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Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits

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I. INTRODUCTION

> Our attorneys advised us that the law firm that lost the case was demanding the wineries pay them $456,000. In return, they would agree not to file an appeal. This threat to our time and money didn't come in a clever disguise; it was blackmail in its most basic form.[1]

Martha Culbertson ran a small winery in Southern California.[2] Along with industry giants, she was named in a class action suit because the lawyer bringing the suit wanted a particular venue for trial.[3] The complaint alleged that the lead foil used in packaging the wine posed a health risk to consumers.[4] Because wine connoisseurs generally do not consume the labels and packaging, the defendants prevailed at trial.[5] Nonetheless, the attorney who brought the suit threatened to file an appeal unless he received a settlement.[6]

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1. Martha Culbertson, *Grapes of Wrath: Frivolous Lawsuits Can Sink a Small Business*, NEWSWEEK, May 16, 1994, at 10.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* Section 128.5 of the California Code of Civil Procedure has allowed courts to impose sanctions on parties who pursue frivolous claims. *See* CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1995); *see also infra* notes 207-13 and accompanying text. Recent legislation preserves § 128.5 for "a complaint filed, or a proceeding initiated, on or before December 31, 1994." 1994 Cal. Stat. 1062 § 1 (A.B. 3594); CAL. CIV. PROC. CODE § 128.5(b)(1). Otherwise, the California Legislature has suspended § 128.5 "until January 1, 1999, substituting in its place, for a four-year trial period, a statute modeled on recently revised Rule 11 of the Federal Rules of Civil Procedure." Crowley v. Katleman, 881 P.2d 1083, 1096 n.13 (Cal. 1994) (en banc); *see* Kane v. Hurley, 35 Cal. Rptr. 2d 809, 811-12 (Ct. App. 1994) (acknowledging the legislative changes); CAL. CIV. PROC. CODE § 128.7 (West Supp. 1995) (providing a statewide Rule 11 analogue for four years); 1994 Cal. Stat. 1062; *see also* CAL. CIV. PROC. CODE § 446 (West 1973 § Supp. 1995) (requiring verification for complaints filed by public entities).

> On January 1, 1988, the judicial council shall provide a report to the Legislature that details the number of sanctions motions filed, the types of cases

Attorneys who make a living bringing meritless class action suits may be responsible for a large and lucrative number of frivolous lawsuits.[7] Further, the American rule[8] has given rise to a culture of litigation by

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and the frequency to which those cases are subjected to a sanctions motion, the numbers of pleadings, motions, or similar papers withdrawn or corrected within the 30-day period for withdrawal or correction, the numbers of sanctions motions granted or denied, and the forms of sanctions imposed when sanctions are assessed.

1994 Cal. Stat. 1062 § 7 (A.B. 3594).

Although § 128.5 was operative at time of the Culbertson case and California has a number of fee-shifting statutes, none of these statutes prevented the abuse cited in the text. *See* CAL. CIV. PROC. CODE § 128.5; *infra* notes 214-28 and accompanying text; *see also, e.g.*, CAL. CIV. CODE § 3344 (West Supp. 1995) (requiring fee shifting in actions for misappropriation of another's likeness).

7. *See generally In re* Fine Paper Antitrust Litig., 98 F.R.D. 48 (E.D. Pa. 1983), *rev'd on other grounds*, 751 F.2d 562 (3d Cir. 1984). *In re Fine Paper* involved a class action suit against paper companies. *See generally id.* Although the suit was settled before trial, it generated a number of lawsuits concerning the distribution of the proceeds. *Id.* at 190-91. These cases are representative of attorney self-dealing. *See generally id.* at 68-80 (describing the background of the lawsuit). In the initial suit to apportion attorney fees, squabbling among the attorneys gave rise to allegations that the attorneys overstaffed the case to run up attorneys' fees, "to fatten the lodestar determination." *In re Fine Paper*, 751 F.2d at 572. The district court refused the attorneys' request for legal fees entailing approximately 40% of the settlement fund. *In re Fine Paper*, 98 F.R.D. at 68. The court pointed out that the various law firms' petitions for fees were "grossly excessive on their face and, regrettably, lend substance to the widely-held and mostly unfavorable impressions of the plaintiffs' class action bar, sometimes referred to as the class action industry." *Id. See generally* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (analyzing incentives that cause attorneys to file claims that are unlikely to succeed); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1 (1971) (stating that class actions, designed to induce settlements, are "legalized blackmail"); Francis R. Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976) (stating that class actions undermine the judicial process); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974) (discussing consumer class actions); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979) (noting that class actions burden the courts); William Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972) (suggesting that the detriment to society outweighs any benefit class actions might have).

8. The American rule provides that each party must bear the cost of his attorney's fees unless there is a statutory, contractual or judicial exception. *See generally* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (affirming the American rule and discussing the exceptions).

In 1796, the Supreme Court endorsed the American rule, a judicially created doctrine. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796). Since there are many articles discussing the history and development of the American rule in detail, that back-

encouraging individuals, sometimes misguided, sometimes bringing patently false claims, to sue.[9] In fact, the cynical view is that it is every American's right to legally harass anyone he chooses.[10] According to some commentators, freedom of access to the courts is the primary reason for social progress and the development of important civil rights.[11] While there is some truth to that position, there must be a clear standard for sanctioning invalid claims for courts to function efficiently and fairly. Although colorable claims should be welcome in court, courts and legislatures must do more to discourage abuse of the legal system. Indeed, there is a current political movement to apply the English rule[12] to legal fees in American courts.[13]

II. OVERVIEW: PROBLEMS WITH THE AMERICAN RULE AND A MODERATE SOLUTION

> Our system is too costly, too painful, too destructive, and too inefficient for a truly civilized people.[14]

The American rule regarding payment of legal fees has been a source of controversy for many years.[15] Yet, the current concerns about the

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ground will not be presented here. *See, e.g.*, 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); *see also* John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9-11. Some aspects of the history are presented *infra* notes at 257-60, 322 and accompanying text.

9. *See generally* Peter Carlson, *Legal Damages*, WASH. POST, March 15, 1992 (Magazine), at 10 (giving examples and providing statistics of meritless suits).

10. *See generally id.* (discussing public perceptions).

11. *E.g.*, Eric K. Yaramoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 421-29 (1990).

12. The English rule, in its most basic form, provides that the prevailing party in a lawsuit may recover all costs, including attorney fees, from the losing party. *See* Vargo, *supra* note 8, at 1569-71.

13. *See* Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 101(a) (1995) (issued to the public Sept. 27, 1994).

14. Edwin Chen, *Burger Assails Legal System as 'Too Destructive'*, L.A. TIMES, Feb. 13, 1984, at 1 (quoting Chief Justice Warren E. Burger in a Feb. 12, 1984 speech to the American Bar Association), *reprinted in* THE LITIGATION EXPLOSION: A SERIES OF ARTICLES REPRINTED FROM THE LOS ANGELES TIMES 43 (1984) [hereinafter THE LITIGATION EXPLOSION].

15. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 270 (1975). For a list of articles arguing against a strict application of the American rule, see *id.* at 270 n.45, and Hall v. Cole, 412 U.S. 1, 4 n.4 (1973).

litigation explosion[16] highlight its flaws. The American rule provides no deterrent to groundless litigation.[17] In fact, it invites spurious claims.[18] While the American rule remains the general rule in federal and state courts,[19] it has undergone some modification in recent years.[20] Proponents of the American rule resist these changes, claiming that the rule ensures open access to courts.[21] This view holds that the English rule

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16. "Litigation explosion" refers to the modern increase in filing lawsuits and using lawsuits to remedy problems that parties traditionally resolved by other means. *See* Carl Tobias, *Civil Rights Conundrum*, 26 GA. L. REV. 901, 904-05 (1992) (providing background information). *See generally* WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) (arguing in favor of the English rule); Chief Justice Warren E. Burger, *The State of Justice*, 70 A.B.A. J., Apr. 1984, at 62, 65 (expressing concern that discovery has perpetuated groundless suits and has become a "tool of extortion"); Philip Hager & Michael A. Hiltzik, *All Parties Abet a Legal Tidal Wave*, L.A. TIMES, Feb. 12, 1984, at 1, *available in* THE LITIGATION EXPLOSION, *supra* note 14, at 1-5 (citing examples and statistics). For a list of articles from 1972-1983 covering this subject, see John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 435 n.5 (1986).

Some commentators do not feel that "increased litigation" is a problem in light of "expanded expectations of justice." *See, e.g.*, Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 HARV. L. REV. 630, 631 (1987).

17. *See generally* PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991) (recommending a "loser pays" system) [hereinafter AGENDA]; OLSON, *supra* note 16, at 247-70 (arguing that the American rule encourages litigation); John M. Johnson & G. Edward Cassady III, *Frivolous Lawsuits and Defensive Responses to Them—What Relief Is Available?*, 36 ALA. L. REV. 927 (1985) (asserting that new ways to deal with frivolous litigation should be considered); William C. Campbell, Note, *Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis*, 88 YALE L.J. 1218 (1979) (arguing that malicious prosecution should be brought as a counterclaim rather than a separate action); John R. Jones, Jr., Note, *Liability for Proceeding with Unfounded Litigation*, 33 VAND. L. REV. 743 (1980) (proposing a model statute to deter unfounded claims); David Masci, *Tort Plan Limits Liability, Aims at Frivolous Suits*, CONG. Q., Nov. 19, 1994, at 3345 (discussing the Republican proposal, "Contract with America").

18. *E.g.*, Neal H. Klausner, *The Dynamics of Rule 11: Preventing Frivolous Litigation by Demanding Professional Responsibility*, 61 N.Y.U. L. REV. 300, 305-06 (1986).

19. *See, e.g., Alyeska*, 421 U.S. at 270.

20. A number of statutes impact the American rule. *See infra* notes 58-111, 164-228 and accompanying text. In 1983 the legislature amended Rule 11 of the Federal Rules of Civil Procedure. *See infra* note 40 and accompanying text. Congress has enacted a number of statutes that provide for one-way fee shifting in favor of prevailing plaintiffs. *See, e.g.*, 42 U.S.C. § 1988 (1988 & Supp. V 1994) (enacted originally as the Civil Rights Attorney's Fee Act of 1976). Most states have legislation addressing frivolous lawsuits. *See infra* notes 169-75 and accompanying text. In addition, there are judicial exceptions to the common law. *See infra* notes 112-35, 159-63 and accompanying text. Discussions of Rule 11 often include discussions of the relative merits of the American and English rules because fee shifting was a frequent sanction under the 1983 Rule 11. *See infra* note 81 and accompanying text.

21. *See* United States v. Ash, 413 U.S. 300, 309 (1973) (noting that "an additional

chills lawsuits that espouse novel legal theories and promote the growth of the common law.[22] Further, the American system protects important civil and consumer rights.[23] On the other hand, proponents of the English rule point out the deleterious effect of the American rule on the legal system.[24] The courts are overburdened, and the economy suffers when business is subject to a form of legal extortion—settle or pay the legal costs of discovery and trial.[25] Although it is generally accepted that the English rule would deter vexatious lawsuits,[26] it is unclear whether there would be fewer lawsuits filed if it were the norm in America.[27]

Even though the American rule may encourage the filing of claims that have no basis in law or fact,[28] some legitimate claims may still remain

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motivation for the American rule was a desire to minimize imbalance in the adversary system"); Johnson & Cassady, *supra* note 17, at 927-31 (asserting that "any attempt to devise a system for responding to spurious actions is, by its very nature, in conflict with the value placed on free access to courts in American society"); Donna Marino, *Rule 11 and Public Interest Litigation: The Trend Toward Limiting Access to the Federal Courts*, 44 RUTGERS L. REV. 923, 928 (1992) (explaining that Rule 11 "may effectively negate the right to seek redress of injuries in courts").

22. *See* Georgene M. Vairo, *The 1993 Amendments to Rule 11*, *in* 1 A.L.I.-A.B.A. RESOURCE MATERIALS: CIVIL PRACTICE AND LITIGATION IN FEDERAL AND STATE COURTS, § C-1, 8 (1994), *available with minor changes in* WESTLAW, ALI-ABA database, Georgene M. Vairo, *Rule 11: Past and Future*, C915 ALI-ABA 157, 168; Eric K. Yaramoto & Danielle K. Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. HAW. L. REV. 57, 101 (1991) (discussing consequences of Rule 11).

23. *See generally* Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991) (discussing concerns about Rule 11 sanctions).

24. *See generally* AGENDA, *supra* note 17 (proposing reforms and stating the reasons for them); OLSON, *supra* note 16 (providing examples of unwarranted suits and discussing the need for reform).

25. *See generally* AGENDA, *supra* note 17 (discussing abuses of the current system); OLSON, *supra* note 16 (providing examples of bad faith litigation).

26. *See, e.g.*, Susan R. Bogart, Recent Decision, 65 TEMP. L. REV. 959, 959 (1992) (stating that the purpose of fee shifting is to deter claims). *But see* Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1097 (1993) (asserting that, although facially an unreasonable theory, proplaintiff one-way fee shifting "generate[s] the least litigation").

27. *See* A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 422-23 (1993) (arguing that the English rule is not a strong deterrent to frivolous claims); Jeffrey A. Parness, *Choices About Attorney Fee Shifting Laws: Further Substance/Procedure Problems Under* Erie *and Elsewhere*, 49 U. PITT. L. REV. 393, 394 (1988) (stating that fee-shifting statutes promote the filing of valid claims).

28. *See generally* OLSON, *supra* note 16 (citing many examples); Johnson & Cassady, *supra* note 17 (claiming increased costs would deter unfounded suits); Jones, *supra* note 17 (stating that groundless suits are a byproduct of a policy of

unredressed when the cost to litigate exceeds the possible recovery.[29] This rule encourages debtors to avoid paying their debts.[30] In fact, the rationale behind the creation of the American rule may have been to discourage those with minor claims from bringing suit.[31] Conversely, the English rule encourages the filing of small, meritorious claims because it ensures that the injured party is made whole by the awarding of attorney fees.[32] This does not necessarily result in more lawsuits, however, since the injured party's likelihood of success in court provides incentive for the wrongdoer to settle and avoid paying both sides' lawyers' fees.[33] Although institutionalizing the English rule might reduce the burden on courts, simple justice may be the most persuasive rationale for providing some form of fee shifting in American courts.

Although not a principal point of discussion in cases or commentary,[34]

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open access to courts); Campbell, *supra* note 17 (asserting that malicious prosecution does not deter vexatious lawsuits). For examples of meritless claims, see the 12 "civil rights" cases filed by Brenda Pusch in Pusch v. Social Sec. Admin., 811 F. Supp. 383 (C.D. Ill. 1993), including a suit against a newspaper for failing to publicize that she was a member of the Holy Trinity and had been crucified, and United States *ex rel.* Mayo v. Satan & His Staff, 54 F.R.D. 282 (W.D. Pa. 1971).

29. *See* Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CAL. L. REV. 792, 792 (1966) (relating personal experience that lawyer fees discouraged the filing of a legitimate claim); M. Isabel Medina, Comment, *Award of Attorney Fees in Bad Faith Breaches of Contract in Louisiana—An Argument Against the American Rule*, 61 TUL. L. REV. 1173, 1182-83 (1987) (arguing that the American rule does not provide justice for small claimants).

30. Arthur A. Leff, *Injury, Ignorance and Spite—The Dynamics of Coercive Collection*, 80 YALE L.J. 1, 5 (1970) (noting that debtors are aware that the cost of bringing suit may exceed their debt, so "[u]nder the American law of contracts, after the other party has fully performed his obligations it is absolutely irrational for you to perform yours"); *see also* OLSON, *supra* note 16, at 329 ("The imbalance creates a field day for the chisler or defaulter.").

31. OLSON, *supra* note 16, at 330-31.

32. Parness, *supra* note 27, at 394; *e.g.*, Polinsky & Rubinfeld, *supra* note 27, at 423-25.

33. *See* Philip J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26, 34 (1969); Parness, *supra* note 27, at 394. *But see* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 537-42 (3d ed. 1986) (asserting that the English rule induces fewer settlements than the American rule); 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) (stating that the American and English rules induce the same number of settlements).

34. The emphasis has been on open access to the courts for plaintiffs. Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070-71 (1985) (Stevens, J., concurring) ("Freedom of access to the courts is a cherished value in our democratic society."); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 (1975) (stating that the purpose of the American rule is to encourage parties to litigate). Equitable considerations focus on compensating a prevailing plaintiff for bringing his suit. *See, e.g.*, 42 U.S.C. § 1988 (1988 & Supp. V 1993) (providing a fee-shifting statute for civil rights actions).

fairness to a reluctant litigant is a simple concept that has "intuitive" public appeal.[35] It seems fair that a plaintiff who victimizes another with a meritless lawsuit should pay for all legal costs of the prevailing defendant. Yet, legal costs are often a modest remedy, since they alone will not repay the defendant for the emotional and social costs of the lawsuit.[36] Similarly, it seems fair that a defendant who refuses to pay a legitimate claim should have to pay the plaintiff's legal costs. Nonetheless, implementation of the English rule would not be fair in cases where the merits of the case do not clearly favor one party.[37]

The American rule is entrenched in the American legal system,[38] but federal and state statutes attempt to mitigate its negative effects.[39] For example, Congress amended Rule 11 in 1983 to discourage unreasonable pleadings, motions and claims.[40] In response to criticisms that the Rule

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It is evidently considered sufficient justice under the American rule if a plaintiff or defendant prevails. Fairness to the losing party is the primary concern. *See* Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (noting that "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit").

35. *See* Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 657-58 (1982).

36. *See* POSNER, *supra* note 33, at 537 (recognizing that, even under the English rule, "indemnity is never complete, because . . . time and bother . . . are not compensated").

Some commentators view the modern proliferation of lawsuits as a symptom of a greater social problem, the breakdown of supportive institutions, coupled with a desire to blame others for personal misfortune. *See* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982) (asserting that people are turning to courts to take the place of church and family); *see also* Scott S. Partridge et al., *A Complaint Based on Rumors: Countering Frivolous Litigation*, 31 LOY. L. REV. 221, 227 (1985) (arguing that an increase in litigation may have social roots); Kacy Sackett, *Lawyers Grumble Under the Weight of Repeat Plaintiffs*, L.A. DAILY J., Mar. 11, 1988, at 1 (claiming that multiple litigants "often [work] out their psychological problems at the court's expense").

37. Professors Polinsky & Rubinfeld determined through economic analysis that the English rule alone does not provide a sufficient deterrent to frivolous lawsuits. *See generally* Polinsky & Rubinfeld, *supra* note 27 (providing mathematical analysis). They recommend a penalty in addition to the defendant's counsel fees in order to deter meritless claims. *See id.* at 425. If this analysis is correct and compensation, not punishment, is the goal, concerns that the English rule would chill legitimate and socially beneficial claims are unwarranted.

38. *See Alyeska*, 421 U.S. at 270.

39. *See supra* note 20 and accompanying text.

40. *See* Amendment to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 196-97 (1983). The 1983 amendment to Rule 11 required the signature of an attorney of

discouraged novel claims, Congress again amended the Rule in 1993,[41] lessening its effectiveness in sanctioning lawyers and litigants.[42] Yet, revisions of Rule 11 have not alleviated concerns about the effects of the American rule. In fact, recent proposals by elected officials address the need for civil justice reform in the federal courts.[43] A current proposal

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record. The 1983 amendment read in pertinent part:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. 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, 121 F.R.D. 101, 105-06 (1988) (amended 1993).

41. The language of the new Rule weakens a court's ability to sanction parties. The "shall" language has become "may," and the court's power to impose sanctions on its own motion is restricted. *See* FED. R. CIV. P. 11(c). A court is now limited to "enter[ing] an order describing the specific conduct that appears to violate [the requirements of Rule 11 that the filings have a proper purpose] and directing an attorney, law firm, or party to show cause why it has not violated [Rule 11 standards] with respect thereto." *See* FED. R. CIV. P. 11(c)(1)(B). The Rule limits sanctions "to what is sufficient to deter comparable conduct by others similarly situated." *See* FED. R. CIV. P. 11(c)(2). Further, "monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned." FED. R. CIV. P. 11(c)(2)(B). Rule 11 also now provides for a "safe harbor": a Rule 11 motion must be separately filed, and the accused party has 21 days to withdraw or correct the challenged document and avoid sanctions. *See* FED. R. CIV. P. 11(c)(1)(A).

The 1993 amendment strengthened Rule 11 by imposing a continuing duty to withdraw papers when it becomes clear that they are not legally or factually supportable. *See* FED. R. CIV. P. 11. Further, courts may sanction law firms, not only individual attorneys, under the new rule. *See* FED. R. CIV. P. 11(1)(A). In addition, the language of the revised Rule 11 may allow sanctions for oral representations or conduct. Cynthia A. Leiferman, *The 1993 Rule 11 Amendments: The Transformation of the Venomous Viper into the Toothless Tiger?*, 29 TORT & INS. L.J. 497, 498 (1994); *see* FED. R. CIV. P. 11(b).

42. *See* Leiferman, *supra* note 41, at 498.

43. *See* Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 101(a) (1995) (issued to the public Sept. 27, 1994); AGENDA, *supra* note 17. Both the Agenda and the Common Sense Legal Reform Act apply solely to federal diversity cases. *Cf. generally* Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L.

would substantially reinstate the pre-1993 Rule 11 and create a "loser pays" system for diversity actions.[44] Some states attempt to mitigate the effect of the American rule through statutes, which provide valuable comparisons. Alaska has a complex system that approximates the English system;[45] however, it has been the subject of criticism and reform in recent years.[46] To a greater extent than many other states, Texas and California courts practice limited two-way fee shifting, awarding attorney fees to the prevailing party only in certain actions.[47] While some commentators feel that discrete statutes do not provide a satisfactory solution,[48] delineating specific actions subject to fee shifting suggests a suitable compromise. A workable solution combines the best of the English and the American rules[49] and provides the basis of a uniform model for all the states. Although a strict "loser pays" proposal may be too extreme,[50] legislatures nationwide should enact some modification of the English rule.

Current statutory and common law approaches to mitigating the negative effects of the American rule are not sufficient to achieve justice or

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REV. 1521 (1993) (discussing civil justice reform efforts pertaining to the executive branch).

44. *See* Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 101(a) (1995) (issued to the public Sept. 27, 1994).

45. Unless there is an agreement between the parties, Alaska Rule 82 awards attorney's fees to the prevailing party according to the amount recovered. ALASKA CIV. R. 82 (1994). The court retains some discretion in awarding attorney's fees, however, and the rule provides factors to consider, including the reasonableness of the attorney's fees. ALASKA CIV. R. 82(b)(3) (1994). If the court does use its discretion, it must explain its reasoning. *Id.* For a discussion of Rule 82, see *infra* notes 181-94 and accompanying text.

46. *See* ALASKA CIV. R. 82 (1994) (giving dates that Rule 82 was amended, repealed and reenacted); Kevin M. Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429 (1993) (discussing the concern that the rule deters claims).

47. *See infra* notes 195-228 and accompanying text.

48. *See generally* Gregory E. Maggs & Michael D. Weiss, *Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas*, 30 HOUS. L. REV. 1915 (1994) (recommending fee shifting to the prevailing party and citing the Alaskan system as a model).

49. The American rule's value is that it provides unfettered access to courts. *See supra* notes 11, 21 and accompanying text. The English rule discourages spurious lawsuits. *See infra* notes 230-55 and accompanying text. The proposal suggested in this Comment would discourage some groundless filings without discouraging worthy challenges to current law. *See infra* notes 280-300 and accompanying text.

50. *See supra* notes 21-23; *infra* notes 264-74 and accompanying text.

to relieve the burden on courts. This Comment discusses the American rule in light of modern concerns and the effectiveness of existing modifications. Part III explores fee-shifting devices in the federal system, including Rule 11, 28 U.S.C. § 1927, and the inherent power of the courts.[51] The discussion in Part IV encompasses traditional common law solutions and representative state statutes dealing with frivolous suits.[52] Part V examines the policy reasons for two-way fee shifting, taking into consideration the dual aspects of fee shifting, compensation and deterrence.[53] Finally, this Comment concludes that allowing reimbursement of attorney's fees to the prevailing party when the judge awards summary judgment or grants dismissal[54] in state actions is fair and does not chill civil rights claims.[55] This compromise between the American and English rules provides a bright-line test for awarding counsel fees and accrues to the benefit of both courts and litigants.[56]

III. FEDERAL COURTS

> If you're going to maintain respect for our system of justice, it's important to establish some limited standards of responsibility, to say there is no room for deception in the courtroom, or for baseless claims.[57]

A. Rule 11 as a Deterrent to Meritless Claims

Before the 1993 amendments went into effect, Rule 11 was a powerful tool against meritless claims.[58] A claim that was dismissed under Rule 12(b),[59] Rule 12(c)[60] or Rule 41[61] could be the subject of a Rule 11 ac-

51. *See infra* notes 58-135 and accompanying text.

52. *See infra* notes 137-228 and accompanying text.

53. *See infra* notes 230-74 and accompanying text.

54. In this context, dismissal refers to involuntary dismissal or dismissal for a variety of procedural reasons. *See infra* notes 280-87 and accompanying text.

55. *See* AGENDA, *supra* note 17, at 24.

56. *See infra* notes 275-314 and accompanying text.

57. Tamar Lewin, *A Legal Curb Raises Hackles*, N.Y. TIMES, Oct. 2, 1986, at D1, D8 (quoting Judge William W. Schwarzer).

58. *See* JOHN J. COUND ET AL., CIVIL PROCEDURE 586-87 (6th ed. 1993); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015 (1988); *Lawyers' Responsibilities to the Courts: The 1993 Amendments to Federal Rule of Civil Procedure 11*, 107 HARV. L. REV. 1629, 1636 (1994) [hereinafter *Lawyers' Responsibilities to the Courts*]; Lewin, *supra* note 57, at D8 (quoting Professor Arthur Miller, one of the formulators of the 1983 amendments to Rule 11, as to Rule 11's effectiveness in curbing groundless suits). *See generally* Melissa L. Nelken, *The Impact of Federal Rule 11 on Lawyers and Judges in the Northern District of California*, 74 JUDICATURE 147 (1990) (analyzing the results of a survey about Rule 11 effectiveness).

59. Rule 12(b) deals with motions to dismiss for lack of personal or subject matter jurisdiction, improper venue, insufficiency of process or service of process, failure to state a claim, or failure to join a party. FED. R. CIV. P. 12(b).

60. Rule 12(c) concerns motions for a judgment on the pleadings. FED. R. CIV. P.

tion that continued long after the court dismissed the sanctionable claim.[62] Much of the criticism of the pre-1993 Rule 11 focused on the claim that it spawned "satellite litigation"[63] and discouraged the voluntary dismissal of claims.[64] Other concerns were that Rule 11 itself had become a tactic to frustrate opponents,[65] that it was used most frequently against plaintiffs,[66] that judges used the Rule in a discriminatory fash-

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12(c). A 12(c) motion may be treated as a motion for summary judgment. *See id.*

61. Rule 41 involves voluntary and involuntary dismissals. *See* FED. R. CIV. P. 41. Generally, voluntary dismissals are dismissed without prejudice; involuntary dismissals function as "an adjudication upon the merits." *Id.*

62. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 56 (1991) ("Even under Rule 11, sanctions may be imposed years after a judgment on the merits."); Collier v. Marshall, Dennehey, Warner, Coleman & Goggin, 977 F.2d 93, 95 (3d Cir. 1992) (imposing sanctions on attorney pursuant to a motion to dismiss a civil rights claim); Willy v. Coastal Corp., 915 F.2d 965, 968 (5th Cir. 1990) (upholding Rule 11 sanctions awarded after a 12(b)(6) motion was granted), *aff'd*, 503 U.S. 131 (1992); Ring v. R.J. Reynolds Indus., 597 F. Supp. 1277, 1279 (N.D. Ill. 1984) (imposing sanctions on plaintiff, age 39, for bringing an age-discrimination suit against employer), *aff'd*, 804 F.2d 143 (7th Cir. 1986); WSB Elec. Co. v. Rank & File Comm. to Stop 2-Gate Sys., 103 F.R.D. 417, 418 (N.D. Cal. 1984) (imposing sanctions on plaintiff after dismissal of claims). *But cf.* Jones v. Slater Steels Corp., 660 F. Supp. 1570, 1577 (N.D. Ind. 1987) (stating that facts support summary judgment, but not sanctions, although the decision was "dangerously close").

63. *See* Marino, *supra* note 21, at 931; Vairo, *supra* note 22, § C-1, at 4-6, *available in* WESTLAW, C915 ALI-ABA 157, 164-66. Professor Vairo noted that, because a defendant could have invoked the 1983 version of Rule 11 after a plaintiff voluntarily dismissed an action, Rule 11 increased derivative litigation. Vairo, *supra* note 23, at 486. Satellite litigation refers to litigation brought to test the scope of the Rule. *See* William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 183 (1985) (noting that satellite litigation involves "ancillary proceedings that may themselves assume the dimensions of litigation with a life of [their] own").

64. *See* Marino, *supra* note 21, at 944-45; Vairo, *supra* note 22, § C-1, at 17-18, *available in* WESTLAW, C915 ALI-ABA 157, 183. *But see* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 385 (1990) ("If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to [consider the validity of a claim before filing].").

65. Gaiardo v. Ethyl Corp., 835 F.2d 479, 484-85 (3d Cir. 1987) ("The use of Rule 11 as an additional tactic of intimidation and harassment has become part of the so-called 'hardball' litigation techniques."); *Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit*, 143 F.R.D. 371, 409; *see* COUND ET AL., *supra* note 58, at 587.

66. Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775, 1775 (1992); Vairo, *supra* note 22, § C-1, at 2-5, *available in* WESTLAW, C915 ALI-ABA 157, 163-64; Russ Herman, *Rule 11 is Prejudicial to Plaintiff*, NAT'L L.J., July 24, 1989, at 17. *But see* THOMAS E. WILLGING, THE RULE 11 SANC-

ion,[67] and that the Rule had a "chilling effect" on novel legal theories and civil rights claims.[68]

In a recent article, Professor Vairo pointed out that lawmakers instituted the 1983 version of Rule 11 to counter judicial reluctance to impose sanctions on attorneys.[69] The legislature adopted the objective standard to ensure an evenhanded application of the Rule.[70] Furthermore, the 1983 Rule 11 effectively discouraged the filing of groundless claims.[71] While Professor Vairo believes that Rule 11 never should have been the main tool to counter meritless claims, she admits that there is "insufficient evidence" that judges used Rule 11 disproportionately in civil rights cases or that the Rule has had a "chilling effect" on lawsuits in general.[72]

TIONING PROCESS 75 (1988) (concluding that, "although plaintiffs were more likely than defendants to be targeted for sanctions, they were less likely to have sanctions imposed").

67. Marino, *supra* note 21, at 983 ("Because the rule is prone to misuse, it has proven a dangerous tool in the hands of a judge whose personal and political opinions may not match those of the litigant before the court."); Tobias, *supra* note 66, at 1775.

68. *In re* Kunstler, 914 F.2d 505, 524-25 (4th Cir. 1990), *cert. denied*, 499 U.S. 969 (1991); Leiferman, *supra* note 41, at 497; Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1314 (1986); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 488, 525 (1989) (claiming that Rule 11 has "chilled the enthusiasm" of "civil rights litigants and lawyers"); Vairo, *supra* note 22, § C-1, at 2-5, *available in* WESTLAW, C915 ALI-ABA 157, 163-64. *But see* STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 69 (1989) (noting that results of survey indicate only a slightly higher number of requests for sanctions imposed on civil rights plaintiffs); WILLGING, *supra* note 66, at 2 (claiming that "little evidence was found that sanctions have a chilling effect on creative advocacy or unpopular causes"); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017 (1988) ("My own experience has disclosed no anecdotal evidence of chilling.").

69. Vairo, *supra* note 22, § C-1, at 5, *available in* WESTLAW, C915 ALI-ABA 157, 165; *see* D. Michael Risinger, *Honesty in Pleading and Its Enforcement: Some "Striking" Problems with Federal Rule of Civil Procedure 11*, 61 MINN. L. REV. 1, 34-37 (1976) (discussing the infrequency of Rule 11 sanctions before the 1983 amendment); *see also* FED. R. CIV. P. 11 Advisory Committee Notes, *reprinted in* 28 U.S.C. app. at 575 (1988), *and in* 121 F.R.D. 101, 106 (1988) (explaining that the reason for amending Rule 11 in 1983 was to encourage courts to use sanctions) [hereinafter *Advisory Committee Notes*].

70. Vairo, *supra* note 22, § C-1, at 5, *available in* WESTLAW, C915 ALI-ABA 157, 165.

71. *See id.* at 11, *available in* WESTLAW, C915 ALI-ABA 157, 170-71.

72. *Id.* at 7, *available in* WESTLAW, C915 ALI-ABA 157, 167; *see* Elizabeth C. Wiggins et al., *The Federal Judicial Center's Study of Rule 11*, 2 FJC DIRECTIONS 21-23 (Nov. 1991) (claiming that civil rights claims are not sanctioned disproportionately when plaintiffs are represented); *see also* BURBANK, *supra* note 68, at 69 (noting that requests for sanctions were only slightly more frequent "than one would expect on the basis of civil filings in this circuit"); WILLGING, *supra* note 66, at 2 ("Little evi-

Indeed, many frivolous actions are "framed as civil rights actions . . . [which] trivialize[s] important issues."[73]

The new Rule 11 is weaker than the 1983 amended version,[74] in part because it no longer requires mandatory sanctions.[75] Further, the judge may no longer impose monetary sanctions without a motion from one of the parties or without first entering an order requiring a litigant to show cause that he has not violated the Rule.[76] Moreover, litigants are not likely to seek sanctions under the new Rule because monetary sanctions are generally payable to court rather than to the prevailing party.[77] The irony of this change is that, in effect, a court may be unable to sanction abuses of Rule 11 itself.[78] The new Rule also provides a "safe harbor provision," a twenty-one day grace period in which a party can voluntarily withdraw a claim and not be subject to sanctions.[79] Because of this

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dence was found that sanctions have a chilling effect on creative advocacy or unpopular causes.").

73. Sackett, *supra* note 36, at 1 (quoting Warren Kinsler, general counsel for Los Angeles Community College District).

74. *See* Leiferman, *supra* note 41, at 501-06.

75. *See id*; Vairo, *supra* note 22, § C-1, at 14-16, *available in* WESTLAW, C915 ALI-ABA 157, 182; *see also Litigators, Academics Discuss Impact of Amendments to Federal Rules*, 8 No. 3 INSIDE LITIG. 9, 14-15 (1994) [hereinafter *Litigators, Academics Discuss Impact*].

76. FED. R. CIV. P. 11(c). For an excerpt of the text, see *supra* note 41. For additional discussion about this aspect of the 1993 amendment, *see* Vairo, *supra* note 22, § C-1, at 14-16, *available in* WESTLAW, C915 ALI-ABA 157, 182; *Litigators, Academics Discuss Impact*, *supra* note 75, at 13.

77. Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 507, 508-09 (1993) (dissenting statement of Scalia, J.); *see* FED. R. CIV. P. 11(c)(2); Vairo, *supra* note 22, § C-1, at 14-16, *available in* WESTLAW, C915 ALI-ABA 157, 182 (stating that "Rule 11 movants have no right to a sanctions award"); *see also* Leiferman, *supra* note 41, at 501-02 (discussing the elimination of mandatory sanctions); *Litigators, Academics Discuss Impact*, *supra* note 75, at 13 (discussing the new Rule's provisions).

78. *See* FED. R. CIV. P. 11(c). Since Rule 11 is discretionary, the court would simply deny a Rule 11 motion. Although it is possible a court might impose sanctions for wrongly invoking Rule 11, it is extremely unlikely that any court would bother to do so in the ordinary case. When imposing any sanctions, a court must now "describe the conduct" and "explain the basis for the sanction imposed." FED. R. CIV. P. 11(c)(3). In 1987 the Third Circuit warned, "A court may impose sanctions on its own initiative when the Rule is invoked for an improper purpose." Gaiardo v. Ethyl Corp., 835 F.2d 479, 485 (3d Cir. 1987). This threat is no longer significant in light of the changes in the Rule.

79. FED. R. CIV. P. 11(c)(1)(A). For excerpts from and explanations of the current Rule 11, see *supra* note 41.

waiting period, the new Rule 11 discourages motions for sanctions in conjunction with motions to dismiss.[80] Further, whereas fee shifting was the primary sanction under the pre-1994 version of the Rule,[81] the new version is "designed to eliminate sanctions as a form of cost-shifting" and is "likely to undermine seriously the deterrent effect of the rule."[82] Consequently, many authorities on Rule 11 view it as "functionally dead."[83]

Even before its revision in December 1993, Rule 11 was not a panacea for frivolous lawsuits in federal courts. Courts did not routinely award monetary sanctions for blatantly groundless claims.[84] The Rule addressed claims that lacked substantial justification, but not those that could not be proved.[85] Because Rule 11 in any form has not been a completely effective deterrent[86] to meritless suits, proponents of the English rule have maintained their efforts to establish civil justice reforms.[87] The

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80. *See* Vairo, *supra* note 22, § C-1, at 17-20, 24-26, *available in* WESTLAW, C915 ALI-ABA 157, 173-74, 189-91; *see also supra* note 78 and accompanying text.

81. *See* Schwarzer, *supra* note 58, at 1018-20; Vairo, *supra* note 22, § C-1, at 4, *available in* WESTLAW, C915 ALI-ABA 157, 164.

82. Leiferman, *supra* note 41, at 504-05.

83. *See Litigators, Academics Discuss Impact*, *supra* note 75, at 15 (stating that Gregory P. Joseph, a noted Rule 11 scholar, believes that Rule 11 motions will now be the "exception rather than the rule").

84. *See generally* Pease v. Pakhoed Corp., 980 F.2d 995 (5th Cir. 1993) (denying a motion to sanction plaintiff who filed a general, scandalous complaint and refused to comply with an order for a more definite statement). In some cases, plaintiffs bring a number of lawsuits before injunctions are issued against them. *See* Mallon v. Padova, 810 F. Supp. 642, 643 (E.D. Pa. 1993); Pusch v. Soc. Sec. Admin., 811 F. Supp. 383, 385 (C.D. Ill. 1993); *see also* Jane Fritsch, *The Man Who Sued Too Much*, NEWSDAY MAGAZINE, Feb. 1, 1987, at 10 (reporting that nationwide injunction was imposed on law school graduate after years of bringing frivolous lawsuits). In the most egregious cases, the plaintiffs filed complaints pro se. *See Mallon*, 810 F. Supp. at 643; *Pusch*, 811 F. Supp. at 385. *See generally* Fritsch, *supra* (describing various suits the plaintiff initiated). These patently unfounded suits might not have been before the court and the injunctions would not have been necessary if courts had routinely assessed attorney fees on dismissal.

Courts most frequently impose Rule 11 sanctions in tax cases. *See, e.g.*, Lemaster v. United States, 891 F.2d 115, 122 (6th Cir. 1989) (upholding Rule 11 sanctions for frivolous suit against the Internal Revenue Service); *see also* Lewin, *supra* note 57, at D1.

85. Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. REV. 1023, 1062 (1989).

86. A primary objective in amending the pre-1983 statute was to deter frivolous suits. *See Advisory Committee Notes*, *supra* note 69, at 575, *reprinted in* 121 F.R.D. at 107.

87. *See generally* AGENDA, *supra* note 17 (listing proposed reforms). The President's Council on Competitiveness also recommended strengthening Rule 11 by requiring a continuing duty and by applying it to all lawyers involved in the case. *Id.* at 25. The Council also suggested that the Rule be applied more uniformly, which, in

current "Contract with America" proposal includes reinstating the court's ability to sanction parties on its own motion, as well as reinstating the mandatory sanction requirement of the prior Rule.[88]

Although the earlier Rule provided both deterrence and compensation, the current Rule 11 does little to deter unfounded claims.[89] Further, the new version usually will not allow significant fee shifting to compensate defendants in unmeritorious lawsuits.[90] In addition, commentators have criticized Rule 11 for its flexibility and the courts for not providing clear guidelines for its use.[91]

Courts need a bright-line test that works in concert with other devices[92] to deter vexatious claims. Unlike Rule 11, such a test must not apply to federal actions. It would then pose no threat to civil rights claims.

B. 28 U.S.C. § 1927

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.[93]

The initial version of this statute was rarely used and was not uniform-

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this context means, presumably, more often. *See id.* The 1993 amendment incorporates the first two recommendations. *See* FED. R. CIV. P. 11; *supra* notes 43-44 and accompanying text.

88. *See* Common Sense Legal Reform Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 104(b) (1995) (issued to the public Sept. 27, 1994).

89. *See generally Litigators, Academics Discuss Impact*, *supra* note 75, at 13-16 (discussing the ramifications of the 1993 amendment).

90. *See Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1632-34.

91. *E.g.*, Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 261 (1991) (advocating a presumption that a pre-trial dismissal precludes application of Rule 11).

92. An important statute that is beyond the scope of this Comment is Federal Rule 68, which provides incentive to settle before trial by penalizing a party who refuses to accept a reasonable offer. *See* FED. R. CIV. P. 68. Under Rule 68, if the plaintiff rejects an offer made at least 10 days before trial and the offered settlement is more favorable than the judgment, the plaintiff is liable for the defendant's costs from the time the defendant made the offer. *Id.* Rule 68 may also impact a prevailing plaintiff's ability to collect attorney fees when a statute provides for fee shifting. *See* Marek v. Chesny, 473 U.S. 1, 9 (1985) (holding that "where the underlying statute defines 'costs' to include attorney's fees," the fees are recoverable under Rule 68). Many states have enacted similar "offer of judgment" statutes. *See, e.g.*, WASH. REV. CODE ANN. § 4.84.280 (West 1988); *see also id.* §§ 4.84.260, 484.270 (West 1988).

93. 28 U.S.C. § 1927 (1988 & Supp. V 1994).

ly applied.[94] Originally, § 1927 did not specify counsel fees as a possible sanction under the statute.[95] Before *Roadway Express, Inc. v. Piper*,[96] some districts awarded attorney's fees and others did not.[97] In *Roadway Express*, however, the Supreme Court ruled that courts could not award attorney fees under § 1927.[98] Congress immediately responded by amending § 1927 to explicitly allow fee shifting, with courts retaining the right to use other sanctions.[99] After the amendment in 1980, § 1927 had potential as a deterrent against groundless claims, although the sanction remained discretionary.[100] Yet, courts still infrequently use it.[101]

Because § 1927 only allows sanctions against attorneys,[102] its reach is narrow. Nonetheless, in some respects it has a broader application than other remedies. For example, it imposes a continuing duty on attorneys,[103] and a voluntary dismissal does not prevent the court from imposing sanctions under the statute.[104] Yet, although Congress intended to permit sanctions for a wide variety of meritless claims,[105] courts have limited the statute's use by requiring a subjective finding of bad faith.[106] Under this restraint, applying sanctions under § 1927 requires the same finding of bad faith as required under the court's inherent powers.[107] Therefore, § 1927 is a superfluous, not a powerful, tool. Section 1927 could have independent significance, however, if used to sanction a lawyer when his client voluntarily dismisses a frivolous lawsuit.[108]

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94. Johnson & Cassady, *supra* note 17, at 956; Jones, *supra* note 17, at 767-68 (discussing discrepancy among circuits).

95. Johnson & Cassady, *supra* note 17, at 956.

96. 447 U.S. 752 (1980).

97. Johnson & Cassady, *supra* note 17, at 956; Jones, *supra* note 17, at 767-68 (discussing discrepancy among circuits).

98. *Roadway Express*, 447 U.S. at 757-61.

99. Johnson & Cassady, *supra* note 17, at 956-57; Wade, *supra* note 16, at 472-74; *see* 28 U.S.C. § 1927 (1988 & Supp. V 1994).

100. *See* Wade, *supra* note 16, at 472-73.

101. *See* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 192 (1988).

102. 28 U.S.C. § 1927 (1988 & Supp. V 1993).

103. *See Wade*, *supra* note 16, at 472-73 (noting cases that apply § 1927 to different aspects of the proceedings); *Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1636 n.54.

104. Bolivar v. Pocklington, 975 F.2d 28, 31 (1st Cir. 1992) (holding that district courts retain jurisdiction to impose sanctions after voluntary dismissal).

105. *See* H.R. CONF. REP. NO. 1234, 96th Cong., 2d Sess. 1, 5-7 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2781-83; Johnson & Cassady, *supra* note 17, at 956.

106. *See* Wade, *supra* note 16, at 472-73. Professor Wade pointed out that § 1927 could apply to any actions that multiply the proceedings unreasonably, as well as to filing a groundless suit. *Id.* He interprets this as creating an objective test. *Id.*

107. *Id.*

108. *See Litigators, Academics Discuss Impact*, *supra* note 75, at 16. Since recent amendments have weakened Rule 11, § 1927 may be used to impose sanctions when

28 U.S.C. § 1927 has limited value as a deterrent or as a means of compensating a prevailing party since it only applies to lawyers[109] and courts have interpreted the statute narrowly.[110] Furthermore, because courts rarely use it,[111] there must be other methods to dissuade unreasonable litigants.

C. The Inherent Power of the Court

In addition to statutory measures, federal courts may exercise common law exceptions to the American rule.[112] When a party exercises bad faith or deliberately defies a court order, he may have to pay the opposing party's attorneys' fees.[113] Under the common benefit or common fund exception,[114] the court may award attorney fees when the "litiga-

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a case has been voluntarily dismissed. *Id.* at 13-14. Professor Vairo predicts it will be unusual for a party to prevail on a motion to dismiss and to recover attorney fees under Rule 11. *Id.* at 13, 16. According to Professor Vairo, under the 1993 amendment, "courts are quite clearly supposed to be shifting towards non-monetary sanctions and fines" and people are "not to think that Rule 11 is compensatory." *Id.* at 16. In an egregious case, § 1927 may be the sole remedy for "vexatious multiplication of the proceeding." *Id.*

109. When considering a suit's merit and whether to impose sanctions, courts may have different standards for lawyers and litigants. *Compare* CAL. CIV. PROC. CODE § 391 (West 1973 & Supp. 1995) (a "vexatious litigant" is, *inter alia*, he who represents himself and who has filed more than five suits within seven years that are determined to be final and adverse to him) *with* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2 (1994). The American Bar Association's Model Rules provide:

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt. 2 (1994).

110. *See* Wade, *supra* note 16, at 472-73.

111. *See* Vairo, *supra* note 101, at 192.

112. *See generally* Chambers v. NASCO, Inc., 501 U.S. 32 (1991) (discussing the courts' inherent power).

113. *Id.* at 45-46.

114. This doctrine has many names. In addition to the common benefit or common fund doctrine, it is also known as the equitable fund doctrine. *See infra* note 130

tion efforts directly benefit others."[115] In *Chambers v. NASCO, Inc.*,[116] the Supreme Court endorsed the application of these inherent powers in concert with statutory sanctions.[117]

The bad faith exception is a subjective test with limited use.[118] Subjective bad faith can be difficult to prove, and courts historically have been reluctant to award attorney fees on this basis.[119] Furthermore, although the court in *Chambers* broadly applied the bad faith exception,[120] it emphasized that fee shifting is an extraordinary measure.[121]

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and accompanying text. Further, the theory is similar to the substantial benefit doctrine which allows recovery of attorney fees for nonpecuniary benefits. *See* Vargo, *supra* note 8, at 1579-83. Courts have not always distinguished between the two doctrines. *See id.* at 1581-82.

115. *Chambers*, 501 U.S. at 45 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257-58 (1975)).

116. 501 U.S. 32 (1991).

117. *Id.* at 46. Since statutes may reach "only certain individuals or conduct, the inherent power extends to a full range of litigation abuses. At the very least, the inherent power must continue to exist to fill in the interstices." *Id.* Some commentators have criticized this manifestly sensible decision as an example of judicial overreaching. *See* Leading Case, *Courts' Inherent Authority to Sanction in Diversity Cases:* Chambers v. NASCO, Inc., 105 HARV. L. REV. 349 (1991) [hereinafter *Courts' Inherent Authority*]. Yet, Rule 11 could not address all the misconduct in *Chambers*. *See Chambers*, 501 U.S. at 35-42. The majority was correct to use its inherent power to sanction the whole of Chambers' misbehavior since this did not contravene Rule 11. *Id.* The purpose of Rule 11 clearly was to discourage unreasonable litigation practices. *See Advisory Committee Notes*, *supra* note 69, at 575, *reprinted in* 121 F.R.D. at 106.

The facts of the case support a finding of bad faith. Chambers breached a contract to sell a television station. *Chambers*, 501 U.S. at 35-36. He then engaged in a number of unethical maneuvers to avoid specific performance, blatantly disobeying an injunction against transferring the station. *Id.* at 36-39. The court warned Chambers that his actions were unethical; however, he continued to frustrate the proceedings. *Id.* at 38. Although the dissent and some commentators claim otherwise, the trial court did not impose the sanction substantively for bad faith breach of conduct. *See id.* at 58-60 (Scalia, J., dissenting); *id.* at 60-77 (Kennedy, J., dissenting); *Courts' Inherent Authority*, *supra*, at 358. The court sanctioned Chambers for his outrageous conduct after the breach and for his defiance of court orders. *See Chambers*, 501 U.S. at 35-42.

118. *See Alyeska*, 421 U.S. at 258-59.

119. *See, e.g.*, Medina *supra* note 29, at 1187-88; *cf. Advisory Committee Notes*, *supra* note 69, at 575, *reprinted in* 121 F.R.D. at 106 ("The new language is intended to reduce the reluctance of courts to impose sanctions.").

120. *See Chambers*, 501 U.S. at 50-52.

121. *Id.* "A court must, of course, exercise caution in invoking its inherent power, and it must comply with the mandates of due process . . . ." *Id.* at 50. The *Roadway Express* Court is often cited to support this. *Id.* at 50, 59 (Scalia, J., dissenting). "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a fair hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980).

As with Rule 11, the court may employ a variety of sanctions and is not obligated to award attorney fees.[122]

The purpose of fee shifting under the bad faith exception is punitive.[123] Thus, the remedy is too uncertain to be a reliable deterrent to frivolous litigation.[124] Furthermore, courts have accepted the idea that the "mere fact that an action is without merit does not amount to bad faith."[125] The courts' avowed reluctance to exercise its inherent power and judicial freedom to choose sanctions weigh against fee shifting to the prevailing party. Even when exercised, the courts' inherent power may not compensate an injured party.

The common fund exception developed as a restitutionary remedy[126] for a prevailing plaintiff who "confer[red] substantial benefits on the members of an ascertainable class of beneficiaries."[127] This exception developed so that beneficiaries of the lawsuit share in the cost of the attorney's fees.[128] Those who benefit may not be parties to the lawsuit, but it is possible that they would have a relationship to it.[129] Although the benefit to the target class may be fictional, this exception provides the rationale for fee shifting in shareholder derivative suits.[130] Yet,

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122. *See, e.g., Chambers*, 501 U.S. at 58-60 (Scalia, J., dissenting).

123. *Id.* at 53-54 (quoting Hall v. Cole, 412 U.S. 1, 5 (1973)).

124. Sanctions under the court's inherent power are uncertain because punitive damages are, by nature, a speculative remedy. *See* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 33-63 (1982); Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1, 42 (1992); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 310-11 (1983). Compensatory damages, on the other hand, must be measurable. *See* ELAINE W. SHOBEN & W. MURRAY TABB, REMEDIES 552 (1989); Rustad, *supra*, at 42. Nonetheless, sanctioning under this power is an important part of the entire package of sanctioning devices. *Chambers*, 501 U.S. at 46. Although it may be difficult to prove bad faith, this remedy is less onerous than bringing an action for malicious prosecution or abuse of process. Johnson & Cassady, *supra* note 17, at 968.

125. Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980) (citing Runyan v. McCrary, 427 U.S. 160, 183-84 (1976)).

126. *E.g.*, Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 440 (1986).

127. *Hall*, 412 U.S. at 15.

128. Dobbs, *supra* note 126, at 440.

129. *See, e.g., id.* at 441 (discussing shareholder derivative suits).

130. *See Hall*, 412 U.S. at 5-7; Dobbs, *supra* note 126, at 441. In *Alyeska Pipeline Service Co. v. Wilderness Society*, the Court rejected the private attorney general exception to the American rule, but upheld the common fund exception. 421 U.S. 240, 264-71 (1975). The difference between the two theories of recovery is that, under

courts did not develop the common fund theory to shift fees to prevailing parties, and in the usual case, it may not do so.[131]

These common law exceptions to the American rule provide little deterrent to frivolous litigation.[132] Although the courts designed the bad faith exception to deter extreme abuse, the common fund exception never served that purpose.[133] The courts designed the common benefit theory solely to compensate a prevailing party.[134] While the common fund exception may be a compensatory device, it is not necessarily a fee-shifting one, and people other than the losing party may indemnify the successful litigant.[135] Thus, the common fund doctrine rarely deters vexatious litigants, and only in rare instances does the bad faith exception compensate a prevailing party. Therefore, both the bad faith and the common fund doctrines have limited use.

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the private attorney general theory, the general public supposedly benefits from the action. *Id.* at 264-67. Conversely, the class of beneficiaries under the common fund exception is presumed to be "small in number and easily identifiable." *Id.* at 264-65 n.39; *see* F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129-30 (1974) (distinguishing between the two theories). Further, under the common fund theory, the losing party may not have to pay the attorney fees. Vargo, *supra* note 8, at 1579-83. In any case, the court must have control of the common fund to implement fee shifting under this theory. *Id.* at 1581.

The common benefit doctrine, also known as the equitable fund doctrine, is susceptible to abuse by class action lawyers. *See In re* Fine Paper Antitrust Litig., 98 F.R.D. 48, 67 (E.D. Pa. 1983), *rev'd on other grounds*, 751 F.2d 562 (3d Cir. 1984). Class action lawyers who run up large fees generally do not have altruistic motives. *See* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1090-91 (3d Cir.) (stating that lawyer, who was the class representative, hired his law firm to pursue the suit), *cert. denied*, 429 U.S. 830 (1976). "Critics point particularly to over-generous application of the equitable fund doctrine, by means of which massive fees are awarded attorneys with too little regard for the interests of the class members." *In re Fine Paper*, 98 F.R.D. at 67 (citing City of Detroit v. Grinnell Corp., 560 F.2d 1093, 1098 (2d Cir. 1977)).

131. *See, e.g.*, Dobbs, *supra* note 126, at 440-41.

132. *See, e.g., id.* at 440-44.

133. *See* Wade, *supra* note 16, at 470.

134. *See* Chambers v. NASCO, Inc., 501 U.S. 32, 52-54 (1991). Under both the bad faith and common fund exception, courts award attorney's fees only to prevailing parties. *See Hall*, 412 U.S. at 5.

135. *See* Rowe, *supra* note 35, at 662.

IV. STATE SOLUTIONS TO UNJUSTIFIABLE LITIGATION

> Groundless civil litigation is, however, more than an affliction visited upon a few scattered individuals; it besets the judicial system as a whole. It is, therefore, appropriate to think of it as a systemic problem and to fashion a remedy which preserves and strengthens the integrity of the civil litigation system rather than randomly providing a fortuitous amount of compensation in a handful of isolated cases.[136]

A. Common Law Solutions

Malicious prosecution and abuse of process are tort remedies for abuse of legal procedure. Additionally, state courts may offer relief to injured parties by exercising inherent powers.

1. Malicious Civil Prosecution

Malicious civil prosecution is the traditional common law remedy for filing frivolous lawsuits.[137] The tort generally requires that a party be a prevailing defendant in a civil lawsuit.[138] The prior lawsuit first must be concluded, and the vindicated party then must bring a separate suit.[139] A few states, however, allow the defendant in the original suit to bring a counterclaim for malicious prosecution.[140] Additionally, a plaintiff in a subsequent suit must prove malice and absence of probable cause to bring the initial action.[141] The malice element requires a subjective standard,[142] which is a heavy burden for a plaintiff to prove.[143] Since the tort requires a separate action and the elements may be difficult to prove, there is little incentive for injured parties to use malicious prosecution to vindicate their rights.[144] Further, in approximately one-third of

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136. Friedman v. Dozorc, 312 N.W.2d 585, 608 (Mich. 1981) (Levin, J., concurring).

137. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 120, at 889-96 (5th ed. 1984) (discussing the background and application of wrongful civil proceedings).

138. *E.g.*, *id.* § 120, at 892.

139. *E.g.*, *id.*

140. *Id.* § 120, at 892-93; Campbell, *supra* note 17, at 1233 n.107.

141. *E.g.*, KEETON ET AL., *supra* note 137, § 120, at 893-95.

142. *See id.* § 120, at 894-95. Malice "may consist of a primary motive of ill will, or a lack of belief in any possible success" or an improper purpose in bringing the action. *Id.* § 120, at 895. For example, in California, malice is "a wish to vex, annoy or injure." CALIFORNIA JURY INSTRUCTIONS: CIVIL (BAJI) No. 7.34 (8th ed. 1994).

143. *E.g.*, KEETON ET AL., *supra* note 137, § 120, at 896.

144. *See, e.g.*, Campbell, *supra* note 17, at 1232.

American jurisdictions, special damages are a separate element of the tort.[145] Because special damages do not include attorney fees incurred in the wrongful suit, attorney fees are not recoverable in a subsequent lawsuit.[146]

Since malicious prosecution requires bringing another lawsuit after the wrongful action terminates, the tort is neither an effective deterrent to frivolous litigation nor an adequate means of compensating a wronged party.[147] Further, malicious prosecution compromises judicial efficiency, since bringing an additional action increases the burden on the courts.[148] Therefore, of all the alternatives for an injured party, this remedy is the most unsatisfying.[149]

2. Abuse of Process

Unlike malicious prosecution, abuse of process does not require that the proceedings at issue be concluded.[150] To prevail under this tort, a party must prove an ulterior purpose and a deliberate and improper use of process.[151] The second element is subjective, although motive may be inferred from the act.[152]

While abuse of process may be easier to prove than malicious prosecution,[153] both are difficult to establish.[154] Further, a party cannot bring an abuse of process action to counter a vexatious lawsuit[155] because

145. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 1009 (9th ed. 1994).

146. *E.g.*, KEETON ET AL., *supra* note 137, § 120, at 889. The rationale for this requirement is to encourage good faith litigants to file suits without fear of a later action. *Id.*

147. *E.g.*, Jones, *supra* note 17, at 753.

148. *See, e.g.*, Campbell, *supra* note 17, at 1232.

149. *See* KEETON ET AL., *supra* note 137, § 120, at 896. *But cf.* Amwest Mortgage Corp. v. Grady, 925 F.2d 1162 (9th Cir. 1991). After Amwest voluntarily dismissed Grand Capital Mortgage Co. as a defendant in an action for fraud, Grand Capital moved for Rule 11 sanctions. *Id.* at 1163. The court denied the motion, and Grand Capital then sued for malicious prosecution. *Id.* When Amwest requested that the court issue an injunction to enjoin Grand Capital's suit, the court refused to do so. *Id.* Because a lack of probable cause was not the basis of the decision to deny the Rule 11 motion, the issue had never been "fully and fairly litigated." *Id.* at 1165. Further, "[t]he scope of a Rule 11 hearing is much narrower than a full civil proceeding in state court." *Id.* While malicious prosecution is not a complete remedy, it serves a purpose, particularly with the weakening of Federal Rule 11. *See id.*

150. *E.g.*, KEETON ET AL., *supra* note 137, § 121, at 897.

151. *E.g.*, *id.* § 121, at 898.

152. *E.g.*, *id.* § 121, at 899.

153. *See* Wade, *supra* note 16, at 451.

154. *E.g.*, Partridge et al., *supra* note 36, at 250.

155. PROSSER ET AL., *supra* note 145, at 1012.

abuse of process addresses discrete acts incidental to the lawsuit.[156] Some commentators believe, however, that abuse of process can lie where a defendant brings a counterclaim to delay the plaintiff's recovery in the original action.[157] At best, abuse of process, like malicious prosecution, provides an uncertain remedy to frivolous litigation. Most often, it would not be an appropriate answer to warrantless suits. Indeed, "[t]he roadblocks to malicious prosecution and abuse of process claims are, in most cases, nearly impossible to overcome."[158]

3. Inherent Power

The inherent power of courts to shift fees provides only a limited exception to the American rule.[159] The majority of states that have considered the issue in the judicial forum recognize this inherent power.[160]

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156. *See* KEETON ET AL., *supra* note 137, § 121, at 897-99.

157. Johnson & Cassady, *supra* note 17, at 941.

158. Grace A. Carter, *New Limits on Malicious Prosecution: Remedies for Frivolous Lawsuits and Abusive Legal Tactics*, L.A. LAWYER, Sept. 1989, at 23, 28.

159. *See supra* notes 112-35 and accompanying text.

160. Many, if not most, states recognize the court's inherent power to shift fees in extreme cases. *See, e.g.*, Larkin v. State *ex rel.* Rottas, 857 P.2d 1271, 1281 (Ariz. Ct. App. 1992); Price v. Price, 780 S.W.2d 342, 345 (Ark. Ct. App. 1989); Fattibene v. Kealey, 558 A.2d 677, 684 (Conn. App. Ct. 1989); Miller v. Miller, 586 So. 2d 1315, 1317 (Fla. Dist. Ct. App. 1991) (Sharp, J., dissenting in part); Wong v. Frank, 833 P.2d 85, 91-92 (Haw. Ct. App.), *cert. denied*, 834 P.2d 1315 (Haw. 1992); Sander v. Dow Chem. Co., 624 N.E.2d 1255, 1265 (Ill. App. Ct.), *appeal allowed*, 624 N.E.2d 817 (Ill. 1993); *In re* Estate of Kroslack, 570 N.E.2d 117, 121 (Ind. Ct. App. 1991); Lake Village Water Ass'n v. Sorrell, 815 S.W.2d 418, 421 (Ky. Ct. App. 1991); Optic Graphics, Inc. v. Agee, 591 A.2d 578, 587-88 (Md. Ct. Spec. App.) (quoting Needle v. White, 568 A.2d 856, 861 (Md. Ct. Spec. App.), *cert. denied*, 573 A.2d 1338 (Md. 1990)), *cert. denied*, 598 A.2d 465 (Md. 1991); Selleck v. S.F. Cockrell Trucking, Inc., 517 So. 2d 558, 560 (Miss. 1987); State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co., 382 N.W.2d 2, 8 (Neb. 1986) (quoting Holt County Coop. Ass'n v. Corkle's, Inc., 336 N.W.2d 312, 315 (Neb. 1983)); Harkeem v. Adams, 377 A.2d 617, 619 (N.H. 1977); State *ex rel.* Highway and Transp. Dept. v. Baca, 867 P.2d 421, 422-23 (N.M. Ct. App. 1993), *aff'd in part & rev'd in part*, 1995 WL 322764 (N.M. 1995); City of Gahanna v. Eastgate Properties, Inc., 521 N.E.2d 814, 816-17 (Ohio 1988); Robinson v. Kirbie, 793 P.2d 315, 319 (Okla. Ct. App. 1990); Deras v. Myers, 535 P.2d 541, 550 (Or. 1975) (en banc); Truk Away of R.I., Inc. v. Macera Bros. of Cranston, 643 A.2d 811, 817 (R.I. 1994); Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994); Van Eps v. Johnston, 553 A.2d 1089, 1091 (Vt. 1988); Wilson v. Henkle, 724 P.2d 1069, 1076-77 (Wash. Ct. App. 1986); Daily Gazette Co. v. Canady, 332 S.E.2d 262, 264 (W. Va. 1985); Schaefer v. Northern Assurance Co., 513 N.W.2d 615, 617, 621 (Wis. Ct. App. 1994).

Some states interpret the common fund theory broadly, so that courts may award attorney fees to "a party who has prevailed in an action that benefits many other litigants,"[161] including defendants in the case.[162] Other states reject fee shifting as being contrary to the American rule and do not allow it when courts exercise their inherent power.[163]

B. Statutory Solutions

In recent years, some state legislatures have fashioned statutes based on Federal Rule 11. In addition, many states have a general statute dealing with meritless claims. Other state legislation allows for fee shifting in very specific cases.

1. Rule 11 in State Courts

Several states have adopted Rule 11, or a modification of it, as part of the state civil procedure code.[164] The statutes vary in breadth.[165] While some call for mandatory sanctions when a motion or pleading is not made in good faith,[166] others merely provide for discretionary sanc-

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161. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 16.6.2, at 924 (1986).

162. *See id.*

163. Absent statutory authority, California and Idaho do not recognize the inherent power of the courts to award attorney fees as a sanction. *See* Crowley v. Katleman, 881 P.2d 1083, 1094-95 (Cal. 1994) (en banc) (citing Bauguess v. Paine, 586 P.2d 942, 947-49 (Cal. 1978), *abrogated by* CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1995) (suspended from 1995 to 1999)); *In re* Estate of Keeven, 882 P.2d 457, 465 (Idaho Ct. App. 1994). Yet, at one time, California and Idaho were the only two states that recognized the private attorney general doctrine. Blue Sky Advocates v. State, 727 P.2d 644, 649 (Wash. 1986) (en banc); *see* CAL. CIV. PROC. CODE § 1021.5 (West 1980 & Supp. 1995); Serrano v. Priest, 569 P.2d 1303, 1315 (Cal. 1977) (en banc); Hellar v. Cenarrusa, 682 P.2d 524, 531 (Idaho 1984). Alaska now recognizes this doctrine. Anchorage Daily News v. Anchorage Sch. Dist., 803 P.2d 402, 404 (Alaska 1990). Further, under Rule 82, fee awards involving public interest litigants may differ from the schedule provided in the statute. *See* ALASKA RULES OF COURT 82 (1994).

Other states also refuse to recognize fee shifting as within the court's inherent power or severely limit its application. *See, e.g.*, Hearity v. Iowa Dist. Court, 440 N.W.2d 860, 863 (Iowa 1989); Goodover v. Lindey's, Inc., 843 P.2d 765, 775-76 (Mont. 1992); Lannon v. Lee Conner Realty Corp., 385 S.E.2d 380, 383 (Va. 1989).

164. *See, e.g.*, MINN. STAT. ANN. § 549.21 (West 1988) (providing for discretionary sanctions). For a list of 34 state statutes that reflect the 1983-1993 Federal Rule 11, see Gerald F. Hess, *Rule 11 Practice in Federal and State Court: An Empirical, Comparative Study*, 75 MARQ. L. REV. 313, 316 n.9 (1992). As of 1992, 16 states had statutes that were similar to the pre-1983 Federal Rule. *Id.* at 315 n.8.

165. *See* Wade, *supra* note 16, at 466.

166. *See, e.g.*, ARIZ. REV. STAT. ANN. R. 11 (West 1987 & Supp. 1994).

tions.[167] For the reasons noted in the discussion of Federal Rule 11,[168] statutes modeled on this Rule are not a satisfactory or complete answer to problems created by unmeritorious litigation.

2. General Legislation

States have attempted to deal with the problem of frivolous lawsuits by enacting general legislation. As of 1986, over twenty states had passed legislation to counter vexatious claims,[169] and since then other states have followed suit.[170] Professors Johnson and Cassady note that, under these statutes, the principal sanction available to courts is fee shifting.[171] Once again, some statutes provide for mandatory sanctions,[172] but these appear to be in the minority.[173]

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167. *See, e.g.*, MINN. STAT. ANN. § 549.21 (West 1988).

168. *See supra* notes 58-92 and accompanying text.

169. The majority of states have a general statute allowing the court to award sanctions for frivolous claims. *See, e.g.*, ARIZ. REV. STAT. ANN. § 12-341.01 (West 1992); CONN. GEN. STAT. ANN. § 52-99 (West 1991) (providing only a nominal recovery); FLA. STAT. ANN. § 57.105 (West 1994); IOWA CODE ANN. § 617.16 (West Supp. 1995); KAN. STAT. ANN. § 60-2007 (1994); MINN. STAT. ANN. § 549.21 (West 1988); N.D. CENT. CODE § 28-26-01 (1991); WASH. REV. CODE ANN. § 4.84.185 (West 1988 & Supp. 1995); *see also* Johnson & Cassady, *supra* note 17, at 958-60 (discussing state statutes); Wade, *supra* note 16, at 457-68 (discussing state statutes and rules); Raymond A. Nolan, Comment, *Ohio's Frivolous Conduct Statute: A Need for Stronger Deterrence*, 21 CAP. U. L. REV 261, 262-63 n.4 (1992) (listing 11 state statutes designed to counter vexatious claims).

170. *See generally* Parness, *supra* note 27 (discussing various states statutes); Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321 (surveying state fee-shifting statutes) [hereinafter Note, *Are We Quietly Repealing*].

171. Johnson & Cassady, *supra* note 17, at 958-59.

172. *See* COLO. REV. STAT. ANN. §§ 13-17-101 (West 1987), 13-17-102 (West 1987 & Supp. 1994); FLA. STAT. ANN. § 57.105 (West 1994); GA. CODE ANN. § 9-15-14 (Harrison 1993 & Supp. 1995) (providing for mandatory sanctions if the claim or defense is completely unreasonable and for discretionary sanctions if the claim or defense is substantially unreasonable); ILL. ANN. STAT. ch. 750. para. 60/226 (Smith-Hurd 1993 & Supp. 1995); KAN. STAT. ANN. § 60-2007 (1994); MASS. GEN. LAWS ANN. ch. 231, § 6f (West 1985 & Supp. 1995); MICH. COMP. LAWS ANN. § 600.2591 (West Supp. 1995); WIS. STAT. ANN. § 814.025 (West 1995).

173. Professor Wade analyzed many of the pertinent statutes in his 1986 article. *See* Wade, *supra* note 16, at 457-67. Although some of the statutes have undergone revision, most remain current.

A typical statute provides that courts may impose sanctions for claims or defenses made in bad faith or without substantial justification.[174] Nonetheless, some statutes do not penalize good faith efforts to extend existing law.[175] Functionally, a finding of bad faith seems necessary under most of these statutes. Although this general legislation may be useful where the court has no inherent power to impose attorney fees for bad faith conduct, the statutes normally do not apply unless the bad faith is obvious or extreme.

3. Specific Statutes

While many states have passed specific statutes to counter unreasonable litigation,[176] this Comment will explore only the legislation in Alaska, Texas and California, which represent the wide variety of state fee-shifting statutes. Alaska most closely models the English system.[177] Texas has more fee-shifting statutes than many states,[178] including, for example, a blanket provision that covers contract claims.[179] Of all the states, California has the most fee-shifting statutes.[180]

a. Alaska's Rule 82

Alaska has the most complete fee-shifting scheme in the United States;[181] however, Alaska's system is a pale modification of the English rule.[182] Under Rule 82, the prevailing party recovers only 1% to 30% of

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174. *See, e.g.*, MD. CODE ANN. R. 1-341 (1995).

175. *See, e.g.*, MINN. STAT. ANN. § 549.21 (West 1988) (stating that "[n]othing herein shall authorize the award of [monetary sanctions] against a party or attorney . . . if . . . supported by a good faith argument for the extension . . . of the existing law").

176. *See, e.g.*, N.Y. GEN. BUS. LAW § 396-q (McKinney 1984 & Supp. 1994) (addressing unlawful selling practices).

177. *See* Note, *Are We Quietly Repealing*, *supra* note 170, at 337.

178. *See id.* at 336. The 1983 survey showed that Western States tended to enact more fee-shifting statutes of all types. *See id.* at 339. Four states enacted almost 25% of the statutes. *See id.* at 337. North Carolina had the fewest fee-shifting statutes. *See id.* at 336. Apparently the most recent survey of any breadth, this 1983 survey is widely cited.

179. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 1986); *infra* notes 195-206 and accompanying text.

180. In 1983, California had 146 fee-shifting statutes, the most of any state. Note, *Are We Quietly Repealing*, *supra* note 170, at 335-37. California currently has "hundreds" of such statutes. *See* RICHARD M. PEARL, CALIFORNIA ATTORNEY FEE AWARDS § 2.1 (Christopher D. Dworin ed., 2d ed. 1994).

181. *See* Kordziel, *supra* note 46, at 429; Note, *Are We Quietly Repealing*, *supra* note 170, at 337; *see also* ALAN J. TOMKINS & THOMAS E. WILLGING, TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS 31-47 (1986).

182. *See* TOMKINS & WILLGING, *supra* note 181, at 32-34; Kordziel, *supra* note 46, at

his attorney fees,[183] which are determined by the court according to a sliding scale written into the Rule.[184] For instance, if a judgment is uncontested and exceeds $500,000, including prejudgment interest, the prevailing party receives 1% of his attorney fees.[185] If the case proceeds to trial and the recovery is $25,000, however, the prevailing party receives 20% of his attorney fees.[186] The successful litigant receives 30% of his attorney fees if his case goes to trial and he receives no monetary recovery.[187] Rule 82 also allows the court flexibility and discretion to vary the fees;[188] however, the court must evaluate exceptions using particular factors and must explain its reasons for varying an award.[189] Reasons for varying attorney fees include bad faith conduct and "the extent to which a given fee award may be so onerous to the nonprevailing party that it would deter similarly situated litigants from the voluntary use of the courts."[190] Rule 82 is further limited by time restraints. For the prevailing party to recover counsel fees, he must file a timely motion with the court.[191] Failure to do so constitutes a waiver of the fees.[192]

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183. ALASKA CIV. R. 82.

184. *See* ALASKA CIV. R. 82(b)(1).

185. *Id.*

186. *Id.*

187. ALASKA CIV. R. 82(b)(2). If a case is resolved without trial, the court awards the prevailing party 20% of his attorney fees. *Id.*

188. *See* ALASKA CIV. R. 82(b)(3).

189. *Id.* The factors of Rule 82 are:

> [T]he complexity of the litigation; the length of trial; the reasonableness of the attorneys' hourly rates and the number of hours expended; the reasonableness of the number of attorneys used; the attorneys' efforts to minimize fees; the reasonableness of the claims and defenses pursued by each side; vexatious or bad faith conduct; the relationship between the amount of work performed and the significance of the matters at stake; the extent to which a given fee award may be so onerous to the nonprevailing party that it would deter similarly situated litigants from the voluntary use of the courts; the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and other equitable factors deemed relevant.

ALASKA CIV. R. 82(b)(3) (subsection lettering omitted). Justice Rabinowitz dissented when the court added this provision to Rule 82. *See* ALASKA RULES OF COURT 182 (1994).

190. ALASKA CIV. R. 82(b)(3)(I).

191. ALASKA CIV. R. 82(c). The motion for counsel fees must be filed within 10 days after the certified date of judgment. *Id.*

192. *Id.*

Attorneys criticize Rule 82 for discouraging novel or colorable claims.[193] The principal failing of the Alaskan system is, however, that partial fee shifting neither protects champions of meritorious claims nor fully compensates wronged parties.[194]

b. The Texas Statutes

Texas also allows the prevailing party to recover attorney fees in some cases.[195] The Texas Civil Practice and Remedies Code states:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for: (1) rendered services; (2) performed labor; (3) furnished material; (4) freight or express overcharges; (5) lost or damaged freight or express; (6) killed or injured stock; (7) a sworn account; or (8) an oral or written contract.[196]

In addition to the above, specific statutes allow fee shifting for causes of action that are either generally easy to prove or reflect a strong public interest. For instance, litigation involving estate taxes,[197] towing and storing vehicles,[198] and warehouseman's liens[199] may seem singularly specific for fee-shifting legislation. These actions may be distinguished, however, as involving debts that are usually easy to prove. Similarly, statutes governing fee shifting for landlord-tenant disputes,[200] political

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193. Kordziel, *supra* note 46, at 430-31 (asserting that a "sizeable contingent of the Alaska Bar" sought the abrogation of the statute). *Compare generally* Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, JUDGES' J., Spring 1985, at 4 (noting the limitations of Rule 82 and claiming it should be abolished) *and* Andrew J. Kleinfeld, *On Shifting Attorneys' Fees in Alaska: A Rebuttal*, JUDGES' J., Summer 1985, at 39 (claiming that promoting settlements may not serve justice) *with* James A. Parrish, *The Alaska Rules Are a Success: Plaintiff's View*, JUDGES' J., Spring 1985, at 8 (claiming that fee shifting encourages settlements and discourages only plaintiffs who file nuisance claims) *and* H. Bixler Whiting, *The Alaska Rules Are a Success: Defendant's View*, JUDGES' J., Spring 1985, at 9 (stating that fee shifting protects innocent defendants).

194. *See* ALASKA CIV. R. 82. *Compare* Demoski v. New, 737 P.2d 780, 788 (Alaska 1987) (holding that it is an abuse of discretion to award the prevailing party the full amount of the legal fees incurred) *with* ALASKA RULES OF COURT 182 (1994) (stating that an "award of full attorney's fees is manifestly unreasonable in the absence of bad faith . . . by the nonprevailing party"). *See generally* Kordziel, *supra* note 46 (claiming that the exceptions of the most recent Rule 82 have affected the statute's usefulness).

195. *See, e.g.*, TEX. PROP. CODE ANN. § 92.058(c) (West Supp. 1995).

196. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 1986).

197. TEX. PROB. CODE ANN. § 322A(y) (West Supp. 1995).

198. TEX. REV. CIV. STAT. ANN. art. 6701g-2 § 11 (West Supp. 1995).

199. TEX. PROP. CODE ANN. § 24.0062 (West Supp. 1995).

200. *Id.* § 92.058 (West Supp. 1995).

campaign reports,[201] and distribution of alcoholic beverages[202] reflect public policy concerns that these areas may be particularly subject to abuse. Actions regarding state purchasing contracts[203] and city building ordinances[204] trigger fee shifting because the government is a party to the action. These Texas statutes, while limited in scope, provide an important model, because the award of attorney fees is mandatory.[205] The statutes do not address a primary area of abuse, however, since tort claims are not part of the "loser pays" scheme in Texas.[206]

c. *The California Statutes*

Although California did not have a statewide version of Rule 11 until recently,[207] it has had a general statute dealing with frivolous actions.[208] Codifying judicial definition,[209] section 128.5 of the Califor-

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201. TEX. ELEC. CODE ANN. § 254.231 (West Supp. 1995).

202. TEX. ALCO. BEV. CODE ANN. § 102.79 (West Supp. 1995).

203. TEX. GOV'T CODE ANN. § 2251.043 (West Supp. 1995).

204. TEX. LOCAL GOV'T CODE ANN. § 214.0015 (West Supp. 1995).

205. *See, e.g., id*; *see also* Maggs & Weiss, *supra* note 48, at 1921. Texas does have some older fee-shifting statutes that are discretionary. For example, attorney's fees may be awarded to the prevailing party in an action for adverse possession of property. *See* TEX. CIV. PRAC. & REM. CODE § 16.034 (West 1986) (enacted in 1977).

206. *See generally* Maggs & Weiss, *supra* note 48 (discussing fee-shifting statutes). Although Texas also has a Rule 11 analogue, it is limited by the requirements that courts must presume that claims are brought in good faith and that "[n]o sanctions . . . may be imposed except for good cause, the particulars of which must be stated in the sanction order." TEX. R. CIV. P. ANN. r. 13 (West Supp. 1995). Because of this language, Rule 13 is, in effect, discretionary. Craig Enoch, *Incivility in the Legal System? Maybe It's the Rules*, 47 SMU L. REV. 199, 218 n.126 (1994); *see* Maggs & Weiss, *supra* note 48, at 1942-43 (maintaining that "Rule 13 sanctions are too difficult to obtain because of a presumption of good faith"). For a discussion of rules that allow Texas courts to sanction litigants, see generally Jason C. Smith & Jim Hund, *Avoiding Sanctions: Trying to Dodge the Bullet*, 25 TEX. TECH. L. REV. 3 (1993).

207. California has experimented with Rule 11 analogues. Recently repealed, § 447 of the California Civil Procedure Code provided for implementation of a Rule 11 analogue in two counties, Riverside and San Bernardino. *See* CAL. CIV. PROC. CODE § 447 (repealed 1994). This statute was experimental and due to expire on January 1, 1998; however, it was replaced with a statewide statute modeled on the 1993 version of Federal Rule 11. *See* 1994 Cal. Stat. 1062 (A.B. 3594); *see also* Maryann Jones, *"Stop, Think and Investigate": Should California Adopt Federal Rule 11?*, 22 SW. U. L. REV. 337, 363-71 (1993) (concluding that California should not have a statewide Rule 11 analogue); Georgene M. Vairo, *The New Rule 11: Past as Prologue?*, 28 LOY. L.A. L. REV. 39, 41-42 (1994) (comparing § 447 to the 1983 version of Rule 11).

208. CAL. CIV. PROC. CODE § 128.5 (West 1982 & Supp. 1995).

209. *See In re* Marriage of Flaherty, 646 P.2d 179, 187 (Cal. 1982) (en banc) (noting

nia Code of Civil Procedure defines frivolous as "totally and completely without merit" or "for the sole purpose of harassing an opposing party."[210] Either prong of this definition would be a difficult burden for an opposing party to prove. Even though this statute provides a limited remedy, the California Legislature has suspended the operation of section 128.5 for four years.[211] Moreover, section 128.5, which currently applies only to complaints filed on or before December 31, 1994, and section 128.7, the Rule 11 analogue that replaces section 128.5 until 1999, are discretionary.[212] The usefulness of these narrow statutes are mitigated by California judges who "give too much deference to 'the mystical right to bring suit'" and thus decline to impose sanctions on vexatious litigants.[213]

In addition to sections 128.5 and 128.7, California has many specific statutes that allow for fee shifting to the prevailing party in a variety of circumstances.[214] According to one survey, California has over twice as many fee-shifting statutes as Texas.[215] For example, courts may award

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that "an appeal should be held to be frivolous only when it is prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment—or when it indisputably has no merit—when any reasonable attorney would agree that the appeal is totally and completely without merit" (citing Estate of Walters, 222 P.2d 100, 104 (Cal. Ct. App. 1950)). *Flaherty* requires both subjective and objective analysis of the merits of a claim. *Id.* at 186-87; *see, e.g.*, Simonian v. Patterson, 32 Cal. Rptr. 2d 722, 729 (Ct. App. 1994). Additionally, the "weight of authority requires" a finding of bad faith; however, the "bad faith requirement does not impose a determination of evil motive and subjective bad faith may be inferred from the prosecution of a frivolous action." Childs v. Painewebber Inc., 35 Cal. Rptr. 2d 93, 102 (Ct. App. 1994) (citing West Coast Dev. v. Reed, 3 Cal. Rptr. 2d 790, 795 (Ct. App. 1992)).

210. CAL. CIV. PROC. CODE § 128.5(b)(2) (West 1982 & Supp. 1995).

211. 1994 Cal. Stat. 1062 (A.B. 3594); *see supra* note 6. Sections 128.7 and 446 of the California Civil Procedure Code replace § 128.5 from January 1, 1995, to January 1, 1999. 1994 Cal. Stat. 1062.

212. Section 128.5(a) states in pertinent part: "Every trial court *may* order a party, the party's attorney, or both to pay any reasonable expenses, including attorney's fees, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." CAL. CIV. PROC. CODE § 128.5(a) (West 1982 & Supp. 1995) (emphasis added); *see id.* § 128.5(b)(1) (amending the statute to limit its application). Section 128.7 provides that "after notice and a reasonable opportunity to respond, . . . the court *may*, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have [brought a frivolous claim]." CAL. CIV. PROC. CODE § 128.7(c) (West Supp. 1995) (emphasis added). Additionally, the court may not award monetary sanctions under § 128.7 if a party withdraws or settles a claim. CAL. CIV. PROC. CODE § 128.7(d).

213. Sackett, *supra* note 36, at 24.

214. *See, e.g.*, *infra* notes 216-27 and accompanying text.

215. Maggs & Weiss, *supra* note 48, at 1944 n.43.

attorney fees in cases dealing with domestic violence[216] or those concerning the unsolicited sending of merchandise.[217] Procedural concerns, such as a party unreasonably requesting or contesting a change of venue, may trigger an award of attorney fees.[218] Some fee-shifting statutes, such as those that award counsel fees to the prevailing party in dog-breeding disputes,[219] also require a finding of bad faith. Very specific circumstances, such as breach of contract for the construction of swimming pools,[220] trigger the mandatory fee-shifting statutes. Yet, the majority of the statutes are discretionary.[221]

Although California has many two-way fee-shifting statutes, most protect only the prevailing plaintiff.[222] Even when a statute's language is discretionary and allows for recovery by either party, courts interpret it as presumptively requiring awards to plaintiffs and disallowing fee shifting to defendants.[223] The discretionary statutes permit fee shifting to defendants only when the plaintiff's suit was "frivolous, unreasonable, or without foundation."[224] Additionally, fees may be shifted to a plaintiff when the court involuntarily dismisses the case[225] or when the parties settle the claim before trial.[226]

In spite of its many fee-shifting statutes, California lacks an effective blanket provision to counter nuisance litigation. In fact, the state's proplaintiff stance may encourage litigation.[227] Further, while many Cali-

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216. CAL. FAM. CODE app. § 547 (West 1995).
217. CAL. CIV. CODE § 1584.5 (West 1982 & Supp. 1995).
218. CAL. CIV. PROC. CODE § 396(b) (West Supp. 1995).
219. CAL. HEALTH & SAFETY CODE § 25989.555 (West Supp. 1995).
220. CAL. BUS. & PROF. CODE § 7168 (West Supp. 1995).
221. PEARL, *supra* note 180, § 2.4.
222. *See, e.g.*, CAL. LAB. CODE § 1697.1(c) (West Supp. 1995) (providing for fee shifting when plaintiff is injured by false, fraudulent or misleading representations concerning transportation fees); *see also* Winick Corp. v. Safeco Ins. Co. of America, 232 Cal. Rptr. 479, 480 (Ct. App. 1986) (noting that most statutes shift fees one way, in favor of a prevailing plaintiff); PEARL, *supra* note 180, § 2.4.
223. PEARL, *supra* note 180, § 2.4; *see* Sokolow v. County of San Mateo, 261 Cal. Rptr. 520, 528 (Ct. App. 1989).
224. PEARL, *supra* note 180, § 2.7.
225. *Id.* § 2.21.
226. *Id.* § 2.25. California's law may differ from federal proplaintiff fee-shifting statutes. The Supreme Court determined in *Evan v. Jeff D.* that a settlement under a federal statute may include matters relating to the attorney fees. 475 U.S. 717, 730-31 n.19 (1986) (stating that the statute "vests the right to attorney's fees in the 'prevailing party' rather than in his attorney").
227. *See* PEARL, *supra* note 180, § 2.5.

fornia statutes award attorney fees to the prevailing party, California, like Texas, fails to address the variety of tort claims overburdening the court system. As a result, "Rambo" lawyers and avid litigants thrive in California.[228] Moreover, suspending section 128.5 and creating a Rule 11 analogue modeled on the weakened federal statute is insufficient to discourage meritless litigation. The state needs additional legislation to deter vexatious suits and to compensate wronged parties.

V. THE ARGUMENT FOR FEE SHIFTING

> Ideally, the system should minimize conflicts by insuring that the rules are clear and that disagreements are resolved rapidly. The trouble is that lawyers' well-being runs in the opposite direction. The more conflict, the better.[229]

Two-way fee shifting[230] serves two goals: compensation to the injured party and deterrence of nuisance claims.[231] The American rule, however, does neither. The sole justification for the American rule is that it allows everyone—even one with no reasonable claim—to have his day in court. While proponents of the American rule claim this ensures the growth of the common law,[232] not all commentators agree that the American rule can be supported on this basis.[233] Most commentators recognize that the American rule chills some meritorious claims while encouraging mar-

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228. *See supra* notes 1-6 and accompanying text; *cf.* Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 87-96 (1991) (describing attorney misconduct at trial and judicial reluctance to impose sanctions). *See generally* Sackett, *supra* note 36 (claiming that fee-shifting statutes are ineffective since they apply in rare instances and judges do not use them in any case).

229. Robert J. Samuelson, *Go Ahead, Bash Lawyers: The People Who Should Make the System Better Are Making It Worse*, WASH. POST, Apr. 22, 1992, at A21, *reprinted in* Robert J. Samuelson, *I am a Big Lawyer Basher*, NEWSWEEK, Apr. 27, 1992, at 62, 62.

230. Two-way fee shifting awards attorneys' fees to either the prevailing plaintiff or defendant. Conversely, most one-way fee-shifting statutes award counsel fees solely to a prevailing plaintiff. *See infra* note 291 and accompanying text.

231. *See Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1632-34 (discussing "use of Rule 11 as a fee-shifting device").

232. *See In re* Michael Sindram, 498 U.S. 177, 182 (1991) (Marshall, J., dissenting) ("Our longstanding tradition of leaving our door open to all classes of litigants is a proud and decent one worth maintaining.") (citing Talamini v. Allstate Ins. Co., 470 U.S. 1067, 1070 (1985) (Stevens, J., concurring)). Commentators usually do not defend the American rule on any other basis. *See generally* Yaramoto, *supra* note 11 (arguing that the American rule ensures the growth of the law and protects civil rights).

233. *See, e.g.*, Ehrezweig, *supra* note 29 (asserting that the American rule does not provide open access to courts for the less powerful). *But see generally* Vargo, *supra* note 8 (claiming that the English rule does not deter frivolous claims or compensate to any greater extent than the American rule, which provides open access to courts).

ginal ones.[234] Although some legal scholars claim that the American rule is necessary to guarantee all people access to the courts[235] and credit it with the social progress of recent years,[236] others claim that the American rule suppresses test claims.[237] Thus, it is arguable whether the American rule deserves significant credit for social advancements. In any case, the rule presents a conundrum. The rule may provide access to courts to those with new claims, but it denies access to those whose claims are small.[238]

Courts are not truly open to those with small claims when the system penalizes them for bringing suit. Moreover, current avenues of redress do not adequately mitigate the negative aspects of the American rule. Because they are "limited in terms of jurisdiction, availability, and expertise,"[239] small claims courts do not furnish an adequate solution for those with modest claims.[240] Further, the bulwark of the American rule,

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234. *See, e.g.*, Mause, *supra* note 33, at 35-36.

235. *See generally* Yaramoto, *supra* note 11 (stating that the American rule assures open access). *But see* Samuelson, *supra* note 229, at A21, *reprinted in* NEWSWEEK, April 27, 1992, at 62. Samuelson points out that arguments claiming the American rule allows poor people to sue large companies do not reflect reality. *Id.* Poor people do not sue large companies; lawyers do. *See id.* Further, lawyers may solicit clients for this purpose and still have a contingency-fee arrangement. Fee shifting would probably dampen the lawyer's, and the occasional layperson's, enthusiasm for litigious sport.

236. *See, e.g.*, Vairo, *supra* note 23, at 475, 494. Professor Vairo cites Brown v. Board of Educ., 347 U.S. 483 (1954), *supplemented by*, 349 U.S. 294 (1955) and Roe v. Wade, 410 U.S. 113 (1973) as examples of social progress attributable to the American rule. Vairo, *supra* note 23, at 475, 494. This Comment's proposal would not affect constitutional cases such as *Brown* or *Roe*.

237. *See, e.g.*, Medina, *supra* note 29, at 1185-86.

238. *See generally* Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231 (1988) (arguing that the American rule denies access to many low-income claimants) [hereinafter Note, *Fee Simple*]. For a compelling discussion and excellent sources regarding fee shifting in the context of mandatory pro bono service, see Ronald H. Siverman, *Conceiving a Lawyer's Legal Duty to the Poor*, 19 HOFSTRA L. REV. 885, 1095-99 (1991).

The theory behind one-way fee shifting applies to two-way fee shifting as well. *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986) (stating that a plaintiff may "find it possible to engage a lawyer based on the statutory assurance that he will be paid a 'reasonable fee'"), *rev'd on other grounds*, 483 U.S. 711 (1987). *See generally* Mark S. Stein, *Is One-Way Fee Shifting Fairer Than Two-Way Fee Shifting?*, 141 F.R.D. 351 (1992) ("For every claim of right by a plaintiff there is a reciprocal and equivalent claim of right by a defendant.").

239. Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148, 161 (1981).

240. *See generally* Arthur Best et al., *Peace, Wealth, Happiness, and Small Claims*

contingency fees,[241] provide no incentive when the claim is modest. Lawyers seek high return on risk. Few would take a lawsuit on a contingency fee basis that would, if it succeeded, return less than normal hourly fees. For this reason, commentators note that the English rule would be a boon to people with honest, but modest, claims.[242] Because lawyers could recover reasonable fees when a valid claim or defense succeeded, fee shifting encourages lawyers to represent indigent clients on speculation.[243] Therefore, in terms of equity, the English rule is superior to the American rule. The English rule opens access to the courts to those with small, well-grounded claims, whereas the American rule prevents access. Furthermore, the English rule compensates the victim, but the American rule does not.[244] Generally, commentators acknowledge

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Courts: A Case Study, 21 FORDHAM URB. L.J. 343 (1994) (discussing problems with small claims courts); Barbara Yngvesson & Patricia Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 LAW & SOC'Y REV. 219 (1975) (analyzing various studies of small claims courts and recommending reform of the small claims system); Suzanne E. Elwell & Christopher D. Carlson, Contemporary Studies Project, *The Iowa Small Claims Court: An Empirical Analysis*, 75 IOWA LAW REV. 433 (1990) (discussing recent criticisms of the small claims courts and concluding there is a "need for refinement of the current system"); Beatrice A. Moulton, Note, *The Persecution and Intimidation of the Low-Income Litigant as Performed by the Small Claims Court in California*, 21 STAN. L. REV. 1657 (1969) (maintaining that small claims courts deny justice to the poor). Critics of the small claims system note that it is used primarily by businesses to collect debts. *See, e.g.*, Elwell & Carlson, *supra*, at 443-44. Poor and middle-income individuals have less success in small claims courts than the wealthy because they are less familiar with legal methods and are more intimidated when appearing pro se. *See, e.g., id.* at 441-44.

241. Professor Rowe has noted that contingency fees could coexist with two-way fee shifting as they do in Alaska. Rowe, *supra* note 35, at 674-75; *see* 2 AMERICAN LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 267, 275 (1991). In fact, England has considered allowing contingency fees. Robert B. Donin, *England Looks at a Hybrid Contingent Fee System*, 64 A.B.A. J. 773, 773-74 (1978).

242. *See, e.g.*, Note, *Fee Simple*, *supra* note 238, at 1236-37 (claiming that the poor are not able to exercise their rights for lack of representation for small claims, so "economic actors" are likely to take advantage of them). Logistically, "the party with the most financial resources is likely to prevail. In any case, it is difficult to see how forcing parties to pay their own costs furthers equality in litigation." Medina, *supra* note 29, at 1186-87.

243. Medina, *supra* note 29, at 1187.

244. *See, e.g.*, Maggs & Weiss, *supra* note 48, at 1923-26 (listing theoretical justifications for fee shifting). This seems self-evident with little need to elaborate. Nonetheless, on occasion, creative proponents of the American rule argue that the English rule does not fully compensate wronged parties and may not benefit those with modest claims. *See* Vargo, *supra* note 8, at 1635-36. According to Vargo, authorities should not consider the English rule until they conduct further "studies." *Id.* Yet, Vargo fails to state why studies are needed when, by its terms, fee shifting compensates. *See, e.g., id.* Further, the English rule is the law in most of the Western world, and "anyone who has observed both the American and British courts at

that mandatory two-way fee shifting is the most effective way of deterring nuisance claims and providing complete compensation to the injured party.[245] In fact, it is the only way to make a wronged party whole.[246]

While the American rule deters exactly those who should bring suit, the English rule provides a deterrent to frivolous litigation.[247] A potential litigant is properly motivated when the probable recovery exceeds the cost of litigation and dissuaded when the risk exceeds a possible recovery—or windfall.[248] Unlike the American rule, which shields litigants from the consequences of bringing an unfounded suit, the English rule encourages potential litigants to consider the merits of a claim or defense before asserting it. Although some commentators characterize fee shifting as punitive,[249] such a generalization is only partially accurate. It is more accurately described as a moral and civil duty to pay one's debts. Indeed, not only is fee shifting not principally punitive, it may not be a complete deterrent to frivolous actions. Contending that the English rule does not sufficiently discourage meritless claims, some commentators recommend sanctions in addition to awarding attorney fees to the prevailing party.[250]

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close range knows that there is no more vigorous advocacy or fairer justice than in British courts, and at the same time they maintain strict regulation of lawyers' professional conduct, as we do not." WARREN E. BURGER, DELIVERY OF JUSTICE 108 (1990) (reprint of Burger's speech to the Pound conference in 1976, *Agenda for 2000 A.D.—Need for Systematic Anticipation*); *see* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37 (discussing various countries' fee-shifting schemes).

245. *See, e.g.*, Rowe, *supra* note 35, at 670.

246. *See, e.g., id.*

247. In spite of attempts by opponents of the English rule to downplay its importance as a deterrent, reputable scholars have accepted this aspect of fee shifting. *See, e.g.*, Sandra Day O'Connor, *Reflections on Preclusion of Judicial Review in England and the United States*, 27 WM. & MARY L. REV. 643, 664 (1986) ("[It is] undoubtedly right to point to the more litigious nature of the American people and to the deterrent function served by the English rule on costs and attorney's fees."). Further, fee shifting may be a more effective deterrent to meritless claims than sanctions and may invite fewer appeals. *See* WILLGING, *supra* note 66, at 136.

248. *See generally* POSNER, *supra* note 33, at 537-42 (describing mathematical likelihood of settling claims under the American and English rules); Polinsky & Rubinfeld, *supra* note 27 (providing abstract analysis of deterrent effects of American and English rules).

249. This is one of the rationales that Professor Rowe considers for fee shifting. Rowe, *supra* note 35, at 660-61.

250. *See* Polinsky & Rubinfeld, *supra* note 27, at 425-26.

Within the realm of fee shifting, deterrence and compensation are two aspects of fairness. Although both the English and the American rule deter some plaintiffs from bringing suit,[251] the American rule "subsidizes meritless litigation."[252] Moreover, since fairness informs public policy, worthy claims should receive priority over spurious ones. Yet, critics of the English rule isolate the deterrent aspect and unfairly focus on mathematical models and abstract analysis to argue that two-way fee shifting is ineffective.[253] In addition to denying that the English rule is a deterrent to baseless claims[254]—an amazing position that perpetuates the stereotype that lawyers and legal scholars value clever arguments over the truth—proponents of the American rule largely ignore the equitable aspects of two-way fee shifting.[255]

The irony of the American rule is that, because of it, courts are truly open to only two groups: lawyers and the wealthy.[256] The American rule exists, in part, because attorneys lobbied for it.[257] The English rule that was in existence in Colonial America limited the amount of fees that a lawyer could recover.[258] Conversely, the American rule allowed attor-

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251. *See* Mause, *supra* note 33, at 35-37.

252. Maggs & Weiss, *supra* note 48, at 1926.

253. *See* Hylton, *supra* note 26, at 1071 ("Not a shred of empirical evidence on the compliance effects of alternative fee shifting rules exists, however, and it is unlikely that it ever will, given the cost of the required experiments."); *see also* POSNER, *supra* note 33, at 537-42 (providing mathematical analysis to demonstrate that the English rule induces fewer settlements than the American rule); Donohue, *supra* note 33, at 1094 (arguing that mathematical analysis determines that neither rule produces more settlements). *But see* Polinsky & Rubinfeld, *supra* note 27, at 422-23 (concluding through economic analysis that sanctions are necessary to deter frivolous litigation, even under the English rule). Professor Mause's thoughtful article discusses the probable effects of fee shifting and also illustrates his predictions in chart form. *See generally* Mause, *supra* note 33 (asserting that strong claims generally are settled before trial, but that the particular facts and the parties' opinions of their positions' merits determine whether marginal claims are litigated).

Professor Cohen notes the differences between the disciplines of law and economics. *See* Lloyd Cohen, *A Different Black Voice in Legal Scholarship*, 37 N.Y.L. SCH. L. REV. 301, 321 (1992). "Our law is about and for human beings. While a good mathematician may be an immature and disturbed savant, a good legal scholar may not. Those who propose to tell us something normatively important about law should have an insight into what people are about." *Id.*

254. *See, e.g.*, Hylton, *supra* note 26, at 1071.

255. *See generally* Vargo, *supra* note 8 (arguing that one-way fee shifting in favor of prevailing plaintiffs provides the most effective way to ensure justice).

256. *See, e.g.*, Monroe, *supra* note 239, at 159-61 (claiming that those with greater resources prevail in lawsuits). Small claims courts are a very limited solution to this problem. *Id.* at 161.

257. *See* Leubsdorf, *supra* note 8, at 16-17.

258. *Id.* at 14-16.

neys to charge market rates for their services.[259] Perhaps fearing a return to the fee restraints of Colonial America, attorneys often oppose modifications of the American rule.[260] Yet, an attorney's self-interest distorts his perception of fairness.[261] Even if ethics codes do not proscribe self-dealing in every instance,[262] lawmakers have a moral duty to ensure fairness to an injured party. If maintaining the status quo of attorneys is at odds with that principle, the status quo must change. No one has a constitutional right to file a frivolous lawsuit.[263] Concomitantly, attorneys have no inherent right to a favored position in society to the detriment of the average citizen.

The proponents of the American rule have some basis for their enthusiasm. When legislatures delay enacting new law, courts may take the initiative. This is important in civil rights cases,[264] but has been true in other instances as well. For instance, Judge Cardozo's seminal opinion in *MacPherson v. Buick*[265] advanced the negligence theory of product liability by determining that a manufacturer is liable for defective products where there is no privity between the injured party and the manufacturer.[266] In another case, *Li v. Yellow Cab*,[267] the California Supreme Court rejected the existing theory of contributory negligence and adopted a pure comparative negligence standard.[268] This holding reflected a growing trend in the law. Before the decision in *Li*, half of the states recognized comparative negligence,[269] but currently only a few states

259. *Id.* at 16.

260. *See, e.g.*, Herbert M. Kritzer, *The English Rule*, A.B.A. J., Nov. 1992, at 54, 54-58 (discussing opposition to the English rule).

261. "[T]he interests of the profession are not fully congruent with those of the general public." GEOFFREY C. HAZARD, JR., ET AL., THE LAW AND ETHICS OF LAWYERING 443 (2d ed. 1994).

262. According to the American Bar Association's Model Rules, an attorney can use confidential client information as long as it is not to the client's detriment. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b) (1994) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation . . . .").

263. *See* Cheek v. Doe, 828 F.2d 395, 397 (7th Cir.) (quoting Coleman v. Commissioner, 791 F.2d 68, 72 (7th Cir. 1986), *cert. denied*, 484 U.S. 955 (1987)).

264. *See generally* Tobias, *supra* note 16 (suggesting civil rights claims should not be subject to sanctions).

265. 111 N.E. 1050 (N.Y. 1916).

266. *Id.* at 1053-55.

267. 532 P.2d 1226 (Cal. 1975) (en banc).

268. *Id.* at 1229.

269. *Id.* at 1232.

retain the contributory negligence defense.[270] Yet, in the overwhelming majority of states, the legislature, not the courts, effected the change in the law.[271] Further, while judicial law may be innovative in some cases, it is not always commendable. In *Dillon v. Legg*,[272] the California Supreme Court created controversial new law. A narrow majority in *Dillon* held that a bystander who observes injury to a close relative could recover damages for emotional distress.[273] Most states rejected this minority view for not providing a clear standard of liability.[274] From these well-known cases, one might surmise that the American rule facilitates the judicial creation of new rights.

Yet, it is anomalous to acknowledge a right without a satisfactory means of enforcing it. When a person is subject to a harassment lawsuit, he has a right to defend it. Nevertheless, he may be unwilling or unable to defend the suit unless he is indemnified for all costs incurred. Often, in effect, the law welcomes to court one who wishes to challenge the law and turns away one who wishes to enforce it. Further, it is not enough that he who insists on enforcing his rights prevails in court. The law must also make him whole. A plaintiff with a legitimate claim deserves full compensation from the defendant, at least as far as a money judgment can do so. A prevailing defendant, generally an unwilling participant in the legal process, deserves to be indemnified, so that burdensome legal fees do not further victimize him. Current law does not adequately compensate the prevailing party and thus impairs his ability to bring or defend the lawsuit. Therefore, while the American rule may provide an alternate avenue for the creation of new rights, it also inhibits the vindication of rights already in existence. The purpose of the American rule and its consequences are contradictory: To facilitate social change, American courts must dispense injustice.

When sacrificing individual justice to a perceived greater good, it is wise to periodically re-examine and retest the social benefits against the mores of the time. Perhaps the American rule was justifiable at one time, but it needs to be re-examined now. Taking a small, but significant, step towards the English rule is one way to effect change.

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270. PROSSER ET AL., *supra* note 145, at 578.

271. *Id.*

272. 441 P.2d 912 (Cal. 1968) (en banc).

273. *Id.* at 925.

274. *See* Whetham v. Bismarck Hosp., 197 N.W.2d 678, 682-83 (N.D. 1972) (stating that the "artificial" and "unpredictable" rule could impose limitless liability) (quoting *Dillon*, 441 P.2d at 926 (Burke, J., dissenting)).

VI. A MODEL STATUTE

CODE OF CIVIL PROCEDURE

§_____: Attorney Fees

(a) Allowance to Prevailing Party.

(1) The prevailing party in a motion for summary judgment under section [56] of this code shall be awarded reasonable attorney fees.

(2) A prevailing party in a motion for involuntary dismissal under section [41] of this code shall be awarded reasonable attorney fees. Under this subsection "prevailing party" refers to the party who did not initiate the claim or counterclaim.

(3) A prevailing party in a motion for dismissal under section [12] of this code shall be awarded reasonable attorney fees. Under this subsection "prevailing party" refers to the party who did not initiate the claim or counterclaim. [Cause for dismissal under section [12] are (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under section [19] of this code.][275]

(b) Limitations of this Section. This provision shall not apply to claims based on federal issues, child custody disputes, or first-party insurance claims.

(c) Determining Reasonable Fees. The court may determine the reasonable amount of attorney fees awarded under this section not to exceed [the amount currently required to bring a diversity action in federal courts].

(d) Exceptions to this Section.

(1) Upon motion, the court may vary an attorney fee award in any action that was brought to enforce an important right affecting the public interest if a significant benefit, whether pecuniary or nonpecuniary, would have been conferred on the general public or a large class of persons if the action had succeeded.[276]

(2) If the court varies an award, the court shall explain the reasons for the variation.[277]

(3) A motion for an exception to this section must be filed within 10 days after the date shown in the clerk's certificate of distribution on the judgment.[278]

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275. The list of reasons to dismiss under this subsection are taken verbatim from Rule 12(b) of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 12(b).

276. This subsection is modeled on § 1021.5 of the California Code of Civil Procedure. *See* CAL. CIV. PROC. CODE § 1021.5 (West 1993).

277. ALASKA CIV. R. 82(b)(3).

278. ALASKA CIV. R. 82(c).

VII. THE PROPOSAL AND WHY PUBLIC INTEREST REQUIRES IT

> We are not to . . . shut our eyes to living needs, and yet we are not to find a living need in every gust of fancy that would blow to earth the patterns of history and reason.[279]

Under this proposal, the court must award reasonable attorney fees to the prevailing party[280] on a motion for summary judgment[281] or dismissal[282] in most state cases. Undoubtedly, a statute consistent with this proposal would discourage many unwarranted lawsuits,[283] but, most importantly, it would be fair.

The proposal suggested here ensures fairness because proceedings that end before trial lack merit either procedurally or substantively. Courts do not grant summary judgments lightly, and, at least in federal court, a case is dismissed before trial either for procedural reasons or for behavior of the claimant that is inconsistent with maintaining the suit.[284] Judges award summary judgments only when no material issue of law or fact exists.[285] Thus, awarding attorney's fees to the prevailing party is

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279. BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 76 (1924).

280. It may be difficult to define "prevailing party" in some fee-shifting schemes. *See* Maher v. Gagne, 448 U.S. 122 (1980) (stating that a "prevailing plaintiff" may include one whose rights are vindicated by consent decree or settlement). No such difficulty exists with this proposal because its scope is quite narrow and it pertains to both parties. The prevailing party is the party prevailing on the motion.

281. Currently, under the Federal Rules of Civil Procedure, the judge may award attorney's fees pursuant to a summary judgment when the filing has been made in bad faith. FED. R. CIV. P. 56(g). The proposal here would make it mandatory rather than discretionary.

282. In federal court, Rule 12 or Rule 41(b) would apply. *See* FED. R. CIV. P. 12; FED. R. CIV. P. 41(b); *supra* notes 60-62. This proposal does not apply to a voluntary dismissal, but does apply to all dismissals of the action that are not voluntary. *See* FED. R. CIV. P. 41(a); *supra* note 61. In the interest of concision, this Comment may refer to dismissals in general. Summary judgment carries a higher burden of proof to dismiss a claim. *Compare* FED. R. CIV. P. 56 *with* FED. R. CIV. P. 41(b) *and* FED. R. CIV. P. 12.

283. This proposal cannot curtail all meritless litigation. A number of opportunistic lawsuits proceed to trial. In one recent case, an unsupervised five-year-old child rode a tricycle down a hill into a street. Cummings v. Fisher-Price, Inc., 857 F. Supp. 502 (W.D. Va. 1994). The child suffered serious injury when a car driven by an elderly woman hit him. *Id.* at 503. The parents sued the tricycle manufacturer for product liability based on inadequate warning. *Id.* at 503-04. Although the company warned parents that they must supervise their children and that the tricycle was unsafe on sloping driveways, the company did not specifically warn against sloping hills. *Id.* The parents requested punitive damages. *Id.* at 503. The court granted the defendant partial summary judgment on the issue of punitive damages with the rest of the claims to be decided at trial. *Id.* at 505-07.

284. FED. R. CIV. P. 41(b) (stating reasons to dismiss that include "failure . . . to prosecute or to comply with these rules or any order of court").

285. *See, e.g.*, FED. R. CIV. P. 56; CAL. CIV. PROC. CODE § 437c (West Supp. 1994).

fair because, if the motion for summary judgment succeeds, the claim is objectively without merit. Moreover, even when dismissal is granted for procedural reasons in state or federal courts,[286] the comparatively brief duration of the proceedings limits the burden to the losing party.[287]

The Federal Rule states in pertinent part:

> The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

FED. R. CIV. P. 56(c).

Under Rule 56, courts resolve any doubt as to the existence of a genuine issue of material fact against the moving party, in a light most favorable to the opposing party. *See* Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970). Summary judgments, once rarely employed, have become more routine in recent years. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (noting that summary judgments are necessary to the scheme of justice); Robert K. Smits, Comment, *Federal Summary Judgment: The "New" Workhorse for an Overburdened Federal Court System*, 20 U.C. DAVIS L. REV. 955, 969-70 (1987) (commenting that federal courts grant summary judgments with greater frequency than in the past). The standards for granting or denying summary judgments in state courts may vary, but the modern trend favors a greater use of summary judgments. *See, e.g.*, Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 640 (1988) (recommending more frequent use of summary judgment in Texas).

Using summary judgment as a requirement for fee shifting furthers predictability and uniformity in enforcement because fee shifting would not then be affected by a jury's whims or an attorney's skill at voir dire.

286. This proposal is meant to provide a remedy different from Rule 11, so the prevailing party could recover attorney's fees when the claim is dismissed under Rule 12(b) or (c) of the Federal Rules of Civil Procedure. Because an involuntary dismissal is a dismissal on the merits, it falls under this proposal. Thus, no distinction exists between dismissal for procedural or substantive reasons. A party who voluntarily dismissed the action, however, would not be liable for the other party's attorney's fees because voluntary dismissal would have to occur before the motion for summary judgment. *See* FED. R. CIV. P. 41(a).

Even Rule 11 opponents acknowledge the logical link between dismissal on the merits and fee shifting. Commentators have frequently argued that Rule 11 sanctions relating to the merits of a claim should apply solely when courts award summary judgment or grant a motion to dismiss. *See, e.g.*, Stempel, *supra* note 91, at 268-79 (noting that a case proceeding to trial is some "'measure of its merit'" (quoting Rule 11 authority Gregory Joseph)).

287. This proposal also covers partial summary judgments. *See, e.g.*, FED. R. CIV. P. 54(b). Otherwise, a party could protect himself from fee shifting by attaching a vexatious claim to a minor, meritorious one. Determining the award of attorney's fees when there has been a partial summary judgment should not be a significant burden

Fairness is further ensured because the prevailing party recovers reasonable, not actual, attorney's fees.[288] Determining reasonableness is a matter for the court to decide on an individual basis.[289] While statutes might place a cap on the amount recoverable, this would not be an important qualification since the proposal's narrow scope limits counsel fees. By restricting this proposal to summary judgment or dismissal, the

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to the court, since a basic assumption of this proposal is that there would be a general standard of reasonableness for attorney's fees. Under current state or federal statutes, courts may shift part of the attorney fees when appropriate. *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 715 (1987) ("Under the typical fee-shifting statute, attorney's fees are awarded to a prevailing party and only to the extent that party prevails.").

288. Reasonableness is the standard under Rule 11 and most fee-shifting statutes. *See, e.g.*, FED. R. CIV. P. 11. In 1991, the President's Council on Competitiveness recommended limiting the prevailing party's recovery of attorney fees to the amount the loser must pay his attorney. AGENDA, *supra* note 17, at 24; *see* Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 567 (1992).

289. Federal courts have developed the lodestar method of calculating reasonable fees. *See* Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 562-66 (1986) (approving the use of lodestar calculation as reasonable hours times reasonable rate), *rev'd on other grounds*, 483 U.S. 711 (1987). Courts may consider the *Johnson* factors, which may modify the lodestar formula, to determine reasonableness. *See id.*; Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974); Dobbs, *supra* note 126, at 467-70 (disucssing Supreme Court decisions concerning the lodestar formula). All factors may not apply to a particular case, and some may assume a perspective that is not relevant here. Nevertheless, in the absence of statutory or precedential direction, the *Johnson* factors provide a useful tool for courts. In *Johnson*, the court listed the following factors to consider when determining attorney fees awarded under federal statute:

> (1) The time and labor required . . . . The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work . . . . and other work which can often be accomplished by non-lawyers . . . . Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it. (2) The novelty and difficulty of the questions. Cases of first impression generally require more time and effort on the attorney's part . . . . (3) The skill requisite to perform the legal service properly . . . . (4) The preclusion of other employment by the attorney due to acceptance of the case . . . . (5) The customary fee . . . . (6) Whether the fee is fixed or contingent . . . . (7) Time limitations imposed by the client or the circumstances . . . . (8) The amount involved and the results obtained . . . . (9) The experience, reputation, and ability of the attorneys . . . . (10) The "undesirability" of the case . . . . (11) The nature and length of the professional relationship with the client . . . . (12) Awards in similar cases.

Johnson, 488 F.2d at 717-19 (emphasis and citations omitted).

losing party, in effect, does not face a penalty for bringing a colorable claim.

While the vast majority of state actions are covered by this proposal, some claims must be excluded from it. The proposal is broader than most statutes, because it applies to both contract and tort actions. Yet, for public policy reasons,[290] child custody matters and first-party insurance claims might also be exempt from fee shifting. Further, federal issues, such as civil rights claims, would not be subject to this proposal. Thus, this fee-shifting statute would not chill civil rights claims. In addition, this proposal is subject to current legislation that allows one-way fee shifting.[291]

Because awarding summary judgment is discretionary, the judge's discretion is factored into the proposal. The possibility remains that a court's reluctance to award summary judgment in some cases could contravene this proposal. Those cases would, most likely, be rare. Although some judges may have an unhealthy commitment to the American rule, judges have an interest in relieving the current burden on courts. As the success of the 1983 amendment to Federal Rule 11 shows,[292] courts

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290. Although insurers do not have a fiduciary duty to the insured, the insured should not have to face penalties for trying to enforce an insurance contract. *See* Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 103-17 (1994). In addition, society has a strong interest in the welfare of children, and thus challenging custody orders may be in the best interest of children. *But see* CAL. FAM. CODE § 3407(g) (West 1994) (providing that courts may award attorney fees to the party not commencing the proceeding).

291. One-way fee-shifting statutes may benefit a prevailing plaintiff in certain cases, such as consumer actions. *See, e.g.*, Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2056-57 (1993). There are over 100 federal statutes that allow for one-way fee shifting in favor of plaintiffs. *Id.* at 2041-42. These statutes are designed to allow plaintiffs with limited resources to sue even when the remedy sought may not involve large damages. *Id.* at 2088-89 (noting that one-way fee shifting is appropriate when plaintiff successfully seeks injunction). These statutes may involve civil rights or claims against the government. *See* 42 U.S.C. § 1988(b) (1988 & Supp. V 1993) (involving civil rights); 28 U.S.C. § 2412 (1988 & Supp. IV 1992) (awarding counsel fees to prevailing defendant when government brings suit); *see also* Claudio Riedi, Comment, *To Shift or to Shaft: Attorney Fees for Prevailing Claimants in Civil Forfeiture Suits*, 47 U. MIAMI L. REV. 147 (1992) (arguing for a fee-shifting statute for prevailing defendants in drug forfeiture cases). The majority of state and federal fee-shifting statutes allow recovery of attorney fees solely to a prevailing plaintiff. *See* Gregory A. Hicks, *Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions*, 49 LA. L. REV. 763, 795 n.112 (1989); *see also* Note, *Are We Quietly Repealing*, *supra* note 170, at 329-31.

292. *See, e.g.*, *Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1635-36

quickly adjust to a new practice. Although making summary judgment mandatory in particular cases would eliminate the court's discretion[293] and strengthen this proposal, judicial discretion in the disposition of cases preserves the likelihood that colorable claims will proceed to trial.[294]

Variations on current exceptions to the American rule, such as the common fund exception,[295] may provide exceptions to fee shifting under this proposal. While the exceptions under the American rule operate solely in favor of the successful litigant,[296] possible exceptions under this proposal favor the loser. For example, if a plaintiff brings an action with the intent to benefit a particular class but loses the suit, she may not be solely liable for the other party's attorney fees.[297] For obvious reasons,[298] courts would very rarely invoke such an exception. Nonetheless, exceptions not currently recognized in federal courts might be appropriate under a two-way fee-shifting statute. The private attorney general doctrine[299] could protect claimants motivated by public interest. Additionally, the factors delineated in Alaska's Civil Rule 82[300] could provide guidelines for other exceptions. Overall, this proposal could be a boon to public interest litigants. Having to pay both sides' counsel fees may induce solvent individuals and companies to settle legitimate claims.

(claiming that courts and lawyers generally viewed the 1983 version of Rule 11 as favorable).

293. The President's Council on Competitiveness recommended mandatory summary judgments. *See* AGENDA, *supra* note 17, at 20. Mandatory summary judgments would be effective, because, "[a]lthough judges should be independent, they must comply with the law." MODEL CODE OF JUDICIAL CONDUCT Canon 1 cmt. 1 (1990); *see In re* Hague, 315 N.W.2d 524, 532-33 (Mich. 1982) (holding that a judge's repeatedly ignoring legal precedent is grounds for discipline).

294. Justice Thurgood Marshall maintained that a judge's ability to sanction parties and his ability to manage a case are related. Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120, 127 (1989) (Marshall, J., dissenting). In addition, Justice Marshall argued that the court's power to sanction under Rule 11 should be broadened to include all culpable parties. *Id.* at 127-31 (Marshall, J., dissenting). This idea was incorporated into the new Rule 11. *See supra* note 41 and accompanying text.

295. *See supra* notes 112-35, 160-63 and accompanying text. As it is antithetical to the purpose of the proposal here, the bad faith theory would not provide an exception to this Comment's fee-shifting scheme.

296. *See supra* note 134 and accompanying text.

297. Suits brought by shareholders, trust beneficiaries, and union members are the obvious examples. See Vargo, *supra* note 8, at 1579-83 for other possibilities. The key qualifier for the purpose of this Comment is that there are symbiotic relationships among the plaintiff, the defendant, and the class.

298. Courts would be loathe to burden a class that has not received a benefit except in the most extreme cases. A case that obviously has merit but is dismissed for obscure procedural reasons might be such a case.

299. *See supra* note 130.

300. *See supra* note 189 and accompanying text.

Further, the statute recommended here does not significantly impact indigent litigants, particularly if an exception applies. Select use of exceptions protects worthy claimants and ensures that justice serves both parties to a lawsuit.

Government must seek new remedies to meritless litigation, because current solutions are incomplete or ineffective. Rule 11 is now discretionary, and awarding attorneys' fees may become a rare penalty.[301] Additionally, post-1983 versions of the Rule have not allowed sanctions for good faith efforts to modify current law,[302] so that the court's discretion has been a significant factor at some point in all Rule 11 motions.[303] For this reason, meritless claims never triggered Rule 11 sanctions in a predictable fashion,[304] and Rule 11 in any form has not been a reliable tool. Certainly, society cannot depend upon it now to deter unmeritorious claims or to compensate the victims of abusive litigation.

Further, as discussed in previous sections,[305] other federal measures do not offset the Rule's deficiencies. The usefulness of § 1927 and the courts' inherent power are both very limited. Similarly, state common law and statutory remedies do not discourage meritless claims. Common law remedies are difficult to prove.[306] State analogues of Federal Rule 11 are inoperative in federal courts, and many are discretionary.[307] Other state statutes designed to counter frivolous claims are ineffective either because they do not apply to many causes of action or because the court may chose not to shift fees.[308] Alaska's statute, which is mandatory and is not restricted to specific types of claims, only partially indemnifies a prevailing party.[309] Clearly, none of the current state or federal exceptions to the American rule furnish a satisfactory solution to the problem of abusive litigation.

The proposal offered here benefits society and individuals. It benefits society because it is efficient. Although efficiency is not the primary rationale for this proposal, an inefficient court system impairs the admin-

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301. *See supra* notes 74-83 and accompanying text.
302. *See supra* note 20 and accompanying text.
303. *See* Risinger, *supra* note 69, at 5; Vairo, *supra* note 23, at 495; *Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1649-51.
304. *See* Risinger, *supra* note 69, at 5; Vairo, *supra* note 23, at 495; *Lawyers' Responsibilities to the Courts*, *supra* note 58, at 1649-51.
305. *See supra* notes 93-135 and accompanying text.
306. *See supra* notes 137-63 and accompanying text.
307. *See supra* notes 164-68 and accompanying text.
308. *See supra* notes 169-228 and accompanying text.
309. *See supra* notes 181-94 and accompanying text.

istration of justice. Managing claims, even to the point of summary judgment or dismissal, is time consuming and detrimental to courts.[310] Therefore, courts benefit from discouraging claims that have no substantial justification.[311] The proposed law is a bright-line test, designed to facilitate efficiency and to prevent satellite litigation.[312] Further, individuals benefit from fee shifting because it is fair. When fee shifting is the law, people are less likely to be legally harassed, and those who are harassed are compensated. While some commentators deny the importance of fairness to victims of meritless suits,[313] logic and intuition suggest that individuals should be free even from the harassment of an unreasonable complaint.[314]

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310. *See* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990) ("Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.").

311. Excessive litigation is a social problem because "[r]esources that might be devoted to more productive uses are wasted on excessive litigation expenditures." HAZARD ET AL., *supra* note 261, at 441-42. Further, "[i]f the economists are correct, the only group that benefits from . . . [protracted or excessive litigation] are lawyers engaged in high-stakes litigation . . . ." *Id.* at 442.

312. *See supra* note 63 and accompanying text; *cf.* BURBANK, *supra* note 68, at 98 (claiming that, with a presumptive rule that Rule 11 sanctions will be imposed, satellite litigation would be reduced).

313. *See Cooter & Gell*, 496 U.S. at 411-12 (Stevens, J., concurring and dissenting) ("[T]he fact that the filing of a complaint imposes costs on a defendant should be of no concern to the rulemakers if the complaint does not impose any costs on the judiciary."); *see also* Kimberly A. Stott, Comment, *Proposed Amendments to Federal Rule of Civil Procedure 11: New, but Not Necessarily Improved*, 21 FLA. ST. U. L. REV. 111, 134 n.160 (1993) (asserting that "there is little harm done when a pleading is filed and withdrawn").

314. This proposal deters the filing of frivolous lawsuits because filing a meritless complaint with the intent to voluntarily dismiss it before trial would be risky. A voluntary dismissal is subject to this proposal if the injured party has already filed a motion for summary judgment or dismissal.

Further, this proposal may chill a common practice. Some plaintiffs file suit and then use discovery to try to justify it. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741 (1975) (stating that discovery which allows "a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence . . . is a social cost rather than a benefit"). *But cf.* Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1440-43 (1984) (claiming that courts should not dismiss cases under Rule 9(b), but should allow for ample discovery after filing a complaint). While discovery may be needed to prove factual allegations, lawyers and clients should investigate claims as much as possible before filing suit. *See* Thomas v. Capital Sec. Servs., Inc., 836 F.2d 866, 875-76 (5th Cir. 1988); *In re Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 507, 585 (1993). This proposal will not deter plaintiffs who are certain of their claims, but it may discourage plaintiffs in search of a cause of action.

Even when the burden of counsel fees is not great, those who bring suits in order to force settlement would probably think twice before doing so under the law suggested here. Innocent defendants will no longer be forced to weigh the relative losses of settling or proceeding to trial. Further, when a suit is honest, plaintiffs will not be forced to abandon claims when attorneys' fees threaten to exceed any recovery. Therefore, the financial burden would fall completely on the party most at fault, a litigant who either brings a suit with no chance of success or one who unreasonably defends a legitimate claim. The prevailing party would experience true justice—a vindication of his rights and reimbursement for defending them.

VIII. CONCLUSION

> An effective program will . . . simplify rules and procedures as well as . . . give greater access to the poor and middle class. Access without simplification will be wasteful and expensive; simplification without access will be unjust.[315]

The American rule rewards baseless claims.[316] For this reason alone, two-way fee shifting is preferable to the American rule. Yet, the American rule also discourages the litigation of strong, but modest, claims. Thus, when the law is well-defined and the merits of a case clearly favor one party, fee shifting is appropriate, predictable, and eminently fair. Indeed, fee shifting is necessary to do justice if a claim or defense is procedurally or substantively without merit. While justice requires that the courts welcome those with meritorious claims, justice also requires that a responsible party make a wronged party whole. This proposal compels plaintiffs to recognize an affirmative duty to investigate the likelihood of a suit's success before bringing it. Similarly, defendants must not be able to avoid liability by hiding behind the outdated philosophy of the court system.

To the extent that this proposal discourages some plaintiffs from challenging existing law, it may inhibit the growth and modification of the common law. Yet, every case does not present an opportunity for change and many lawsuits are brought in bad faith. Clearly, a case such as the Culbertson winery case that began this article is no *MacPherson v. Buick Motor Co.*[317] or *Li v. Yellow Cab.*[318] Further, it is not likely that the lim-

315. THE LITIGATION EXPLOSION, supra note 14, at 44 (quoting Derek C. Bok, President of Harvard University).

316. *See* Maggs & Weiss, *supra* note 48, at 1926.

317. 111 N.E. 1050 (N.Y. 1916); *see supra* notes 265-66 and accompanying text.

318. 532 P.2d 1226 (Cal. 1975) (en banc); *see supra* notes 267-71 and accompanying

ited scope of this proposal and the modest cost to the losing party would deter serious efforts to change the law. The chilling effects on good faith claims would be minimal—a "small but necessary price we must pay to impose a modicum of responsibility on those who litigate."[319]

The common law grows by small increments, gray areas of the law clarified with each step, and there are many gray areas in the law that courts must resolve. It is not in the public interest to repeatedly haul settled legal issues before the judiciary. Neither is it in the public interest to allow claims with no factual basis to go unsanctioned and victims to remain uncompensated. In any case, the proposal recommended here would have a minimal effect on the growth of the common law. While the judiciary is generally reluctant to overturn precedent,[320] the legislature is sufficiently active and more likely to modify the law.[321] Even for modest changes of judicially-created rules, the judicial branch often defers to the legislature.[322] Therefore, it is the responsibility of state and federal legislatures to take meaningful steps to reform the American rule. Certainly, the foundation of any legal system is equity and justice, and the American rule too often contravenes these principles.

The solution presented here must work in conjunction with current statutory and common law remedies. Nonetheless, this proposal should prove an effective addition to the tools designed to deter frivolous litigation. Further, the fee-shifting statute suggested here not only provides full compensation to an injured party in limited, but significant, instanc-

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text. An example of a case that would have been impacted by this proposal is Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc). As discussed *supra*, this opinion is controversial and represents a minority position. *See supra* notes 272-74 and accompanying text.

319. Louis, *supra* note 85, at 1062 (referring to Rule 11 sanctions).

320. *See* BURGER, *supra* note 244, at 67 (reprint of a speech given at Georgetown Law Center, Sept. 17, 1971). "[T]he litigation process is one factor in change, it is a slow, painful and often clumsy instrument of progress unless one is content to measure progress in terms of generations and centuries." BURGER, *supra* note 244, at 67.

321. *Compare* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975) (rejecting the private attorney general doctrine as justification for fee shifting) *and* Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980) (rejecting counsel fees as a sanction under 28 U.S.C. § 1927) *with* 42 U.S.C. § 1988 (1988 & Supp. V 1993) (allowing fee shifting in civil rights actions) *and* 28 U.S.C. § 1927 (1988 & Supp. V 1993) (allowing attorneys' fees as a sanction under this statute). *See generally* Note, *The Inefficient Common Law*, 92 YALE L.J. 862, 871-87 (1983) (asserting that, because the judiciary favors "reckless rules," modern legislatures eclipse the common law with efficient statutory law).

322. For example, the American rule itself is judicially created. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). Nonetheless, the American rule "is entitled to the respect of the court till it is changed, or modified, by statute." *Id.*; *see also supra* note 8 and accompanying text. When courts have refused to modify the American rule, the legislatures have made modifications. *See supra* notes 20, 321.

es, but also encourages positive attitudes toward the American court system in general. Without compromising public access to courts, this proposal denies lawyers and irrational litigants the right to sue irresponsibly. By merging the American and English rules, American courts have the long-awaited opportunity to dispense unencumbered justice.

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