

The Burger Court Opinion Writing Database

Marek v. Chesny

473 U.S. 1 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: **MAY 30 1985**

Recirculated: _____

*I await the dissent
JH*

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

**JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS v. ALFRED W.
CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF STEVEN CHESNEY, DECEASED**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT**

[May —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to rejection of an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U. S. C. §1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U. S. C. §1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded \$5,000 on the state-law "wrongful death" claim, \$52,000 for the §1983 violation, and \$3,000 in punitive damages.

*Wait
Answers*

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 3, 1985

Re: 83-1437 - Marek, Wadycki & Rhode v. Chesny

Dear John:

Thank you for your June 3rd note.

I am working on the point you raise, and it may be I can accommodate your view.

Regards,



Justice Stevens

Copies to the Conference

SI 47 31 5 111

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

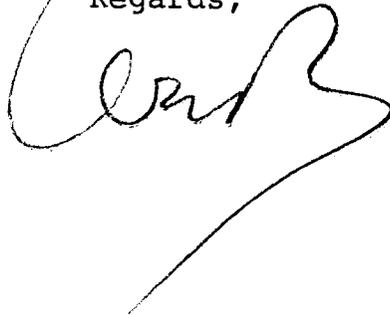
June 17, 1985

Re: No. 83-1437 - Marek v. Chesny

Dear Lewis:

This is a proposed change in No. 83-1437, Marek v. Chesny, in response to requests from Byron and John that we address the issue that we had previously reserved in footnote 2. At first glance, you may consider the new material inconsistent with your views, but I hope upon reading the proposed revision you will agree that it meets your overriding concern that an offer to allow judgment must cover accrued costs and attorney's fees.

Regards,



Justice Powell

Enclosure

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1985

PERSONAL

Re: 83-1437, Marek v. Chesny

Dear Lewis:

Thank you for your June 19 note on this case. I am not sure that we are not in total agreement in substance.

In the paragraph on page 2 of the draft to which you refer, is the following sentence: "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 ... it determines to be sufficient to cover costs." (emphasis added). Thus, as the proposed draft now reads--contrary to the implication in your memorandum--if a lump sum offer is made with no mention of "costs," the court will be obliged to include in its judgment an amount sufficient to cover costs. In other words, the plaintiff will receive costs, but in an amount set by the court. I thought the draft was clear on this point; but so long as this thought is included, I will be glad to make any clarifying additions you suggest.

We do seem to disagree that "[a] fair reading of [the Rule] would require that an offer, like the one in this case, must be for a specified sum that 'includes costs now accrued.'" As is apparent from the draft, I believe that the only significant requirement of the portion of the Rule with which we are concerned is that the offer allow a judgment that would include costs. The Rule provides that a defendant may serve on the 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." A judgment "with costs then accrued" will be allowed regardless whether the offer by its terms specifies that costs are included. To reiterate, if the offer does not specify that costs are included, the court must award reasonable costs; nevertheless, a judgment for costs will have been allowed by the offer. (This is the reason the draft emphasizes that if an offer purports to preclude an award of costs it will be invalid.)

Does CQ have
a court? BRW?

I don't
understand

?

?

Your second concern relates to the sentence on page 3 of the draft which reads that, "At the time an offer is made, the plaintiff knows the amount in damages caused by the challenged conduct." I agree with you that a plaintiff might not know with mathematical certainty what his damages are. For this reason, I would be glad to add something to the following effect: "or he can determine them with sufficient certainty to permit a reasonable assessment of the merit of the offer." But I have difficulty understanding the relevancy of the facts that "the plaintiff usually claims a vastly larger amount than he is willing to settle for" and that he has "no idea as to what the jury will award." "Uncertainties" are bound to exist whenever settlement offers are being considered. I, for one, am not at all reluctant to impose upon a plaintiff the burden of calculating his damages and probable recovery in response to an offer of settlement; if we are unwilling to do this, we should forget about trying to encourage settlements.

I see us as really in agreement on substance, with only a minor disagreement on form (i.e. whether an offer itself must specifically use the word "costs"), but, as I see it, the latter is on a matter of no practical significance given that the plaintiff will receive costs. ??

Regards,



Justice Powell

CHANGES AS MARKED: pp. 3 5

STYLISTIC CHANGES THROUGHOUT

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: The Chief Justice

Circulated: _____
Recirculated: JUN 21 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS *v.* ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether attorney's fees incurred by a plaintiff subsequent to an offer of settlement under Federal Rule of Civil Procedure 68 must be paid by the defendant under 42 U. S. C. § 1988, when the plaintiff recovers a judgment less than the offer.

I

Petitioners, three police officers, in answering a call on a domestic disturbance, shot and killed respondent's adult son. Respondent, in his own behalf and as administrator of his son's estate, filed suit against the officers in the United States District Court under 42 U. S. C. § 1983 and state tort law.

Prior to trial, petitioners made a timely offer of settlement "for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND (\$100,000) DOLLARS." Respondent did not accept the offer. The case went to trial and respondent was awarded \$5,000 on the state-law "wrongful death" claim, \$52,000 for the § 1983 violation, and \$3,000 in punitive damages.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 7, 1984

No. 83-1437

Marek v. Chesny

Dear Harry,

You and I are the only dissenters
in the above. I'll be happy to take on
the dissent.

Sincerely,

Bill

Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 30, 1985

No. 83-1437

Marek v. Chesny

Dear Chief,

I will be circulating a dissent in
the above next week.

Sincerely,



The Chief Justice

Copies to the Conference

94 20 30 51 11

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: JUN 11 1985

Recirculated:

W B
Please join me in your dissent
M

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND
LAWRENCE RHODE, PETITIONERS *v.* ALFRED W.
CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

JUSTICE BRENNAN, dissenting.

The question presented by this case is whether the term "costs" as it is used in Rule 68 of the Federal Rules of Civil Procedure¹ and elsewhere throughout the Rules refers simply to those taxable costs defined in 20 U. S. C. § 1920 and

¹ Rule 68 provides:

"At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability."

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: _____
Recirculated: JUN 24 1985

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAW-
RENCE RHODE, PETITIONERS *v.* ALFRED W.
CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and
JUSTICE BLACKMUN join, dissenting.

The question presented by this case is whether the term
“costs” as it is used in Rule 68 of the Federal Rules of Civil
Procedure¹ and elsewhere throughout the Rules refers sim-

¹ Rule 68 provides:

“At any time more than 10 days before the trial begins, a party defend-
ing 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 to-
gether with proof of service thereof and thereupon the clerk shall enter
judgment. An offer not accepted shall be deemed withdrawn and evi-
dence 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 de-
termined by verdict or order or judgment, but the amount or extent of the
liability remains to be determined by further proceedings, the party ad-
judged 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.”

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 21, 1985

83-1437 - Marek v. Chesney

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

.82 70 51 53 SA

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1985

Re: No. 83-1437 - Marek v. Chesny

Dear Chief:

I await the dissent.

Sincerely,

Jm.

T.M.

The Chief Justice

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 19, 1985

Re: No. 83-1437-Marek, Wadycki and Rhode v. Chesny

Dear Bill:

Please join me in your dissent.

Sincerely,

J.M.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 14, 1985

Re: No. 83-1437, Marek v. Chesny

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,



Justice Brennan

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 31, 1985

83-1437 Marek v. Chesney

Dear Chief:

Please join me.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

57 13 11 85

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

June 19, 1985

83-1437 Marek v. Chesney

Dear Chief:

This refers to your letter of June 17, enclosing proposed changes in your opinion that I joined some time ago. I understand that if these changes are made, Byron will join you. Although John wants you to address the form of the offer, he joins you anyway. Thus, Byron will give you a Court. Therefore, you may not need me for a Court.

As your proposed addition construing Rule 68 is contrary to my concurring opinion in Delta, I would prefer to leave open whether the form of the offer is proper - as you did in the draft I joined. If, however, my vote is necessary for a Court, I will join you subject to the clarifications in your opinion indicated below. I probably would write a brief concurring opinion along the lines of that enclosed. I do think it important to have a rule that has been approved by a majority of the members of this Court.

I am troubled, however, by the broad sweep of some of the language in the draft you sent me with your letter. As I read the long paragraph on p. 2, you would hold that a lump sum offer with no mention of "costs" would be deemed to include costs then accrued. I do not know whether I could go this far, and it is not necessary that you do so. Rule 68 provides that the offer must specify that judgment will be allowed "for the money or property or to the effect specified in the offer, with costs then accrued." (emphasis added). A fair reading of this language would require that an offer, like the one in this case, must be for a specified sum that "includes costs now accrued". The specific offer before us was "for a sum, including costs now accrued and attorney's fees, of \$100,000." I could approve this offer without requiring any "itemization," as long as the offer makes clear that it includes costs accrued.

A second point relates to the statement on p. 3 of your draft to the effect that at the time an offer is made "the plaintiff knows the amount in damages caused by the challenged conduct." I doubt that this often is true. My own experience indicates that the plaintiff usually claims a

vastly larger amount than he is willing to settle for. At the time a complaint is filed - and prior to discovery - counsel often has only the vaguest idea as to what he will be able to prove and, of course, no idea as to what the jury will award.

In sum, Chief, I think changes along the foregoing lines would be compatible with the Rule. There is nothing in John's letter that requires you to go as far as this draft does. I have seen nothing in writing from Byron. If you need me for a Court, I will certainly try to accommodate.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 24, 1985

Re: No. 83-1437 Marek v. Chesny

Dear Chief:

Please join me in your revised draft. I am circulating a brief concurring opinion.

Sincerely,

Lewis

The Chief Justice

cc: The Conference

82 JUN 24 5 11 PM

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06/21

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: JUN 24 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS v. ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

JUSTICE POWELL, concurring.

In *Delta Airlines, Inc. v. August*, 450 U. S. 346 (1981), the offer under Rule 68 stated that it was "in the amount of \$450, which shall include attorney's fees, together with costs accrued to date." *Id.*, at 365. In a brief concurring opinion, I expressed the view that this offer did not comport with the Rule's requirements. It seemed to me that an offer of judgment should consist of two identified components: (i) the substantive relief proposed, and (ii) costs, including a reasonable attorney's fee. The amount of the fee ultimately should be within the discretion of the court if the offer is accepted. In questioning the form of the offer in *Delta*, I was influenced in part by the fact that it was a Title VII case. I concluded that the "costs' component of a Rule 68 offer of judgment in a Title VII case must include reasonable attorney's fees accrued to the date of the offer." *Id.*, at 363. My view, however, as to the specificity of the "substantive relief" component of the offer did not depend solely on the fact that *Delta* was a Title VII case.

No other Justice joined my *Delta* concurrence. The Court's decision was upon a different ground. Although I think it the better practice for the offer of judgment expressly to identify the components, it is important to have a

06/24

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: JUN 24 1985

Stylistic Changes Throughout

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS *v.* ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNEY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

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No other Justice joined my *Delta* concurrence. The Court's decision was upon a different ground. Although I think it the better practice for the offer of judgment expressly to identify the components, it is important to have a

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

RECEIVED

Re: No. 83-1437 Marek v. Chesny

Dear Chief,

Please join me. I will circulate a paragraph recanting the view I expressed in dissent in Delta Airlines.

Sincerely,



The Chief Justice

cc: The Conference

REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

10:19 AM JUN 18

From: Justice Rehnquist

Circulated: JUN 4 1985

Recirculated:

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1437

JEFFREY MAREK, THOMAS WADYCKI AND LAWRENCE RHODE, PETITIONERS *v.* ALFRED W. CHESNY, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[June —, 1985]

JUSTICE REHNQUIST, concurring.

In *Delta Airlines v. August*, 450 U. S. 346 (1981), I expressed in dissent the view that the term "costs" in Rule 68 did not include attorney's fees. Further examination of the question has convinced me that this view was wrong, and I therefore join the opinion of THE CHIEF JUSTICE. Cf. *McGrath v. Kristensen*, 340 U.S. 162, 176 (1950) (Jackson, J. concurring).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 3, 1985

Re: 83-1437 - Marek, Wadycki & Rhode
v. Chesny

Dear Chief:

In footnote two on page three you conclude that we need not decide whether petitioners' offer, which included all attorney's fees, was a proper offer of settlement under Rule 68. It seems to me that the question whether the offer was a good one is fairly comprised within the question that was presented by the certiorari petition. I would be inclined to decide it.

In my opinion there is no substance at all to the suggestion that the offer was not proper. Settlement offers are made every day in the form of a lump sum and counsel thereafter bills his client for his services without raising any special conflict of interest question.

Apart from that suggestion, I think your opinion is excellent, and I will join it. If you decide not to address the issue of the validity of the offer, perhaps I will add a few sentences explaining why I think the offer was proper.

Respectfully,



The Chief Justice

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 20, 1985.

Re: 83-1437 - Marek v. Chesny

Dear Chief:

Please join me.

Respectfully,



The Chief Justice

Copies to the Conference

JUN 20 1985

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

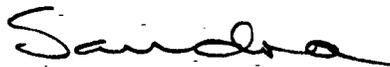
June 3, 1985

No. 83-1437 Marek v. Chesny

Dear Chief,

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference