

# ATTORNEY FEE-SHIFTING IN AMERICA: COMPARING, CONTRASTING, AND COMBINING THE “AMERICAN RULE” AND “ENGLISH RULE”

David A. Root\*

## I. INTRODUCTION

The headline in the *New York Times* read, “You Win but You Lose,” as the author lamented about the money he had to pay out in successfully defending himself in a libel suit.<sup>1</sup> While the amount was only \$5,134.80 (small fees in comparison to many lawsuits), the fact that frivolous lawsuits could be pursued by hasty plaintiffs without the threat of having to pay a successful defendant’s legal costs inflamed the author as he was bitten by the “American rule.”<sup>2</sup> Like him, other commentators and judicial experts have clamored for the adoption of the English “loser pays” rule in many areas of the law, hoping to decrease frivolous and unreasonable litigation.<sup>3</sup>

However, it is not all a bed of roses on the other side of the Atlantic. In London, England, Pauline Hughes brought an action against the treating physicians following her late husband’s death caused by his gall bladder surgery.<sup>4</sup> After an initial victory in the trial court and an award of \$396,000, the appellate court overturned Mrs. Hughes’ victory and, in accordance with the “loser pays” rule, ordered her to pay the successful doctors’ litigation expenses.<sup>5</sup> These expenses totaled \$144,000, on top of her own legal fees of \$146,000, thus totaling \$290,000 in an attempt to sort out and make right the tragic events befallen her deceased husband.<sup>6</sup>

Suffice it to say, there are short-comings and limitations to both the American and English systems of allocating attorneys fees.<sup>7</sup> However, there are

---

\* J.D./M.B.A. candidate, 2006, Indiana University School of Law – Indianapolis, Kelley Graduate School of Business – Indianapolis. The author wishes to thank his parents, Clyde R. and Maryanne Root, as well as his brothers, Mark and Jon Root, for all of their love, support and encouragement.

1. Steven Brill, *You Win but You Lose*, N.Y. TIMES, July 2, 1980, at A27.

2. *Id.*

3. Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALB. L. REV. 1, 51 n.250 (1995) (“Congress can substantially reduce the threat from frivolous litigation by requiring losers to pay the opponent’s attorney fees.”).

4. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1568-69 (1993).

5. *Id.* at 1569. The physicians based their appeal solely on the merits of Mrs. Hughes’ medical negligence claim, and in no way argued that Mrs. Hughes’ counsel had acted in an abusive manner. *Id.*

6. *Id.*

7. Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney’s Fees: Expanding the*

positive sides to both frameworks as well. Specifically, the contingency fee system employed in America leaves the courtroom equally open for those who wish to pursue a legal claim.<sup>8</sup> On the other side of the Atlantic, positive attributes of the “loser pays” rule include fuller compensation of winning plaintiffs and deterrence of frivolous claims.<sup>9</sup>

This Note’s goal is to suggest the fashioning of a hybrid system, combining other analyses and commentaries, aiming to extract from both systems a maximum amount of positive attributes while working to keep negative by-products at a minimum. Part II of this Note traces the development and history of both the “American rule” and “English rule” to provide a working basis from which to begin building a more efficient and equitable system. Part III discusses the positive and negative qualities of the contingency fee system employed in America; Part IV discusses the positives and negatives of the “loser pays” rule of England. Part V puts forth the new system, discussing its positive and negative attributes.

## II. HISTORY OF THE “AMERICAN RULE” AND THE “ENGLISH RULE”

### A. *History of the “American Rule”*

Originally, the United States adopted the “loser pays” rule from England and awarded attorneys fees to the successful party.<sup>10</sup> As was the case in England, attorneys fees were governed by statute in colonial America, but these statutes reflected more the legislature’s goal of limiting the amount a lawyer could charge his client rather than awarding the costs to the prevailing party.<sup>11</sup>

*“Loser Pays” Rule in Texas*, 30 HOUS. L. REV. 1915, 1936 (1994) (“[T]he American Rule can encourage frivolous litigation and discourage meritorious litigation.”); see also Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a “Better Way”: Litigation, Alternatives, and Accommodation*, 1989 DUKE. L.J. 824, 888 (1989). Members of the middle class are most adversely affected by the “English rule” because they do not financially fall within the range of litigants who would receive subsidized legal assistance, and therefore, potentially could lose a great deal if the litigation turned out to be unsuccessful. *Id.* Thus, often times they do not pursue meritorious claims. *Id.* See also Philip J. Havers, *Take the Money and Run: Inherent Ethical Problems of the Contingency Fee and Loser Pays Systems*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 621, 633 (2000) (“[T]he negative effects of the Loser Pays rule are limited to the middle and lower classes who do not qualify for legal aid.”).

8. Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998). A fundamental goal of the contingency fee system is “to guarantee that both rich and poor will have access to the courts and will be assured an opportunity to avail themselves of the assistance of counsel.” *Id.* This seems to resound the theme of equality purported in the Declaration of Independence that “all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness . . .” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). A simple substitute of “legal justice” for “happiness” seems to fill this bill.

9. Rowe, *supra* note 7, at 888.

10. Robin Stanley, *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources: To the Prevailing Party Goes the Spoils . . . and the Attorney’s Fees!*, 36 AKRON L. REV. 363, 365-66 (2003).

11. *Id.* at 366; see also Vargo, *supra* note 4, at 1571 (“Almost all colonial legislation

In 1796, the Supreme Court ultimately set the standard in *Arcambel v. Wiseman*<sup>12</sup> by determining that the award of attorneys fees was not appropriate.<sup>13</sup> Regarding the \$1,600 attorneys fees awarded as damages, the Court stated:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.<sup>14</sup>

Thus, the "American rule," which has stood for over 200 years, is one in which each party must bear its own costs for litigation, regardless of the outcome.<sup>15</sup>

While each party has had to bear its own expenses for over two centuries of American jurisprudence, as with most rules, exceptions began appearing around the turn of the twentieth century.<sup>16</sup> There are six general categories of exceptions to the "American rule:" 1) Contracts;<sup>17</sup> 2) Bad Faith;<sup>18</sup> 3) Common Fund;<sup>19</sup> 4) Substantial Benefit;<sup>20</sup> 5) Contempt;<sup>21</sup> and 6) Fee-shifting statutes.<sup>22</sup>

### 1. *Contracts*

Riding along with the policy of freedom to contract, parties to a contract may include attorneys fees in potential litigation as a provision of the contract.<sup>23</sup> A primary reason for the rise of this exception was the prevailing attitude of the laissez-faire doctrine during the nineteenth century.<sup>24</sup> However, courts disfavor this practice, and deem unenforceable, fee-shifting provisions found to be

regarding attorney's fees reflect an intent to control the amount an attorney could charge the client rather than an intent to shift attorney's fees as costs to be collected by the prevailing litigant.").

12. 3 U.S. (3 Dall.) 306 (1796).

13. *Id.*

14. *Id.*

15. Neal H. Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 302 (1986).

16. Stanley, *supra* note 10, at 367; see also John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 29 (Winter 1984). "Exceptions to the rule grew in number and importance, usually grounded on the same concern for incentives and disincentives [to encourage or discourage meritorious litigation]." *Id.*

17. Vargo, *supra* note 4, at 1578-79.

18. *Id.* at 1584-87.

19. *Id.* at 1579-81.

20. *Id.* at 1581-83.

21. *Id.* at 1583-84.

22. Ruth Bader Ginsburg, *Access to Justice: The Social Responsibility of Lawyers*, 7 WASH. U. J.L. & POL'Y 1, 8 (2001).

23. Vargo, *supra* note 4, at 1578.

24. *Id.*

contrary to public policy, such as when the more powerful party to the contract drafts it into the provisions.<sup>25</sup>

## 2. *Bad Faith*

Awarding attorneys fees for bad faith can derive from actions occurring in the filing of the lawsuit, and for conduct by parties, or their counsel, before or after the course of the proceeding.<sup>26</sup> Bad faith in filing a claim may warrant the award of attorneys fees if the suit brought is found to be “unwarranted,” “baseless,” or “vexatious.”<sup>27</sup> While this type of bad faith revolves around the actual bringing of the claim, the Supreme Court also provides for an award of attorneys fees based on misconduct transpiring during the course of the lawsuit.<sup>28</sup> Additionally, the Court has expanded the “bad faith” doctrine to provide compensation to either party when the opposing party has acted inappropriately.<sup>29</sup> Policy drives this exception as “it awards attorney fees against parties who litigate in bad faith, for the obvious purpose of deterring illegitimate behavior in the courtroom, and sometimes outside it.”<sup>30</sup>

## 3. *Common Fund*

The Common Fund doctrine provides an exception to the “American rule” outside the bounds of the “loser pays” rule by dispersing the litigation costs over the range of beneficiaries not involved in the litigation, but who benefit from the fund being drawn from through court order.<sup>31</sup> In *Trustees v. Greenough*,<sup>32</sup> the Supreme Court established three reasons why the Common Fund doctrine is a valid exception to the “American rule:” 1) it would be unjust for the plaintiff to bear all the costs of the litigation when there are other beneficiaries of the same class or group; 2) nonparticipating beneficiaries would have an unfair advantage; and 3) courts of equity historically have awarded attorneys fees from court-controlled funds when the suit of one creditor would benefit other creditors in a bankruptcy proceeding, with the legal

---

25. *Id.* at 1579. An example of this is insurance agreements in which the insurance company makes the insured liable for attorneys fees in suits where the insurance company is successful. *Id.*

26. *Id.* at 1584.

27. *Id.*

28. *Hall v. Cole*, 412 U.S. 1, 15. The Court stated in dicta that “‘bad faith’ may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation” and may warrant imposition of attorneys fees on such party. *Id.* See also *F. D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). “We have long recognized that attorneys’ fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . .” *Id.*

29. *Vargo*, *supra* note 4, at 1584.

30. *Leubsdorf*, *supra* note 16, at 29.

31. *Vargo*, *supra* note 4, at 1579.

32. 105 U.S. 527 (1882).

fees coming out of the bankrupt assets.<sup>33</sup>

The Common Fund doctrine is applied to many situations, including antitrust litigation, mass disaster torts, and class actions.<sup>34</sup> Three conditions must be met before the litigation expense will be spread over a number of parties: 1) a fund must exist; 2) a court must be able to exert control over the fund; and 3) fund beneficiaries must be identifiable so the court can shift the attorneys fees to those benefiting from the litigation.<sup>35</sup> This doctrine's purpose is "to compensate parties who create or preserve a common fund for the benefit of others."<sup>36</sup>

#### 4. *Substantial Benefit*

Closely related to the Common Fund doctrine is the Substantial Benefit rule, as both force nonparties to share in the litigation expenses and disallow absent parties to be unjustly enriched at the cost of the party bringing the suit.<sup>37</sup> Like the Common Fund doctrine (absent the fund), the court must exert some control over an entity composed of beneficiaries in order to disperse the fee award.<sup>38</sup> However, the key difference between the two doctrines is that the Substantial Benefit doctrine applies to non-pecuniary benefits as well as pecuniary benefits.<sup>39</sup>

#### 5. *Contempt*

A small exception to the "American rule" can be found in contempt proceedings.<sup>40</sup> In *Toledo Scale Co. v. Computing Scale Co.*,<sup>41</sup> the Supreme Court held that a party can collect attorneys fees for the enforcement of a contempt order when seeking to enforce a judgment through contempt proceedings.<sup>42</sup> To determine which fees will be awarded, and when, the court looks to the willfulness of the contempt.<sup>43</sup>

---

33. Vargo, *supra* note 4, at 1580.

34. *Id.* at 1581.

35. *Id.*

36. *Id.* at 1579.

37. *Id.* at 1581.

38. *Id.* at 1582.

39. *Id.* at 1581. The Substantial Benefit doctrine applies first and foremost to cases not involving a fund, but may also apply in conjunction with the Common Fund doctrine if such a court controlled fund exists. *Id.* at 1581-82. However, neither doctrine imposes personal liability on beneficiaries. *Id.* at 1582.

40. *Id.* at 1583.

41. 261 U.S. 399 (1923).

42. *Id.* at 427-28; *see also* Vargo, *supra* note 4, at 1583.

43. Vargo, *supra* note 4, at 1583-84 ("As a general rule, the willfulness of the contempt is a relevant factor in determining whether fees will be awarded and the amount of such fees.").

## 6. Fee-Shifting Statutes

Perhaps the most meaningful exception to the “American rule” can be found in statutory shifting of attorneys fees, whereas there are more than 200 federal and close to 2,000 state statutes allowing the shifting of fees.<sup>44</sup> Fee-shifting statutes can be divided into four main categories: 1) civil rights suits;<sup>45</sup> 2) consumer protection suits;<sup>46</sup> 3) employment suits;<sup>47</sup> and 4) environmental protection suits.<sup>48</sup> Congress has allowed these categories of statutes because they compel a higher public purpose,<sup>49</sup> and therefore, successful lobbying litigants should not shoulder the cost of advancing American public policy, particularly when their victory does not result in a monetary award.<sup>50</sup>

Although there are a minority of statutes allowing a two-way shift (essentially the “loser pays” rule in which the losing party, whether plaintiff or defendant, must pay opponent’s legal fees), most legislation employs a one-way shift whereby only a successful plaintiff can recover attorneys fees via statute.<sup>51</sup> Regardless of whether a court enforces one-way or two-way fee-shifting

---

44. *Id.* at 1588.

45. Ginsburg, *supra* note 22, at 8; *see also* William A. Bradford, *Private Enforcement of Public Rights: The Role of Fee-Shifting Statutes in Pro Bono Lawyering*, in *THE LAW FIRM AND THE PUBLIC GOOD* 125, 136 n.21 (Robert A. Katzmann ed., 1995) (citing as an example the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3613(c)(2) (2004), which states, “In a civil action under subsection (a) . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee and costs. The United States shall be liable for such fees and costs to the same extent as a private person.”).

46. Ginsburg, *supra* note 22, at 8; *see also* Bradford, *supra* note 45, at 136 n.19 (citing as an example the Equal Credit Opportunity Act, 15 U.S.C. § 1691e(d) (2004) which states, “Recovery of costs and attorney fees[.] In the case of any successful action under subsection (a), (b), or (c), the costs of the action, together with a reasonable attorney’s fee as determined by the court, shall be added to any damages awarded by the court under such subsection.”).

47. Ginsburg, *supra* note 22, at 8; *see, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 216(b) (2004) (“The court in [an action violating section 6 or 7 of this Act] shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs to the action . . .”).

48. Ginsburg, *supra* note 22, at 8; *see also* Bradford, *supra* note 45, at 136 n.20 (citing as an example the Clean Air Act, 42 U.S.C. § 7604(d) (2004), which states, “The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, wherever the court determines such award is appropriate.”).

49. Ginsburg, *supra* note 22, at 8.

50. Leubsdorf, *supra* note 16, at 30. “Such legislation goes far beyond the goal of making access to the courts easier for litigants with strong cases. It embodies a policy of social reform through litigation—especially through litigation that does not yield plaintiffs a financial award from which a contingent fee may be paid.” *Id.* Furthering this policy and sustaining consistency, these statutes “grant fees to virtually all prevailing plaintiffs while denying them to virtually all prevailing defendants.” *Id.* *But see* Carrion v. Yeshiva Univ., 535 F.2d 722 (2nd Cir. 1976) (successful defendants’ litigation expenses charged to unsuccessful plaintiff who brought a civil rights action for discrimination in the workplace but presented no evidence supporting her claim).

51. Vargo, *supra* note 4, at 1590.

legislation, the fact that such legislation exists at all is a sign that the “American rule” is under criticism and erosion,<sup>52</sup> but it does not necessarily mean a sudden shift to the “loser pays” rule.<sup>53</sup>

In summary, the “American rule” began as a trans-Atlantic extension of the “loser pays” rule in England.<sup>54</sup> In 1796, the Supreme Court stood American jurisprudence on its own two feet, stating the award of attorneys fees to the winner was inappropriate.<sup>55</sup> Over the years many exceptions have appeared, most notably statutory fee-shifting; nevertheless, the “American rule” is still very much in effect today.<sup>56</sup>

### B. History of “Loser Pays” or the “English Rule”

Although first pronounced fifty years prior to the Code of Justinian, the principle that the loser must pay the winner’s legal costs provides a solid starting place because of the Code’s heavy influence on modern European law.<sup>57</sup> “The presumption of the now-codified rule was that the loser had done a wrong by insisting on his legal position, which had been proven in court to be unjustified.”<sup>58</sup> The “English rule” reflects this principle from a slightly different angle, that a “victory is not complete in civil litigation if it leaves substantial expenses uncovered.”<sup>59</sup> Furthermore, the “English rule” rests on two simple premises: 1) defeat provides adequate basis for imposing legal fees on the losing party; and 2) the winner deserves to be fully compensated for all legal costs, including attorneys fees and incidental expenses.<sup>60</sup>

---

52. See *id.* at 1588. The “American rule” of prohibiting fee-shifting is “riddled with exceptions.” *Id.*

53. See Leubsdorf, *supra* note 16, at 32.

[T]hough fee statutes will undoubtedly continue to be passed, there is no likelihood that the English rule of almost automatic fee recovery will be any more successful in this country in the future than it has been in the past. We will continue to evolve a system of our own in which considerations of policy and politics determine which lawsuits and lawyers will be encouraged.

*Id.*

54. Stanley, *supra* note 10, at 365-66.

55. Arcambel v. Wiseman, 3 U.S. 306 (1796).

56. Vargo, *supra* note 4, at 1578-84.

57. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 404 (1999). It is interesting to note that originally in Roman law there were no costs associated with a legal dispute because all disputes were handled by the priests or the government, as there were no lawyers. *Id.* Lawyers began to appear, and charge clients for their services, by the time the Byzantine Empire was formed. *Id.*

58. *Id.* This is hardly consistent with the American contingency fee system’s purpose of opening the courts to everyone. See Landsman, *supra* note 8, at 262.

59. Davis, *supra* note 57, at 405.

60. *Id.* The basics of the “English rule” are:

- 1) The objective fact of defeat is sufficient grounds for imposing legal costs on the loser, without regard to bad faith, fault, or frivolity; and 2) The costs to be reimbursed include not only the court fees and related costs but also the attorney

In legal terms, the technical beginning of the “loser pays” rule in England traces back to the Statute of Gloucester of 1275, from which it statutorily evolved over time into the rule it is today.<sup>61</sup> Slowly expanding, in 1601 the rule was extended to personal actions by allowing a successful plaintiff recovery so long as his debt or damages was at least forty shillings; otherwise, the plaintiff could not recover attorneys fees greater than damages and might be awarded less.<sup>62</sup> In 1607, successful defendants were granted relief from attorneys fees in all suits in which the plaintiff could recover fees.<sup>63</sup>

No major changes in the allocation of attorneys fees occurred from the late seventeenth century until 1875, when Order 55 changed the principle upon which fees were awarded, leaving the disbursement to the discretion of the High Court as opposed to automatically following the event.<sup>64</sup> Costs automatically followed the event in previous statutes, but Order 55 provided that, with certain exceptions, “the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court.”<sup>65</sup> When the Rules of Court were substantially rewritten in 1883, Order 55 was greatly expanded and the provisions set out in the order are still in force today.<sup>66</sup>

Although Order 55 was an important piece in forming the modern day “loser pays” rule, Order 65, rule 1 is arguably the single most important provision on costs.<sup>67</sup> Order 65, rule 1 provides:

Subject to the provisions of the Act and these Rules, the costs of and incident to all proceedings in the Supreme Court . . . shall be in the discretion of the court or judge; . . . [p]rovided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court shall, for good cause, otherwise order.<sup>68</sup>

---

fees and other expenses incurred by the winner.

*Id.*

61. Geoffrey Woodroffe, *Loser Pays and Conditional Fees—An English Solution?*, 37 WASHBURN L.J. 345, 345 (1998). The Statute of Gloucester gave plaintiffs a right to claim only certain costs in specific real property suits. *Id.* The “loser pays” rule slowly expanded to encompass all litigation and apply for both successful plaintiffs and defendants. *Id.* at 345-46.

62. Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 852 (1929). The rule was extended further in 1623 to include actions of slander and again in 1670 to trespass and assault and battery. *Id.* at 852-53. “In 1697 full costs of suit were given to a plaintiff whenever defendant’s trespass was wilful [sic] and malicious.” *Id.* at 853.

63. *Id.* In 1607, the revised statute was the final step taken in compensating victorious defendants. *Id.* This was a furtherance of the statute revised in 1531, which provided that a defendant could recover costs in certain actions such as trespass, case, debt, contract, covenant, detinue and account. *Id.*

64. *Id.* at 854.

65. *Id.*

66. *Id.*

67. *Id.* at 860.

68. *Id.*



Thus, while many consider the “loser pays” rule always to be automatic, it is more accurately described as a semi-automatic rule with an invisible hand guiding the courts, since they may deny the victorious party costs for good reason.

Like the “American rule,” exceptions to the “loser pays” rule have also surfaced in recent years.<sup>69</sup> The biggest exception is the general rule that in small claims disputes each party must bear its own costs.<sup>70</sup> The current rule provides a “no cost” provision when the claim does not exceed a certain sum, and each party must therefore bear its own expenses.<sup>71</sup> “The reason for this exceptional approach was to encourage private claimants to bring small claims without legal representation, for even if they lost, they would not have to pay the costs of the other side.”<sup>72</sup>

There are two other noteworthy exceptions, although not as significant as the small claims exception.<sup>73</sup> The first involves tribunals where each party must pay its own costs.<sup>74</sup> The second involves suits in which one party receives Legal Aid.<sup>75</sup> Here, when one party is legally aided and the other is privately funded, if the latter is victorious, he will usually not receive compensation for his legal costs against the legal aid fund.<sup>76</sup>

In summary, the “loser pays” rule originated under the Statute of Gloucester in 1275 and continued its development via subsequent legislation.<sup>77</sup> The rule is not an automatic award of attorneys fees to the winner, but rather one that is in the discretion of the bench, with fee-shifting carrying a substantial prevalence.<sup>78</sup> As with the “American rule,” exceptions to the “loser pays” rule exist, but not to the extent of keeping fee-shifting from remaining the norm.<sup>79</sup>

---

69. Woodroffe, *supra* note 61, at 346-47.

70. *Id.* at 346. This exception was established in 1970 when “Justice Out of Reach” was published by the Consumer Council, an independent council funded by the government. *Id.* This document argued for an exception to the “loser pays” rule in respect to defective goods or services. *Id.* This procedure was introduced into the County Courts in 1977. *Id.*

71. *Id.*

72. *Id.* at 346-47. Along with encouraging small claims disputes, the Consumer Council also wanted legal representation to be banned from this new procedure. *Id.* at n.6. While the government ultimately rejected this proposal, it is evident that lawyers were discouraged from small claims litigation. *Id.* In cases concerning amounts greater than £3,000, successful plaintiffs may recover their court fee plus limited expenses, but will not recover the costs or expenses of retaining a lawyer for the proceeding. *Id.* at 347.

73. *Id.*

74. *Id.* An example of such tribunal exception would be industrial tribunals involving claims of redundancy, unfair dismissal and equal pay. *Id.*

75. *Id.* See *infra* part IV.A.2.

76. *Id.*

77. Goodhart, *supra* note 62, at 853.

78. *Id.* at 854.

79. Woodroffe, *supra* note 61, at 346-47.

### III. THE CONTINGENCY FEE SYSTEM IN AMERICA

#### A. *What the Contingency Fee Means for the Client and the Lawyer*

While the lay definition of the contingency fee system holds there is no bill for services when unsuccessful in litigation, this definition, although partially accurate, does not take into account all of the transactions that comprise a contingency fee agreement.<sup>80</sup> When a lawyer takes a case on a contingency basis, he offers the client both his legal services as well as additional services.<sup>81</sup> The two main additional services the lawyer provides the client in a contingency agreement are: 1) financing; and 2) insurance.<sup>82</sup>

##### 1. *Financing*

In typical non-contingent fee agreements, lawyers charge their clients up-front with a flat fee, or quote their hourly fee and explain that incidental expenses will also be charged.<sup>83</sup> Lawyers charge up-front because they are well aware of the difficulties of collecting from a client after the conclusion of a case, especially after an unfavorable outcome.<sup>84</sup> However, in a contingency agreement, the lawyer normally will not collect fees or incurred expenses until after the conclusion of the case.<sup>85</sup> Therefore, by delaying collection, "the contingency fee lawyer finances the litigation for the client while a case is pending."<sup>86</sup>

---

80. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270 (1998) ("The popular image of the contingencies involved in the contingency fee does not fully represent the way the fee works.").

81. *Id.* Under a non-contingency client/lawyer agreement, the lawyer charges an hourly fee or a flat fee, as well as expenses, both with the expectation that these sums will be collected promptly and while the case is still progressing. *Id.* However, the additional services provided by a contingency agreement revolve around time and the outcome of the case. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at n.13; see also Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15, 27 (June 1967). From a criminal lawyer's perspective, "because there are great risks of nonpayment of the fee, due to the impecuniousness of his clients, and the fact that a man who is sentenced to jail may be a singularly unappreciative client, the criminal lawyer collects his fee in advance." *Id.* (Emphasis omitted).

85. Kritzer, *supra* note 80, at 270. "One advantage that the contingency fee lawyer has is that the actual collection of the fee is usually not a problem because the lawyer typically receives the defendant's payment on behalf of the client, and then deducts fees and expenses before disbursing funds to the client." *Id.* at n.13.

86. *Id.* at 270. While this is not the traditional definition of financing, one in which money is borrowed from a third party and paid back with interest (e.g., car buyer, car seller and bank lender), the idea is the same. However, the difference here is that only the two parties (buyer and seller) are involved in the transaction, and the lawyer is essentially loaning the cost of the litigation to the client but not charging interest *per se*.

## 2. Insurance

In addition to financing, the contingency agreement also offers clients insurance by providing protection for both expenses and time.<sup>87</sup> Though many states require a client to compensate his lawyer for expenses incurred, when an unsuccessful result occurs under a contingency fee agreement, the lawyer typically will not look to collect these expenses.<sup>88</sup> Furthermore, because a lawyer collects only after a favorable judgment in a contingency agreement, he essentially bears the opportunity cost of performing the litigation regardless of the outcome, especially if unsuccessful.<sup>89</sup> Opportunity costs are also present in cases where there is recovery for the client.<sup>90</sup>

### B. The Purpose of the Contingency Fee System in the United States

As stated earlier, the major purpose of the contingency fee was to provide open access to the courts for all people, regardless of their financial station.<sup>91</sup> This purpose became magnified by the Industrial Revolution as the number of work-related accidents increased, but those injured could not afford legal representation.<sup>92</sup> Consequently, this increase in laborers' claims forced the American Bar Association to accept the contingency fee as a valid system for lawyers' compensation.<sup>93</sup>

However, the Industrial Revolution cannot take all of the credit, or discredit, for the surge of the contingency fee in America.<sup>94</sup> The contingency fee also served as an attempt by American jurisprudence to expel itself from the English ideology that litigation was evil.<sup>95</sup> "[T]he English typically 'lumped the contingent fee in with other champertous practices that were thought to stir

87. Kritzer, *supra* note 80, at 270.

88. *Id.*

89. *Id.* ("If the lawyer obtains no recovery for the client, the lawyer absorbs the entire opportunity cost of the time expended on the case.")

90. *Id.* at 270. In these cases, the opportunity cost is the difference between the lawyer's compensation for the successful outcome and the amount of compensation he could have earned had he spent the time working on a different case, whether a flat fee case or successful contingency case. *See id.* Thus, the contingent fee lawyer must first discern which cases will be favorable, and then estimate which ones he feels will be the most profitable. *Id.* at 271.

91. Landsman, *supra* note 8, at 262.

92. Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLAL. REV. 29, 37 (1989). Thus, young lawyers used the contingency fee as a way to both bolster their struggling practices and provide an affordable means for those injured to pursue their legal claims. *Id.*

93. *Id.* at 37-38. "The American Bar Association [ABA], reflecting the history of the development of the contingent fee as one of grudging acceptance, gave its reluctant approval in 1908." *Id.* Further pressuring the ABA to accept the contingency fee was the increasing judicial approval of contingency fees. *Id.* at 37.

94. Aaron C. Charrier, *Taxing Contingency Fees: Examining the Alternative Minimum Tax and Common Law Tax Principles*, 50 DRAKE L. REV. 315, 320 (2002).

95. *Id.*

up unwanted litigation and involve unscrupulous lawyers in the nefarious business of brokering lawsuits.”<sup>96</sup> Contrary to the English view that litigation was evil, American jurisprudence took the view that litigation should be used to cure societal problems, thus encouraging the use of the contingency fee as a financial vehicle to alleviate these ills.<sup>97</sup>

In conjunction with the free access to the courts made available through the contingency fee, litigation may also be used to promote broad and far reaching social policies.<sup>98</sup> The Supreme Court has come to highly value the contingency fee with the belief that “[c]ontingent fees, which promote access to the legal system, are . . . an expression of national policy favoring such access.”<sup>99</sup> Thus, the contingency fee may possibly find constitutional protection in the eyes of the Court.<sup>100</sup>

Furthermore, one of the major criticisms of the contingency fee system, very large awards to successful plaintiffs, is viewed by some to aid in accomplishing the goal of furthering social reform.<sup>101</sup> As one commentator noted, “[l]arge jury awards are often the only effective incentive for changes in the interest of public safety.”<sup>102</sup>

### C. Criticisms of the Contingency Fee System

While the contingency fee system has many positive attributes that promote fairness and justice, it shares these benefits with much criticism. This criticism comes in one of four general categories: 1) a “flood” of litigation;<sup>103</sup> 2) frivolous and unreasonable litigation;<sup>104</sup> 3) unconscionably large fees;<sup>105</sup> and 4) unjust financial detriment to a successful defendant.<sup>106</sup>

#### 1. “Flood” of Litigation

For almost 200 years, debate has raged about whether a flood of litigation has resulted from the contingency fee system of the United States.<sup>107</sup> Many

96. *Id.* (quoting CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 527 (1986)).

97. *See* Brickman, *supra* note 92, at 38.

98. *See id.* (“[T]he United States Supreme Court has come to view litigation as a form of political and even commercial speech, which is to be encouraged and protected rather than disfavored.”).

99. *Id.*

100. *Id.* at n.37.

101. Susan Arkun, *Cures for the Malpractice System*, N.Y. TIMES, July 27, 2003, § 4, at 12.

102. *Id.*

103. Landsman, *supra* note 8, at 264.

104. Tamar Lewin, *Class Actions Pay for Some Lawyers*, N.Y. TIMES, Dec. 5, 1983, at D1.

105. *Id.* The author cites to lawsuits where class action attorneys, taking a nominal twenty to twenty-five percent of the award, have either settled for or been awarded judgments of over \$40 million on more than one occasion. *Id.*

106. Maggs & Weiss, *supra* note 7, at 1936.

107. Landsman, *supra* note 8, at 264.

commentators feel the contingency fee has had little to no impact on the amount of litigation, stating this claim is empty, without evidence, and citing to other causes.<sup>108</sup> On the other hand, the Supreme Court has stated that contingency fee agreements have led to an increase in litigation,<sup>109</sup> mainly due to the contingent fee based system's primary purpose of providing a "Key to the Courthouse Door."<sup>110</sup>

## 2. *Frivolous and Unreasonable Litigation*

"Congress needs to pass legal reforms to cut down on the frivolous lawsuits that provide a drag to our economy[.]" President George W. Bush stated in a news conference from the White House Rose Garden.<sup>111</sup> While Bush left open the cause of the high amount of frivolous lawsuits, both commentators and courts argue that the contingency fee system is to blame and must be addressed through legislative action.<sup>112</sup> In some situations (e.g.,

108. *Id.* Speaking on the history and complaint of the contingency fee:

It is interesting to observe that 175 years ago judicial critics were using virtually the same rhetoric about contingency fees as critics use today. For many in both groups the key risk alleged to arise because of contingency is a flood of litigation. This rhetoric has had a hollow ring since the beginning of the Republic. Unmanageable "floods" of lawsuits have, upon investigation, usually proven to be a chimera.

*Id.*

See also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't [sic] Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 69 (1983). The author credits the increase in litigation as an "adaptive response" to the many changes that have occurred in society. *Id.* Among other things, Galanter cites increases in the power and range of machinery as a catalyst for the increasing number of injuries, as well as technological advancements leading to greater knowledge of the causation of injuries, and a greater sense of personal detachment over controls, coupled with more available means of litigating, as reasons for more frequent litigation. *Id.*

109. *Deposit Guaranty Nat'l Bank of Jackson, Miss. v. Roper*, 445 U.S. 326, 338 (1980).

Plainly there has been a growth of litigation stimulated by contingent-fee agreements and an enlargement of the role this type of fee arrangement has played in vindicating the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost.

*Id.*

110. See Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27.

111. *From the Rose Garden; In Bush's Words: 'Taking the Fight to the Enemy' in Iraq*, N.Y. TIMES, July 31, 2003, at A12.

112. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 548 (1999). Arguing in the context of medical malpractice suits, Abel stated "[l]imiting contingent fees would reduce frivolous suits and unrealistic settlement demands." *Id.* Abel further concluded that the increasing frequency of medical malpractice litigation contributes to the rising cost of health care. *Id.* See also *Roa v. Lodi Med. Group, Inc.*, 695 P.2d 164, 170-71 (Cal. 1985) (arguing the legislature imposed limits on contingency fees, for medical malpractice actions, in the hopes of reducing the amount of frivolous litigation and unreasonably high settlement amounts).

medical malpractice suits), the limiting of contingency fees will arguably pass economic benefits on to consumers.<sup>113</sup> In addition to medical malpractice concerns, another argument against the contingency fee cites it as an opportunity for the rich to bully the poor, and the poor to blackmail the rich.<sup>114</sup> In the global context, in order to decrease frivolous litigation, the contingency fee system is banned in most countries outside the United States.<sup>115</sup>

However, some commentators find the high frequency of frivolous litigation argument to be without merit. For example, the lawyer who takes a certain percentage of the proceeds from a victorious case will screen out those cases lacking sufficient merit to avoid the opportunity cost of wasting his time and resources.<sup>116</sup> Coinciding with this "screening out" argument, others argue that contingency fees actually decrease the amount of frivolous litigation by changing the lawyer's incentives.<sup>117</sup> Nevertheless, a number of factors erode this argument.<sup>118</sup> One of these eroding factors, diversification, means that "if the lawyer takes several cases on a contingent fee basis, the cost of a frivolous case that loses may be offset by the rewards from frivolous cases that prevail."<sup>119</sup>

113. See *DiFillippo v. Beck*, 520 F.Supp. 1009, 1016 (D. Del. 1981).

[I]t is rational to limit attorney's fees which may be collected in malpractice suits and not in other actions because the limitation is also related to reducing malpractice insurance costs and, consequently, medical costs. For example, the attorney's fee limitation is likely to deter attorneys from instituting frivolous suits and to encourage the settlement of such suits, thus saving litigation expenses and ultimately reducing medical costs to the consumer.

*Id.*

114. Ernest van den Haag, *The Politics of Law: A Progressive Critique*, 82 MICH. L. REV. 988, 988 (1984) ("[The contingency fee system] encourages litigiousness and makes it inviting for rich persons to harass poor ones and for poor persons to, in effect, blackmail corporations and the rich.").

115. Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 297 n.35 (1994) ("Contingent fees are banned in most foreign countries to avoid frivolous litigation . . .").

116. Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 207 (2000).

117. Teal E. Luthy, *Assigning Common Law Claims for Fraud*, 65 U. CHI. L. REV. 1001, 1011 (1998). "[Contingency agreements] may actually decrease the number of frivolous lawsuits as compared to an hourly wage system by changing the lawyer's incentives." *Id.* Comparing contingency agreements to assignments, Luthy argues that by taking into account the opportunity cost of time and other cases in a contingency fee system, coupled with the fact that compensation is not guaranteed, the risk shifts from the client to the lawyer. *Id.*

118. Guthrie, *supra* note 116, at 208. Frivolous litigation still occurs because not all lawyers have the luxury of being selective with their cases. *Id.* They diversify (have high-probability and low-probability cases) to try and maximize their benefits, but some cases do not become known to be low-probability until after the discovery process. *Id.*

119. Allison F. Aranson, *The United States Percentage Contingent Fee System: Ridicule and Reform from an International Perspective*, 27 TEX. INT'L L.J. 755, 761-62 (1992). Furthermore, "[l]awyers can subsidize baseless cases by using funds from contingent cases in which they have prevailed to front the litigation costs." *Id.* at 762.

### 3. Unconscionably large fees

High fee percentages in contingency agreements mainly arise from the risk of the litigation being assumed by the lawyer, due to the no-win, no-pay nature of the agreement.<sup>120</sup> However, “[c]ommentators have criticized the use of high contingent fee arrangements in claims resolution, as opposed to litigation, contexts because the high risk does not exist.”<sup>121</sup> Thus, it is unethical for lawyers to collect high percentage fees in contingency agreement cases involving little to no risk of loss.<sup>122</sup>

As a counter to this argument, some commentators contend that the contingent fee produces results roughly equal to those of flat fee or hourly based fee schedules.<sup>123</sup> Proponents of this theory argue that both the amount of fees collected in a contingent agreement and on a flat fee agreement are coincidental if they approximate the fee with the time and effort spent.<sup>124</sup> Furthermore, neither the contingency fee nor hourly flat fee agreement account for the difficulty of representation or the quality of work performed.<sup>125</sup> Lastly, “[a]t the very least, the contingent fee reflects the most important element of the value of legal services, which the hourly fee ignores: the result obtained.”<sup>126</sup>

### 4. Unjust Financial Detriment to a Successful Defendant

A fundamental concern with the “American rule” is that defendants must pay legal fees, which may amount to huge sums, even where their actions or

120. See Georgene M. Vairo, *The Dalkon Shield Claimants Trust: Paradigm Lost (or Found)?*, 61 *FORDHAM L. REV.* 617, 619 n.10 (1992). (“The contingent fee arrangement is supposed to shift risks from the client to the attorney—the high risk of litigating justifies a high fee.”).

121. *Id.*

122. *Id.* (“Charging high contingent fees but not assuming any risk is arguably unethical.”); see also Lester Brickman, *The Asbestos Litigation Crises: Is There a Need for an Administrative Alternative?*, 13 *CARDOZO L. REV.* 1819, 1837 (1992) (“By charging contingent fees, lawyers are including a risk premium[,] . . . the greater the risk, the greater the premium. Charging a premium for risk but not assuming any risk is not simply charging a grossly exorbitant fee; it is illegal and unethical as well.”).

123. Elihu Inselbuch, *Contingent Fees and Tort Reform: A Reassessment and Reality Check*, 64 *LAW & CONTEMP. PROBS.* 175, 186-87 (Spring/Summer 2001).

124. *Id.* at 187.

While the contingent-fee contract might produce disparities in an individual case between the number of hours of work performed and the amount paid, such disparities are not unique to contingent-fee compensation. A flat fee will accurately reflect the amount of work actually required in a particular case only by pure happenstance.

*Id.*

125. *Id.* (arguing highly experienced attorneys charge high hourly rates not because of their knowledge of the instant dispute, but because of the presumption that, on average, over time they will provide greater knowledge and experience on specific issues).

126. *Id.* (“One does not pay the cobbler who fails to nail the new heel to the shoe, no matter how many hours were devoted to the failure.”).

behaviors are legally justified.<sup>127</sup> “[T]he American rule has the effect of requiring [defendants] to subsidize the depredations of contestants.”<sup>128</sup> Thus, because the defendant must bear some of the cost for a plaintiff’s unreasonable or unmerited claim, it allows plaintiffs to further pursue more unwarranted claims, with a portion of the price tag (often very expensive) unjustly going to the successful defendant.<sup>129</sup> This Note’s opening story illustrates this concern. Although Steven Brill lost only \$5,134.80 in his successful defense of a libel suit,<sup>130</sup> this was an expensive price to pay for a victory on summary judgment based on the running of the statute of limitations.<sup>131</sup>

#### D. What to Take from the Contingency Fee System

The most important aspect of the contingency fee system is its ability to provide all American citizens an opportunity to have their day in court.<sup>132</sup> To some commentators, this access to the courts is so important that they believe it should be constitutionally protected.<sup>133</sup> Indeed, the Supreme Court may even support this position, stating, it “is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’”<sup>134</sup> The underlying philosophical reason driving this goal is simply, fairness—which should be a fundamental aspiration in a country founded on equality.<sup>135</sup>

127. Maggs & Weiss, *supra* note 7, at 1936. The “American rule” forces “defendants to pay huge sums of money even though they have done nothing wrong.” *Id.*

128. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 65 (1978). The term “defendants” has been substituted in the above text for the original “decedents’ estate” in an attempt to compare the idea that the estate is frivolously being sued by a creditor of the decedent, *Id.*, with the general criticism that the “American rule” unjustly penalizes wrongly accused defendants. Maggs & Weiss, *supra* note 7, at 1936.

129. Maggs & Weiss, *supra* note 7, at 1936; *see also* Langbein, *supra* note 128, at 65 (In the living probate context, “the American rule diminishes the magnitude of a contestant’s potential loss, which diminishes his disincentive to litigate an improbable claim.”).

130. Brill, *supra* note 1.

131. Sheeran v. Brill, No. 80-4574, 1981 U.S. Dist. LEXIS 18410, at \*\*4-5 (E.D. Pa. Apr. 28, 1981).

132. Landsman, *supra* note 8, at 262; *see also* Kevin Michael Kordziel, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 454 (1993) (“Litigation outcomes are often unpredictable, and the right to have one’s day in court is a central concern of the American legal system.”).

133. Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 472 (1997) (“The right to individual control and management of one’s own personal injury claim is itself a substantive right, indeed perhaps a constitutional right.”).

134. Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449, at 417 (1981)).

135. *The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives*, 113 HARV. L. REV. 1806, 1809 (2000). In citing one goal of class actions as providing the injured a legal voice, the author comments that “fair process is often celebrated as an end in itself; underlying this view is the notion that every American has a right to her ‘own day in court.’” *Id.* (Internal citations omitted).



A second feature to take from the contingency fee system is the opportunity for people, or classes of people, to litigate issues of social importance.<sup>136</sup> The contingency fee system allows usage of litigation as a means for achieving social change in two ways: 1) pecuniary,<sup>137</sup> and 2) non-pecuniary.<sup>138</sup>

An example of pecuniary policy adjudication can be seen in the infamous McDonald's coffee case.<sup>139</sup> Here, the court originally awarded the plaintiff over \$2.5 million after spilling scalding hot coffee on herself and receiving third degree burns.<sup>140</sup> The obvious intention of the court was to punish McDonald's, and make an example of them, for repeatedly failing to provide customer service that would ensure its products were safe.<sup>141</sup>

Non-pecuniary policy adjudication may be found in *Shelley v. Kraemer*,<sup>142</sup> in which residential restrictive covenants based on race were deemed unconstitutional.<sup>143</sup> In that case, the Court reasoned that any court upholding such covenants constituted state action, and therefore violated the Fourteenth Amendment.<sup>144</sup> The obvious need for such court action can be found in the language of the Declaration of Independence declaring all persons were created equal.<sup>145</sup>

---

136. Brickman, *supra* note 92, at 38.

137. Arkun, *supra* note 101, at 12.

138. *Shelley v. Kraemer*, 334 U.S. 1 (1948). Conversely to the "English rule's" encouragement of "social" litigation, the "American rule" can also work to promote this type of litigation because more claims can be brought without the fear of having to pay a successful defendant's costs. See Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons From the Experience in Ontario*, 47 LAW & CONTEMP. PROBS., 125, 133 (Winter 1984).

139. See *Liebeck v. McDonald's Rests.*, No. CV-93-02419, 1995 WL 360309 (D. N.M. Aug. 18, 1994); see also Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4-5 (1996). What is not so well known about this case is the history McDonald's had with serving extremely hot coffee and injuries resulting from it. *Id.* at 5. McDonald's had received over 700 complaints for serving its coffee at a dangerously high temperature. *Id.* The court, in granting such a large award, was looking to punish McDonald's for having repeatedly cold customer service by serving scalding hot coffee. See *id.* The court was also making a statement to other businesses in general, that injuries resulting from corporate stubbornness would be penalized to the utmost.

140. Gross & Syverud, *supra* note 139, at 5. The original award was \$2.86 million (\$160,000 in compensatory damages and \$2.7 million in punitive damages), but was later reduced to \$640,000. *Id.*

141. See *id.*

142. 334 U.S. 1 (1948).

143. *Id.*

144. *Id.* at 20-21.

145. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). While an argument may be made that all persons, more specifically, persons of color, was not the intent of the signers of the Declaration, it is commonly held today that this phrase encompasses all persons of all colors and origins.

### E. What Should Be Left Behind from the Contingency Fee System

In order to most effectively pursue the goal of an open courthouse, it is important to limit the number of frivolous or unreasonable lawsuits that clog up the system and bog down its efficiency.<sup>146</sup> Controls on contingent fee agreements could have the desired effect of decreasing the amount of frivolous litigation.<sup>147</sup> While the number of frivolous and unreasonable lawsuits needs to be decreased, it cannot be firmly stated that the contingency fee has resulted in a "flood" of litigation.<sup>148</sup> Nevertheless, frivolous and unreasonable litigation must ultimately be reduced in an effort to minimize the delay in hearing meritorious claims because of loaded court dockets.<sup>149</sup>

Unconscionably large attorneys fees in cases involving little risk of winning present another negative attribute of the contingency fee system that must be left behind.<sup>150</sup> It is the risk of not receiving a fee, or a fee substantially less than the lawyer's opportunity cost, that justifies the lawyer charging a risk premium.<sup>151</sup> Because the attorney/client relationship is a fiduciary one, it would be illegal for the attorney to charge for a service (bearing the risk) that does not exist, thus making this an obvious attribute to avoid.<sup>152</sup> In addition, the attorney's monetary interest in the litigation, deriving from the risk premium,

146. Richard M. Birnholz, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 978 (1990) (proposing contingency fee limits as a way to "decrease the amount of court overcrowding and increase judicial efficiency by deterring frivolous litigation.").

147. *Id.*

[C]ontingency fee limits can be utilized by the legislature as a means of deterring frivolous suits [by not having a large "pie in the sky" award for the attorney]. Contingency fee limits can also be used to encourage a plaintiff to accept a lower settlement. If the attorney's percentage is smaller, a plaintiff will obtain the same net recovery from a lower overall settlement amount. An increase in the number of settlements eases the burdens on the court system by lessening the number of cases that must be tried.

*Id.*

See also P. DANZON & L. LILLARD, *THE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS: MODELING THE BARGAINING PROCESS* 55-56 (1982) ("Limits on contingent fees decrease settlement size, increase the likelihood that a case is dropped, and decrease the likelihood of litigation to verdict.").

148. Landsman, *supra* note 8, at 264.

149. Birnholz, *supra* note 146, at 978.

150. Brickman, *supra* note 122, at 1837.

151. Brickman, *supra* note 92, at 70. The contingency fee system is based on an "assumption that the lawyer's risk of receiving no fee, or a fee that effectively will be well below his normal hourly rate [opportunity cost], merits compensation in and of itself; bearing the risk entitles the lawyer to a commensurate risk premium." *Id.*

152. *Id.* at 70-71 ("It is illegal because it violates the lawyer's fiduciary duty to deal fairly with clients. A lawyer who charges for a service that is not provided is at least breaching the fiduciary duty.").

has in many ways diminished the bar's reputation due to contingency fees because this risk premium appears to be solely for the attorney's benefit.<sup>153</sup>

#### IV. THE "LOSER PAYS" RULE IN ENGLAND

##### A. How the "Loser Pays" Rule Applies

"The application of the cost-shifting principle is much more complicated than the simple phrase 'loser pays' implies."<sup>154</sup> The traditional two-way shift most Americans think occurs is not the norm in England.<sup>155</sup> In England, the "loser pays" rule is not an absolute, automatic rule, but one in the court's discretion.<sup>156</sup> Also, the English legal system has three particular mechanisms for financing a legal claim: 1) legal expense insurance;<sup>157</sup> 2) legal aid;<sup>158</sup> and 3) trade unions (for particular parties).<sup>159</sup>

##### 1. Legal Expense Insurance

Legal expense insurance (non-existent in America) is a mechanism in which the plaintiff is insured against the potential of paying the entire amount of his opponent's fees.<sup>160</sup> This secondary industry allows plaintiffs with strong, but not necessarily guaranteed winning cases, to enjoy access to the courts without the fear of having to fully bear a victorious opponent's costs.<sup>161</sup>

153. Edward D. Re, *The Causes of Popular Dissatisfaction with the Legal Profession*, 68 ST. JOHN'S L. REV. 85, 104 (1994).

The present concern [with the contingency fee system] stems from the fact that the lawyer's monetary stake or financial interest in the litigation appears to be antithetical to the lawyer's given objective—independent advice primarily for the benefit of the client. As a consequence, a further erosion of the public's faith in and respect for the professionalism of lawyers has occurred.

*Id.*

154. Herbert M. Kritzer, *Legal Fees: The English Rule*, A.B.A. J., Nov. 1992, at 54, 55.

155. *Id.* ("While most defendants, who tend to be institutional (either as named defendants or as insurers of defendants), are genuinely at risk to pay costs if they lose, this is not true for plaintiffs, especially individuals.")

156. Goodhart, *supra* note 62, at 854.

157. Havers, *supra* note 7, at 633.

158. *Id.* at 634.

159. *Id.*

160. *Id.* at 633. ("If [the plaintiff] lose[s], the litigant pays a portion of the costs, but most are picked up by the insurance carrier.")

161. *Id.* at 633-34.

[T]his system protects individuals from the dangers of filing suits which, while meritorious, may not be guaranteed winners. Because of the inherent risk of these types of suits, under the English rule and without litigation insurance which helps minimize the risks involved if one loses, these types of cases would never be filed. . . . [W]e do not want to discourage valid claims from being brought simply because of their costs; every person deserves their day in court.

*Id.*

However, it is important not to confuse the functioning of legal expense insurance with complete indemnification for a plaintiff who loses on a counterclaim, as it only covers the costs of losing.<sup>162</sup> Also, legal expense insurance is structured so that frivolous or unreasonable claims are filtered out of the system more efficiently than in the contingency fee system because insurance providers "employ case-screening procedures that effectively remove the doubtful cases."<sup>163</sup>

Finally, while legal expense insurance appears greatly fortuitous, it must be noted that only about two percent of all cases litigated, circa the early 1990s, were brought by insured plaintiffs.<sup>164</sup> "Nonetheless, insurance makes a significant difference in how solicitors handle cases, primarily because clients need not be concerned about costs."<sup>165</sup>

## 2. *Legal Aid*

While only about two percent of plaintiffs utilize the legal expense insurance option, roughly twenty-eight percent of personal injury plaintiffs receive legal aid.<sup>166</sup> Unlike legal expense insurance, a small amount of Legal Aid is available in America; however, it is only for the severely disadvantaged and not for cases which could normally be dealt with using the contingency fee system.<sup>167</sup>

So what is Legal Aid? Legal aid is a program whereby financially qualified plaintiffs may have their legal costs subsidized by the government, with the norm being a full subsidy.<sup>168</sup> An important comparison to draw here is that over a quarter of personal injury litigants receive Legal Aid in England.<sup>169</sup>

162. Kritzer, *supra* note 154, at 57. Essentially, what this means is that if a plaintiff is found to owe money to the defendant in a counter-claim, the legal insurance would not pick up the tab for this adverse judgment, but only for a portion of the costs of both parties in association with bringing the plaintiff's original claim.

163. *Id.* Since the insurance provider's biggest concern is paying out, theoretically it will be more selective and conservative in the cases it takes. *Id.* Also, because legal expense insurance only invests money, and not time, they have access to a significantly higher amount of cases to support. This in turn affords them the luxury of being more selective than a lawyer. *Id.* Compare Guthrie, *supra* note 116, at 207. In the contingency fee system there is a screening-out process in theory. *Id.* However, since the contingent lawyer's biggest concern is not paying out, but the pay out, he is more likely to be adventurous and liberal in the cases he takes on as he views himself as a "portfolio manager" of high-risk and low-risk cases. *Id.* at 208. Furthermore, not all contingent lawyers have the luxury of being completely objective in their selection because of the nature of the market. *Id.*

164. Kritzer, *supra* note 154, at 56.

165. *Id.*

166. *Id.*

167. Havers, *supra* note 7, at 634.

168. Kritzer, *supra* note 153, at 55-56. "[P]ersons whose incomes and assets fall within the appropriate guidelines are eligible to have their legal costs paid by Legal Aid, a program funded by the government . . ." *Id.* at 55. The author goes on to say that some Legal Aid participants are required to cover a portion of their costs, but most pay little to nothing. *Id.* at 55-56.

169. *Id.* at 56.

However, in America, only those falling below the poverty line qualify for the program.<sup>170</sup> Nevertheless, Legal Aid augments the goal of legal expense insurance in a limited way, as its purpose is to allow injured plaintiffs who are financially disadvantaged the opportunity to seek justice without the fear of paying their opponent's legal fees if they lose.<sup>171</sup>

With this limited scope of purpose, some commentators feel Legal Aid is not effective and litigation should be financed from the private sector, not by the government.<sup>172</sup> Even some members of the English bench find Legal Aid to be severely inhibited in its effect on English justice; as one judge stated, "Everyone knows, every lawyer particularly knows, that for the ordinary citizen unqualified for Legal Aid a lawsuit is quite out of the question."<sup>173</sup> Thus, Legal Aid opens the door to litigation for only a special class of persons.<sup>174</sup>

### 3. Trade Unions

The third mechanism employed in English litigation to alleviate the dangers of the loser paying is litigation financed through trade unions, which is utilized by almost thirty percent of accident plaintiffs (in contrast, American trade unions only get involved if the injury is work related).<sup>175</sup> "Generally, unions provide both legal representation for their members and absorb litigation costs."<sup>176</sup> Additionally, unions generally secure talented and capable representation because these lawyers do not worry about their client's ability to pay since the expenses and costs are covered by the more deep-pocketed unions.<sup>177</sup> Like legal expense insurance and Legal Aid, the purpose of trade union financing is to help plaintiffs avoid the risks created by the "English rule," which, combined with legal expense insurance and Legal Aid, helps more than half of plaintiffs in personal injury cases avoid such risks.<sup>178</sup>

170. Havers, *supra* note 7, at 634.

171. Kritzer, *supra* note 154, at 55-56.

172. Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 325-26 (2001). "[It is] the clear experience of the United Kingdom and Sweden that legal aid does not work well and that legal services should be privately financed." *Id.* The author goes on to say that private legal expense insurance should be emphasized and favored over state funded litigation. *Id.*

173. Kritzer, *supra* note 154, at 55 (quoting English judge Patrick Devlin).

174. *Id.*

175. Havers, *supra* note 7, at 634 ("[A]bout twenty-nine percent of English plaintiffs in accident cases, including nonwork-related claims, receive legal financial assistance from their trade unions.").

176. *Id.* (quoting Herbert M. Kritzer, *Legal Fees: The English Rule*, A.B.A. J., Nov. 1992, at 56).

177. Kritzer, *supra* note 154, at 56 ("Solicitors retained by the unions are generally regarded as extremely effective, in no small part because they do not have to worry about skittish clients who fear paying out substantial sums if their cases are unsuccessful.").

178. *Id.* at 55-56. "[I]n court actions involving personal injury, only about [forty] percent of English plaintiffs are subject to the downside risk of the English rule . . ." *Id.* at 55.

As a result of these mechanisms in England, the Loser Pays system allows the average individual to bring valid claims, while incurring only *some* of the risk of a suit (through insurance premiums, having to pay a percentage of the legal costs based on a scale of their earnings). As America has no such mitigating programs, the burden of losing falls squarely on the shoulders of the average individual, thereby making it virtually impossible, economically speaking, to file a case.<sup>179</sup>

### B. Positive Impacts of the "Loser Pays" Rule

By having the losing party bear the costs of litigation for both parties, the "English rule" has three primary benefits: 1) fuller compensation of winners (including unjustly accused defendants);<sup>180</sup> 2) deterrence of frivolous claims;<sup>181</sup> and 3) a possible higher frequency of settlements.<sup>182</sup>

#### 1. Fuller Compensation of Winners

Stemming from the Roman perspective that the loser of a lawsuit had committed a wrong against the winner by insisting on his position, which was ultimately proven incorrect,<sup>183</sup> the "English rule" follows this premise to conclude that a winning party does not experience total victory if costs or expenses are left unpaid by the defeated.<sup>184</sup> Thus, the "English rule" works to fully compensate a victorious plaintiff, awarding damages and costs,<sup>185</sup> as well as to fully exonerate a victorious defendant, awarding him the costs of litigating his correct position.<sup>186</sup> Ultimately, the "English rule" works to ensure a

fairer method of distributing the burden of attorney fees. . . .  
[A]s between the party adjudged in the right and the party adjudged in the wrong, the party adjudged in the right should

179. Havers, *supra* note 7, at 634 (Emphasis in original).

180. Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 66-67 (Winter 1984).

181. Rowe, *supra* note 7, at 888.

182. Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 428-29 (1973).

183. Davis, *supra* note 57, at 404.

184. *Id.* at 405; see also Pfennigstorf, *supra* note 180, at 83 (stating the general rule as requiring the loser to pay the winner's expenses, with no fee-shifting as the exception).

185. A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 422 (1993) ("[T]he English rule increases the award to a winning plaintiff—by the amount of the plaintiff's litigation costs . . .").

186. *Id.* The author goes on to say that the "English rule" compensates a victorious defendant by "impos[ing] a penalty on a losing plaintiff—equal to the defendant's litigation costs." *Id.*

bear no fee burden and the party adjudged in the wrong should bear the entire fee burden.<sup>187</sup>

## 2. Deterrence of Frivolous Claims

Perhaps the greatest impact of the "English rule" has been the deterrence of frivolous litigation, allowing the courts to be more open to meritorious claims.<sup>188</sup> While it is important to keep in mind that England is generally less litigious than America,<sup>189</sup> the "English rule" deters these claims primarily because the threat of paying a victorious defendant's legal costs raises the stakes for the plaintiff, forcing him to more carefully assess his case and act more conservatively.<sup>190</sup> In fact, America has roughly twenty times the amount of civil lawsuits as England (figure adjusted for population difference).<sup>191</sup>

A simple comparison between the quantity of English civil litigation and American civil litigation does not, in and of itself, prove the "English rule" deters litigation. However, many commentators feel that adoption of the rule would decrease the number of lawsuits in America, albeit, not always justly.<sup>192</sup> Ironically and unjustly, the "English rule" deters many meritorious claims as

187. Mark S. Stein, *The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT. L. REV. 603, 604 (1995); see also Pfennigstorf, *supra* note 180, at 66-67.

[A] claimant who is forced to resort to court action to enforce his claim against [sic] a reluctant debtor is entitled to recover the full value of the claim and should not be expected to be satisfied with a lesser amount because of the necessity of suing. Likewise, one who successfully defends himself against an unjustified claim raised by another person should come out of the experience without financial loss.

*Id.*

188. See Rowe, *supra* note 7, at 888.

189. Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always be an England?*, 9 CONN. J. INT'L L. 185, 214 (1994) ("By force of culture and law, the English are less litigious than Americans.").

190. Polinsky & Rubinfeld, *supra* note 185, at 402.

The English rule, under which the loser pays the winner's legal costs, tends to discourage frivolous suits because, if frivolous plaintiffs have a higher probability of losing than legitimate plaintiffs, making a losing plaintiff pay the winning defendant's legal costs imposes a higher expected cost on frivolous plaintiffs than on legitimate plaintiffs.

*Id.*

191. Schwarzschild, *supra* note 189, at 215. English civil courts handled roughly 400,000 civil cases in 1990 while American civil courts handled over nine million cases. *Id.* "In sheer volume of litigation, the differences between England and the United States are striking. . . . With something less than five times the population of England and Wales . . . the United States has perhaps twenty times the number of civil lawsuits." *Id.*

192. Roxanne Barton Conlin & Clarence L. King, Jr., *The "Loser Pays" Rule: Who Pays for Injustice?*, TRIAL, Oct. 1992, at 58, 60 ("No matter whether we think the English rule is intended to be an aggressive response to litigation or a mechanism for fairness, it will always deter litigation and inevitably create some injustice where it is implemented.").

well as frivolous claims, leaving justified plaintiffs without legal remedy.<sup>193</sup> Nevertheless, whether the injustices outweigh the purpose, the “English rule” acts as a deterrent to frivolous or unreasonable litigation.<sup>194</sup>

### 3. Increase in Settlements

The net effect of the “English rule” on settlements is a heatedly debated topic and one in which the Honorable Judge Richard Posner asserts that the rule leads to a greater settlement rate,<sup>195</sup> only later to discuss scenarios in which fee-shifting decreases the settlement rate.<sup>196</sup> Thus, one is left with the feeling that this impact is debatable.

Judge Posner’s initial argument, that the “English rule” would increase settlements, takes on the following line of reasoning. The “English rule” raises the stakes for the parties involved in litigation by attaching attorney fees and costs to unsuccessful judgments.<sup>197</sup> Because the stakes of the proceeding are raised, “the expected value of litigation [is] less for risk-averse litigants, which will encourage settlements if risk aversion is more common than risk preference.”<sup>198</sup> While a party’s attitude toward risk is subjective, it can be assumed for further argument that more than likely, a party will be risk averse

193. Kritzer, *supra* note 138, at 133 (“The potential of having to pay the other side’s costs may create a very substantial barrier to litigation, particularly for individuals and especially when the potential litigant is not 100% sure about his or her case.”); see also Herbert M. Kritzer, *A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases*, 14 LAW & SOC. INQUIRY 167, 174 n.30 (1989). An overwhelming majority of people interviewed in England would not pursue a lawsuit if the award for damages would be \$10,000 and their chances for victory were only eighty percent. *Id.* The total attorneys fees in this hypothetical were \$3,000 (\$1,000 for plaintiff and \$2,000 for defendant), of which the plaintiff faced only a twenty percent chance of being required to pay.

194. Rowe, *supra* note 7, at 888.

195. Posner, *supra* note 182, at 428-29. “With the costs of guessing wrong on the outcome [of the litigation] . . . higher, the dispersion of subjective probabilities about the true probability of prevailing should be reduced, leading . . . to a higher settlement rate.” *Id.* at 428.

196. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 21.11, at 588 (6<sup>th</sup> ed. 2003). Posner argues that when a plaintiff’s belief in victory is greater than the defendant’s belief in plaintiff’s victory, the “English rule” makes litigation more likely than the “American rule.” *Id.* Example: plaintiff believes his chances of winning are sixty percent and defendant believes plaintiff’s chances of winning are forty percent. Each party will proceed to litigation because each one thinks he has a better than not chance of winning, and thus will have his attorney fees shifted to the losing party.

197. Richard L. Schmalbeck & Gary Myers, *A Policy Analysis of Fee-Shifting Rules Under the Internal Revenue Code*, 1986 DUKE L.J. 970, 977 (1986) (“[T]he clear effect of using the English rule . . . is to increase each party’s stakes by the sum of *both* parties’ litigation costs, not merely by the other party’s costs.”) (Emphasis in original); see also Posner, *supra* note 182, at 428. Stated slightly differently, the plaintiff’s raised stakes are total recovery of judgment award and fees, as opposed to a net recovery of judgment award minus fees under the “American rule” in the case of victory. *Id.* In the case of defeat, the stakes are raised from having to bear only his costs, to having to bear both his own, and his successful opponent’s costs as well. *Id.* For the defendant, the stakes are similar, just without the judgment award. *Id.*

198. *Id.*



as opposed to being risk preferred.<sup>199</sup> Thus, because a majority of litigants are risk averse, it is fair to conclude that “adding the possibility of a fee shift against individual litigants relying on their own resources might well result in a greater tendency to settle claims once pursued than exists under the American rule.”<sup>200</sup>

In the end, while some commentators argue that increased stakes do not lead to a higher frequency of litigation,<sup>201</sup> as will be shown, others argue the exact opposite: that increased stakes work to increase the number of cases proceeding to trial (*See infra* Part IV, C). Thus, truly conclusive findings can only be found in practice.

### C. Negative Impacts of the “Loser Pays” Rule

The two main criticisms of the “Loser Pays” rule are: 1) it deters reasonable and meritorious claims that are not clear winners due to the threat of paying defendant’s costs;<sup>202</sup> and 2) it decreases the number of settlements based on higher stakes and positive outlooks on the case.<sup>203</sup>

#### 1. Deters Reasonable and Meritorious Litigation Where the Case is not a Clear Winner

One of the biggest downfalls of the “English rule,” as many commentators see it, is that while it deters frivolous litigation, it does so at the cost of preventing plaintiffs of modest financial means from bringing meritorious claims because the risk of paying a successful defendant’s legal costs is simply too great.<sup>204</sup> The “English rule” can be financially unforgiving

199. John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 292-93 (1973) (Risk preference should not increase the number of cases that go to trial since risk preferred parties should be able to find cheaper ways to gamble).

200. Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., 139, 159 (Winter 1984).

201. Schmalbeck & Myers, *supra* note 197, at 979 (“High stakes . . . do not appear to lead to a higher probability that a given dispute will lead to litigation. . . . Because the primary effect of fee shifting is to increase the stakes, implementation of a fee-shifting rule . . . should not increase the number of litigated cases.”).

202. Rowe, *supra* note 7, at 888.

203. 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, 1869 (1998).

204. Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 329-30 (1998). “Whatever the desirability of ex ante deterrence of weak or frivolous claims, general indemnity applies to frivolous and non-frivolous claims alike. Its deterrent effects, especially given risk aversion among many claimants, will extend quite far up the scale from frivolous into possibly meritorious claims . . .” *Id.* at 330. This expansion into meritorious claims is an injustice of the “English rule” because it harms parties strictly on the basis of finances. *See id.* *See also* Gregory A. Hicks, *Statutory Damage Caps are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 790-91 (1989) (“In the absence of institutional arrangements allowing plaintiffs of lesser means to avoid fee indemnity obligations

to an unsuccessful plaintiff even when "entirely reasonable in pursuing a claim that turned out at trial to lose. As a result, the rule may excessively discourage the pressing of plausible but not clearly winning claims. . . . This effect is especially likely to fall on middle class people . . . ." <sup>205</sup> Members of the middle class, who make up the greatest percentage of a population, are at the greatest risk because they do not qualify for subsidized assistance, and therefore would have to shoulder the entire burden of an unfavorable result. <sup>206</sup> Often, the chances of an unfavorable result are too great to justify the risk of proceeding with a solid claim that is not guaranteed on its merits. <sup>207</sup> Thus, some commentators fear that litigation will be deterred not on the merits (which is desired), but on the financial risks associated with bringing a claim that is not a sure-fire winner (which is not desired). <sup>208</sup>

This fear has been brought to fruition in England, where approximately eighty-five percent of accident victims do not file a claim for compensation, mainly due to fear of paying their opponent's legal costs if unsuccessful. <sup>209</sup> Critics of the "English rule" bemoan the opinion that civil justice in Britain "is now too expensive for all but the poorest and the richest." <sup>210</sup> One commentator postulates that middle-income litigants would not even pursue strong claims if the risk of losing fell somewhere within the relatively small range of \$5,000 to \$10,000 (small in terms of what legal fees could run). <sup>211</sup> Essentially, the "English rule" may deter middle class individuals from bringing meritorious claims because the threat of what could be lost is too much to put on the line. <sup>212</sup>

---

in unsuccessful litigation, two-way fee shifting could deter such plaintiffs from bringing meritorious claims of uncertain outcome by exposing them to the risk of having to pay the defendant's legal fees.").

205. Rowe, *supra* note 7, at 888.

206. Christian Brooks, *Political Bluff and Bluster: Six Years Later, A Comment on the Texas Private Real Property Right Preservation Act*, 33 TEX. TECH L. REV. 59, 100-01 (2001) ("Making losing parties liable for all of the expenses of the suit creates an unreasonable level of risk for middle income claimants.").

207. Rowe, *supra* note 204, at 329 ("[T]here is serious and repeatedly expressed concern that general loser-pays fee shifting is too harsh and too much of a deterrent to the medium-strength claims of the middle class.").

208. William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 148 (1992) ("The rule would deter some litigation, but it would do so more on the basis of a litigant's risk averseness than the merits of the litigant's case."); see also Michael Napier & Nick Armstrong, *Costs After the Event*, NEW L.J., Vol. 143, No. 6582, p. 12 (1993) ("[L]oser pays' disincentive to litigate is based more upon the client's fear of costs than the merits of the claim.").

209. Rowe, *supra* note 204, at 330 n.53.

210. *Id.* (Internal citations omitted).

211. Kritzer, *supra* note 154, at 57 ("If the amount at stake were \$10,000 or \$25,000, most middle-income individuals still would be reluctant to put \$5,000 to \$10,000 on the line to pursue even a strong case.").

212. Charles W. Branham, III, *It Couldn't Happen Here: The English Rule—But Not in South Carolina*, 49 S.C. L. REV. 971, 980 (1998). "The middle-class plaintiff with a house, family, and savings has the most to lose from an adverse award of attorneys' fees." *Id.* "Therefore, when the potential of bearing the other party's litigation expenses outweighs the

## 2. *Decreases Settlements*

The fundamental argument that the “English rule” will decrease the settlement rate is simply stated as: each party believes their chances of winning are high, and therefore, in order to incur no legal costs, proceed to trial expecting to win and pay nothing.<sup>213</sup> To pose the argument in a slightly different manner, under the “American rule,” if both parties are certain of victory, they will still settle in cases where the cost of victory at trial is more than the cost of settling; whereas, the “English rule” would encourage the litigants to proceed to trial in order to have a full recovery in the case of the plaintiff, or no loss in the case of the defendant.<sup>214</sup> Thus, one may conclude that “the likelihood of trial under the British system will be greater than under the American system.”<sup>215</sup>

A further argument that the “English rule” will decrease settlements relies on the same presumption used by some commentators arguing for an increase in settlements. This argument states that the “English rule” raises the stakes of the suit, and therefore, makes litigation more attractive to a hopeful plaintiff.<sup>216</sup> It also follows that when the defendant views his chances of winning with greater optimism, litigation becomes more attractive because of the same raised stakes.<sup>217</sup> This augments the argument that parties’ willingness to offer, and expectation to take, depend on their beliefs regarding the lawsuit’s outcome.<sup>218</sup> The outcomes break down into three possible categories; where the parties’

---

potential gain of a meritorious suit, lower-middle-class plaintiffs may not sue at all.” *Id.*

213. Sherman, *supra* note 203, at 1869 (“[P]arties . . . pursu[e] litigation because they are overly optimistic about their chances at trial, which causes them to discount the amount of attorneys’ fees they will have to pay, and thus makes settlement less attractive.”).

214. *Id.* at n.35.

[U]nder the American rule, if the plaintiff firmly believed he or she would recover \$10,000, and the defendant firmly believed there would be no recovery, but each anticipated having to spend \$6,000 to take the case through trial, the parties might enter settlement discussions anyway, because even a \$5,000 settlement would leave each party in better financial shape than a trial. Yet under the loser-pays rule, the argument goes, the litigants might dig in since each anticipates no net loss following a verdict.

*Id.* (quoting William W. Schwarzer, *Fee-Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147, 153 (1992)).

215. Sherman, *supra* note 203, at 1869 n.35 (quoting Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65 (1982) (emphasis omitted)).

216. Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1079 (1993) (“[T]he British rule raises the stakes, which makes litigation more attractive to the parties when the plaintiff places a higher estimate on the likelihood of his winning than does the defendant.”); *see also* Jay P. Kesan, *Carrots and Sticks to Create a Better Patent System*, 17 BERKELEY TECH. L.J. 763, 792 (2002) (“Because the British rule raises the stakes, it makes litigation more attractive to the plaintiff.”).

217. Kesan, *supra* note 216, at 792 (“Litigation is more attractive to both parties when the defendant’s estimate of the plaintiff’s victory is less than the plaintiff’s estimate of his chances of success.”).

218. Philip J. Mause, *Winner Takes All: A Re-Examination of the Indemnity System*, 55 IOWA L. REV. 26, 31 (1969).

expectation of victory is: 1) greater than fifty percent: offer less, demand more; 2) less than fifty percent: offer more, demand less; or 3) fifty percent: no effect.<sup>219</sup> “Thus, if each party feels he has a better than even chance of success, indemnity will discourage pre-trial settlement by encouraging plaintiffs to demand more and defendants to offer less.”<sup>220</sup> In the end, whether the “English rule” decreases the frequency of settlements seems to turn on the parties’ beliefs regarding the strength of their respective case.<sup>221</sup>

## V. THE NEW RULE ON COSTS

### A. *Defining the New Rule on Costs*

The New Rule on Costs (“New Rule”) is a combination of the “American rule” and “English rule,” taking into account analysis from a myriad of commentators. However, the New Rule provides only a skeleton for the proposed system of allocating attorneys fees as opposed to a full flesh and blood model. The basis of the New Rule will be the contingency fee system, slightly modified, but still keeping the courts open to all individuals.<sup>222</sup> Whether fee-shifting will occur will depend on the stage of litigation in which the case is terminated. Because both the “American rule” and “English rule” do not have a clear, bright line effect on settlements, in the case of a settlement, each side will bear its own costs.<sup>223</sup>

---

219. *Id.*

[I]ndemnity would seem to encourage a party to offer less or demand more when he feels he has a better than even chance of success, discourages it when he feels his chance of success is less than even, and has no effect when he feels that the chance is even.

*Id.*

220. *Id.* See also James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 231 (1995) (“[The] optimism effect associated with the English rule occurs because the settlement gap—the difference between the plaintiff’s demand and the defendant’s offer—shrinks under the English rule as the optimistic litigants anticipate shifting their costs to their rivals.”).

221. Mause, *supra* note 218, at 32 (“The litigated case most often is one in which the parties have differing estimates of the probable chance and size of recovery. In such a case, indemnity might reinforce the parties’ positions and place their estimates of a fair settlement value even further apart.”).

222. Landsman, *supra* note 8, at 262. The New Rule must keep in line with American faith in a “robustly individualistic adversarial system where each side is given an opportunity to make its strongest case.” *Id.*

223. Posner, *supra* note 182, at 428; see also Rowe, *supra* note 200, at 159 (arguing the “English rule” increases settlements). But see Schwarzer, *supra* note 208, at 153; see also Hylton, *supra* note 216, at 1079 (arguing the “English rule” decreases settlements); see also Mause, *supra* note 218, at 31 (arguing the “English rule” does not have an absolute impact on the settlement rate, but rather is better determined by each parties’ subjective perception of risk). The impact of the New Rule on settlements will more than likely fall in Mause’s determination that it depends on the subjective attitudes and risk aversion of the particular litigants. See *id.* Thus, it is safest to leave the system to the wild when it comes to settlements as it seems neither

If a proceeding is terminated or dismissed during a pre-trial stage (e.g., discovery, summary judgment, judgment on the pleadings, etc.), then the losing party must bear the opponent's costs, keeping in line with the old Roman ethic that the losing party does a wrong to the victor by insisting on his legal claim, which the court proves unjustified.<sup>224</sup> Using the same rationale for assessing fees on pre-trial judgments, the "loser pays" rule would also apply to cases adjudicated on directed verdicts, as they resolve issues of law and not fact since they never reach the fact-finder for decision.<sup>225</sup> Finally, cases proceeding to trial and decided by jury, as well as appellate decisions, will break down into two outcomes. (It must be noted, however, that both outcomes will be decided in the discretion of the court.)<sup>226</sup> Under the first outcome, which will be considered the default rule, both sides must bear their own costs.<sup>227</sup> Under the second outcome, the losing party must pay a percentage of the winner's costs, this percentage (1% - 100%) being at the discretion of the judge with possible consideration for the jury's recommendations.<sup>228</sup>

---

rule has a greater impact on them than the other.

224. See Davis, *supra* note 57, at 404. It would seem appropriate to award fees to the winning party in cases dismissed before going to trial because it would most closely follow this old Roman law. Cases dismissed or ruled on summary judgment are cases where there is no genuine issue of material fact, and thus, the losing party has no legal basis to assert or defend his position. Thus, in such cases, a victorious plaintiff should not have to bear costs just because he had to sue to claim his recovery, and likewise, a victorious defendant should not have to pay for a claim against him that had no basis.

225. See Davis, *supra* note 57, at 404. While it takes longer and involves more costs, a case decided on a directed verdict still does not reach the jury. Thus, it is not the facts that are in dispute, but the law. Directed verdicts imply that the law was particularly strong on one side, which should be recognized by the parties' counsel. Therefore, having to pay the opponent's fees for a directed verdict will hopefully increase settlements, when the law is fairly clear, as the losing party does not have to pay his opponent in a settlement.

226. Goodhart, *supra* note 62, at 854. This is in line with Order 55, which put the wheels of the "English rule" as seen today in motion, that being the allocation of attorneys fees is left to the discretion of the bench. *Id.* Each outcome will remain subject to Federal Rule of Civil Procedure 68 (Offer of Judgment). FRCP 68 states, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred [both offeree's and offeror's] after the making of the offer." *Federal Rule of Civil Procedure 68.*

227. Schmalbeck & Myers, *supra* note 197, at 979 (discussing the Tax Court's hybrid system where most litigants bear their own costs, with some fee-shifting); see also Landsman, *supra* note 8, at 262; see also Rowe, *supra* note 7, at 888. This will be the default rule because it will still work to encourage an open system of justice and discourage the stifling of meritorious claims on the fear of paying the victorious opponent's legal fees.

228. Goodhart, *supra* note 62, at 860. This is consistent with Order 55 and Order 65, which leaves the awarding of attorneys fees to the discretion of the bench. *Id.* The jury may also give an opinion on an attorney fee award based on its intense involvement in the proceeding; see also Schmalbeck & Myers, *supra* note 197, at 979-80. In the Tax Court, only cases on the extreme fringes find fee-shifting allocations. *Id.* at 979. If the court finds the taxpayer's claim to be frivolous or unreasonable, it may penalize the taxpayer by awarding costs damages to the government. *Id.* Similarly, if the court finds the government's position to be substantially unjustified, it may award reasonable attorneys fees to the taxpayer. *Id.* at 979-80. The New Rule attempts to extend the Tax Court's procedure to allow for fee-shifting to reflect

## B. Positives and Negatives of the New Rule

The most important feature of the New Rule is that it will keep the courts open for ordinary citizens to pursue meritorious claims that are not gold-star winners.<sup>229</sup> The flexibility of the New Rule will allow parties to initiate actions, despite the uncertainty inherent in litigation, and then decide whether or not to pursue the action based on where they are in the proceeding and the consequences of their decision.<sup>230</sup> In any case, the New Rule must not lose sight of the "most commonly cited purpose of the contingency fee . . . its 'function as a financing device that enables a client to assert and prosecute an otherwise unaffordable claim.'"<sup>231</sup>

### 1. Goals

In addition to open access, the two main goals of the New Rule are: 1) deter frivolous and unreasonable litigation,<sup>232</sup> and 2) provide fairness to prevailing plaintiffs or unjustly accused defendants.<sup>233</sup>

#### a. Deter Frivolous and Unreasonable Litigation

While access to the courts remains fundamental, another important goal of the New Rule is attempting to decrease frivolous and unreasonable litigation in order to alleviate the congestion these suits bring to court dockets.<sup>234</sup> This congestion, arising from an overwhelming number of both meritorious and frivolous cases, makes it difficult to hear the strongest and most meritorious cases within a reasonable amount of time.<sup>235</sup> "The bottom line cause of the frivolous litigation problem . . . is a cost structure that tends to make lawsuits in the United States 'easy to maintain and tolerable to lose.'"<sup>236</sup> This cost

---

the parties' relative positions in the litigation, even if not on the extreme fringes. Thus, with fee-shifting being at the judge's discretion, parties in close cases should not fear being slammed with a large portion of the opponent's fees, if any.

229. Landsman, *supra* note 8, at 262. As was the goal of the early American legislatures, keeping the courts open to all people, rich and poor, must be the basis of American jurisprudence. *Id.*

230. Vargo, *supra* note 4, at 1634-35 ("Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting such actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."). The New Rule will allow such actions to be initiated and will allow parties to evaluate the strength of their claim before concern of paying their opponent's fees becomes realized.

231. Charrier, *supra* note 94, at 321 (quoting Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 43 (1989)).

232. Rowe, *supra* note 7, at 888.

233. Maggs & Weiss, *supra* note 7, at 1936.

234. Aranson, *supra* note 119, at 762. The contingency fee system has the effect of "clogging the legal system with litigation and resulting in costly delays for society." *Id.*

235. Klausner, *supra* note 15, at 301-02.

236. *Id.* at 302 (Internal citations omitted).

structure allows the contingency lawyer to take many cases in order to diversify his case portfolio, as some frivolous suits will result in settlements and finance the frivolous suits yielding no return.<sup>237</sup>

The New Rule seeks to eliminate these frivolous suits that yield no return through settlement. To show how this can be done, it must be explained how these suits make it to trial in the first place. Individuals bring frivolous suits, and lawyers accept them, based on the chance that the defendants will be pressured into settling even though the claim would clearly not prevail at trial.<sup>238</sup> Frivolous claims are essentially “unmeritorious cases brought with the intention of securing settlement from the defendant since the defendant’s unrecoverable lawyer fees could run higher than the amount the plaintiff will accept to settle the case.”<sup>239</sup>

Thus, the New Rule’s imposition of “loser pays” consequences on cases dismissed, ruled on summary judgment or directed verdict, or deemed frivolous by the judge, may significantly help alleviate this problem of brave-heart plaintiffs who pursue frivolous claims after settlement fails simply because they know they will not have to pay the winning defendant’s legal fees.<sup>240</sup>

*b. Provide Fairness to Prevailing Plaintiffs or Unjustly Accused Defendants*

Providing fairness is a limited spin-off of the result the “English rule” has of full compensation to prevailing plaintiffs and exoneration of unjustly accused defendants as the New Rule will normally only provide partial fees and expenses upon the judge’s determination.<sup>241</sup> While some may argue that, because the New Rule will only achieve this goal on a part time basis it is not worth implementing, the New Rule should behave more fairly on an overall basis than both the American and English rules, which have been thoroughly criticized for simply not being effective.<sup>242</sup> Forcing defendants to bear all or a

237. Aranson, *supra* note 119, at 761-62.

238. Angela Wennihan, *Let’s Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1658 (1996).

239. *Id.* (Internal citations omitted).

240. *See id.* at 151. The New Rule is aimed at solving the problem created by the “American rule” when a lawyer took a case, which has now weakened, but he is “unable to persuade the client—who has little to lose if not threatened with adverse fee shifting—to drop the case.” *Id.* *See also* Aranson, *supra* note 119, at 761-62. This aim is in addition to the goal of preventing lawyers from diversifying their caseloads in order to profit off successful frivolous suits, which finance unsuccessful frivolous suits.

241. Rowe, *supra* note 7, at 888 (discussing the wanted effect of fuller compensation of victorious plaintiffs); *see also* Maggs & Weiss, *supra* note 7, at 1936 (discussing how defendants are forced to bear their own costs even when the suit brought against them was without merit). By providing fees and expenses via the judge’s discretion, the New Rule seeks to apply “English rule” principles in a limited context.

242. Maggs & Weiss, *supra* note 7, at 1936. “[I]t remains true that the current fee system does not work as well as it should. Under the American rule, attorneys fees can devour judgments won by plaintiffs and can also force defendants to pay huge sums of money even

portion of the plaintiff's legal fees when their defense is deemed to be meritless and without justification, as determined by the stage at which judgment occurs or by the court, will work to fairly and fully compensate the plaintiff for a case that should never have been filed.<sup>243</sup> Likewise, the New Rule will work to provide the same justice to victorious and wholly justified defendants.<sup>244</sup> Meanwhile, the New Rule's imposition of costs should not work to deter meritorious litigation, a valid concern, because this imposition of costs will not necessarily be total indemnity, but instead will be based on the merits of each individual position.<sup>245</sup>

## 2. Concerns

There are two main concerns in the formation and adoption of the New Rule: 1) its effect on individuals' accessibility to the American courtroom,<sup>246</sup> and 2) the difficulties judges will encounter in determining what is, and what is not, frivolous and unreasonable litigation.<sup>247</sup>

### a. *The New Rule's Effect on the Accessibility of American Courts*

Accessibility concerns, while not wholly unfounded, do not have a strong base because the undertone of the New Rule, a contingency fee orientation, is

though they have done nothing wrong." *Id.* See also James H. Cheek III, *Attorneys Fees: Where Shall the Ultimate Burden Lie?*, VAND. L. REV. 1216, 1230 (1967).

[T]he contingent fee has been devised to aid those who cannot afford litigation, but in many ways its results have been unsatisfactory, since the contingent fee has been a major impetus of litigation and, thus, of the court congestion which plagues our judicial system. Our system of fees, which in effect denies the basic rights to many by allowing the innocent injured party to go uncompensated, creates nothing but dissatisfaction and disrespect for the law and the legal profession.

*Id.*

It is important to clarify here that the phrase "innocent injured party" does not refer to an injured plaintiff, but the victorious party who only experiences limited victory because they have to pay their legal fees. See also M. Stuart Madden, *The Vital Common Law: It's Role in a Statutory Age*, 18 U. ARK. LITTLE ROCK L. REV. 555, 565 (1996) ("[A] loser pays protocol represents a 'fee shifting' approach which has been demonstrated repeatedly to be ineffective, inefficient, and unfair in working its purported goal."); see also Honorable Edward R. Becker, Moderator, Theodore Olson, et al., *Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore?*, 41 N.Y.L. SCH. L. REV. 431, 449 (1997) ("'Loser pays' does not work because plaintiffs do not have the money to pay when they lose.").

243. See Davis, *supra* note 57, at 404. This is in line with the old Roman law that an unjustified party should make whole his adversary. See *id.* It also is in line with the premise that a victory is not complete when the costs of obtaining the victory are not covered. *Id.* at 405.

244. Maggs & Weiss, *supra* note 7, at 1936.

245. See Goodhart, *supra* note 62, at 860. The New Rule seeks to apply Order 65's imposition of costs as a discretionary decision of the judge instead of an automatic following of the event.

246. Rowe, *supra* note 204, at 329.

247. Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529 (1997).



rooted in the long-standing view that accessibility to the courts is essential.<sup>248</sup> The New Rule's contingency fee basis works precisely to secure a "fundamental principle of our legal system—preservation of access to the courts."<sup>249</sup>

*b. The Difficulties in Assessing which Claims are Frivolous*

A more valid concern of the New Rule is the difficulties judges will encounter in determining which suits are frivolous and unreasonable and which suits are not.<sup>250</sup> "Numerous judges [have] found it difficult to get a fix on the meaning of 'frivolous' litigation, and the formulations range from the forgiving, to the unforgiving, to the 'middle.'"<sup>251</sup>

Three possible definitions for what constitutes a frivolous claim follow here. The first possibility is:

[a] suit is frivolous (1) when a [party proceeds] knowing facts that establish complete (or virtually complete) absence of merit as an objective matter on the legal theories alleged, or (2) when a [party proceeds] without conducting a reasonable investigation which, if conducted, would place the suit in prong (1).<sup>252</sup>

A second possible definition is: "[i]t seems reasonable to characterize a frivolous suit as an action where both sides know that it is very unlikely that a trial outcome will favor [one of the parties]."<sup>253</sup> Finally, a third possible definition can be gleaned from Black's Law Dictionary: a "groundless lawsuit with little prospect of success."<sup>254</sup>

Ultimately, judges should be allowed to use their discretion to determine which suits are frivolous, using the standard applied to the determination of frivolous appeals, which is a case-by-case basis.<sup>255</sup>

248. Landsman, *supra* note 8, at 262.

249. Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 819 (1984).

250. Bone, *supra* note 247, at 529 ("Most commentators use the term 'frivolous suit' without defining it, as if the meaning were obvious to all. But the concept is quite slippery.").

251. Maureen N. Armour, *Practice Makes Perfect: Judicial Discretion and the 1993 Amendments to Rule 11*, 24 HOFSTRA L. REV. 677, n.235 (1996); *see, e.g.*, In re Kunstler, 914 F.2d 505, 516 (4th Cir. 1990) (adopting a harsh standard for imposing sanctions), *cert. denied*, 499 U.S. 969 (1991); United States v. Stringfellow, 911 F.2d 225, 226 (9th Cir. 1990) (adopting a relatively forgiving standard).

252. Bone, *supra* note 247, at 533.

253. I.P.L. P'ng, *Strategic Behavior in Suit, Settlement, and Trial*, 14 BELL J. ECON. 539, 548 (1983).

254. BLACK'S LAW DICTIONARY 668 (6<sup>th</sup> ed. 1990).

255. Alan G. Bryan, *Arkansas Rule of Appellate Procedure 11: What Should the Practitioner Expect?*, 53 ARK. L. REV. 661, 676 (2000). Author defines 'frivolous appeal' as

### 3. *Limitation of the New Rule*

The New Rule's main limitation is that it will have an uncertain effect on the rate of settlements and parties' temptation to proceed to trial in order to have their legal fees paid, either entirely or partially, by the losing party.<sup>256</sup> As has been demonstrated above, the effect of adhering to fee-shifting policies demonstrates neither a positive nor negative impact on the settlement rate.<sup>257</sup> This ambiguity rests in the subjective nature of parties' attitudes and outlooks toward trial, and the New Rule's impact cannot be measured in general terms regarding parties' subjective opinions about probabilities for victory or higher or lower stakes.<sup>258</sup> Instead, the New Rule's impact on settlements will be specific to the individual lawsuit, as it will turn on each party's assessment of the strength of their case winning at trial.<sup>259</sup>

## VI. CONCLUSION

As with most theories and practices, both the "American rule" and the "English rule" have positive and negative attributes. It is the goal of this Note to forward a New Rule capitalizing on the positives of each rule and minimizing the negatives.

First and foremost, the New Rule must preserve the fundamental quality of American jurisprudence that justice is available to everyone via open courts. Implicit in this open court system, Americans must continue to be able to use the courts as a way of pursuing positive social reforms without having to bear the financial burden of advancing America into a better age of political and social theory.

Inherent in this primary goal of open access is the concern that possible fee-shifting could deter some parties from bringing meritorious claims or defenses. The structure of the New Rule attempts to safeguard against this deterrence by allowing parties to investigate their claims before the threat of paying the opposing party's legal fees becomes realized. Even then, the default rule provides an assurance that if the claim or defense contains merit, such a penalty is not a credible threat.

---

"one with no reasonable legal or factual basis." *Id.* In Arkansas, an objective standard is used on a case-by-case basis to determine whether an appeal is frivolous. *Id.*

256. Posner, *supra* note 182, at 428-29; see also Schmalbeck & Myers, *supra* note 197, at 980 (arguing fee-shifting increases settlements). *But see* Schwarzer, *supra* note 208, at 148; see also Hylton, *supra* note 216, at 1079 (arguing fee-shifting decreases settlements); Sherman, *supra* note 203, at 1869 (discussing parties discounting the costs of trial because they believe their fees will be covered by the losing party).

257. See *infra* note 223 and accompanying text; see also John J. Donohue III, *The Effects of Fee Shifting on the Settlement Rate: Theoretical Observations on Costs, Conflicts, and Contingency Fees*, 54 LAW & CONTEMP. PROBS. 195, 222 (Summer 1991) ("Until a better empirical foundation has been established, the existing theoretical arsenal is still too weak to resolve many of the ultimate questions of interest.").

258. Mause, *supra* note 218, at 31.

259. *Id.*

Following principles of fairness and justice, American jurisprudence should also fully compensate plaintiffs whose claims are sufficiently substantial that litigation should not have been pressed upon them. It is not fair to rob an injured party of a portion of their recovery simply because the party in the wrong held out for an unjustified trial. Likewise, it is not fair to impose a financial burden on defendants who were clearly right in their actions or behaviors. This is especially true when coming at the hands of a reckless plaintiff who takes the American judicial system out for a spin simply because it is relatively inexpensive to do so. Furthermore, making parties financially responsible for unreasonable claims and defenses will not only release wholly justified victorious parties from their financial burdens, but will also free up the courts to hear more meritorious cases, ones deserving the rigors of American justice.

The greatest concern centers around the uncertainty of how “frivolous” will be defined. While this is one unknown that remains, it is reasonable to allow the providence of the court to demonstrate its capabilities. In addition, states can enact legislation defining “frivolous” and provide standards and tests to make such determinations.

While many commentators disagree on the smaller points in the “American rule” “English rule” debate, most will agree that neither system functions efficiently or equitably by itself. Thus, the structure of the New Rule as a hybrid, while in its infancy and most simplistic form, attempts to forward a system that leaves the courtroom open, deters frivolous litigation without unjustly deterring meritorious litigation and justly compensates victorious parties based on the merits of each case. Perhaps no one rule can accomplish these goals, but it is time to get off the overcrowded paper sidelines of legal commentary and into the game of legal practice.

