

THE PRICE OF JUSTICE: ALLOCATING ATTORNEYS' FEES IN CIVIL LITIGATION

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I. INTRODUCTION

Imagine you are a defendant in a civil lawsuit. Your adversary's claim is legally weak, while not falling to the level of frivolous. Your lawyer advises that you have an excellent chance of prevailing on the merits, yet to your astonishment, your attorney advises you to settle because the cost of defending the claim will quickly exceed a reasonable settlement offer.¹ Conversely, imagine you are a civil plaintiff who has suffered a clear and cognizable harm of \$1000. After informing you that you are entitled to recovery, your lawyer engages in the difficult and delicate task of explaining why the cost of actually obtaining your legal remedy is greater than the value of the recovery itself.

These simple examples illustrate the all too realistic ramifications of the American Rule, under which each party bears their respective attorneys' fees regardless of the ultimate outcome of the litigation.² Numerous judicial and statutory exceptions to the American Rule attempt to cure the potential inequities the rule creates by allowing litigants, in specifically enumerated instances, to allocate some or all of

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¹ See Ted Sichelman, *Why Barring Settlement Bars Legitimate Suits: A Reply to Rosenberg and Shavell*, 18 CORNELL J.L. & PUB. POL'Y 57, 58 (2008) ("[T]he defendant will ordinarily concede to settlement, regardless of the relative merits of the plaintiff's case. Otherwise, the defendant would pay just as much (or more) in litigation costs in order to defend the suit for the mere prospect of paying no damages.").

² See Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 435.

their attorneys' fees (fee shifting) to the opposing party.³ Critics of the American Rule claim the rule's exceptions have riddled it so much that the resulting patchwork of guidelines is unrecognizable and unmanageable.⁴ These critics advocate abolishing the American Rule and adopting a system in which the losing litigant bears both parties attorneys' fees (the English Rule),⁵ or a system in which the litigants' pretrial behavior awards the attorneys' fees based on statute (offer-of-judgment rule).⁶ Fee-shifting statutes are either one-way, meaning the parties are treated asymmetrically in that only one party is entitled to shift his or her attorneys' fees to their opponent, or two-way, in which parties are equally entitled to fee shifting.⁷

This Article examines the benefits and shortcomings of several approaches to allocating attorneys' fees between civil litigants. First, this Article examines the importance of encouraging efficient settlements and the role attorneys' fees play in influencing settlement behav-

³ See *id.*; see, e.g., Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006) (allowing the prevailing plaintiff to recover attorneys' fees when bringing a claim under certain enumerated federal statutes, including federal civil rights claims).

⁴ Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551, 557 (2009) (describing current fee-shifting attempts as "produc[ing] 'a senseless patchwork of fee shifting that flies in the face of the fundamental purpose of the Federal Rules' to foster uniform procedure for federal courts" (quoting *Marek v. Chesny*, 473 U.S. 1, 24 (1985)) (Brennan, J., dissenting)). Currently, there are over 200 federal and almost 2000 state fee-shifting statutes. David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 588 (2005) (citing John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1588 (1993)). There are over 200 statutes in Florida alone allowing for the award of attorneys' fees in certain situations. FLA. BAR, ATTORNEY'S FEES (2009), available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/9303C88F73598EBE85256B29004BD178/\\$FILE/04-%20Attorneys%20Fees%20-Eng-W.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/9303C88F73598EBE85256B29004BD178/$FILE/04-%20Attorneys%20Fees%20-Eng-W.pdf?OpenElement).

⁵ Root, *supra* note 4, at 589.

⁶ Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 156 (2006).

⁷ Jennifer M. Smith, *Credit Cards, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War*, 61 ME. L. REV. 171, 187 (2009).

ior. Part II discusses the interests and competing concerns that a successful attorneys' fee allocation system must address. The remainder of this Article analyzes traditional (American/English Rules) and reform (offer-of-judgment) approaches to allocating attorneys' fees, in light of the considerations discussed in Part II. Specifically, Part IV examines the federal offer-of-judgment statute codified in Federal Rule of Civil Procedure 68 and several comparable state offer-of-judgment statutes.

II. COMPETING CONCERNS

A. *Importance of Efficient Settlements and the Role of Attorneys' Fees*⁸

Two of the main, yet highly related, issues plaguing the judicial system in the United States are the ever-increasing costs of litigation and the congestion of the courts.⁹ Since 1951, tort litigation costs in the United States have grown at an average rate of 8.9% per year, costing Americans \$254.7 billion in 2008.¹⁰ In addition, the sheer volume of cases filed massively overburdened the U.S. court system.¹¹ In 2009, U.S. district courts received 363,744 new case filings in addition to the 369,366 cases still pending from the previous year.¹² The number of

⁸ Part II.A discusses the interests fee allocation laws serve at the macrolevel, meaning the U.S. court system as a whole. Part II.B focuses more on the microlevel interests of the individual litigants.

⁹ See Daniel Glimcher, Note, *Legal Dentistry: How Attorney's Fees and Certain Procedural Mechanisms Can Give Rule 68 the Necessary Teeth to Effectuate Its Purposes*, 27 CARDOZO L. REV. 1449, 1449-50 (2006).

¹⁰ TOWERS PERRIN, 2009 UPDATE ON U.S. TORT COST TRENDS 3 (2009), available at http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf; see also Laura Inglis et al., *Experiments on the Effects of Cost-Shifting, Court Costs, and Discovery on the Efficient Settlement of Tort Claims*, 33 FLA. ST. U. L. REV. 89, 90 (2005) (performing this same analysis, but with older statistics).

¹¹ Glimcher, *supra* note 9, at 1449-50.

¹² *Federal Court Management Statistics*, U.S. COURTS (2009), <http://www.uscourts.gov/fcmstat/index.html> [hereinafter U.S. COURTS]. In 2009, civil cases represented approximately 76%, or 276,397, of the new case filings in U.S. district courts. *Id.*; see also Glimcher, *supra* note 9, at 1449 (performing this same analysis, but with older statistics).

total filings increased 3.9% from 2008.¹³ With 678 available district court judges, this equated to 537 new filings per judge.¹⁴ This overburdening of the U.S. court system resulted in an average of 25.3 months between the filing of a civil lawsuit and a trial in 2009.¹⁵

Based on these alarming statistics, courts have strong interests in (1) conserving scarce judicial resources by encouraging civil litigants to reach quick and efficient settlements and (2) discouraging frivolous lawsuits.¹⁶ The very nature of the judicial process creates powerful incentives for litigants to resolve their conflicts through nonadjudicated methods.¹⁷ “[F]iling fees, pleading requirements, . . . highly formalized presentation of evidence,” and overcrowded courts make the trial process lengthy and expensive.¹⁸ Therefore, it is not surprising that approximately “98% of civil cases filed in federal courts do not go to trial.”¹⁹

In addition to statutes mandating the use of alternative dispute resolution methods,²⁰ the allocation of attorneys’ fees can serve as a

¹³ U.S. COURTS, *supra* note 12. “[I]n 1940, there were only approximately 35,000 civil cases filed in the federal courts.” Glimcher, *supra* note 9, at 1450. It is estimated that if filings continue to grow at the current rate, “by 2064 there will be approximately 2,007,799 civil cases filed in the federal courts each year.” *Id.* at 1449.

¹⁴ U.S. COURTS, *supra* note 12; *see also* Glimcher, *supra* note 9, at 1450 (noting that, based on statistics in 2002, “If each judge worked year-round and spent one full day on each new civil filing, [the judge would fail to reach each new case, and] would have no time to spend on any pending civil case, pending criminal case, criminal filing, or any other non-adjudicatory matters each year”).

¹⁵ U.S. COURTS, *supra* note 12. Note that this 25.3 month period is from the filing date. *Id.* The length between the occurrence of the actual incident and the date of trial is often much longer. Yoon & Baker, *supra* note 6, at 156 n.1 (citing George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 532 (1989)) (estimating delay between the date of the incident creating the claim and trial in a civil suit at 5.68 years).

¹⁶ *See* Inglis et al., *supra* note 10, at 91.

¹⁷ Yoon & Baker, *supra* note 6, at 155.

¹⁸ *Id.* at 155-56.

¹⁹ Lewis & Eaton, *supra* note 4, at 557 (citing Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332, 336 & n.18 (2007)).

²⁰ *See, e.g.*, FLA. R. CIV. P. 1.700 (allowing the presiding judge to “enter an order referring all or any part of a contested civil matter to mediation or arbitration”).

powerful mechanism to further courts' interests in encouraging settlement and deterring frivolous lawsuits.²¹ The likelihood of success at trial is often extremely difficult to predict with any certainty.²² In evaluating available alternatives, the certainty of settlement even if at a less-favorable amount than potentially available at trial, theoretically becomes more attractive when a litigant considers the potential of being forced to pay both parties' attorneys' fees upon an unfavorable outcome at trial.²³

B. Goals of a Fee Allocation System

In addition to the goals of encouraging settlements and deterring frivolous lawsuits, fee allocation systems should seek to advance interests of the individual litigants and society in general. While there is no comprehensive list of interests a fee allocation system must serve, the following factors represent core values of American jurisprudence. At a minimum, a fee allocation system should: (1) provide equal access to justice on the merits of the claim, regardless of a litigant's financial status;²⁴ (2) allow private litigants to use the courts to institute societal reform;²⁵ (3) deter abuses of the litigation process;²⁶ (4) minimize unjust expenses for a successful litigant;²⁷ and (5) provide clear and manageable guidelines.²⁸

First, perhaps no ideal is more central to a nation founded on equality than the notion that everyone should have equal access to the

²¹ Inglis et al., *supra* note 10, at 91.

²² Sichelman, *supra* note 1, at 81-83.

²³ Root, *supra* note 4, at 607.

²⁴ *Id.* at 598.

²⁵ *Id.* at 594. Florida's offer-of-judgment statute expressly recognizes the role of private litigants in instituting societal reform, by allowing the court to consider "[w]hether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties" in determining the reasonableness of the amount of attorneys' fees awarded. FLA. STAT. § 768.79(7)(b)(5) (1997).

²⁶ Root, *supra* note 4, at 595-96.

²⁷ *Id.* at 597-98.

²⁸ *See* Lewis & Eaton, *supra* note 4, at 556-57 (indicating many lawyers surveyed confessed to being unaware of how the federal offer-of-judgment rule operated, and therefore never attempted to use it); *see also* Glimcher, *supra* note 9, at 1453 (noting that the federal offer-of-judgment rule, Federal Rule of Civil Procedure 68, is rarely used due to its complexity and ambiguity).

justice system.²⁹ The Supreme Court affirmed this value in holding it “is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’”³⁰ Therefore, any system of redistributing the burdens of initiating or defending a lawsuit must deter potential litigants solely on the merits of the claim, and not the relative financial resources of the parties.³¹

Second, a fee allocation system must allow private litigants to use lawsuits as a method of ensuring compliance with federal laws, initiating societal reform, and advancing public policy.³² The underlying theory is that courts should not force an individual to pay “the cost of advancing American public policy.”³³ Often, private lawsuits to enforce individual rights are necessary due to administrative limitations and the impracticality of government involvement in discrete occurrences.³⁴ In addition, plaintiffs seeking to vindicate individual rights are generally limited in financial resources and requesting injunctive non-monetary relief.³⁵ Therefore, a system of allocating attorneys’ fees must recognize the desirability of such lawsuits and remain mindful of Congress’s concern that “if the cost of private enforcement becomes too great, there will be no private enforcement.”³⁶

²⁹ Root, *supra* note 4, at 598.

³⁰ *Id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

³¹ *See id.* at 608.

³² *See id.* at 594. Examples of lawsuits that “compel a higher public purpose” commonly include: civil rights suits, consumer protection suits, employment suits, and environmental protection suits. *Id.* at 588. These examples are four of the main categories of statutory fee-shifting exceptions to the American Rule; thus, a plaintiff may generally recover costs and attorneys’ fees incurred in bringing a successful lawsuit. *Id.*

³³ *Id.*

³⁴ Ashley E. Compton, *Shifting the Blame: The Dilemma of Fee-Shifting Statutes and Fee-Waiver Settlements*, 22 *GEO. J. LEGAL ETHICS* 761, 764 (2009).

³⁵ *Id.*

³⁶ *Id.* (quoting S. REP. NO. 94-1011 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5913). Congress has expressly stated that private litigants “should not be deterred from bringing good faith actions to vindicate . . . fundamental rights . . . by the prospect of having to pay their opponent’s counsel fees should they lose . . .” Lewis & Eaton, *supra* note 4, at 553 (quoting The Civil Rights Attorney’s Fees Awards Act of 1976, S. REP. NO. 94-1011, at 5, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912). The Supreme Court has also sought to prevent costs from deterring the private enforcement of civil liberties by interpreting a federal fee-shifting provision for civil rights lawsuits

The third and fourth interests aim to promote equitable outcomes and general notions of fairness in the litigation process.³⁷ While it is impossible to prevent all advantages gained through improper uses of litigation procedures, a fee allocation system should seek to prevent parties from using their superior financial resources to force the opposing party to accept a settlement on grounds other than the merits of the claim.³⁸ In addition, a system should aim to allow the prevailing party to realize the true benefit of their legal entitlement by minimizing the expenses associated with pursuing or defending a legally justified position.³⁹

Finally, while not necessarily a core American value, any method of fee allocation must provide litigants and attorneys with a clear understanding of its operation and certainty in its outcome.⁴⁰ In order to influence settlement behavior, a system must produce a reasonably definite outcome so parties feel confident relying on its operation in formulating their litigation strategy.⁴¹

as only allowing prevailing plaintiffs to recover attorneys' fees; therefore, prevailing defendants are prohibited from collecting attorneys' fees unless the lawsuit was brought in bad faith. *Id.* (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978)).

³⁷ See Root, *supra* note 4, at 598.

³⁸ See Philip J. Havers, Student Article, *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, 624 (2000). For example, under a system in which each party pays their own attorneys' fees, a defendant may make excessive discovery requests and file a multitude of motions, knowing that it will be less expensive for the plaintiff to settle immediately than to continue to pursue the lawsuit, even if the plaintiff has extremely favorable odds of prevailing on the merits at trial. See Sichelman, *supra* note 1, at 83.

³⁹ See Root, *supra* note 4, at 597-98 ("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 behaviors are legally justified."); *supra* Part I (providing examples of how expenditures on attorneys' fees can quickly moot any net benefit for a legal right).

⁴⁰ See *supra* note 28.

⁴¹ Havers, *supra* note 38, at 644.

C. *Difficulties in Measuring Success and Uncontrollable Variables*

One of the main problems in evaluating the effect of fee allocation laws on desirable settlement behavior is a lack of empirical data.⁴² Furthermore, the prevalence and effect of uniquely local attributes on settlement behavior make it difficult to form broad generalizations regarding the available data.⁴³ These local variables include the area's legal culture, as well as state statutes affecting liability, such as "no-fault laws, . . . [and] contributory negligence laws."⁴⁴ Legal culture refers to a population's predisposition toward formal or informal legal mechanisms.⁴⁵ The political environment, the "area's rural, urban, or suburban character," and "the ethnic background of its residents," all influence legal culture, making it "difficult, if not impossible, to quantify."⁴⁶

The available theoretical models on the influence of fee allocation laws are also limited in utility because they generally make broad and unlikely predictions about the behavior of participants in the litigation process.⁴⁷ Most notably, theoretical predictions commonly assume litigants behave rationally and have all the information necessary to make decisions.⁴⁸ Rational behavior means a party will settle at any amount more favorable than its predicted outcome at trial.⁴⁹ A litigant's unrealistic beliefs in the likelihood of a favorable outcome at trial, inaccurate or incomplete information, and personal view of potential fee

⁴² Inglis et al., *supra* note 10, at 92.

⁴³ See Jackson Williams, *Effects of Attorney Fee Shifting Laws on Claiming Behavior*, 34 POL'Y SCI. 347, 352 (2001).

⁴⁴ *Id.*

⁴⁵ *Id.* Williams describes legal culture as a "degree of adversarial legalism" indicating whether people are more likely to pursue formal proceedings, alternative dispute resolution methods, or simply accept the wrong. *Id.* For example, England is generally described as "less litigious than America." Root, *supra* note 4, at 605. Adjusting for population differences, there are approximately twenty times more civil lawsuits in America than in England. *Id.*

⁴⁶ Williams, *supra* note 43, at 352.

⁴⁷ See, e.g., Sichelman, *supra* note 1, at 60-63 (discussing misguided assumptions of a proposal for deterring frivolous lawsuits based on theoretical analysis).

⁴⁸ *Id.* at 62.

⁴⁹ See Yoon & Baker, *supra* note 6, at 160.

shifting as a gain or a loss can all inhibit rational behavior.⁵⁰ If a litigant has an inaccurately favorable perception of the likely outcome at trial, the litigant will refuse to settle at a realistically rational amount.⁵¹ Furthermore, litigants rarely have all of the information necessary to make perfectly rational decisions and therefore must make critical decisions in light of uncertainty.⁵² The way individual litigants view the risk created by this uncertainty may also prevent them from behaving rationally.⁵³ People generally accept small, certain gains over larger, riskier gains (risk aversion) but will take the risk of paying a significantly larger amount to avoid a smaller certain loss (loss aversion).⁵⁴ Most theoretical models assume litigants are neither risk nor loss averse (risk neutral), when in reality a litigant's perception of the likelihood (risk) of being forced to pay the opposing counsels' fees (loss), or having the litigant's own legal fees paid (gain), can significantly affect the litigant's decision to settle.⁵⁵

III. TRADITIONAL THEORIES OF ALLOCATING ATTORNEYS' FEES

A. *The American Rule*

Under the American Rule, a prevailing litigant may not recover their expenditures on fees from the opposing party.⁵⁶ Originally, colonial America adopted the English Rule and allowed a prevailing party to

⁵⁰ See Sichelman, *supra* note 1, at 84-85. See generally ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 121-25 (2d ed. 2006) (describing how biases interfere with decision making).

⁵¹ See Sichelman, *supra* note 1, at 84-85. See generally COCHRAN ET AL., *supra* note 50, at 126-33 (describing circumstances that can bias a litigant's assessment of his or her likelihood of success).

⁵² Sichelman, *supra* note 1, at 81-82.

⁵³ *Id.* at 84-85.

⁵⁴ COCHRAN ET AL., *supra* note 50, at 126. A risk averse person would accept a definite \$20 gain rather than take a one-in-four chance at receiving \$100 (with a three-in-four chance of receiving nothing), even though accepting the risk has a mathematically higher value of \$25 [(\$100 x 25%) + (\$0 x 25%) + (\$0 x 25%) + (\$0 x 25%)]. *Id.* A loss averse person would risk one-in-four odds of paying \$100 (with three-in-four odds of paying nothing) rather than pay a definite loss of \$20, even though paying the definite amount is mathematically cheaper for the reasons noted above. *Id.*

⁵⁵ See Sichelman, *supra* note 1, at 62, 87.

⁵⁶ Dobbs, *supra* note 2, at 435.

collect the cost of attorneys' fees from the party's opponent.⁵⁷ During this period, legislation heavily controlled the amount attorneys could charge.⁵⁸ The English Rule lost favor as attorneys desired to charge higher rates and public opinion came to view awarding fees as an unjust penalty.⁵⁹ In 1796, the Supreme Court announced what is now known as the American Rule, when it denied a prevailing party from collecting attorneys' fees because such an award would be contrary to "the general practice of the United States."⁶⁰ Proponents of the American Rule view awarding attorneys' fees as a penalty for losing and argue, "individuals should not be penalized for exercising their right to bring suit, 'even if they should lose.'"⁶¹

Multiple statutory exceptions to the American Rule began to emerge in the twentieth century.⁶² Three major areas of exceptions are sanctions for bad faith, contractual agreements between the parties, and statutory exceptions based on the substantive claim, such as federal civil rights suits.⁶³ However, critics argue these exceptions dilute the benefit of the American Rule's certainty, increase legal costs, and further burden the courts because they spur secondary litigation over the propriety of awarding attorneys' fees in a given case.⁶⁴

Proponents claim the American Rule encourages settlement and discourages frivolous lawsuits while still keeping the courts available to everyone, because parties will not proceed to trial on a weak claim with hopes of having the opposing party pay their legal fees.⁶⁵ Litigation is extremely expensive under a loser pays system; therefore, an individual

⁵⁷ Smith, *supra* note 7, at 187.

⁵⁸ *Id.*

⁵⁹ *Id.*; Root, *supra* note 4, at 584-85.

⁶⁰ Root, *supra* note 4, at 585 (quoting *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796)).

⁶¹ Lindsey Simmons-Gonzalez, Comment, *Abandoning the American Rule: Imposing Sanctions on an Empty Head Despite a Pure Heart*, 34 OKLA. CITY U. L. REV. 307, 308 (2009) (quoting 1 ROBERT L. ROSSI, ATTORNEY'S FEES § 6:1 (3d ed. 2007)). However, if a party brings a frivolous suit or uses procedures in bad faith, the court has discretion to award the opposing party attorneys' fees as a sanction. *Id.* at 308-09; FED. R. CIV. P. 11(c)(2), 37(b)(2)(C).

⁶² Simmons-Gonzalez, *supra* note 61, at 308.

⁶³ See *supra* notes 3-4 and accompanying text.

⁶⁴ See Dobbs, *supra* note 2, at 436.

⁶⁵ See Root, *supra* note 4, at 609.

with a valid, yet not guaranteed, claim may never file a lawsuit because, with their limited financial means, they simply cannot afford to lose.⁶⁶ Critics of the American Rule present two major counterarguments. First, the American Rule's guaranteed expenses of one's own legal fees is arguably just as likely to discourage financially disadvantaged claimants, while simultaneously providing a bargaining advantage to those with superior resources.⁶⁷ Second, the American Rule fails to fully compensate prevailing parties because they must unjustly pay to receive what they are legally entitled to.⁶⁸

To nullify these concerns, perhaps the most beneficial, and arguably most detrimental, feature of the American Rule has developed—contingent fees.⁶⁹ In a contingency fee system, the plaintiff's attorney essentially agrees to provide financing and insurance for the plaintiff's lawsuit in exchange for a percentage of the plaintiff's recovery.⁷⁰ Therefore, if the plaintiff does not collect anything, he is not obligated to compensate his attorney.⁷¹ A successful plaintiff's attorney will generally be entitled to a larger compensation under a contingency fee system than under an hourly rate, due to the attorney assuming the risk of receiving no payment at all.⁷² The contingency fee system ensures those with valid claims will not be discouraged from pursuing their legal rights due to personal financial limitations.⁷³ In addition, contingency fees allow individual plaintiffs to challenge large institutional defendants and use litigation as a means for initiating societal reform.⁷⁴

⁶⁶ *Id.* at 607-08.

⁶⁷ Havers, *supra* note 38, at 622.

⁶⁸ *See* Dobbs, *supra* note 2, at 435; *see also* Root, *supra* note 4, at 604-05 (stating the English Rule allows the prevailing party to be fully compensated).

⁶⁹ *See* Root, *supra* note 4, at 593. A legal system in which both parties bear their own attorneys' fees regardless of outcome is a uniquely American phenomenon. Williams, *supra* note 43, at 348. Furthermore, "the contingency fee system is banned in most countries outside of the United States." Root, *supra* note 4, at 596.

⁷⁰ Root, *supra* note 4, at 592-93; *see also* Havers, *supra* note 38, at 624.

⁷¹ Havers, *supra* note 38, at 624.

⁷² *Id.* at 624-25 (stating the percentage an attorney receives is approximately "one-third for pretrial settlement, forty percent if it goes to trial and up to fifty percent if appeals are required").

⁷³ *Id.* at 624.

⁷⁴ *See id.*; Root, *supra* note 4, at 594. "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.'" Root,

Critics of the contingency fee system claim that it encourages frivolous litigation, creates large incentives for unethical behavior, and fails to fully compensate prevailing parties.⁷⁵ Attorneys can easily spread their risk across multiple cases, weakening the argument that the system discourages frivolous lawsuits because attorneys will not take a case if they anticipate receiving no compensation.⁷⁶ By diversifying their caseload, if even one plaintiff receives a substantial recovery, an attorney can compensate for multiple losses.⁷⁷ The attorney's personal stake in the case may also encourage unethical behavior, conflicts of interest between the attorney and client, and the pursuit of unconscionably large settlements.⁷⁸ Mistrust may corrupt the attorney-client relationship if the client receives less net compensation than anticipated, or the attorney collects a large fee relative to the work performed.⁷⁹ If a defendant offers to settle immediately, an attorney may be tempted to accept the offer and receive a large payday for merely filing a complaint, even though the attorney knows the client is likely to receive a larger payment at the end of a lengthy and work-intensive trial.⁸⁰ The attorney-client relationship is further strained because, while contingency fees were originally developed to alleviate a plaintiff's financial burden in pursuing risky litigation, large contingency fees are becoming the standard method of compensating many attorneys even in cases where the attorney assumes little risk because success on the merits is likely.⁸¹ Finally, while contingency fees help plaintiffs gain access to the courts, the system still fails to fully compensate prevailing parties,

supra note 4, at 594 (quoting Lester Brickman, *Contingent Fees without Contingencies: Hamlet without the Prince of Denmark?*, 37 UCLA L. REV. 29, 38 (1989)).

⁷⁵ Root, *supra* note 4, at 594; *see also* Havers, *supra* note 38, at 625-31 (discussing the ethics of the contingency fee system).

⁷⁶ Root, *supra* note 4, at 596.

⁷⁷ *Id.* Therefore, contingency fees may encourage attorneys to initiate multiple lawsuits they would not ordinarily pursue based on the assumption that they only need one to be successful. *See id.*

⁷⁸ Havers, *supra* note 38, at 625-31.

⁷⁹ *Id.* at 626-27.

⁸⁰ *Id.* at 626.

⁸¹ *See id.* at 628, 631 (arguing contingency fees have become the exclusive method for compensating attorneys in personal injury cases).

because plaintiffs must still pay their attorneys out of their legally entitled remedy and prevailing defendants are entirely without redress.⁸²

B. The English Rule

The English Rule, commonly referred to as the “‘loser pays’ rule,” is a two-way fee-shifting system that allows the prevailing party to have the opposing party pay all the legal fees.⁸³ Fee shifting is not automatic under the English Rule; the courts have a significant amount of discretion in determining the amount of the award.⁸⁴ In addition, the losing party is not responsible for the prevailing party’s fees in several exceptions.⁸⁵ Claims under a certain amount, funded by Legal Aid, or initiated in specially designated tribunals are not subject to fee shifting.⁸⁶ In the late 1980s, a number of legislative initiatives to institute the English Rule in the United States gained support.⁸⁷ While enthusiasm for converting to a pure loser pays system has diminished, the concept of awarding attorneys’ fees in certain contexts has become acceptable.⁸⁸ Such a notion was virtually nonexistent twenty years ago.⁸⁹

The most concrete benefit of the English Rule is that prevailing parties receive the full compensation to which they are entitled.⁹⁰ A defendant who has committed no legal wrong incurs no expense to affirm his or her lack of liability, and a prevailing plaintiff collects the amount entitled in its entirety.⁹¹ In addition, the potential of paying the opposing party’s fees increases the risk of litigation and deters frivolous

⁸² See Root, *supra* note 4, at 597-98.

⁸³ *Id.* at 601.

⁸⁴ *Id.*

⁸⁵ *Id.* at 591.

⁸⁶ *Id.*

⁸⁷ Havers, *supra* note 38, at 632. In 1980, Florida passed a law that “mandated fee shifting in medical malpractice lawsuits,” but the Florida legislature repealed the statute in 1985. Williams, *supra* note 43, at 348; FLA. STAT. § 768.56 (repealed 1985). Florida’s unique experience with the English Rule is discussed *infra* Part IV.C.4.

⁸⁸ Havers, *supra* note 38, at 632.

⁸⁹ *Id.*

⁹⁰ Root, *supra* note 4, at 604.

⁹¹ *Id.*

suits.⁹² Finally, proponents claim the English Rule encourages settlement, but this point is highly contested.⁹³

Critics of the English Rule claim that it deters meritorious suits and may actually decrease settlement.⁹⁴ The threat of paying an opposing party's legal fees has a different effect on "different classes of legal participants."⁹⁵ While a financially limited plaintiff may decide not to bring a valid lawsuit because the risk of losing is too high, a very wealthy defendant may take his chances at trial or leverage his wealth to force a financially disadvantaged opponent to settle.⁹⁶ Furthermore, the possibility of having an opponent pay a litigant's legal fees may discourage an overly optimistic party from settling at a realistic amount.⁹⁷ Theoretically, litigants average the potential benefits and costs of going to trial, weighted by the outcome's likelihood of occurrence, to determine the point at which they will settle.⁹⁸ Therefore, under the American Rule, if a plaintiff predicts a 60% chance of a favorable outcome at trial, a likely award of \$80,000, and attorneys' fees of \$20,000, the plaintiff should settle at any amount greater than \$28,000.⁹⁹ However, assuming both parties will have the exact same legal fees, under the English Rule, the plaintiff would settle at any amount above \$32,000.¹⁰⁰

Fundamental differences between the legal systems of the United States and England also make a loser pays system impractical in the United States.¹⁰¹ There are a number of additional measures that make the loser pays system possible in England, which are generally

⁹² *Id.* at 605-06.

⁹³ *Id.* at 606-07.

⁹⁴ *Id.* at 607.

⁹⁵ Havers, *supra* note 38, at 633.

⁹⁶ *Id.* In England, "approximately eighty-five percent of accident victims do not file a claim for compensation," demonstrating the threat of deterring valid, yet not guaranteed, claims. Root, *supra* note 4, at 608.

⁹⁷ Root, *supra* note 4, at 609-10; *see supra* notes 54-55 and accompanying text.

⁹⁸ HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 20-24 (Anthony J. Bocchino & Zelda Harris eds., 2004).

⁹⁹ *Id.* at 21-22. The mathematical equation would be as follows: $\$28,000 = [60\% \times (\$80,000 - \$20,000)] + (-\$20,000 \times 40\%)$.

¹⁰⁰ *See id.* The mathematical equation would be as follows: $\$32,000 = (60\% \times \$80,000) - [(-\$20,000 + -\$20,000) \times 40\%]$.

¹⁰¹ Havers, *supra* note 38, at 635-36.

unavailable in the United States.¹⁰² Legal expense insurance, more widely available legal aid, and trade unions all help finance the costs of private litigation in England.¹⁰³ In addition, specially designed administrative agencies handle disputes over fees so that secondary fee-shifting litigation does not burden the courts.¹⁰⁴ Without the availability of these facilitative support structures, the English Rule denies equal access to the courts to those with limited financing.¹⁰⁵

IV. ATTEMPTS AT REFORM

A. Offer-of-Judgment Rules in General

Offer-of-judgment rules, also referred to as benchmarking, are a form of fee shifting in which a litigant may become responsible for an opponent's attorneys' fees based on their pretrial settlement behavior.¹⁰⁶ The main goal of offer-of-judgment rules is to encourage settlement and alleviate the congestion of the courts, by providing incentives for parties to make realistic offers to settle early in the process and increasing the risk of failing to accept a reasonable offer.¹⁰⁷ Under an offer-of-judgment rule, if a party rejects a formal settlement offer and subsequently receives a judgment at trial less favorable than the offer, then the rejecting party must pay the offering party's postoffer fees.¹⁰⁸

There are several variations of offer-of-judgment rules. One-way offer-of-judgment rules only allow the defendant to make offers

¹⁰² Root, *supra* note 4, at 601-04.

¹⁰³ *Id.* Legal expense insurance, which does not exist in America, is a secondary industry that allows plaintiffs with meritorious, but not guaranteed, cases to proceed to trial without fear of paying his opponents' fees. *Id.* at 601-02. While only the severely disadvantaged are entitled to legal aid in the United States, approximately "twenty-eight percent of personal injury plaintiffs" qualify for government subsidy of their legal expenses in England. *Id.* at 602-03. Trade unions in England provide legal assistance for their members regardless of the nature of the claim, as opposed to unions in the United States that only represent their members in work-related claims. *Id.* at 603. Approximately "thirty percent of accident plaintiffs" in England utilize their trade union for legal representation. *Id.*

¹⁰⁴ Havers, *supra* note 38, at 635-36.

¹⁰⁵ *Id.* at 633-34.

¹⁰⁶ See Yoon & Baker, *supra* note 6, at 156.

¹⁰⁷ *Id.* at 157 ("At their core, offer-of-judgment rules are about influencing the quantity and quality of cases that go to trial . . .").

¹⁰⁸ *Id.* at 156.

that trigger the potential fee shifting.¹⁰⁹ Therefore, only the plaintiff may become responsible for his opponent's fees, unless the defendant has filed a counterclaim.¹¹⁰ Two-way, or bilateral, offer-of-judgment rules allow both parties to make settlement offers and potentially receive compensation for their attorneys' fees.¹¹¹ Some offer-of-judgment rules allow for a margin of error (also referred to as a cushion or buffer) that attempts to avoid unjustly punishing a party for failing to predict the likely outcome at trial to an impossibly precise amount.¹¹² With a margin of error, a party that rejects a settlement offer is not forced to pay their opposing party's fees, even if they receive a less favorable judgment at trial, as long as the judgment does not differ from the offer by a certain percentage.¹¹³ With a 10% margin of error, a plaintiff would not receive sanctions as long as the judgment is greater than 90% of the rejected settlement offer, and a defendant would not receive sanctions so long as the plaintiff recovers no more than 110% of the rejected offer.¹¹⁴ However, if a margin of error is set too high, the unlikely sanction of paying an opposing party's fees fails to encourage litigants to consider serious settlement offers.¹¹⁵

Offer-of-judgment rules can potentially create inequitable results when a defendant makes a nominal settlement offer immediately following the commencement of a lawsuit.¹¹⁶ Under the \$1 Strategy, the defendant makes an extremely modest, or even insultingly low, settlement offer very early in the litigation, knowing the plaintiff will likely

¹⁰⁹ *Id.* at 162.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 163.

¹¹² Lewis & Eaton, *supra* note 4, at 572. It is often extremely difficult, if not impossible, to predict to an exact amount whether an offer will be more or less favorable than the outcome at trial. *Id.* Therefore, an offer-of-judgment statute that enforces sanctions to an exact amount may unduly punish a party for reasonably rejecting an offer, if the party receives a judgment that is mere pennies less favorable. *Id.*

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 573.

¹¹⁶ *See* Jeffrey B. Crockett, *Statutory Offers of Settlement in Florida Practice: Uses, Problems, and Solutions*, 80 FLA. B.J. 24, 24-26 (2006); William VanDercreek, *Civil Procedure: 1992 Survey of Florida Law*, 17 NOVA L. REV. 95, 127-28 (1992).

reject the offer.¹¹⁷ Such an offer is merely a strategic ploy to begin collecting attorneys' fees in the event the defendant is ultimately determined to be without liability.¹¹⁸ Margin of error buffers fail to protect plaintiffs offered nominal settlements because no percentage of the defendant's nonexistent liability will ever meet the statutory margin required to prevent fee shifting. Furthermore, defendants generally make nominal offers at the very commencement of the lawsuit, before the plaintiff has had any opportunity to engage in discovery or otherwise obtain the information necessary to determine the likelihood of succeeding at trial. The \$1 Strategy appears to be a "no-lose tactic," while offering defendants enormous potential benefits.¹¹⁹ However, the \$1 Strategy defeats the purposes of fee-shifting statutes, because nominal offers are unlikely to produce early settlements and such offers provide one party with a strong bargaining advantage unrelated to the merits of their claim.¹²⁰

B. Federal Rule of Civil Procedure 68

No offer-of-judgment rule has received more scholarly attention, while being simultaneously regarded as inconsequential by practitioners, than Federal Rule of Civil Procedure 68 (Rule 68).¹²¹ Rule 68 is a one-way, federal offer-of-judgment rule that contains no margin of error provision.¹²² If, after rejecting an offer of judgment, the plaintiff receives a judgment at trial that is "not more favorable than the unaccepted offer, the [plaintiff] must pay the *costs* incurred after the offer

¹¹⁷ VanDercreek, *supra* note 116, at 127 (deeming a defendant's use of a nominal offer as a procedural tactic the "\$1 Strategy").

¹¹⁸ Crockett, *supra* note 116, at 24.

¹¹⁹ VanDercreek, *supra* note 116, at 128.

¹²⁰ *See id.*; *see also supra* Part II.B (discussing the goals of any fee allocation system).

¹²¹ *See* Yoon & Baker, *supra* note 6, at 158 (noting Rule 68 "has long been regarded by practitioners and jurists as largely inconsequential"); *see also* Glimcher, *supra* note 9, at 1453 ("Rule 68 is one of the most powerful, yet most underutilized pre-trial maneuvers."); William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, 39 N.M. L. REV. 349, 352 (2009) ("[L]awyers rarely use Rule 68 and . . . it is considered to be largely ineffective in settling cases.").

¹²² *See* Lynch, *supra* note 121, at 350.

was made.”¹²³ There is considerable debate as to whether *costs* subject to Rule 68’s shifting provision include attorneys’ fees (fees), or encompass only traditional court costs (costs).¹²⁴ The Supreme Court has expressly declared “[t]he plain purpose of Rule 68 is to encourage settlement and avoid litigation.”¹²⁵ However, critics argue Rule 68 fails to provide a powerful incentive for parties to make and accept settlement offers because courts commonly interpret Rule 68’s ambiguous language as not including attorneys’ fees, which account for the majority of litigation expenses.¹²⁶ Furthermore, Rule 68 only applies to post-offer costs, further reducing the dollar amount subject to the cost-shifting provision and thus creating an “insufficient sanction to motivate parties to use the rule.”¹²⁷

In defining costs under Rule 68, it is important to examine Federal Rule of Civil Procedure 54(d), which, subject to the court’s discretion, automatically awards costs other than attorneys’ fees to the prevailing party.¹²⁸ Costs under Rule 54(d)(1) include “fees to the clerk, marshal, court reporter, witnesses, court appointed experts and interpreters, and fees for printing, copying, and docketing,” but expressly excludes attorneys’ fees.¹²⁹ These costs are generally minimal when compared to attorneys’ fees or the amount at issue in the underlying substantive claim.¹³⁰ Even though Rule 68 makes the award of costs presumptively mandatory, interpreting costs to exclude attorneys’ fees significantly reduces the rule’s potency to a point that it has little effect on how parties formulate their litigation strategy.¹³¹

¹²³ FED. R. CIV. P. 68(d) (emphasis added). The words “attorneys’ fees” do not appear in the language of the statute.

¹²⁴ Inglis et al., *supra* note 10, at 94-95.

¹²⁵ *Marek v. Chesny*, 473 U.S. 1, 5 (1985).

¹²⁶ JOHN E. SHAPARD, *LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE 1* (1995), [http://www.fjc.gov/public/pdf.nsf/lookup/rule68.pdf/\\$file/rule68.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/rule68.pdf/$file/rule68.pdf).

¹²⁷ *Lynch*, *supra* note 121, at 352.

¹²⁸ *Glimcher*, *supra* note 9, at 1456-57.

¹²⁹ *Lynch*, *supra* note 121, at 351. *See generally* 28 U.S.C. § 1920 (2006) (defining all of the fees included under Federal Rule of Civil Procedure 54(d)).

¹³⁰ SHAPARD, *supra* note 126, at 1.

¹³¹ *See Yoon & Baker*, *supra* note 6, at 158.

The Supreme Court attempted to clarify the ambiguity regarding the award of attorneys' fees under Rule 68 in *Marek v. Chesny*.¹³² In *Marek*, the plaintiff brought a claim based upon a federal civil rights statute that expressly allowed a prevailing plaintiff to recover costs including attorneys' fees.¹³³ The plaintiff ultimately received a judgment at trial that was less favorable than a previously rejected Rule 68 offer.¹³⁴ Then, the plaintiff attempted to collect preoffer and postoffer costs, including attorneys' fees, pursuant to the substantive civil rights statute.¹³⁵ The Court held that costs under Rule 68 "was intended to refer to all costs properly awardable under the relevant substantive statute."¹³⁶ Therefore, if the "underlying statute defines 'costs' to include attorney's fees" then they are subject to Rule 68's fee-shifting provision.¹³⁷ The Court held the defendant was not responsible for the plaintiff's postoffer costs or fees because the plaintiff "refused an offer more generous than the ultimate verdict."¹³⁸ However, the Court did not address whether a defendant can collect postoffer attorneys' fees from a plaintiff that prevails at trial, but for an amount lower than a previously rejected Rule 68 offer, when the underlying substantive statute defines attorneys' fees as part of costs.¹³⁹

¹³² *Marek v. Chesny*, 473 U.S. 1 (1985); see Glimcher, *supra* note 9, at 1461-65 (discussing *Marek*).

¹³³ *Marek*, 473 U.S. at 3. The plaintiff's claim was based on 42 U.S.C. §§ 1988-1989 (2006). *Id.* See generally Glimcher, *supra* note 9, at 1461 nn.83, 86-87 (discussing the plaintiff's substantive claim).

¹³⁴ *Marek*, 473 U.S. at 3-4. The defendant made a settlement offer of \$100,000. *Id.* The plaintiff rejected and received an award of \$60,000 at trial. *Id.* at 4.

¹³⁵ *Id.* The plaintiff requested \$171,692 in costs and fees, \$32,000 preoffer, and \$139,692 postoffer. *Id.*

¹³⁶ *Id.* at 9.

¹³⁷ *Id.*

¹³⁸ Glimcher, *supra* note 9, at 1464 (citing *Marek*, 473 U.S. at 12).

¹³⁹ *Id.* at 1458. Defendants to a federal civil rights allegation may not collect attorneys' fees from a prevailing plaintiff unless the suit is frivolous. See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) ("In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."). This limit reflects the strong congressional support for private litigants to ensure enforcement of federal civil rights statutes through litigation. See Lewis & Eaton, *supra* note 4, at 552. However, the issue remains open whether Rule 68's cost-shifting provision

Several courts have refused to include attorney's fees in those costs subject to Rule 68's cost-shifting provision, even though the underlying substantive statute expressly described attorneys' fees as costs.¹⁴⁰ Circuit courts have split on whether attorneys' fees are "subject to Rule 68's cost-shifting provisions."¹⁴¹ The circuits holding that a defendant may not recover postoffer attorneys' fees when the plaintiff rejects a Rule 68 offer and then receives a less favorable judgment at trial, support their decision based on the specific language of the underlying substantive statutes.¹⁴² For example, the Seventh Circuit interpreted the Copyright Act,¹⁴³ expressly allowing the "prevailing party" to collect fees and costs, as prohibiting a defendant from collecting postoffer attorneys' fees when the plaintiff received a judgment lower than the offered amount because the defendant was not a prevailing party.¹⁴⁴ However, the Eleventh Circuit has interpreted the same portions of the Copyright Act¹⁴⁵ to allow "a non-prevailing offeror, who made an offer more generous than the ultimate judgment, . . . [to] recover post-offer attorney's fees."¹⁴⁶ The Eleventh Circuit interpreted Rule 68 and *Marek* as mandating an award of attorneys' fees because the underlying statute expressly recognized the awarding of attorneys' fees as costs.¹⁴⁷ For the Eleventh Circuit, the inquiry of attorneys' fees under Rule 68 turned on whether the underlying statute recognized fees as a properly awarded cost, not whether the statute enumerated a specific party's entitlement to collect fees.¹⁴⁸

allows a defendant to shift postoffer attorneys' fees to a prevailing plaintiff under non-civil-rights statutes allowing the award of attorneys' fees.

¹⁴⁰ Glimcher, *supra* note 9, at 1464.

¹⁴¹ *Id.* at 1465. The First, Third, Seventh, and Ninth Circuits do not include attorneys' fees as costs under Rule 68, while the Fourth and Eleventh Circuits hold postoffer attorneys' fees subject to Rule 68's cost-shifting provision. *Id.* at 1458-59.

¹⁴² *See id.* at 1465-69.

¹⁴³ *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638, 642 (7th Cir. 2001). Specifically, the court interpreted 17 U.S.C. §§ 412, 501-505 (2000). *Id.*

¹⁴⁴ *Id.* at 645-47; Glimcher, *supra* note 9, at 1468-69.

¹⁴⁵ *Jordan v. Time, Inc.*, 111 F.3d 102, 103 (11th Cir. 1997). Specifically, the court interpreted 17 U.S.C. § 504(c)(1) (1994). *Id.*

¹⁴⁶ Glimcher, *supra* note 9, at 1470 (citing *Jordan*, 111 F.3d at 105).

¹⁴⁷ *Jordan*, 111 F.3d at 105.

¹⁴⁸ *Id.*

In addition to the ambiguities surrounding whether Rule 68 includes attorneys' fees in its cost-shifting provisions, Rule 68 can also produce troubling results when the defendant ultimately prevails at trial. The \$1 Strategy¹⁴⁹ does not provide defendants with a strategic advantage under Rule 68, because Rule 68 does not apply when the defendant is victorious at trial.¹⁵⁰ In *Delta Air Lines, Inc. v. August*, the Supreme Court held that a defendant is not entitled to receive an award of costs under Rule 68 when the plaintiff loses at trial.¹⁵¹ The Court reasoned that cost shifting under Rule 68 applies only when "the plaintiff has obtained a judgment for an amount less favorable than the defendant's settlement offer."¹⁵² However, when a plaintiff loses at trial, the plaintiff never obtains a judgment as defined by the plain language of Rule 68; the defendant receives the judgment, and Rule 68 is inapplicable.¹⁵³

Limiting Rule 68's application to situations in which the plaintiff prevails at trial eliminates the defendant's ability to use the \$1 Strategy to increase the plaintiff's risk in proceeding to trial. Concerns that "any defendant, by performing the meaningless act of making a nominal settlement offer," could trigger Rule 68's cost-shifting provision influenced the Court to hold that prevailing defendants have no right to receive costs under Rule 68.¹⁵⁴ It seems inconsistent that a defendant is entitled to receive costs under Rule 68 if the plaintiff receives a judgment at trial that is less favorable than a previously rejected offer of judgment, but that same defendant is entitled to nothing under Rule 68 if the judgment at trial finds the defendant entirely without fault.¹⁵⁵ This anomaly is attributable to the fact that the Court decided *Delta Air Lines* four years before ruling that Rule 68 potentially includes attorneys' fees in its cost-shifting provision.¹⁵⁶ At the time the Court decided *Delta Air Lines*, the costs available under Rule 68 included only

¹⁴⁹ See *supra* notes 116-19 and accompanying text (discussing the problems the \$1 Strategy presents under one-way offer-of-judgment statutes).

¹⁵⁰ *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351-52 (1981).

¹⁵¹ *Id.* at 352.

¹⁵² *Id.* at 351.

¹⁵³ *Id.* at 351-52.

¹⁵⁴ *Id.* at 353 ("If . . . Rule 68 applies to defeated plaintiffs, any settlement offer, no matter how small, would apparently trigger the operation of the Rule.")

¹⁵⁵ *But see id.* at 353 n.12 (contesting the argument that interpreting Rule 68 to exclude prevailing defendants creates illogical results).

¹⁵⁶ *Id.* at 346; *Marek v. Chesny*, 473 U.S. 1, 9 (1985).

those costs that a party was entitled to receive, subject to the judge's discretion, upon prevailing at trial under Rule 54(d).¹⁵⁷ Therefore, in *Delta Air Lines*, the Court found it unnecessary to award a prevailing defendant costs under Rule 68 because the defendant was already presumptively entitled to receive those costs as a victorious litigant under Rule 54(d).¹⁵⁸ The Court viewed the sole purpose of allowing a victorious defendant to collect costs under Rule 68 was to divest the trial judge of any discretion to alter the presumptive award of costs to the prevailing party by replacing the discretionary language of Rule 54(d) with the mandatory language of Rule 68, which the Court refused to do.¹⁵⁹

However, in *Marek*, the Court ruled that if the “underlying statute defines ‘costs’ to include attorney’s fees” then postoffer fees are subject to Rule 68’s cost-shifting provision.¹⁶⁰ The potential of receiving attorneys’ fees under Rule 68 casts serious doubts on whether the logic of *Delta Air Lines* would withstand modern scrutiny.¹⁶¹ Generally, attorneys’ fees far exceed the value of costs awarded to a prevailing litigant under Rule 54(d).¹⁶² Therefore, receiving only costs under Rule 54(d) greatly undercompensates a victorious defendant at trial when compared to the value of attorneys’ fees the party could potentially receive under Rule 68. While the \$1 Strategy may provide defendants with an unfair strategic advantage, completely barring victorious defendants from collecting costs that may include valuable attorneys’ fees decreases the incentives for defendants to make, and reduces the risks for plaintiffs to decline, offers of judgment, further impairing Rule 68’s ability to encourage settlements.

As the debate over Rule 68 continues, there is a growing consensus that Rule 68 is overly ambiguous, fails to encourage settlement, and

¹⁵⁷ FED. R. CIV. P. 54(d); see *Delta Air Lines*, 450 U.S. at 353; see also *supra* text accompanying notes 128-30 (discussing the types of costs awarded under Rule 54(d)).

¹⁵⁸ *Delta Air Lines*, 450 U.S. at 353-55.

¹⁵⁹ *Id.*

¹⁶⁰ *Marek*, 473 U.S. at 9.

¹⁶¹ See generally *id.* (explaining the legislative history of adding attorneys’ fees to “costs” pursuant to The Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988 (2006)).

¹⁶² SHAPARD, *supra* note 126, at 1.

is in need of reform.¹⁶³ Failing to include attorneys' fees in Rule 68's cost-shifting provision undermines the incentive for parties to seriously make and accept settlement offers, because litigants view the potential sanction of paying nonfee costs as largely inconsequential.¹⁶⁴ These deficiencies severely limit Rule 68's use and undermine its intended purpose of encouraging settlement and decreasing the congestion of the court system.

C. *State Offer-of-Judgment Rules*

1. Prevalence of State Offer-of-Judgment Rules

In light of the perceived failures of Rule 68, many states have revised their offer-of-judgment statutes. Currently, twenty-three states have two-way offer-of-judgment statutes.¹⁶⁵ Nine states allow a party to collect attorneys' fees when the opposing party receives a judgment at trial that is less favorable than a rejected offer.¹⁶⁶ Six states allow a margin of error before imposing cost-shifting sanctions.¹⁶⁷ Other offer-of-judgment variations include imposing higher sanctions by awarding some multiple of costs, limiting the timing of offers, and placing a cap on the amount of attorneys' fees that are allowed to shift.¹⁶⁸ While evaluating the success of these alternative offer-of-judgment rules presents the same difficulties as evaluating any fee-shifting rule,¹⁶⁹ preliminary data indicates these mechanisms may increase use of offer-of-judgment rules and encourage settlement.¹⁷⁰

2. New Mexico

New Mexico has a two-way offer-of-judgment rule (Rule 1-068) that allows a plaintiff to recover double costs if the final judgment ex-

¹⁶³ Lynch, *supra* note 121, at 372.

¹⁶⁴ See Glimcher, *supra* note 9, at 1455.

¹⁶⁵ Lewis & Eaton, *supra* note 4, at 569-70 & n.40.

¹⁶⁶ Lynch, *supra* note 121, at 355.

¹⁶⁷ Lewis & Eaton, *supra* note 4, at 572 (stating five states allow a margin of error between twenty and twenty-five percent, while one state sets the margin of error at five percent).

¹⁶⁸ See Lynch, *supra* note 121, at 354-55.

¹⁶⁹ See *supra* Part II.C.

¹⁷⁰ See, e.g., Lynch, *supra* note 121, at 361-67.

ceeds a previously rejected offer.¹⁷¹ The award of double costs is designed to increase the attractiveness of making settlement offers for plaintiffs, because a prevailing plaintiff receives costs as a matter of course under a New Mexico statute similar to Federal Rule of Civil Procedure 54(d).¹⁷² Rule 1-068 takes a wider definition of costs, including items such as expert witness fees, but does not include attorneys' fees.¹⁷³ Prior to 2003, Rule 1-068 was identical to Federal Rule of Civil Procedure 68, therefore examination of the rule's use prior to and after amendment should indicate if the changes influenced litigants' willingness to make and accept settlement offers.¹⁷⁴ While the number of Rule 1-068 offers accepted did not increase, the use of Rule 1-068 by defense attorneys did increase.¹⁷⁵ However, lawyers surveyed agreed Rule 1-068 offers increased settlement by encouraging communication between the parties and eliciting counteroffers that drive the parties toward settlement.¹⁷⁶

3. New Jersey

New Jersey also has a two-way offer-of-judgment rule (Rule 4:58) that allows for a twenty percent margin of error.¹⁷⁷ Unlike many state offer-of-judgment rules, Rule 4:58 is not modeled after Federal Rule 68.¹⁷⁸ Attorneys' fees are subject to Rule 4:58's cost-shifting provision.¹⁷⁹ Rule 4:58 previously had a \$750 cap on the recovery of attorneys' fees, but in 1994, this limitation was removed.¹⁸⁰ After the

¹⁷¹ RULE 1-068 NMRA; Lynch, *supra* note 121, at 349.

¹⁷² See RULE 1-068 NMRA (committee commentary on 2002 Amendments discussing the incentive doubling the award); see also Lynch, *supra* note 121, at 349 (stating that "incentives to accept such an offer are increased"); *supra* text accompanying notes 128-30 (discussing the award of costs to a prevailing litigant under Federal Rule of Civil Procedure 54(d)).

¹⁷³ Lynch, *supra* note 121, at 349.

¹⁷⁴ See *id.* at 360-63.

¹⁷⁵ See *id.* at 362-66.

¹⁷⁶ *Id.* at 366-67. "Fifty-nine percent of the plaintiffs' lawyers and 69 percent of the defense lawyers surveyed believe that Rule 1-068 leads more cases to settle or helps them to settle earlier." *Id.* at 367. "[O]nly 31 percent of plaintiffs' counsel and 47 percent of defense counsel thought Rule 68 led more cases to reach settlement." *Id.*

¹⁷⁷ N.J. Ct. R. 4:58-1; Yoon & Baker, *supra* note 6, at 163-64.

¹⁷⁸ Yoon & Baker, *supra* note 6, at 163.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 164.

amended Rule 4:58 was enacted, “the duration of litigation in New Jersey dropped by an average of 2.3 months.”¹⁸¹ In addition, average attorneys’ fees decreased by nearly twenty percent.¹⁸² However, the average damage award did not significantly change.¹⁸³ Therefore, Rule 4:58 seems to indicate offer-of-judgment rules can increase the efficiency of litigation by reducing time and costs, while reaching a similar outcome.¹⁸⁴ Rule 4:58 also indicates an offer-of-judgment rule must have a credible threat of shifting significant dollar amounts, beyond mere court costs, in order to have an appreciable effect on litigants’ behavior.¹⁸⁵

4. Florida

Florida has had its own unique experiences with fee-shifting statutes. In 1980, Florida adopted the English Rule for medical malpractice cases, requiring a party that loses at trial to pay all of the winning litigant’s costs and attorneys’ fees.¹⁸⁶ The goal of the statute was to deter frivolous lawsuits and increase the speed with which medical malpractice actions were resolved, thereby reducing the personal hardships and financial burdens on injured plaintiffs caused by drawn out settlement processes.¹⁸⁷ In the 1970s and 1980s, “all 50 states and the District of Columbia enacted new laws . . . governing the resolution of medical malpractice claims” due to the widespread perception that the increasing prevalence and costs of medical malpractice lawsuits was causing a medical malpractice liability crisis.¹⁸⁸ Florida repealed its use of the English Rule for medical malpractice claims in 1985 because many felt the statute did not encourage settlement or prevent meritless suits.¹⁸⁹

¹⁸¹ *Id.* at 178 (representing a seven percent reduction in the duration of litigation).

¹⁸² *Id.* at 179 (equating to an average reduction in attorneys’ fees of \$1173).

¹⁸³ *Id.* at 191-93.

¹⁸⁴ *Id.* at 192-93.

¹⁸⁵ *Id.* at 192.

¹⁸⁶ FLA. STAT. § 768.56 (repealed 1985).

¹⁸⁷ See James W. Hughes & Elizabeth Savoca, *Measuring the Effect of Legal Reforms on the Longevity of Medical Malpractice Claims*, 17 INT’L REV. L. & ECON. 261, 263-64 (1997).

¹⁸⁸ *Id.* at 262.

¹⁸⁹ Williams, *supra* note 43, at 348.

However, a review of medical malpractice cases in Florida from 1985 to 1993 indicates Florida's use of the English Rule may have been a partial success.¹⁹⁰ Florida's adoption of the English Rule reduced the duration of medical malpractice disputes, "especially those resolved out of court" through private settlement or dropping the lawsuit.¹⁹¹ This data suggests that the English Rule encouraged the timely resolution of weaker claims and conserved judicial resources for those disputes most deserving of a full trial.¹⁹² This data does not address the amount litigants spent once a claim actually went to trial or how often the prevailing party was actually able to collect any amount owed by the losing party. Many commentators argue that the English Rule causes parties to increase their expenditures once at trial because of the enlarged financial risk and the attractive possibility of having the opposing party ultimately pay for the additional spending.¹⁹³ A separate study of medical malpractice cases in Florida indicates that, under the English Rule, defendants spent up to 150% more in litigating a case than under the American Rule.¹⁹⁴ Therefore, by increasing the risk of proceeding to trial, the English Rule may deter plaintiffs from filing meritless lawsuits and encourage both parties to settle. However, once a case reaches trial, the English Rule encourages a legal arms race, artificially inflating the litigation costs to a point that is financially disastrous for the losing party.

The ability to draw broad conclusions as to the effectiveness of the English Rule from Florida's experience is limited due to the unique nature of medical malpractice claims and Florida's legal culture.¹⁹⁵ Moreover, Florida adopted several additional provisions aimed at encouraging settlement around the time the English Rule was repealed, making it difficult to determine what changes in settlement behavior were a result of the abandonment of the English Rule and what changes

¹⁹⁰ See Hughes & Savoca, *supra* note 187, at 263-64, 272 (examining insurance data that Florida requires to be filed with each medical malpractice lawsuit).

¹⁹¹ *Id.* at 272.

¹⁹² See *id.* at 264.

¹⁹³ See *id.*

¹⁹⁴ *Id.* (citing Edward A. Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990), available at <http://jleo.oxfordjournals.org/content/6/2/345.full.pdf+html>).

¹⁹⁵ *Id.* at 272.

were a result of the new provisions.¹⁹⁶ Most notably, Florida enacted a two-way offer-of-judgment rule that contains a twenty-five percent margin of error and expressly includes attorneys' fees within the statute's cost-shifting provision.¹⁹⁷ While the award of costs and fees under Florida Statute section 768.79¹⁹⁸ appears mandatory upon the entry of a qualifying judgment, if the trial court determines that the offering party did not act in good faith in making the rejected offer, the court has the discretion to disallow any award.¹⁹⁹ If an offering party meets the statutory requirements and the trial court does not find bad faith, the award is mandatory and the trial court is without discretion to eliminate the party's entitlement to an award of costs and fees.²⁰⁰ Once entitlement to an award becomes mandatory, the trial court determines a reasonable amount for the award, considering statutorily enumerated factors and any other relevant information.²⁰¹ Separating the determination of enti-

¹⁹⁶ *Id.* at 266. These provisions included: (1) a two-way offer-of-judgment rule; "(2) mandatory pretrial settlement conferences; (3) limits on punitive damages; (4) itemization of jury awards;" and (5) limiting the percentage that plaintiffs' attorneys may receive as compensation. *Id.* (footnotes omitted). See generally *id.* at 266 nn.14-18 (providing the citation and subsequent history of these provisions).

¹⁹⁷ FLA. STAT. § 768.79 (2010) (originally enacted as FLA. STAT. § 768.585 (1985) (repealed 1986)). Florida Statute section 768.79 is not limited to medical malpractice claims and applies to "any civil action for damages" filed in any Florida court. *Id.*

¹⁹⁸ The following discussion focuses exclusively on Florida Statute section 768.79. However, in addition to section 768.79 entitled Offer of Judgment and Demand for Judgment, Florida also has Florida Statute section 45.061 (enacted Oct. 1, 1990) entitled Offers of Settlement, and Florida Rule of Civil Procedure section 1.442 (enacted Jan. 1, 1990) entitled Proposals for Settlement. Having three different fee-shifting statutes governing the availability of costs and fees has caused considerable confusion among practitioners, judges, and scholars. See generally David L. Kian, *The 1996 Amendments to Florida Rule of Civil Procedure 1.442: Reconciling a Decade of Confusion*, 71 FLA. B.J. 32, 32 (1997) (discussing the confusion surrounding Florida's offer-of-judgment rules and recent attempts "'to reconcile . . .' the often confusing and contradictory set of statutes, rules, and cases that govern offers of judgment in Florida"). In 1996, the Florida Supreme Court amended the language of section 1.442 so that it is more in line with the provisions of sections 45.061 and 768.79. See generally *In re Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105, 124-26 (Fla. 1996).

¹⁹⁹ § 768.79(7)(a).

²⁰⁰ *TGI Friday's, Inc. v. Dvorak*, 663 So. 2d 606, 612 (Fla. 1995).

²⁰¹ *Id.* at 612-13; § 768.79(7)(b)(1)-(6). The amount of attorneys' fees awarded must be reasonable as guided by the statutory factors. *TGI Friday's, Inc.*, 663 So. 2d at 613. However, the reasonableness of the opposing party in rejecting the settlement

tlement to an award and the award's actual amount helps further both the efficiency and equitable goals of a fee allocation system.²⁰² Florida's offer-of-judgment statute achieves the efficiency goals of encouraging settlements while deterring abuses of the litigation process, because the risk of paying an opposing party's postoffer fees provides a powerful financial incentive to accept reasonable settlement offers.²⁰³ However, by also allowing an individualized judicial determination of the reasonable amount of fees, the courts can ensure that the statute achieves the equitable goal of allowing equal access to the justice system based on the merits of the claim, rather than the parties' relative financial positions.²⁰⁴

Despite the equitable potential in making individualized determinations as to the proper amount of fees, Florida's offer-of-judgment rule has failed to overcome the powerful procedural advantage a defendant gains by making a nominal settlement offer early in the litigation.²⁰⁵ While such statutory manipulation is likely to offend judges and opposing parties, Florida courts have been unwilling to find that such offers automatically fail to constitute good faith.²⁰⁶ Florida's Second District Court of Appeal expressly held a settlement offer of one dollar was made in good faith for the purposes of Florida Statute section

offer is wholly irrelevant to whether the party is entitled to an award under section 768.79, provided the offer was made in good faith. *Id.* Yet, the reasonableness of rejecting the offer becomes relevant for settlement offers under section 45.061. *See supra* note 198 (discussing Florida's multiple fee-shifting provisions).

²⁰² *See generally supra* Part II.B (discussing the goals any fee allocation system attempts to achieve).

²⁰³ *See generally supra* Part II.B (discussing the goals any fee allocation system attempts to achieve).

²⁰⁴ *See generally supra* Part II.B (discussing the goals any fee allocation system attempts to achieve). In determining the reasonable amount of fees, the court is specifically required to consider "[w]hether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties." § 768.79(7)(b)(5). This ensures that private litigants can continue to use the justice system to advance social reform in previously unexplored areas of the law, without fear of harsh financial burdens that could result from the mechanical operation of other fee-shifting statutes or the American Rule. *See supra* notes 32-36 and accompanying text.

²⁰⁵ *See supra* text accompanying notes 116-19 (discussing the problems created by the \$1 Strategy).

²⁰⁶ Crockett, *supra* note 116, at 24 & n.6; *see VanDercreek, supra* note 116, at 128.

768.79, where the defendant assessed the case and determined that it had no liability and was not a proper party to the litigation.²⁰⁷ Florida courts may be unwilling to lay down bright-line rules because the appropriateness of any settlement offer is deeply connected to the particular merits of each individual claim, and any black and white rule may pigeonhole judges into making inequitable rulings in future cases.²⁰⁸ Instead, Florida trial courts consider the unique circumstances surrounding any offers in determining the reasonableness of attorneys' fees awards.²⁰⁹

While flexibility helps tailor the applicability of the offer-of-judgment statute to the facts of each individual case, it has the potential to create inconsistent and unpredictable results. Such uncertainty may decrease the making and accepting of settlement offers, thus undermining the statute's ability to encourage settlements. The possibility of having the court reduce the amount of an award makes the risks of rejecting an offer appear more hypothetical. The more litigants view the potential benefits and detriments associated with making or rejecting a settlement offer as uncertain to occur, the less the offer-of-judgment statute influences their settlement behavior. Therefore, Florida's offer-of-judgment rule demonstrates that fee-shifting statutes must make a delicate balance between clearly defined standards, which provide certainty but have the potential for abuse and inequitable results, and flexible guidelines, which prevent injustice in individual cases but may decrease the statute's effectiveness at encouraging settlement by creating inconsistent and unpredictable results.

²⁰⁷ *State Farm Mut. Auto. Ins. Co. v. Marko*, 695 So. 2d 874, 876 (Fla. Dist. Ct. App. 1997).

²⁰⁸ For example, a one dollar settlement offer may be a perfectly legitimate offer for the defendant in a frivolous lawsuit, both to settle the matter and as a procedural tactic to recover costs and fees incurred in defending against the meritless allegations. However, the same one dollar offer made by a defendant, who has a fifty percent chance of prevailing at trial, is likely an attempt to manipulate the fee-shifting statute to gain a bargaining advantage by increasing the financial risk for the plaintiff to proceed to trial. Any automatic rule determining that a one dollar offer always, or never, constitutes good faith would cause an inequitable result in one of these two situations.

²⁰⁹ *See* § 768.79(7)(b) (stating the court must consider the six enumerated statutory factors and "all other relevant criteria").

V. CONCLUSION

The ever-increasing cost of litigation and massive overburdening of the U.S. court system are serious concerns that require intervention. Statutorily awarding attorneys' fees may serve as a powerful incentive to encourage settlement. However, any system of fee allocation reform must keep the courts available to everyone regardless of financial ability, allow private litigants to use the courts to institute social reform, deter abuse of the litigation process, minimize the expenses necessary to defend or pursue a legally justified position, and provide clear guidelines to ensure certainty in its results.

While the American Rule and its contingency fee counterpart provide those with limited financial means access to the courts, they do little to help an innocent defendant avoid undue expense. In addition, contingency fees may encourage a flood of frivolous litigation and cause distrust between attorneys and their clients. However, the English Rule appears to create an unacceptable deterrent to those with limited financial resources, because the high cost of paying both parties' attorneys' fees may discourage valid litigation if the party cannot afford to lose.

Offer-of-judgment rules that award attorneys' fees based on pre-trial settlement behavior present an interesting opportunity to encourage settlement while not punishing a party for exercising their legal rights. Unfortunately, Federal Rule of Civil Procedure 68 is vastly underutilized, due to its ambiguous language and the limited definition of costs some courts have attributed to its cost-shifting provision. Without the definitive inclusion of attorneys' fees in Rule 68's cost-shifting provision or some other significant sanction, Rule 68 will continue to be an inefficient incentive for parties to make and accept settlement offers.

Several states' experimentation with two-way offer-of-judgment statutes indicates that offer-of-judgment statutes do have the ability to influence litigation behavior and achieve desirable results in the form of reduced trial durations and litigation expenses, while still guaranteeing equitable settlement amounts. Monitoring these state statutes is important so legislators can learn from their successes and failures when

drafting future offer-of-judgment statutes. While reforming the allocation of attorneys' fees presents unique obstacles, the cost of inaction is too high a price to pay because it will cost some their right to justice.

