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## LOSER-PAYS: WHERE NEXT?

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### INTRODUCTION

Recent legislative developments at both the federal and state levels have focused new attention on the loser-pays rule, under which the side that loses an adversary civil proceeding must pay some or all of the winner's fees and expenses.<sup>1</sup> The rule appears to be in effect in most if not all jurisdictions outside the United States,<sup>2</sup> and its advantages are manifold. Most obviously, it discourages speculative litigation—among the most persistent problems facing the American litigation system—and it limits the tactical leverage parties with weak cases can obtain by threatening to inflict the cost of litigation on their opponents.<sup>3</sup> A claimant will hesitate before pursuing either a long-shot case, where a low or fluke chance of prevailing is made attractive by a high potential payoff, or an imposition-based case, whose settlement value arises from its threat of cost infliction, if he knows he will be responsible for the defendant's reasonable legal costs.<sup>4</sup>

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1. The loser-pays rule is often referred to as the "English Rule," because it has long been the practice in the English common-law system. The contrary practice, in which each side is left to bear its own legal fees, is commonly termed the "American Rule." See Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 37, 44 (1984) (reviewing the fee-shifting systems employed in eight European countries); John Lenbsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *LAW & CONTEMP. PROBS.* 9 (1984); Bradley L. Smith, Note, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 *MICH. L. REV.* 2154, 2154 n.2 (1992).

2. See Pfennigstorf, *supra* note 1, at 37 (indicating that with regard to fee-shifting, America "on an international level . . . represents the exception rather than the rule").

3. Speculative litigation can be defined as the pressing of claims that depend for their success not on intrinsic legal merit, but on fortuity. For example, in some toxic tort and product liability cases, the plaintiff's causation theory has been directly contrary to the overwhelming weight of the scientific evidence. These cases may nonetheless carry potentially high settlement value and be rational to file if plaintiffs' attorneys can persuade the occasional jury to issue a verdict contrary to the scientific evidence.

4. Recent law review literature supportive of the loser-pays principle includes Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the 'Loser-Pays' Rule in Texas*, 30 *Hous. L. Rev.* 1915 (1994); Lorraine W. Feinstein, Comment, *Two-Way Fee Shifting*

The loser-pays rule also deters parties likely to lose on the merits from engaging in excessive discovery and filing unnecessary motions. Except for the remote threat of judicial sanctions,<sup>5</sup> the American legal system does little to discourage such activity. Under the loser-pays rule, however, the losing side may ultimately have to pay for the time the other side's attorneys wasted in responding to excessive demands. Moreover, if the loser-pays rule applies not just to the ultimate success or failure of a claim as a whole, but to each individual cause of action, motion, or other legal initiative to which an opponent is obligated to respond, it will discourage speculative or impositional tactics even by the side destined to prevail. Both effects will streamline litigation by encouraging parties to focus on their strongest claims, theories, and procedural options, rather than, as tends to be the current practice, throwing everything but the kitchen sink at each other.

In addition, a loser-pays system is, in the authors' view, ethically superior to the current system. A defendant who has been dragged into litigation and had his property put in jeopardy deserves compensation for having had to repulse an invalid claim. Conversely, a plaintiff with a valid claim deserves a measure of damages that includes some recognition of the legal fees paid in defeating a recalcitrant defendant.

If courts are too ready to award generous fees, they run the risk of giving litigants with strong cases an inappropriate "cost-plus" incentive to run up high legal bills in the expectation that the other side will be forced to reimburse them. Such overinvestment in fees may also help push the opponent into a disadvantageous settlement by magnifying its fear of a fee shift. Virtually all fee-shifting systems, therefore, provide for judicial review of the extent to which claimed fees and expenses are reasonable and necessary. (Courts in this country currently carry on such review in some important categories of litigation, as in class actions and cases arising under "one-way" fee-shifting statutes.<sup>6</sup> As an added safeguard, most countries follow a policy of

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*on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125 (1996); Smith, *supra* note 1.

5. See FED. R. CIV. P. 11 (allowing federal courts to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee"); see also *infra* notes 25-30 and accompanying text (discussing FED. R. CIV. P. 11).

6. See FED. R. CIV. P. 23(e) (requiring judicial approval of class action settlements); Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 669 (1982) (discussing the effects of judicial discretion in determining the amount of attorney's fees to shift).

shifting less than the full monetary cost of litigation.<sup>7</sup> Because parties must bear a significant share of the marginal costs of litigation even if they win, they are shielded from the temptation to over-litigate a winning case for strategic or fee-seeking reasons.

A loser-pays rule is likely to discourage another abuse of litigation, namely the use of purposeful delay by defendants aware of their probable liability. Under a loser-pays system, if the defendant ultimately loses, it must bear not only all its own legal costs, but also a hefty chunk of any extra legal burdens that the plaintiff incurred through its delay. By making defendants financially responsible for the legal costs associated with resisting a legitimate claim, the loser-pays rule also helps make legitimate but small claims economically viable for plaintiffs.

After years of neglect, the loser-pays idea has recently begun to receive considerable attention in this country. In this Article, we survey recent developments regarding the loser-pays rule in the United States. In part I, we discuss the remarkable attempt by congressional Republicans to enact a loser-pays rule for certain categories of litigation in federal courts. Next, we discuss the recent enactment of limited but distinctive loser-pays rules in Oklahoma and Oregon. In part III, we review recent changes to the loser-pays rule in Alaska, the only American jurisdiction with a long-standing, generally applicable, two-way fee-shifting system. Finally, we conclude with some thoughts on the future of loser-pays in the United States.

## I. CONGRESSIONAL ACTIVITY

In early 1995 the U.S. House of Representatives brought to the floor a proposal for loser-pays reform in many federal court actions.<sup>8</sup> The proposal would have required the losing side in litigation to compensate the prevailing side for some of the legal costs of going to court.<sup>9</sup> After a vigorous debate and despite strenuous opposition from organized lawyer groups, congressional Democrats, and the Clin-

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7. See WALTER OLSON, *THE LITIGATION EXPLOSION* 330, 334-35 (1991); Lawrence W. Newman & Michael Burrows, *International Litigation*, N.Y. L.J., Oct. 15, 1992, at 3 (discussing fees in England and Germany); Pfennigstorf, *supra* note 1, at 55-59.

8. H.R. 988, 104th Cong., 1st Sess. (1995).

9. The main provisions of the Attorney Accountability Act, H.R. 988, included: (1) enacting a modified loser-pays rule under which the loser pays his opponent's legal fees if the loser rejected a settlement offer higher than the damages actually awarded; (2) amending Federal Rule of Civil Procedure 11 to require imposition of sanctions once a violation is found; and (3) amending Federal Rule of Evidence 702 to presume opinion testimony by scientific experts inadmissible unless proven valid and reliable. *Key Provisions of the House's Legal Reform Bills*, *INSIDE LITIG.*, Apr. 1995, at 9.

ton Administration, the measure passed the House by a vote of 232 to 193.<sup>10</sup> The vote was largely along party lines. Sixteen Democrats broke ranks to support the bill, while eleven Republicans crossed the other way to oppose it.<sup>11</sup>

Loser-pays, together with a range of other litigation reforms, made up one of the ten planks of the Republican "Contract with America."<sup>12</sup> Before it surfaced as part of the G.O.P. Contract, national lawmakers had paid little attention to the idea. No congressional hearings had been held on the idea within living memory. The literature on the subject, in this country at least, had been largely theoretical.<sup>13</sup> Some authors pondered the potential effects of fee-shifting rules as a theoretical puzzle, but they were unable to reach agreement on even such basic issues as whether the rules would be likely to affect the rate or speed of dispute settlement.<sup>14</sup>

On a general level, of course, many lawmakers and legal professionals were aware that fee-shifting or the lack thereof stood as one of the great differences between America's legal system and the systems prevailing in other advanced countries.<sup>15</sup> In fact, America stands virtually alone among nations in refusing to shift fees in lawsuits, and we fall short of presenting a united front: Alaska has long followed a loser-pays rule.<sup>16</sup> Some commentators have suggested that other countries continue to shift costs as the result of accidents in their historical development,<sup>17</sup> and that once these countries come to see the superiority of the American way of litigation, they will begin to adjust

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10. 141 CONG. REC. H2749 (daily ed. Mar. 7, 1995) (Roll Call Vote No. 207).

11. *Id.*; Nancy E. Roman, *First Legal Reforms Clear House: "Loser Pays" Bill OK'd 232-193*, WASH. TIMES, Mar. 8, 1995, at A1.

12. H.R. 10, 104th Cong., 1st Sess. (introduced Jan. 4, 1995) (representing the broad litigation reforms from the Contract with America). The other nine planks of the Contract with America were: (1) Balanced-Budget Amendment and Line-Item Veto; (2) Anti-Crime Measures; (3) Welfare Reform; (4) Family Tax Relief; (5) Middle-Class Tax Cut; (6) National Security; (7) Social Security Earnings Tax; (8) Reductions in Capital Gains and Unfunded Mandates; and (9) Term Limits. *Contract Score Card*, 53 CONG. Q. 181 (Jan. 14, 1995).

13. See John J. Donohue III, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1094 (1991) (citing "immense literature" on theoretical question of impact of American and English Rules on settlement rates, with list of articles).

14. See, e.g., Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 437-41 (1973) (discussing the impact of the English Rule on dispute resolution).

15. See Pfennigstorf, *supra* note 1, at 37.

16. See *infra* part IV (discussing the history of fee-shifting in Alaska pursuant to Alaska Rule of Civil Procedure 82).

17. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1570-78 (1993).

their rules in our direction.<sup>18</sup> Meanwhile, critics in some English-speaking countries have urged adoption of an American Rule on costs.<sup>19</sup> Alaska also has its critics of fee-shifting.<sup>20</sup>

The logic of allowing prevailing parties a remedy for the infliction of costs on them periodically asserts itself in this country. In at least two episodes within recent memory, evolutionary developments that had posed a danger, if danger it was, of bringing loser-pays to the American legal system were nipped in the bud. The first came in the 1960s and 1970s when Congress and state lawmakers began enacting a variety of civil rights, environmental, and other public interest statutes with provisions authorizing judges to award attorney's fees to a prevailing party.<sup>21</sup> Read literally, the language of many of these statutes would appear to authorize something akin to European-style fee-shifting. Two decisions by the U.S. Supreme Court, however, gave the statutes a more creative reading.<sup>22</sup> Despite the language suggesting judicial discretion, plaintiffs were understood to be nearly always enti-

18. See, e.g., Francis J. Carney, "Loser Pays"—Justice for the Poorest and the Richest, Others Need Not Apply, *UTAH B.J.*, May 1995, at 18 (arguing that the middle class in Britain, lacking the benefit of governmental legal aid for the poor, can neither afford lawyers nor risk costs of a loss).

19. See *Bring the Balance Back*, *ECONOMIST*, Jan. 14, 1995, at 13; Tim Cornwell, *Quayle Likes the "English Rule" But Brits Have Their Doubts*, *LEGAL TIMES*, Feb. 10, 1992, at 1 (noting that steadily growing costs of government legal aid are encouraging British authorities to consider alternatives to the English Rule, including a version of the contingent-fee system practiced in America).

20. Kevin M. Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 *ALASKA L. REV.* 429, 431 (1993) (observing that a sizeable contingent of the Alaska bar recommended entirely eliminating fee-shifting to the Alaska Supreme Court in 1993); Liz Ruskin, "Loser-Pays" No Cure-All in Alaska's Civil Courts, *ANCHORAGE DAILY NEWS*, Feb. 19, 1996, at 1A (citing a recent study by Alaska Judicial Council that Alaskans are no less inclined, under its loser-pays system, to sue in court than are residents of other sparsely populated states).

21. See, e.g., Civil Rights Act of 1964 § 204(b), 42 U.S.C. § 2000a-3(b) (1988) ("In any action [for discrimination in public accommodations] the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee as part of the costs . . ."); Civil Rights Act of 1964 § 706(k), 42 U.S.C. § 2000e-5(k) (1988) ("In any action [for denial of equal employment opportunities] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . ."); Clean Water Act § 505, 33 U.S.C. § 1365(d) (1988) ("The court, in issuing a final order in any action [for violation of the Clean Water Act], may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate."); Clean Air Act § 307(f), 42 U.S.C. § 7607(f) (1988) (allowing the court to award costs including reasonable attorney's fees).

22. *Christiansburg Garment v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 422-24 (1978) (holding that an award of attorney's fees against the Equal Employment Opportunity Commission pursuant to Civil Rights Act of 1964 § 706(k) was not justified); *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400 (1968) (reviewing award of attorney's fees under Civil Rights Act of 1964 § 204(b)).

tled to a full fee-shift if they won, but defendants virtually were never entitled to collect fees when *they* won.<sup>23</sup> The result was the emergence of the "one-way" fee-shift that soon became a familiar element of the legal landscape.<sup>24</sup>

The rise and fall of Federal Rule of Civil Procedure 11 likewise showed the resourcefulness of the American bar in heading off the implementation of any general principle providing for compensation of persons injured by legal action. In 1983 rulemakers strengthened Rule 11 to provide, for the first time, a strong remedy for persons victimized by groundless actions. Under Rule 11, parties can petition the court for sanctions against the offending lawyer, client, or both.<sup>25</sup> Courts soon developed a powerful interpretation of the new Rule: the normal measure by which sanctions would be calculated would be the reasonable expenditure of the victim in responding to the wrongful motion or filing.<sup>26</sup> Many courts explicitly added that the objective of sanctions was to compensate those hurt by unfounded litigation, as well as to deter misconduct.<sup>27</sup> But the idea of shifting lawyers' fees as a way of compensating people for the injury done by litigation, even

23. See *Christiansburg Garment*, 434 U.S. at 421 (holding that a district court in its discretion may award attorney's fees to a prevailing defendant only upon a finding that plaintiff's action was "frivolous, unreasonable, or without foundation"); *Piggie Park*, 390 U.S. at 402 (finding that § 204(b) of the Civil Rights Act of 1964 was included to ensure that plaintiffs who succeed in obtaining injunctions for discrimination in public accommodation recover attorneys' fees).

24. For a defense of one-way practice, see Rowe, *supra* note 6, at 662-63 (discussing the advantages of pro-plaintiff fee-shifting in encouraging plaintiffs to act as "private attorneys general"). See also Mark S. Stein, *Is One-Way Fee Shifting Fairer than Two-Way Fee Shifting?*, 141 F.R.D. 351 (1992) (observing that former Vice President Dan Quayle's Agenda for Civil Justice Reform in America opposed federal statutes that mandate one-way, pro-plaintiff fee-shifting).

25. Federal Rule of Civil Procedure 11, as amended April 28, 1983, provides in pertinent part:

If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon *the person who signed it, a represented party, or both*, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, *including a reasonable attorney's fee.*

FED. R. CIV. P. 11 (1983) (emphasis added); see also Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067, 1077-90 (1994) (discussing 1983 amendments to Rule 11).

26. See CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1336, at 113 (2d ed. 1990) ("Rule 11 itself gives courts the discretion to fashion sanctions to fit specific cases; not surprisingly, attorneys' fees have become the Rule 11 sanction of choice." (citations omitted)).

27. See *id.* at 100-01 ("There has been considerable discussion of three different justifications—punishment, compensation, and deterrence—for the imposition of sanctions. Although the Advisory Committee Note mentions only deterrence, courts and commenta-

in the relatively small proportion of cases subject to Rule 11,<sup>28</sup> unmistakably suggested a flirtation with European principles of cost indemnity. In 1993 opponents quietly pushed through an amendment that gutted many of Rule 11's provisions.<sup>29</sup> One change apparently was intended to de-couple the calculation of sanctions from the cost of response. The new provision encouraged courts to set sanctions at some presumably lower level that, nevertheless, would capture the attention of the errant lawyer or client.<sup>30</sup>

Given the success of opponents in resisting loser-pays principles in the civil rights laws and Rule 11, the newly introduced Attorney Accountability Act<sup>31</sup> could be expected to face an uphill fight. Despite the commitment of the House majority to the Contract, it was widely agreed that loser-pays legislation faced far less encouraging prospects in the Senate.<sup>32</sup> Moreover, if it got past that house, President Bill Clinton, whose administration had opposed the loser-pays idea, was expected to veto the legislation.<sup>33</sup> It is easy to forget that

tors have noted that compensatory and punitive purposes also are served by sanctions under Rule 11." (citations omitted)).

28. Federal Rule of Civil Procedure 11 applies only to civil actions in the United States District Courts. It is not applicable to federal criminal cases or to state cases whether civil or criminal. While many states have closely followed the federal rules in providing Rule 11-style remedies, others diverge to one extent or other, providing either fuller or less full relief to victimized opponents. John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1427 (1986).

29. Federal Rule of Civil Procedure 11 was amended for technical reasons in 1987, but no substantive change was intended. FED. R. CIV. P. 11 advisory committee's note (1987).

30. Federal Rule of Civil Procedure 11, as amended April 22, 1993, and effective December 1, 1993, provides in pertinent part:

(c)(1)(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is *sufficient to deter repetition* of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of *some or all of the reasonable attorneys' fees* and other expenses incurred as a direct result of the violation.

FED. R. CIV. P. 11 (emphasis added); see also Keeling, *supra* note 25, at 1090-95 (discussing 1993 amendments to Rule 11).

31. H.R. 988, 104th Cong., 1st Sess. (1995).

32. Senator Larry Pressler, a Republican from South Dakota and chairman of the Senate Commerce Committee, indicated shortly after passage in the House of Representatives that the loser-pays legislation did not "stand a chance" of passing the Senate. David Masci, *Broad Changes Pass House, Face Harder Sell in Senate: Three-Part Legislation Would Curb Medical Malpractice, Suits by Disgruntled Investors and "Fivolous Suits"*, 53 CONG. Q. 744, 744 (Mar. 11, 1995).

33. Attorney General Janet Reno and White House Counsel Abner J. Mikva sent a letter on March 6, 1995, to House Speaker Newt Gingrich expressing the opposition of the Clinton Administration to the loser-pays rules in the House legislation. The letter characterized the loser-pays rules as "tilt[ing] the legal playing field dramatically to the disadvan-



passing the House of Representatives, as the Attorney Accountability Act did with loser-pays provisions intact, might count in normal times as an extraordinary showing for a novel proposal on its first time out. It might seem natural to expect the Senate and White House to reconsider their opposition at some later date, as loser-pays ideas become better known and more fully debated.

The leadership of the American bar evidently prefers to dismiss the sudden burst of interest in the idea as a mere frolic and detour, soon to be forgotten as lawmakers move on to other issues. We think otherwise. The bar is underestimating the appeal of loser-pays proposals in the same way that it has consistently underestimated the extent of public discontent with modern litigation and the serious nature of that discontent.<sup>34</sup> No matter what the fate of loser-pays as a single, highly visible proposal in Congress, we predict that the general principle will manifest itself in many different reform proposals in coming years, around the states and in Washington. While these proposals may be less outwardly dramatic than the bill borne by the Contract with America,<sup>35</sup> cumulatively they will amount to a serious challenge to the current rule.

Variations on loser-pays—and nearly every new proposal seems to differ in detail—have become a common element of state-level reform packages. For example, a loser-pays plan appeared as one component of a package of three legal reform initiatives in California that eventually fell short at the polls after a hard-fought battle.<sup>36</sup> In 1995 the legislatures of both Oklahoma and Oregon passed bills that, while dif-

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tage of consumers and middle-class citizens." *Id.* at 745 (quoting letter); see also Phillip D. Bostwick, *Civil Justice Reform Through Federal Legislation: Watching the House, the Senate, and the President Make Sausage*, CA27 A.L.I.-A.B.A. 317, 323 (Dec. 14, 1995) (indicating that the loser-pays legislation is given "the least chance of becoming law").

34. See *The Trouble with Lawyers* (John Stossel, host, ABC television special, Jan. 2, 1996); Mike McDaniel, *Stossel Pleads for Sanity in Ruinous Legal System*, HOUS. CHRON., Jan. 2, 1996.

35. Attorney Accountability Act, H.R. 988, 104th Cong., 1st Sess. (1995).

36. See Dan Bernstein, *Wilson Endorses 3 Anti-Lawsuit Initiatives*, SACRAMENTO BEE, Jan. 6, 1996, at A3 (announcing California Governor Pete Wilson's support for a ballot initiative requiring losers to pay the attorneys' fees of winners in class action lawsuits by shareholders against corporations); Tom Dresslar, *Tort Contortions: Politics, Parochial and Presidential, Puts Tort Reform on Hold for Another Year in California*, CAL. LAW., May 1995, at 25 (noting that Governor Wilson's aides insisted tort reform ranked with tax cuts and regulatory reform as one of his top three legislative priorities in 1995); Philip Hager, *Civil Liability System Faces Uncivil War*, L.A. TIMES, Dec. 6, 1992, at A3 (reporting that Governor Wilson was studying ways of reforming the civil liability system, including "[a]llowing defendants in some cases to collect attorney fees from unsuccessful plaintiffs"). But see Stephanie Simon, *The Propositions*, L.A. TIMES, Mar. 28, 1997, at B1 (stating that nearly 60% of California voters rejected a ballot initiative requiring shareholders who lose class action lawsuits against corporations to pay the attorneys' fees of the winning corporations).

fering substantially from each other and from the federal proposal, represent significant experiments with loser-pays and will help advance the debate for lawmakers elsewhere.<sup>37</sup> We predict that within a few years other states will have joined them, and American fee practices will take on a less unified look: Alaska will no longer be an asterisk.

The American civil justice system, we hear often, is the finest in the world. It has the most elaborate guarantees of access, the greatest willingness to spare no expense in the pursuit of rights, and the fullest and most adequate methods in its assessment of damage awards. Therefore, one might expect the public with each passing year to beam with greater affection on the litigators and courts who have provided all this new access and all these new rights. Instead, it has risen in revolt. How could it be so ungrateful?

Each wave of public discontent with our litigation regime has taken our legal establishment by surprise. It was surprised when lawyers became the butt of popular jokes and slid to near the bottom in the occupational respect standings.<sup>38</sup> It was surprised when an otherwise less-than-popular figure, former Vice President Dan Quayle, suddenly gained public esteem by picking a fight with it at an American Bar Association convention.<sup>39</sup> The bar leadership was surprised when political candidates began running successfully for major office, such as the California and Texas governorships, by making the need to bring litigation under control a prominent campaign theme.<sup>40</sup> It was

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37. See *infra* part II (discussing the recent legislation in Oklahoma) and part III (discussing the recent legislation in Oregon).

38. See Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50. A 1995 U.S. News & World Report poll of Americans found that only 35% believed lawyers play an important role in holding wrongdoers accountable; 56% believed lawyers use the system to protect the powerful and get rich; only 27% said lawyers are very honest or mostly honest; and 69% said that lawyers are only sometimes honest or not usually honest. *Id.* The story also noted that George Bushnell, a past president of the American Bar Association, launched an expensive public relations campaign to combat lawyer jokes and improve the "image" of lawyers. *Id.*

39. On August 13, 1991, then-Vice President Dan Quayle delivered a speech to the American Bar Association followed by an impromptu debate in which he vigorously criticized the legal profession and called for the enactment of reforms, including a loser-pays proposal. David Broder et al., *ABA President Disputes Quayle on Litigation Proposals*, WASH. POST, Aug. 14, 1991, at A1; see also Sandra Torrey et al., *Bush, Quayle Put Lawyers in Election-Year Docket*, WASH. POST, Aug. 28, 1992, at A16 (discussing how Quayle's speech before the American Bar Association "struck a chord" with the public).

40. In November 1994 Republican Pete Wilson defeated Democrat Kathleen Brown to win a second term as governor of California on a platform that emphasized legal reform. See Cathleen Decker, *California Elections*, L.A. TIMES, Oct. 19, 1994, at A3. Likewise, Republican George W. Bush, Jr., defeated incumbent Democratic Governor Ann Richards in Texas due in part to his plea to "end the frivolous and junk lawsuits." Alan Bernstein, *Bush*

surprised when the Republicans included litigation reform in their Contract with America,<sup>41</sup> surprised when the G.O.P. proceeded to capture the House of Representatives for the first time in forty years,<sup>42</sup> and then surprised when the House in its first hundred days passed all ten planks of the Contract with America, including legal reform.<sup>43</sup> The House Republicans knew these proposals posed a threat to everything the bar held dear.<sup>44</sup> Didn't the public embrace the same values?

Helping to set up the bar leadership for this series of surprises was its attitude toward what was often called tort reform. It viewed tort reform as a preoccupation of business interests and doctors, perhaps reinforced by the nostalgia of ideological conservatives for an earlier and simpler era.<sup>45</sup> The bar believed that only through intensive lobbying, and not because any real mass constituency cared, these interest groups now and again succeeded in enacting a damages cap, or a reform of joint and several liability.<sup>46</sup> Although the organized bar generally resisted such measures, they were at most incremental changes that posed little threat to litigation practice. These isolated reforms affected relatively few cases and often were confined to narrow practice areas such as product liability.<sup>47</sup>

Loser-pays broke from the familiar tort reform pattern. To begin with, it threatened or promised far more fundamental changes to litigation practice. If applied, it would affect virtually every case. It would have a powerful impact, shaping incentives on whether to proceed with a claim or defense, how best to prosecute it, and when and how to settle. Additionally, it would not remain confined to personal

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*Says Tort Reform Would Be Key Project If Elected Governor*, HOUS. CHRON., Oct. 21, 1994, at A37; see also R.G. Ratcliffe, *Richards Criticized on Tort Reform*, HOUS. CHRON., Sept. 14, 1994, at A13 (reporting that George W. Bush, Jr., had criticized Governor Ann Richards for accepting more than \$2.7 million in political contributions from personal injury lawyers between 1990 and 1994).

41. See *supra* note 12 and accompanying text.

42. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1996, at xxiv (1995) (noting that the Democrats last lost control of the House of Representatives in 1954).

43. See *supra* notes 10-11 and accompanying text.

44. The ABA consistently has opposed loser-pays. See, e.g., *ABA Says No to Litigation "Reforms" in Republican Contract with America*, 63 U.S.L.W. 2506, 2507 (Feb. 21, 1995).

45. See Masci, *supra* note 32, at 744 (indicating that the battle over tort reform in the House pitted businesses, doctors, consumer product makers, insurance companies, and accounting firms against trial lawyers and consumer groups); cf. T.R. Goldman, *Opponents of Reform*, LEGAL TIMES, Apr. 17, 1995, at S34 (cataloguing the various groups opposed to tort reform).

46. See Vargo, *supra* note 17, at 1618 (characterizing critics of contingency fee system as "the 'repeat players' and their supporters").

47. See Mark A. Hofmann, *States Take Center Stage*, BUS. INS., June 5, 1995, at 1, (discussing the progress of tort reform in state legislatures across the country).

injury cases; if it made sense there, it would also presumably make sense for most other civil actions.

At the same time, unlike conventional tort reform measures, loser-pays drew little enthusiasm from organized business, which saw it as a drastic step with unpredictable and perhaps disruptive consequences.<sup>48</sup> The practical effect of most tort reform had been pro-defendant,<sup>49</sup> but loser-pays would unleash a wide range of effects, some of which would redound to the benefit of plaintiffs suing business defendants.<sup>50</sup> Washington tort reform lobbyists kept their distance from the loser-pays idea, and, in fact, signaled that they hoped the Republicans would drop it lest it endanger the narrower product liability reforms they sought for their clients.<sup>51</sup>

Other political fracture lines on the issue likewise confounded conventional expectations. The idea had been backed over the years most prominently by a group of writers and intellectuals who were by most standards neither conservative nor pro-business: the "neoliberals." They included *Washington Monthly* Editor in Chief Charles Peters,<sup>52</sup> commentator Michael Kinsley,<sup>53</sup> and commentator James

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48. See, e.g., Dave Lenckus, "Loser Pays" Proposals Make Strange Bedfellows, *BUS. INS.*, Feb. 20, 1995, at 41 (indicating that many insurance and business groups that support tort reform generally had concerns about the loser-pays legislation because it did not contain uniform rules for federal and state courts and they feared it would lead to forum shopping); Reynolds Holding, *House Legal Reformers Find Surprise Foes—Republicans*, *S.F. CHRON.*, Feb. 13, 1995, at A4 (quoting an unidentified business lobbyist who stated that loser-pays proposals "raise a lot of problems from everybody's side" and that "no one is enthusiastic about it").

49. See Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 *UCLA L. REV.* 731, 772-95 (1992) (arguing that the tort reform movement, through, inter alia, legislative successes and shifts in public opinion, contributed to a reduction in the success rate of plaintiffs).

50. See *supra* INTRODUCTION (noting that loser-pays is likely to improve prospects for strong small claims and discourage delay and cost-infliction by defendants).

51. See, e.g., Lenckus, *supra* note 48, at 41 (indicating that neither the National Association of Manufacturers nor the American Tort Reform Association was taking a stance on loser-pays and instead were focusing their efforts on other tort reform proposals); Charles Oliver, *A Way to Trim Litigation Costs?*, *INVESTOR'S BUS. DAILY*, June 9, 1995, at A1 (quoting a spokesperson for the American Tort Reform Association as stating that "[o]ur membership is split on the issue" of loser-pays); *Civil Liability, House Subcommittee Hears Testimony on Tort and Civil Justice Reforms*, *Daily Rep. for Exec. (BNA)* A25 (Feb. 7, 1995) (reporting on Walter Olson's testimony that loser-pays "has not met with enthusiasm from organized business"); *Product Liability*, *MGMT. BRIEFING (BNA)* (Nov. 16, 1994) (indicating that loser-pays "deeply divides business groups").

52. In an article on ways to improve America, Charles Peters's first proposal is adoption of loser-pays rules. Charles Peters, *No Dollars, Common Sense: Eighteen Cost-Free Steps to a Better America*, *WASH. MONTHLY*, Dec. 1992, at 38 ("[E]xtortion suits would be quashed because plaintiffs with lousy cases would be penalized with the opposition's costs—as they are now not—for bringing groundless cases to court. This would mean less work for lawyers and fewer of them.").

Fallows.<sup>54</sup> Another influential supporter not suspected of conservative leanings was *American Lawyer* Editor and *Court TV* Chief Steven Brill.<sup>55</sup>

Writers and intellectuals were not the only ones to see merit in the idea. For a novel proposal being attacked regularly in the press as terrifying and unworkable, loser-pays ran remarkably well in an early 1995 *U.S. News and World Report* survey.<sup>56</sup> To be sure, public support varied amusingly depending on how the question was couched. When phrased in the more menacing form—"If you sue someone and lose the case, should you pay his costs?"—forty-four percent of those polled agreed that they should.<sup>57</sup> That is a far cry from a shabby quantum of public support. Meanwhile, with sides reversed—"If someone sues you and you win the case, should he pay your legal costs?"—nearly everyone saw the idea as simple fairness. Eighty-five percent answered yes.<sup>58</sup> Presumably a number somewhere between forty-four and eighty-five would probably reflect where the public would come out on loser-pays if forced to take a consistent view. Consequently, it becomes less surprising that the House Republicans stood their ground rather than withdrawing the loser-pays measure under political fire.<sup>59</sup>

53. In a discussion of former Vice President Dan Quayle's efforts to curb the "litigation explosion," Michael Kinsley stated that adoption of a loser-pays proposal would not only "curb lawsuits that are frivolous or extortionate . . . . It would actually encourage lawsuits that are clearly meritorious." Michael Kinsley, *Quayle's Case*, *NEW REPUBLIC*, Sept. 9, 1991, at 4.

54. Writing in the not-exactly-Gingrichite *New York Review of Books*, James Fallows called the loser-pays idea "overdue." James Fallows, *The Republican Promise*, N.Y. REV. BOOKS, Jan. 12, 1995, at 3,4.

55. In a widely noted op-ed piece in the *Washington Post*, Steven Brill outlined five elements of a loser-pays proposal that he termed "simple, and overdue":

(1) Put the risk of the cost of litigation on whoever loses the case. . . .

(2) Require the judge to pass on the reasonableness of the legal bills submitted by the winning side . . . .

(3) Make the lawyers equally responsible with their clients for paying these losers' fees . . . .

(4) To prevent defendants from using stonewall litigation tactics against plaintiffs who use contingent-fee lawyers, a winning plaintiff lawyer would have his or her choice of recovering either this one-third contingent fee or the market fees paid by the defendant to the defense lawyer, whichever is higher.

(5) To cover the other costs of a suit, the judge would set a fee that the plaintiff and the defendant could "charge" for the time they have to spend on the case . . . .

Steven Brill, *Paula Jones: There Ought to Be a Law*, *WASH. POST*, June 5, 1994, at C7.

56. Budiansky et al., *supra* note 38, at 50 (reviewing results of a public opinion poll questioning the behavior of lawyers, citizens, and the judicial system).

57. *Id.*

58. *Id.*

59. See *supra* notes 8-11 and accompanying text.

The strong poll showings came as no surprise to Republican strategists. Drafters had carefully vetted the Contract with America before it was launched to include only proposals that they knew roused enthusiasm on Main Street, and loser-pays was no exception.<sup>60</sup> "Time and again, the audience would ask about making the losing side pay," said Representative David McIntosh, who won a seat for the G.O.P. in Muncie, Indiana, in the 1994 election. "That was the reform that really resonated."<sup>61</sup>

The resulting loser-pays legislation, hastily drafted in the early days of the new Republican House, included a few downright peculiar terms.<sup>62</sup> Notably, the legislation applied the loser-pays principle only to cases filed in federal court under diversity jurisdiction.<sup>63</sup> The choice of diversity, but not federal question actions,<sup>64</sup> inverted what one might expect to be the usual priority of introduction for a procedural reform. If Congress believed strongly in the case for a new procedure, one would expect it to show that confidence by applying it to actions arising under its own statutes and only later consider applying it to federal court actions arising under state law. Not only principles of federal-state amity but also concern over forum-shopping might counsel caution in proceeding with the latter step. Every new divergence between federal and state procedure raises the presumably unwelcome prospect that litigants will acquire a new tactical reason to make sure cases land in the one court system instead of the other.<sup>65</sup>

60. See, e.g., Jonathan Alter et al., *Bracing for the Big One*, NEWSWEEK, Oct. 10, 1994, at 27 (stating that every clause of the Contract with America "was included only after it had been approved by at least 60 percent of the voters in public-opinion surveys"); Julie Johnson, *In the Eyes of Newt*, TIME, Oct. 10, 1994, at 35 (reporting that in developing the Contract with America Republican strategists held focus groups every 10 days starting in January 1994).

61. Walter Olson, *And Now for Tort Reform*, WALL. ST. J., Nov. 16, 1994.

62. The loser-pays proposal was included initially as part of a broader package of legal reforms entitled the Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 101 (as introduced, Jan. 4, 1995). Later, the loser-pays proposal was introduced with minor changes as a separate bill entitled the Attorney Accountability Act of 1995, H.R. 988, 104th Cong., 1st Sess. § 2 (as introduced, Feb. 16, 1995).

63. The loser-pays provision was drafted as an amendment to § 1332 of title 28 of the U.S. Code. H.R. 10; H.R. 988. Section 1332 grants diversity jurisdiction to federal courts over what would otherwise be state law claims if the parties are citizens of different states. 28 U.S.C. § 1332 (1988) ("The district court shall have original jurisdiction of all civil actions where the matter . . . is between—(1) citizens of different States; . . .").

64. Federal question jurisdiction is provided for by § 1331 of title 28 of the U.S. Code. 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Because the loser-pays provision was drafted as an amendment to § 1332, it does not affect cases filed based on federal question jurisdiction. See H.R. 10; H.R. 988.

65. Forum-shopping, which is the practice of litigants seeking a tactical advantage by having their case heard in a particular court, has been widely criticized. See, e.g., Pennzoil

Plaintiffs can often control which forum will hear their case by a shrewd choice of defendants.

Another provision in the House loser-pays bill would have given plaintiffs the maximum benefit of forum-shopping. Specifically, the bill would have applied loser-pays only to cases *filed* in federal court under diversity jurisdiction and not to cases initially filed in state court but subsequently *removed* to federal court on the defendants' petition.<sup>66</sup> Thus, even if a case were destined to be heard as a diversity action in federal court, a plaintiff could escape the loser-pays rule by filing in state court and forcing the defendant to remove. Or, if the plaintiff felt the fee-shifting provision was advantageous given the details of the case, he could secure the loser-pays rule by initially filing the case in federal court.

Over a wide range of cases, the legislation as originally drafted would have introduced loser-pays at the plaintiff's option. This extraordinary result turned out to be too clever. If drafters of the Contract with America bill imagined that they could somehow soften opposition by introducing the loser-pays idea in a way so favorable to plaintiffs, they were proved shortsighted. Very little of the public opposition to the bill treated this feature as a welcome mitigation or saving grace; few opponents even mentioned it at all. Meanwhile, some evidence suggests that the gambit did drive away potential support among defense interests.<sup>67</sup> Given its utter failure,<sup>68</sup> one may predict that this stratagem will not be repeated in future drafting of loser-pays legislation.

Between committee hearings and final floor consideration, the House bill was amended from "full" to "modified" loser-pays.<sup>69</sup> In the

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Co. v. Texaco, Inc., 481 U.S. 1, 24 (1987) (Marshall, J., concurring) (referring to "the odor of impermissible forum shopping which pervades this case"); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (attempting to reduce the incentive to parties to choose a federal as opposed to a state forum by applying state substantive law in federal diversity cases); Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (decrying forum-shopping as having become "a national legal pastime"); OLSON, *supra* note 7, at 84-86, 190-91.

66. Federal courts have the power to remove cases from state courts. 28 U.S.C. §§ 1441-1452 (1988). Because the loser-pays provision was drafted as an amendment to section 1332, it does not affect cases removed from state court by defendants. *See* H.R. 10; H.R. 988.

67. *See* Lenckus, *supra* note 48, at 41 (reporting that insurers and the American Bar Association expressed concern about the potential for forum shopping in the loser-pays legislation as introduced in the House).

68. *See* Masci, *supra* note 32, at 744 (commenting that the loser-pays legislation that passed the House of Representatives did not "stand a chance" of passage in the Senate).

69. *Compare* H.R. 988, 104th Cong., 1st Sess. § 2 (as introduced, Feb. 16, 1995) with H.R. 988, 104th Cong., 1st Sess. § 2 (as reported in the House, Mar. 2, 1995).

modified form, the legislation applied only to actions in which a plaintiff spurned a defendant's formal offer of settlement and shifted only costs incurred after the failed settlement offer.<sup>70</sup> In addition, both the original and the modified bill limited the magnitude of a fee-shift to the amount reasonably payable to a party's own lawyer.<sup>71</sup> Without pausing to analyze either provision at length, we would simply comment that neither provision is necessarily inconsistent with achieving reasonably robust loser-pays incentives across a wide range of cases. The last-minute revisions did not change the eccentric choice of domain provisions of the bill, however, which applied to cases *filed* under diversity jurisdiction but not to cases *removed* from state to federal court.<sup>72</sup>

## II. OKLAHOMA

In May 1995, two months after the U.S. House of Representatives passed its bill,<sup>73</sup> Oklahoma lawmakers enacted a loser-pays proposal applying to larger personal injury cases, as part of a package of tort reforms.<sup>74</sup> Under the legislation, a defendant can choose whether to

70. Section 2 of House Bill 988 provided in pertinent part:

(5) If *all offers made* by a party under paragraph (1) with respect to a claim or claims including any motion to dismiss all claims are *not accepted* and the judgment, verdict, or order finally issued (exclusive of costs, expenses, and attorney's fees incurred after judgment or trial) in the action under this section is not more favorable to the offeree with respect to the claim or claims than the last such offer, the offeror may file with the court, within 10 days after the final judgment, verdict, or order is issued, a petition for payment of costs and expenses, including attorney's fees, incurred with respect to the claim or claims *from the date the last such offer was made* or, if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made.

H.R. 988, 104th Cong., 1st Sess. § 2 (as placed on the Senate calendar, Mar. 16, 1995) (emphasis added).

71. Section 2 of House Bill 988 provided in pertinent part:

(7) Attorney's fees under paragraph (6) shall be a *reasonable attorney's fee* attributable to the claim or claims involved, calculated on the basis of an *hourly rate* which may not exceed that which the *court considers acceptable in the community in which the attorney practices law*, taking into account the attorney's qualifications and experience and the complexity of the case, except that the attorney's fees under paragraph (6) may not exceed—

(A) the actual cost incurred by the offeree for an attorney's fee payable to an attorney for services in connection with the claim or claims . . . .

H.R. 988, 104th Cong., 1st Sess. § 2 (1995) (emphasis added).

72. See *supra* notes 65-66 and accompanying text.

73. See *supra* note 10 and accompanying text.

74. S.B. 263, 45th Leg., 1st Reg. Sess., 1995 Okla. Sess. Law (enacted).



invoke the provision by making an offer of judgment.<sup>75</sup> If he does, the plaintiff who turns down the offer and is awarded less at trial can be liable for attorney's fees incurred by the defendant after the offer.<sup>76</sup> Once a defendant makes an offer, the plaintiff is free to make a "counteroffer of judgment,"<sup>77</sup> which starts the loser-pays meter running in his favor if the defendant turns it down and is required to pay more at trial.<sup>78</sup> The bill is confined to personal injury cases in which either a plaintiff demands more than \$100,000 or a defendant offers more than \$100,000.<sup>79</sup>

The Oklahoma loser-pays plan resulted from an exhaustively negotiated compromise between tort reformers and their opponents. The reformers, organized under the name Citizens Against Lawsuit Abuse (CALSA),<sup>80</sup> had assembled a war chest of more than \$2 million to push for reform in the state legislature and, if necessary, through ballot initiatives.<sup>81</sup> Facing the most serious challenge in its history, the

75. Section 1 provides that "any defendant may file with the court, at any time more than ten (10) days prior to trial, an offer of judgment for a sum certain to any plaintiff with respect to the action or any claim or claims asserted in the action. . . ." *Id.* § 1.

76. Section 1 also provides:

3. In the event the plaintiff rejects the offer(s) of judgment and the judgment awarded the plaintiff, exclusive of any costs or attorneys fees otherwise recoverable, is less than the final offer of judgment, then the defendant filing the offer of judgment shall be entitled to recover reasonable litigation costs and reasonable attorneys fees incurred by that defendant from the date of filing of the final offer of judgment until the date of the verdict. . . .

*Id.*

77. With regard to defendants, section 1 provides in pertinent part: "In the event a defendant files an offer of judgment, the plaintiff may, within ten (10) days, file with the court a counteroffer of judgment directed to each defendant who has filed an offer of judgment." *Id.*

78. Section 1 also provides:

In the event a defendant rejects counteroffer(s) of judgment and the judgment awarded to the plaintiff is greater than the final counteroffer of judgment, the plaintiff shall be entitled to recover reasonable litigation costs and reasonable attorneys fees incurred by the plaintiff from the date of filing of the final counteroffer of judgment until the date of the verdict.

*Id.*

79. Section 1 establishes the following limitation: "The provisions of this subsection shall apply only where the plaintiff demands in a pleading or in trial proceedings more than One Hundred Thousand Dollars (\$100,000.00), or where the defendant makes an offer of judgment more than One Hundred Thousand Dollars (\$100,000.00)." *Id.*

80. Citizens Against Lawsuit Abuse (CALSA) was an alliance of independent tort reformers, insurance companies, and business groups. Telephone interview with Terry West, Lawyer, Oklahoma Trial Lawyers' Association (Dec. 1995) [hereinafter West Interview] (stating that CALSA was basically supported by manufacturers, insurance companies, and business groups).

81. See Chuck Ervin, *Tort Law Reform Nearer Reality*, TULSA WORLD, May 9, 1995, at N1; see also West Interview, *supra* note 80 (stating that CALSA had raised \$2 million to help enact tort reform legislation).

Oklahoma Trial Lawyers' Association (OTLA) came to the bargaining table.<sup>82</sup> According to attorney Terry West of OTLA, between January and April negotiators for CALSA and OTLA spent about fifty hours a week hammering out a compromise that included provisions addressing punitive damages reform and loser-pays.<sup>83</sup> Part of the compromise was an understanding that both sides would support the legislation only if no amendments were made by the legislature, and that neither side would try to pass any additional litigation reforms for three years.<sup>84</sup> In addition to CALSA and OTLA, the state Chamber of Commerce and the chambers in the state's two largest cities, Oklahoma City and Tulsa, signed off on the compromise.<sup>85</sup>

CALSA and OTLA presented their compromise as a *fait accompli* to legislators, who passed it by margins of ninety-one to six in the state House<sup>86</sup> and forty-seven to one in the state Senate.<sup>87</sup> Some complaints were heard from combatants on both sides of the controversy. On the reform side, some small business advocates had hoped for more sweeping measures going beyond the topics included in the compromise.<sup>88</sup> Meanwhile, some opponents of litigation reform objected to the legislation with particular vehemence.<sup>89</sup> On the whole, however, most comments were moderate in tone. For example, the *Sunday Oklahoman* in Oklahoma City called the package a "modest improvement" over current law and added that if it was not successful in controlling litigation rates stronger measures would be needed later.<sup>90</sup> As yet we have no reports of notable early experiences under the law.<sup>91</sup>

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82. Ervin, *supra* note 81, at N1.

83. West Interview, *supra* note 80.

84. Ervin, *supra* note 81, at N1 (referring to the three-year moratorium on new tort reform legislation as a "gentlemen's agreement"); see also West Interview, *supra* note 80.

85. Ervin, *supra* note 81, at N1.

86. Chuck Ervin, *House, Senate Pass Tort Reforms*, TULSA WORLD, May 24, 1995, at N9.

87. *Id.*

88. Oklahoma State Senator Dave Herbert said: "This isn't tort reform . . . . This is tort marshmallow." *Id.*

89. The *Tulsa World* reported that State Senator Gene Stipe said that "the bill primarily is designed to protect big corporations who kill innocent people because of wanton disregard for their safety." *Id.* The account continued: "Stipe said the legislation would help people like those responsible for the bombing of the Alfred P. Murrah Federal Building, where 19 children died." *Id.* Another report in the *Tulsa World* characterized Senator Stipe as "one of the state's major trial lawyers" with offices "in a half-dozen cities." Ervin, *supra* note 81, at N1.

90. Editorial, *A Restrained Endorsement*, SUNDAY OKLAHOMAN, May 21, 1995, at 10.

91. See West Interview, *supra* note 80 (stating that the legislation applies to relatively few cases and has not had discernible effects yet).

## III. OREGON

In contrast to the grand compromise that brought limited loser-pays to Oklahoma,<sup>92</sup> Oregon saw a hard-fought battle that resulted in quite a different experiment with the idea. After Republicans took control of the state legislature in 1994,<sup>93</sup> reform legislators soon introduced an ambitious legal overhaul package.

In its original form, the Oregon legislation<sup>94</sup> provided that in all cases in which the amount claimed was less than \$20,000 the losing party would have to reimburse the prevailing party for all reasonable attorney's fees.<sup>95</sup> The bill as introduced further provided that a party that successfully moved for a summary judgment resolving all of the opponent's claims or defenses could recover attorney's fees, although the opponent could avoid this provision by a dismissal or withdrawal of the claim or defense within twenty-one days of the summary judgment motion.<sup>96</sup> A plaintiff who spurned an offer of judgment and then received less at trial waived statutory or contractual entitlement to attorney's fees, while the defendant's entitlement to attorney's fees began from the date of the rejected offer through trial.<sup>97</sup> Finally, in what proved to be the provision with the most staying power, the bill sought to convert the state's one-way fee-shifting statutes into two-way statutes, so that the prevailing party would receive attorney's fees whether he was a plaintiff or a defendant.<sup>98</sup>

The original proposal brought heated opposition from the Oregon Trial Lawyers Association.<sup>99</sup> Surprisingly, or perhaps not, the Or-

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92. See *supra* notes 80-85 and accompanying text.

93. See Steve Suo & Cathy Kiyomura, *Rural GOP Takes Over Capitol*, OREGONIAN, Nov. 11, 1994, at C1 (discussing the Republican takeover of the Oregon state legislature for the first time since 1955).

94. S.B. 385, 68th Leg., 1st Reg. Sess., 1995 Or. Laws (as introduced).

95. See OREGON LITIG. REFORM COALITION, 1995 LEGIS. REP. 6 (Sept. 18, 1995) (on file with author) (stating that in its original form, Oregon Senate Bill 385 included a modified loser-pays system for cases involving less than \$20,000).

96. See *id.* (describing the provisions of the original legislation as they relate to parties moving for summary judgment).

97. See *id.* at 6-7 (analyzing the penalty imposed under the legislation as originally drafted on plaintiffs who refused to accept offers of compromise).

98. See *id.* (reporting that the original version of Senate Bill 385 would have converted all one-way fee-shifting statutes to two-way statutes); cf. S.B. 385, 68th Leg., 1st Spec. Sess. §§ 18-138, 1995 Or. Laws (as enacted) (detailing the specific sections of the Oregon Revised Statute that were amended from one-way to two-way fee-shifting).

99. In testimony before the Oregon legislature's Joint Subcommittees on Civil Process, Charles S. Tauman, Executive Director, Oregon Trial Lawyers Association, explained his organization's opposition to the loser-pays provisions of Oregon Senate Bill 385. Charles S. Tauman, Testimony Before Oregon Joint Subcommittees on Civil Process (Feb. 21, 1995) (transcript on file with author). Tauman testified that "the 'loser pays' provisions of SB 385 deny the average Oregonian, the middle class Oregonian, de facto access to civil

egon Association of Defense Counsel also opposed the loser-pays idea.<sup>100</sup> Opponents of the legislation brought in famed attorney F. Lee Bailey, fresh from consulting as a member of the O.J. Simpson defense team, to instruct Oregonians on the dangers to the administration of justice posed by loser-pays proposals.<sup>101</sup>

The bill was extensively, though not completely, cut back in committee.<sup>102</sup> The general loser-pays provisions were rendered almost meaningless by the use of a damages cap set at a derisory level. The amended bill allowed a prevailing party to collect a maximum of \$500 in attorney's fees,<sup>103</sup> unless a party acted in bad faith or frivolously, in which case the ceiling would rise to \$5000.<sup>104</sup> Lawmakers completely eliminated fee-shifting for summary judgments.<sup>105</sup>

The one application of loser-pays that survived largely intact in the final legislation—and which makes the Oregon legislation interesting as a precedent elsewhere—is the conversion of a long list of one-way loser-pays statutes into two-way statutes.<sup>106</sup> Exceptions were made for suits filed by the state itself and for discrimination suits; in these cases defendants would obtain attorneys' fees only if there had been no reasonable basis for the complaint.<sup>107</sup>

justice . . . [b]ecause 'loser pays' imposes an unacceptable risk on citizens of modest means who find themselves in need of their measure of justice." *Id.* at 2. Tauman also characterized the loser-pays proposal as "bad law and bad policy." *Id.* at 9.

100. In a letter to the co-chairman of the Oregon Joint Subcommittee on Civil Process, the Oregon Association of Defense Counsel expressed its opposition to the loser-pays proposal on the grounds that it would discourage people from bringing meritorious claims. See Ashbel S. Green, *Barring the Courtroom Door*, OREGONIAN, Feb. 19, 1995, at B1 (reporting on the content of the letter).

101. See Jeff Manning, *F. Lee Bailey on Offense Against 'Loser Pays' Bill*, OREGONIAN, Mar. 6, 1995, at B3 (reporting on Bailey's visit to Oregon at the behest of the Oregon Trial Lawyers Association).

102. Compare S.B. 385, 68th Leg., 1st Reg. Sess., 1995 Or. Laws (as introduced) with S.B. 385, 68th Leg., 1st Spec. Sess., 1995 Or. Laws (as enacted). See also Gregory R. Mowe & Katherine A. McDowell, *Changing the Rules: Tracking Oregon's Trail of "Tort Reform,"* OR. ST. B. BULL., Aug./Sept. 1995, at 17 ("The laws ultimately enacted represent a substantially moderated version of the original 'tort reform' package proposed by the business lobby.").

103. The amount of the fee a prevailing plaintiff has a right to recover depends on whether judgment is given with or without trial and whether the action is in circuit court (\$500 with trial or \$250 without trial), district court (\$250 with trial or \$125 without trial), or the small claims department (\$75 with trial or \$50 without trial). S.B. 385, 68th Leg., 1st Spec. Sess. § 7(2), 1995 Or. Laws (as enacted).

104. S.B. 385, 68th Leg., 1st Spec. Sess. § 7(3), 1995 Or. Laws (as enacted).

105. Instead of allowing fee-shifting, the Oregon legislature amended the standard for granting summary judgment. Compare S.B. 385, 68th Leg., 1st Reg. Sess., 1995 Or. Laws (as introduced) with S.B. 385, 68th Leg., 1st Spec. Sess. § 5, 1995 Or. Laws (as enacted). See also OREGON LITIG. REFORM COALITION, *supra* note 95, at 9 (discussing the effect of Oregon Senate Bill 385 on the summary judgment standard).

106. S.B. 385, 68th Leg., 1st Spec. Sess. §§ 18–138, 1995 Or. Laws (as enacted).

107. *Id.* §§ 20, 23–24, 28, 68–69, 110, 116–17.

As applied to a long list of other statutes, spelled out one by one in the legislation, mandatory one-way fee-shifting would become discretionary two-way fee-shifting.<sup>108</sup> To prevent judges from ignoring the legislative mandate, as the U.S. Supreme Court had done in *Christiansburg Garment v. Equal Employment Opportunity Commission*<sup>109</sup> and *Newman v. Piggie Park Enterprises, Inc.*,<sup>110</sup> the Oregon legislature bounded their discretion. A list of factors for them to consider in exercising their discretion was enumerated: the objective reasonableness of claims and defenses asserted by each party; the diligence shown by the parties; the reasonableness of settlement decisions; the extent to which shifting fees might discourage the making of good faith claims and defenses; and the extent to which it might discourage the making of meritless claims and defenses.<sup>111</sup> Notably absent from the list of factors is the relative net worth of the parties.<sup>112</sup>

The Oregon Senate approved the revised version of Senate Bill 385 on May 23, 1995, by a vote of twenty to ten.<sup>113</sup> The vote was mostly along party lines with only one Democrat breaking ranks to vote in favor of the bill.<sup>114</sup> The law went into effect on September 11, 1995.<sup>115</sup>

#### IV. ALASKA

Alone among American states, Alaska has had a fee-shifting rule for decades.<sup>116</sup> The Act of Congress that first established Alaska as a territory in 1900 specified that a prevailing party's judgment should include attorney's fees.<sup>117</sup> The rule survived statehood and currently

108. *Id.* §§ 18, 21-22, 25-27, 29-48, 50-67, 70-109, 111-115, 118-138.

109. 434 U.S. 412 (1978); see *supra* notes 22-23 and accompanying text (discussing the case at greater length).

110. 390 U.S. 400 (1968); see *supra* notes 22-23 and accompanying text (discussing the case at greater length).

111. S.B. 385, 68th Leg., 1st Spec. Sess. § 6, 1995 Or. Laws (as enacted).

112. See OREGON LITIG. REFORM COALITION, *supra* note 95, at 8 (characterizing the absence of a factor allowing judges to consider the relative net worth of parties as significant).

113. *Hot Topics: Senate Approves GOP's Centerpiece of Legal Reform*, OREGONIAN, May 24, 1995, at D4.

114. *Id.*

115. Officially, the law became effective on September 9, 1995, 90 days after the last day of the legislative session, but because that was a Saturday, the practical effective date for S.B. 385 was Monday, September 11, 1995. Mowe & McDowell, *supra* note 102, at 17 n.2.

116. The authors relied heavily on an excellent student note in preparing this section. See Kevin M. Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429 (1993).

117. Act of June 6, 1900, ch. 786, §§ 509-28, 31 Stat. 321, 415-81.

is codified as Alaska Rule of Civil Procedure 82.<sup>118</sup> The Alaska Supreme Court modified the rule in early 1993, making it somewhat biased in favor of plaintiffs.<sup>119</sup> Nevertheless, it remains the strictest two-way fee-shifting rule in the United States.

Rule 82 provides the following schedule of attorney's fees to be awarded to a plaintiff who obtains a monetary award:<sup>120</sup>

Amount of Judgment and, if Awarded, Prejudgment Interest	Contested		
	Contested with Trial	Without Trial	Uncontested
First \$25,000	20%	18%	10%
Next \$75,000	10%	8%	3%
Next \$400,000	10%	6%	2%
Over \$500,000	10%	2%	1%

Under the old version of Rule 82, in effect through 1992, if a court determined that the money judgment was not an accurate criterion for determining the fee to be allowed to the prevailing side, then the court had discretion to award a fee commensurate with the amount and value of legal services rendered.<sup>121</sup> The court was not required to state its reasons for deviating from the schedule or to justify the amount of its award.<sup>122</sup> In any event, the vast majority of fee awards followed the schedule.<sup>123</sup>

Also under the old Rule 82, if the defendant emerged victorious, the court had the discretion to award him "reasonable" attorney's fees.<sup>124</sup> Although the statute did not specify what constituted "reasonable" fees, fifty percent of actual expenditures was a fairly standard award.<sup>125</sup> Judges also had discretion to disallow any attorney's fee award based upon the equities of the case or other valid reasons, but those reasons were not stated in the Rule.<sup>126</sup>

118. ALASKA R. CIV. P. 82 ("Except as otherwise provided . . . the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule.").

119. Alaska Sup. Ct. Order No. 1118 (Jan. 7, 1993) (cited in ALASKA R. CIV. P. 82 (History)). For further explanation of the rule modification, see Kordziel, *supra* note 116, at 433-34.

120. ALASKA R. CIV. P. 82(b)(1).

121. Kordziel, *supra* note 116, at 433-34.

122. *Id.* at 434.

123. See ALAN J. TOMKINS & THOMAS E. WILLGING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* 42 (1986) (estimating that Alaska trial judges based fee awards on the schedule in over 80% of cases involving a monetary recovery).

124. ALASKA R. CIV. P. 82(a)(1) (repealed 1993); see also Kordziel, *supra* note 116, at 433.

125. See Kordziel, *supra* note 116, at 449 & n.124.

126. *Id.* at 434.

Before discussing the new version of Rule 82, it is important to recognize that Rule 82 operates in tandem with Alaska Rule of Civil Procedure 68.<sup>127</sup> Under Rule 68, if a plaintiff rejects an offer and later obtains a recovery that is less than the amount of the offer, then the defendant is treated as the "prevailing party."<sup>128</sup> In such a situation, the defendant would be entitled to reasonable attorney's fees from the date of the settlement offer.<sup>129</sup> Consequently, a plaintiff could emerge victorious at trial, yet suffer an overall monetary loss if the award was less than the defendant's offer and the defendant's reasonable attorney's fees from the time of the offer were greater than the plaintiff's award.<sup>130</sup>

Alaska's fee-shifting rules generally had not aroused much controversy<sup>131</sup> until early 1992, when the Alaska Supreme Court decided *Bozarth v. Atlantic Richfield Oil Co.*<sup>132</sup> Bozarth sued Atlantic Richfield Oil Co. (ARCO) for allegedly firing him in violation of Alaska's whistleblower statute.<sup>133</sup> The trial court granted summary judgment

127. ALASKA R. CIV. P. 68.

128. Rule 68 provides in pertinent part:

(b) If the judgment finally rendered by the court is not more favorable to the offeree than the offer . . .

(1) . . . the offeree must pay the costs and attorney's fees incurred after the making of the offer (as would be calculated under Civil Rules 79 and 82 if the offeror were the prevailing party). The offeree may not be awarded costs or attorney's fees incurred after the making of the offer.

ALASKA R. CIV. P. 68(b)(1).

129. *Id.*

130. A recent report by the Alaska Judicial Council suggests that few defendants ever collect attorney's fees from plaintiffs because the plaintiffs have no money or their assets are protected from creditors. Liz Ruskin, *Lawsuits Not "Loser Pays" If the Loser Doesn't Pay*, OREGONIAN, Feb. 25, 1996, at A19 (reporting that in only 4 of 21 cases studied did the winning defendant actually collect fees). It is worth reiterating that the rarity of actual collection of fees from losing plaintiffs does not mean the device is unhelpful in discouraging weak or exaggerated claims, especially because many plaintiffs may be less than fully confident that they will in fact be judgment-proof at the end of a possibly lengthy action, and because in some cases defendants may have offered forbearance from fee-collection efforts in exchange for, e.g., a plaintiff's willingness to forbear from appeal of a verdict.

131. One exception was a symposium in the *Judges' Journal* in 1985. Compare Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 JUDGES' J. 4 (1985) (criticizing Rule 82 for forcing litigants to settle) and Andrew J. Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, 24 JUDGES' J. 39 (1985) (arguing for the abolition of Rule 82) with James A. Parrish, *The Alaska Rules Are a Success: Plaintiff's View*, 24 JUDGES' J. 8 (1985) (defending Rule 82) and H. Bixler Whiting, *The Alaska Rules Are a Success: Defendant's View*, 24 JUDGES' J. 9 (1985) (same). For an earlier examination of Rule 82, see Gregory J. Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129, 139-45 (1974) (relating that the Alaska Bar Association unsuccessfully called for the repeal of Rule 82 in 1974).

132. 833 P.2d 2 (Alaska 1992).

133. *Id.* at 3.

to ARCO and awarded ARCO \$76,000 in attorney's fees, half of the company's actual expenditure.<sup>134</sup> On appeal to the Alaska Supreme Court, the majority upheld the award but expressed concern that Rule 82 inhibits "a broad spectrum of our populace from the voluntary use of our courts."<sup>135</sup>

Soon thereafter, Chief Justice Rabinowitz of the Alaska Supreme Court appointed a subcommittee of the state Civil Rules Standing Committee to consider possible changes to Rule 82.<sup>136</sup> During its deliberations, the Civil Rules Subcommittee surveyed the Alaska bar.<sup>137</sup> Surprisingly, given the hostility of the organized bar in the rest of the United States to any form of loser-pays rule, a majority of Alaska attorneys opposed rescinding or substantially amending Rule 82.<sup>138</sup> Even more surprising, defense attorneys favored retaining Rule 82, albeit not by quite as high a margin as plaintiffs' attorneys.<sup>139</sup>

Moreover, seventy percent of the attorneys surveyed reported that the old Rule 82 did not deter plaintiffs of moderate means from filing claims.<sup>140</sup> Over two-thirds of survey respondents stated that former Rule 82 did not put excessive settlement pressure on moderate income litigants.<sup>141</sup>

In written comments, some attorneys argued that the old Rule 82 deterred only frivolous or nonmeritorious claims.<sup>142</sup> Other attorneys noted that Rule 82 required plaintiffs to assess their claims more realistically, which often resulted in the settlement of weaker claims.<sup>143</sup>

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134. *Id.*

135. *Id.* at 4 n.3; *see also* Van Huff v. SOHIO Alaska Petroleum Co., 835 P.2d 1181, 1183 (Alaska 1992) (pointing out that Rule 82 can be quite burdensome).

136. Kordziel, *supra* note 116, at 440.

137. *Id.* at 443.

138. *Id.* at 443, 466-67 (showing that 80% of respondents in the survey of members of the Alaska bar opposed rescinding Rule 82, while more than 65% opposed amending it).

139. The survey of members of the Alaska bar found that 169 of 201, or 84%, of plaintiffs' attorneys opposed rescinding Rule 82, while 132 of 161, or 82%, of defense attorneys opposed it. *Id.* at 467. Perhaps these results are not so surprising, given our earlier comment about how loser-pays discourages defendants from engaging in delaying tactics. *See supra* notes 48-50 and accompanying text. James A. Parrish, a plaintiff's attorney in Fairbanks, Alaska, believes that the Alaska system discourages delaying tactics because [i]t is simply impossible, even with a clear liability and clear damage case, in the \$10,000 to \$20,000 range, to make a profit against an obstructive defense in the absence of an attorney's fees rule. Even simple contract cases can be forced to take 10 days actual trial time without regard to the amount at issue.

Daniel B. Moskowitz, *Alaska Seeks to Spur Settlement of Suits with Rule on Lawyers' Fees*, WASH. POST, July 29, 1985, at F7.

140. Kordziel, *supra* note 116, at 443, 466-67.

141. *Id.* at 443-44, 466-67.

142. *Id.* at 443.

143. *Id.* at 444.



Many attorneys also wrote that they believed that the Rule's partial compensation of prevailing parties was just.<sup>144</sup>

Ultimately, the Civil Rules Subcommittee suggested only minor revisions to Rule 82. The Subcommittee recommended that instead of allowing judges to use their discretion in determining the amount of fee awards to victorious defendants and plaintiffs who do not win monetary damages, judges should apply a fixed percentage of reasonable fees incurred for the sake of consistency.<sup>145</sup> The Subcommittee also recommended that if courts deviated from the fixed fee schedules, they should have to justify it by reference to the following factors: the complexity of the litigation, length of the trial, reasonableness of the attorneys' hourly rates, reasonableness of the number of attorneys used, diligence in efforts to minimize fees, willingness to reach a settlement agreement, reasonableness of claims and defenses pursued by each side, the relationship between the amount of work performed and significance of the matters at stake, and other relevant equitable factors.<sup>146</sup>

Bowing to strong resistance from the Alaska bar, the Subcommittee specifically rejected adding an ability-to-pay factor to Rule 82.<sup>147</sup> The Civil Rules Committee then recommended that the Alaska Supreme Court adopt the Subcommittee's proposed changes.<sup>148</sup> Yet despite the Subcommittee's well-reasoned report, the Alaska Supreme Court took a slightly different path. A majority of the court wanted to address the *Bozarth*<sup>149</sup> access issue, and the justices were not going to let the Subcommittee's recommendations stand in their way.

In January 1993 the court adopted most of the Subcommittee's recommendations, while retaining the fee schedule for prevailing plaintiffs with monetary awards from the old Rule 82.<sup>150</sup> It also added a provision that

[i]n cases in which the prevailing party recovers no money judgment, the court shall award the prevailing party in a case which goes to trial 30 percent of the prevailing party's actual attorney's fees which were necessarily incurred, and shall award the prevailing party in a case resolved without trial 20

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144. *Id.* at 445.

145. *Id.* at 445-46 (noting that the subcommittee recommended a figure of either 30% or 35%).

146. *Id.* at 446.

147. *Id.*

148. *Id.*

149. *See supra* text accompanying notes 132-135.

150. Alaska Sup. Ct. Order No. 1118 (Jan. 7, 1993) (cited in ALASKA R. CIV. P. 82 (History)).

percent of its actual attorney's fees which were necessarily incurred.<sup>151</sup>

The Rule promulgated by the court also allowed a court, in determining whether to ignore the schedule of fees, to consider "the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."<sup>152</sup>

Overall, the new Rule 82 is more pro-plaintiff than the old Rule 82. Under the old Rule 82, courts typically awarded victorious plaintiffs between forty and eighty percent of their reasonable expenses.<sup>153</sup> Under the new Rule 82, defendants can get only a maximum of thirty percent.<sup>154</sup> Victorious plaintiffs, meanwhile, are entitled to the same attorneys' fees as they were under the old Rule 82.<sup>155</sup>

The new Rule 82 also specifically permits judges to consider a losing party's ability to pay in determining whether to ignore the schedule, and what damages to award instead.<sup>156</sup> Because large corporations rarely sue individuals, but many individuals sue corporations, this provision has a clear antidefendant bias.

Justice Rabinowitz, who dissented from the adoption of the amendments to Rule 82, expressed his concern that the new provisions "will unnecessarily and dramatically increase litigation over attorney's fees awards both in our trial courts as well as in this court."<sup>157</sup> According to Rabinowitz, any attorney "worth his or her salt" will request variations from either the schedule or the fixed rate.<sup>158</sup>

It is too soon to tell whether the changes to Rule 82 are having any substantial effect on litigation in Alaska. Nevertheless, there is a lesson to be learned from Alaska's experience. Alaska has had two-way fee-shifting for almost one hundred years—yet the public, the bar, and even plaintiffs' lawyers generally support it.<sup>159</sup> The only important opposition has come from the state's supreme court justices, and even they have stopped at modifying the law, without gutting it.<sup>160</sup> It

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151. ALASKA R. CIV. P. 82(b)(2).

152. ALASKA R. CIV. P. 82(b)(3)(H).

153. Kordziel, *supra* note 116, at 437.

154. ALASKA R. CIV. P. 82(b)(2).

155. The exception is that a victorious plaintiff who did not recover a money judgment cannot receive more than 30%. *Id.*

156. ALASKA R. CIV. P. 82(b)(3)(I).

157. Alaska Sup. Ct. Order No. 1118 (Jan. 7, 1993) (Rabinowitz, J., dissenting) (cited in ALASKA R. CIV. P. 82 (notes)).

158. ALASKA R. CIV. P. 82 n.2.

159. See *supra* notes 138-144 and accompanying text.

160. See *supra* notes 149-156 and accompanying text.

seems that, contrary to the warnings of plaintiffs' lawyers and some defense attorneys in the lower forty-nine states, the end of the world will not be upon us if more jurisdictions adopt loser-pays.

## V. THE FUTURE OF LOSER-PAYS

If recent experience is any indication, legislative experiments with loser-pays will continue to spring up around the states, sometimes with little notice elsewhere. A key determinant of their success, of course, will be the degree of sympathy with which judges implement the new provisions. Unsympathetic courts have struck down many tort reform enactments over the years,<sup>161</sup> and fee-shifting, given its reliance on the judiciary for enforcement, is especially vulnerable to being undercut by a bench that does not share its objectives.

State lawmakers also can light a path forward for their federal counterparts. Consider, for example, Oregon's step in turning one-way fee-shifting statutes into two-way statutes.<sup>162</sup> One-way fee-shifting currently typifies wide areas of federal as well as state statutory law.<sup>163</sup> Yet, given its complete defiance of the expectation of basic symmetry and reciprocity in legal relations, this body of procedure should be more controversial than it currently is. The current one-way regime may be characterized as "heads I win and tails we're even." It provides plaintiffs with maximum fuel for speculative litigation and maximum leverage against defendants who may expect to win but cannot rule out the chance of a fluke loss.

Turning one-way fee-shifting statutes into two-way statutes should help build pressure to reform some of the more objectionable aspects of the current fee-shifting system, most notably the methods by which courts calculate attorney's fees. For example, judges often award full attorney's fees to a plaintiff who prevails on a liability theory that has a fee-shifting provision, even if much of the case and fees were spent arguing over damages theories on which the defendant prevailed, or

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161. See, e.g., *Galayda v. Lake Hosp. Sys., Inc.*, 644 N.E.2d 298, 301-02 (Ohio 1994) (striking down a statutory periodic payment scheme for medical malpractice cases as being violative of the state constitutional rights to a jury trial and due process); *Zoppo v. Homestead Ins. Co.*, 644 N.E.2d 397, 401 (Ohio 1994) (holding that a statute that reserved to courts the authority to determine punitive damages violated the state constitutional right to trial by jury); *Smith v. Myers*, 887 P.2d 541, 543 (Ariz. 1994) (holding that a statute requiring a periodic payment scheme in medical malpractice suits violated the state constitution).

162. See *supra* notes 98, 106-112 and accompanying text.

163. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 684 (1983) (noting that Congress has departed from the American Rule in "more than 150 existing federal fee-shifting provisions").

liability theories arising under non-fee-shifting provisions.<sup>164</sup> Explicit two-way fee-shifting is likely to lead to reconsideration of such policies, for the same reason that under European systems partial plaintiff victories at trial are commonly treated for fee-shifting purposes as only partial victories or even as defeats.<sup>165</sup>

Two-way fee-shifting also is likely to lead to reconsideration of "lodestar" and "bonus" theories under which prevailing plaintiffs' lawyers get overcompensated for their efforts by way of attorneys' fee awards set at higher than market rates.<sup>166</sup> This deliberate overcompensation is designed either to reward the putative creativity and talent of plaintiffs' lawyers or to implicitly compensate them for other cases that they lose. If such methods of fee inflation were applied to prevailing defense lawyers, there would be peals of outrage from losing plaintiffs (and properly so). The logical outcome should be the establishment of a single, consistent standard for lawyers on both sides. Such a standard would almost certainly be less munificent than the current plaintiff-only methods of calculating attorney's fees. In Europe and elsewhere, where two-way loser-pays systems have been adopted, standards appear to lean consistently toward "less-than-full" fee compensation, at least in part to avoid the danger that lawyers or litigants will overinvest in cases likely to prevail.<sup>167</sup>

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164. For a time, some courts awarded attorneys' fees to losing plaintiffs based on the language of the Clean Air Act. 42 U.S.C. § 7607(f) (1988); see, e.g., *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 484 F.2d 1331, 1338 (1973) (awarding attorneys' fees to petitioners who were successful on some but not all of their claims). The Supreme Court curbed this practice in *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983). The *Ruckelshaus* Court held it inappropriate for a federal court to award attorneys' fees under the Clean Air Act absent some success on the merits. *Id.* at 694. See generally Ingrid Holmlund, *Awards of Attorneys' Fees to Nonprevailing Parties under the Clean Air Act*, 59 WASH. L. REV. 585 (1984).

165. Pfennigstorf, *supra* note 1, at 46 (indicating that some European countries allow attorney's fee awards to be apportioned if a party is only partially successful).

166. The lodestar method of determining attorney's fees involves multiplying the attorney's reasonable number of hours by the reasonable hourly rate of a similarly skilled attorney in the community. See Peter C. Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 487 (1995). The downside of such a method is that sometimes it "encourages attorneys to amass as many hours as possible—even by padding their hours or rejecting favorable settlement offers." *Id.*; see also *Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1263 (D.C. Cir. 1993) (discussing both lodestar and percentage fee approaches and endorsing the latter).

167. "Less-than-full" fee compensation is achieved in other two-way fee-shifting systems through such mechanisms as: dividing disputes into specific claims and shifting fees only for the claims upon which a party was successful, limiting fee-shifting to reasonable and necessary expenditures, allowing losers to contest fees awarded as inflated, and providing exceptions for unusually close cases, as well as through below-market hourly attorney reimbursements, exclusion of some expense categories from reimbursement, or both. *Hearing on Issues Related to Legal Reform Issues in the Contract with America Before the Subcomm. on Courts*

What is piquant about the arguments against two-way fee-shifting is that virtually all of them apply equally to one-way fee-shifting. Some argue that the prospect of fee indemnity is intolerable because even good cases have a fluke chance of losing, and the prospect of paying the resulting hefty legal fees would scare litigants with good cases into bad settlements. On the other hand, if fear of fluke results has such an effect, then it must do so not only when middle-class people sue but also when they get sued.

A compendium of similar arguments against loser-pays offered by Charles Tauman, executive director of the Oregon Trial Lawyers Association,<sup>168</sup> could be repeated, point by point, as arguments against the current one-way fee-shifting measures. Tauman declared that "unlimited liability for fees [would] simply reward . . . extravagant expenditure of legal expenses."<sup>169</sup> He opposed the "steep cliff" approach under which losing a close case would mean incurring a full fee penalty, rather than a token fee penalty if any.<sup>170</sup> Finally, on the broadest level, he declared that the risk of incurring a fee penalty for insisting on trial placed an "unacceptable burden" on the constitutional right to have one's dispute resolved by jury.<sup>171</sup>

In light of these rhetorical contradictions, legislators would do well to present supporters of existing one-way fee-shifting laws with a choice: you may have two-way fee-shifting, or no-way fee-shifting, but the asymmetry must end. Take your pick.

The wider case for loser-pays draws out a similar inconsistency in the arguments of defenders of our current litigation regime. Their general stance is that a civil justice system should provide a remedy for every right and, in particular, should require the members of every (other) profession and business to pay for the harms they do in the course of their profit-seeking.<sup>172</sup> Supporters of the current fee regime maintain that without the fullest measure of liability and the most generous measure of damages, injuries will go inadequately deterred and victims inadequately compensated.<sup>173</sup>

When the discussion turns to the injury inflicted by litigation itself, however, the arguments of supporters of the current system sud-

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*and Intellectual Property of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1995) (statement of Walter Olson); see also OLSON, *supra* note 7, at 330, 334-35.

168. See Tauman, *supra* note 99 (outlining arguments against a loser-pays system).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* (discussing the values of the current civil justice system).

173. *Id.*

denly shift.<sup>174</sup> They acknowledge that exposure to liability can terrify middle-class persons even when they have strong cases and that trial outcomes can reflect not just objective merit but a large random factor.<sup>175</sup> They also admit that well-meaning persons placed in danger of open-ended legal jeopardy may suspend activities that are privately profitable and sometimes socially useful.<sup>176</sup> From this newly found perspective, they recognize that a courtroom loss may mean only that one's side was "outspent and outlawyered."<sup>177</sup> This is a revealing admission about the nature of the system, and one that must be applied equally to both opponents and proponents of loser-pays. With these admissions on the table, it should be easier to gain sympathy for the liability plight of accountants,<sup>178</sup> nurses,<sup>179</sup> and charity volunteers.<sup>180</sup>

For litigators, the challenge of loser-pays is a challenge to live by the rules they prescribe for everyone else, namely paying for harm done. If accountability for injury and deterrence of harm are such noble goals, if justice must not be rationed, if compensation of trampled-on innocents is worth any amount of disruption of the work of those doing the trampling, why not compensate the people *they* injure? If we ask these questions often enough, we may someday get our answer.

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174. *Id.*

175. *Id.*

176. *Id.*

177. Jeff Merrick, *O.J. Simpson Trial Shows Perils of Oregon's Loser-Pays Law*, OREGONIAN, Oct. 7, 1995, at D7 (Letter to the Editor) (expressing dissatisfaction with the loser-pays legislation enacted in Oregon in 1995).

178. See, e.g., Jodi B. Scherl, Comment, *Evolution of Auditor Liability to Noncontractual Third Parties: Balancing the Equities and Weighing the Consequences*, 44 AM. U. L. REV. 255, 257 (1994) (noting that many investors equate business failures with audit shortcomings and attempt to make accountants liable for their losses).

179. See, e.g., Paul C. Weiler, *The Case for No-Fault Medical Liability*, 52 MD. L. REV. 908, 910 (1993) (discussing the effect of malpractice lawsuits on the reputation, well-being, and insurance premiums of health care professionals).

180. See, e.g., Charles R. Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 401-74 (1991) (exploring the potential liability of charitable organizations and their volunteers and advocating a charitable redress system).