) of the Federal Rules of Civil Procedure, directed that each party pay its own costs.[19] Upon motion of the defendant to modify the judgment in order to allow it to recover costs under the provisions of Rule 68, the trial judge held that Rule 68 was subject to a reasonableness requirement and that since the defendant's offer was not reasonable, recovery of costs was not mandatory.[20] The decision was upheld by the Seventh Circuit, which further conditioned the application of Rule 68 on the amount of the offer bearing a reasonable relationship in amount to the issues, litigation risks, and expenses involved and anticipated.[21]

On certiorari, the Supreme Court affirmed, but rejected the notion that Rule 68 was subject to a reasonableness requirement.[22] Relying on "the plain language, the purpose, and the history of Rule 68,"[23] Justice Stevens, speaking for the majority,[24] held that the rule was not designed to encompass cases in which the defendant-offeror prevailed. The Court held that the rule "is simply inapplicable to this case because it was the defendant that obtained the judgment."[25]

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16. *Id.* at 1148.

17. *Id.*

18. *Id.*

19. August v. Delta Air Lines, Inc., 21 F.E.P. Cases 640 (N.D. Ill. 1978). *See* FED. R. CIV. P. 54(d). *But See* note 64 *infra* and accompanying text.

20. 21 F.E.P. cases at 640. For a discussion of the reasonableness requirement and an argument in support of it, *see*, Note, *Rule 68: A "New" Tool for Litigation*, 1978 DUKE L.J. 889.

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

22. 101 S. Ct. at 1151.

23. *Id.* at 1149.

24. Although the vote was 6-3, Powell, J., concurring in the result only, stated:

> I agree with most of the views expressed in the dissenting opinion of Justice REHNQUIST, and do not agree with the Court's reading of Rule 68. It is anomalous indeed that, under the Court's view, a defendant may obtain costs under Rule 68 against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*.

101 S. Ct. at 1155.

25. *Id.* at 1150.

III. APPLICATION OF RULE 68

In *Staffend v. Lake Central Airlines, Inc.*,[26] the purpose and effect of Rule 68 was clearly announced:

> Rule 68 is intended to encourage early settlements of litigation. It is also intended to protect the party who is willing to settle from the burden of costs which subsequently accrue. The provision in the rule which imposes costs upon a party who refuses an Offer of Judgment and who later recovers no more than the offer also puts teeth in the rule and makes it effective by encouraging acceptance.[27]

A line of cases suggests the rule has met with considerable judicial hostility attributable to the coercive impact of the rule on pre-trial decisions of plaintiffs. Furthermore, courts have held that strict compliance with the technical terms of the rule is required of defendants who seek to employ the rule's mandatory cost shifting provision. In *Maguire v. Federal Crop Insurance Corp.*,[28] the court held that an offer to compromise which provided for a cash payment equal to the amount subsequently recovered by the plaintiff, but which did not meet the technical requirements of the rule, was not an offer of judgment within the meaning of rule 68.[29] Similarly, where the defendant fails to state that the offer was served more than 10 days before the trial and the record does not reflect that it was served at all, the offer will not entitle the defendant to costs under Rule 68.[30]

It is well recognized that Rule 68 encourages settlement before trial by holding the threat of costs over the plaintiff's head.[31] In *Gay v. Waiters' & Dairy Lunchmen's Union, Local 30*,[32] the court

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26. 47 F.R.D. 218 (N.D. Ohio 1969).

27. *Id.* at 219-20. *Staffend* involved a request by the plaintiff to hold the offer of judgment made by the defendant in absence pending the outcome of defendant's motion to dismiss the plaintiff's second cause of action. The court held that it could not extend the 10-day period for acceptance of the offer provided in Rule 68.

28. 181 F.2d 320 (5th Cir. 1950).

29. *Id.* at 322. The plaintiff alleged the offer in the complaint and the defendant admitted it in the answer. Nonetheless, the court held that this did not waive the formal requirements of the rule.

30. Home Ins. Co. v. Kirkevold, 160 F.2d 938 (9th Cir. 1947).

31. Waters v. Heublein, Inc., 485 F. Supp. 110, 113 (N.D. Cal. 1979); *accord*, Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974). The *Mr. Hanger* court held that Rule 68 "is designed to induce or influence a party to settle litigation and obviate the necessity of a trial." 63 F.R.D. at 610.

32. 86 F.R.D. 500 (N.D. Cal. 1980).

observed:

> An offer of judgment imposes upon the offeree the choice of accepting the offer within 10 days or assuming the risk that the outcome of the case will be less favorable than the offer, on pain of having to pay the costs subsequently incurred by the offeror. The rule is intended to be coercive.[33]

Thus, when strategically utilized by a defendant, the rule plays a significant role in the economic decision by the plaintiff whether to settle or continue litigation.[34] In so doing, the rule serves the economic interests of the parties and the courts.[35] As one district court judge has noted, "The Rule attempts to minimize the economic burden of litigating a case to the bitter end by facilitating an acceptable compromise at some earlier point."[36] The public's interest is also served since the public "must provide the resources for disposition of the controversies that are not settled."[37]

Whether Rule 68 applies to prevailing defendants apparently has not been expressly considered by the federal courts before *August*. As noted by Justice Rehnquist in his dissenting opinion, however, those courts which have been faced with post-trial motions by a prevailing defendant to recover costs under Rule 68 have concluded such recovery is permissible.[38] Thus in the federal courts, the implicit rule has been that prevailing defendants are entitled to costs under Rule 68. This position has found support in at least one state court which operates under an offer of judgment rule

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33. *Id.* at 502.

34. The rule has been characterized as "a formidable settlement tactic." Greenwood v. Stevenson, 88 F.R.D. at 226. For a discussion of the economic calculations that enter into a settlement decision, *see* R. POSNER, ECONOMIC ANALYSIS OF LAW, § 21.4 (2d ed. 1977).

35. "The purposes of the Rule are to encourage settlements, thereby avoiding the expense to the parties and the court of protracted litigation . . . ." 88 F.R.D. at 228.

36. *Id.*

37. Simonds v. Guaranty Bank & Trust Co., 480 F. Supp. 1257, 1260 (D. Mass. 1979). So convinced of the importance of settlement was the court in *Simonds* that it directed the parties to confer on the issue using as a guideline a draft settlement procedures and order. Those procedures involved an award of a liquidated amount, representing nontaxable costs and litigation expenses, in addition to the judgment if the amount of the judgment varied by 25% over or under the losing party's final settlement offer. It is worth noting that the proposal would have awarded the liquidated sum to the defendant if the plaintiff obtained a judgment in an amount less than 75% of the defendant's final offer or if judgment was entered for the defendant. 480 F. Supp. at 1261-63.

38. 101 S. Ct. at 1161 (Rehnquist, J., dissenting) (citing Dual v. Cleland, 79 F.R.D. 696 (D. D.C. 1978); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607 (E.D.N.Y. 1974); Gay v. Waiters' & Dairy Lunchmen's Union, Local 30, 86 F.R.D. 500 (N.D. Cal. 1980)).

adopted verbatim from the federal rule. In *Wright v. Vickaryous*[39] the Alaska Supreme Court held:

> Wright contends that Civil Rule 68 does not apply since it operates only when the offeree obtains judgment in his favor. That interpretation would mean that when an offeree prevails, but his judgment does not exceed the offer, he will be penalized, but if he does not prevail at all no penalty will be imposed. We see nothing to recommend such a result . . . .[40]

IV. ANALYSIS OF THE *August* OPINION

The majority opinion in *August* may be characterized as resting on a three-legged stool. The legs are comprised of the plain language, the history, and the purpose of Rule 68.[41] The opinion's reasoning, however, is hardly sturdy and is sharply criticized in a dissent by Justice Rehnquist which suggests that Rule 68 must be read "woodenly and perversely" to reach the majority's conclusion.[42]

As originally adopted in 1938, Rule 68 provided, "If the adverse party fails to obtain a judgment more favorable than that offered, he shall not recover costs in the district court from the time of the offer but shall pay costs from that time."[43] That sentence was deleted when the rule was amended in 1948 and was replaced by two sentences which provide, "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."[44]

In *August*, Justice Stevens declared that the phrase "judgment obtained by the offeree," does not include judgments obtained by the offeror:

> [I]nasmuch as the words "judgment obtained by the offeree"—rather than words like "any judgment"—would not normally be read by a lawyer to describe a judgment in favor of the

39. 611 P.2d 20 (Alaska 1980).
40. *Id.* at 23.
41. 101 S. Ct. at 1149.
42. *Id.* at 1164 (Rehnquist, J., dissenting).
43. Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States, 5 F.R.D. 433, 483 (1946).
44. *Id.*

> other party, the plain language of Rule 68 confines its effect to the second type of case—one in which the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer.[45]

The original version of Rule 68 did not include the "judgment obtained by the offeree" language upon which the Court so heavily relies.[46] Indeed, as Justice Stevens noted, the original version was drafted with several state offer of judgment statutes in mind.[47] The Advisory Committee notes cited three state statutes in particular "as illustrations of the operation of the rule."[48] As Justice Rehnquist stated in his dissenting opinion, "These three statutes, like the original Rule 68, all mandated imposition of costs on a plaintiff who rejected an offer of judgment and later failed to recover a judgment more favorable than the offer."[49] Each of the cited state statutes also did not include "judgment obtained by the offeree" language and utilized language plainly consistent with the notion that prevailing defendants are included within the rule.[50]

The Advisory Committee notes to the 1948 amendment indicate that the change, which provided the "plain language" utilized by the Court, was intended "to make clear that evidence of an unaccepted offer is admissible in a proceeding to determine the costs of the action but is not otherwise admissible."[51] The two new

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45. 101 S. Ct. at 1149-50.
46. *See* note 43 *supra*.
47. 101 S. Ct. at 1152 (footnote omitted).
48. *Id.*
49. *Id.* at 1160 (Rehnquist, J., dissenting) (footnote omitted).
50. In pertinent part those statutes provided:

    2 MINN. STAT 9323 (Mason 1927) provided: "At least ten days before the term at which any civil action shall stand for trial the defendant may serve on the adverse party an offer to allow judgment to be taken against him . . . and if a more favorable judgment be not recovered no costs shall be allowed, but those of the defendant shall be taxed in his favor."

    4 MONT. REV. CODE ANN. § 9770 (1935) provided: "The defendant may, at any time before trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him . . . and if the plaintiff fail [sic] to obtain a more favorable judgment, he cannot recover costs, but he must pay the defendant's costs from the time of the offer."

    § 177 N.Y.C.P.A. (Cahill 1937) provided: "Before the trial, the defendant may serve upon the plaintiff's attorney a written offer to allow judgment to be taken against him . . . but, if the plaintiff fail [sic] to obtain a more favorable judgment, he cannot recover costs from the time of the offer, but must pay costs from that time."

    101 S. Ct. at 1152-53 n.19.
51. 5 F.R.D. at 483.

sentences were designed to "assure a party the right to make a second offer where the situation permits,"[52] such as in the event of a new trial being ordered after a judgment for the plaintiff in the original trial is nullifed.[53] The Advisory Committee notes make no mention of any intent of the drafters of the amendment to limit the circumstances under which a defendant is entitled to recover costs under the rule. As a result, Justice Rehnquist observed that:

> The operation of Rule 68 was not intended to change when this part of the Rule was amended in 1948 to its present form. The Advisory Committee notes to the 1948 amendment explain the reasons for the amendment—none of which give any indication that Congress decided to take away the benefits of the Rule to a defendant who made a Rule 68 offer but later prevailed on the merits.[54]

The majority opinion also attempts to find support for its interpretation of Rule 68 in the writings and remarks of the commentators.[55] These citations, however, make as strong a case against the Court's position as they make for it.[56] Indeed they appear to support Justice Rehnquist's observation that the Court's opinion totally ignores "the common sense maxim that the greater includes the lesser . . . ."[57] Far from supporting the Court's construction of the "plain language" of the rule, the commentators relied upon by Justice Stevens at best suggest ambiguity in the application of the rule to prevailing offerors.[58]

The Court's analysis does not rest exclusively on the plain meaning or history of Rule 68. The Court also looks to the purpose of the rule, which, it declares, "is to encourage the settlement of liti-

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52. *Id.*

53. *Id.*

54. 101 S. Ct. at 1160 (Rehnquist, J., dissenting) (footnote omitted).

55. Justice Stevens relies on C. WRIGHT & A. MILLER, *supra* note 3, and the remarks of a member of the Advisory Committee. 101 S. Ct. at 1153-54.

56. The passage from Wright and Miller cited by Justice Stevens includes language such as, "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." 101 S. Ct. at 1153 n.24 (emphasis added). The italicized language is reasonably susceptible of being interpreted in a manner contrary to the Court's opinion since a judgment for the defendant certainly is less favorable than any positive offer previously declined.

57. 101 S. Ct. at 1158 (Rehnquist, J., dissenting).

58. Justice Rehnquist takes note of the Court's reliance on the commentators and observes that they "either do not support its position or simply fail to address it." 101 S. Ct. at 1161 n.3 (Rehnquist, J., dissenting).

gation."[59] This analysis is undertaken by reading Rule 68 in concert with Rule 54(d).[60] Justice Stevens observed that since a prevailing defendant-offeror would have the presumption of Rule 54(d) operating to award costs anyway, the operation of Rule 68 under that circumstance "would provide little, if any, additional incentive [to settle in advance of trial] if it were applied when the plaintiff loses."[61] It must be noted, however, that in the very case under consideration by the *August* Court, the trial court exercised its discretion to deny costs to the prevailing defendant.[62]

Nonetheless, the Court suggested that to interpret Rule 68 in a manner which would allow a prevailing defendant's nominal settlement offer to remove the discretion of the district court "would require us to disregard the specific intent expressed in Rule 54(d) and thereby to attribute a schizophrenic intent to the drafters."[63] In suggesting that Rule 54(d) discretion should not be disturbed by Rule 68, the Court overlooks the observation made by Justice Rehnquist that by its terms Rule 54(d) does not operate as a presumption "when express provision therefor is made either in a statute of the United States or in these rules . . . ."[64] Thus, Justice Rehnquist opined, Rule 68 does no more than provide an express exception of the sort apparently contemplated in Rule 54(d). "Contrary to the view of the Court, I think that Rule 68 and Rule 54 are entirely consistent with one another when read in a manner faithful to their actual language . . . ."[65]

Moreover, in rejecting the Seventh Circuit's analysis of the case, which applied a reasonableness requirement to the rule,[66] the Court declared that since under its interpretation of the rule plaintiffs must obtain a judgment in order for the rule to operate, unreasonably small offers would serve no purpose.[67]

If the Court had in mind a nominal offer which appears to fall far short of the plaintiff's claim, such an analysis would deprive

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59. 101 S. Ct. at 1150.

60. 101 S. Ct. at 1149. FED. R. CIV. P. 54(d) provides in pertinent part: "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."

61. 101 S. Ct. at 1150.

62. *See* note 19 *supra* and accompanying text.

63. 101 S. Ct. at 1150.

64. FED. R. CIV. P. 54(d).

65. 101 S. Ct. at 1161 (Rehnquist, J., dissenting).

66. *See* note 21 *supra* and accompanying text.

67. 101 S. Ct. at 1151-52.

defendants the opportunity to assess the plaintiff's claim and, if the defendant decided the claim was of nuisance value, to respond with a nominal offer designed to avoid the cost of litigation. In other words, if the defendant determines that the plaintiff has very little chance of success, it still might be reasonable to make a minimal offer in hopes of settling the case and avoiding costs which, at the trial court's discretion, might not be recovered.

Viewed in this light, the defendant's offer in *August* may well have represented a careful legal and economic analysis of the plaintiff's claim. Indeed, although it is admittedly more visible with the advantage of hindsight, any offer made by a defendant who properly analyzes a case and expects to ultimately prevail if the case goes to trial is not only reasonable, it is economically sound.[68] If Rule 68 does apply to a defendant who expects to prevail, an offer of judgment becomes even more appealing since the rule will provide insulation from costs if the defendant's assessment of the plaintiff's claim is accurate.

Thus, although the Court's analysis concludes that applying Rule 68 in the case of a prevailing defendant provides little, if any, incentive for a defendant to settle the case,[69] that analysis denies the practical effect and advantage conferred by the mandatory cost-shifting aspect of Rule 68. At a time when the capacity of the judiciary is being severely taxed,[70] it would seem unreasonable to dismiss a plausible interpretation of a federal rule which could contribute to the goal of judicial economy.

V. CONCLUSION

The Supreme Court's decision in *August* gives an interpretation to Rule 68 of the Federal Rules of Civil Procedure which finds weak support at best in the plain meaning, purpose, and history of the rule. Although the Court suggests that its interpretation of Rule 68 avoids an irreconcilable inconsistency with Rule 54(d) of the Federal Rules of Civil Procedure, it seems clear from the language of Rule 54(d) that no such inconsistency exists. Moreover, by excluding prevailing defendants from the benefits of Rule 68,

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68. It may be observed that even with the benefit of the Court's interpretation of Rule 68, a plaintiff who loses at trial is out costs in addition to taking nothing from the defendant. Any compensation received in the form of a settlement offer places the plaintiff in a better position.

69. *See* note 60 *supra* and accompanying text.

70. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

the Court restricts the scope of the rule and thus removes an incentive for some defendants to make settlement offers. Since settlement of litigation would help ease crowded court dockets, the Court's decision may be viewed as having an adverse impact on the legal system by not fully utilizing the pro-settlement aspects of Rule 68.

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