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Self-Funded Benefits Plans: Up-Front Savings, but Hidden Costs


by Rhonda D. Orin and
Daniel J. Healy

I. Introduction

Self-funding looks like a very attractive option for employers who want to reduce the costs of their company's health benefits. These plans offer a number of cost-saving features, such as avoiding premiums, premium taxes and state mandatory benefit laws. What employers may not see, though, are the hidden costs of self-funded plans. Unfortunately, there are a lot of them.

Plans that fall under the Employees' Retirement Income Security Act of 1974 ("ERISA") may be "self-funded."¹ Self-funded plans are plans that are sponsored by the employer, meaning the employer assumes the expense of paying the actual benefits for plan participants. When a plan participant incurs costs by, e.g., seeing a dermatologist, the employer's plan, rather than an insurance company, is responsible for paying the dermatologist's bill.

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The Right to Collect Attorneys' Fees in Insurance Coverage Litigation: Should We Look to the Statute of Gloucester and Common Law Reception Statutes for a Solution?

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"The 'loser pays' rule was enacted 725 years ago by the British Parliament. States adopted this rule through their state 'reception statutes' and constitutional provisions unless the rule was contrary to existing constitutions or statutes, or was explicitly rejected by statute."

I. Introduction

This Article identifies a new argument for applying the rule that the "loser-pays" for attorney fees in insurance coverage litigation. The "loser pays" rule was enacted 725 years ago by the British Parliament. States adopted this rule through their state "reception statutes" and constitutional provisions unless the rule was contrary to existing constitutions or statutes, or was explicitly rejected by statute. Although the English Rule has been rejected in the United States by several courts, unless the state legislature has rejected the rule, it could be considered in appropriate cases as a means of allocating attorney fees.

Many practitioners may not be familiar with reception statutes in state codes or reception provisions in state constitutions. These provisions purport to adopt English common law and specific statutes. Reception statutes were in effect a legislature's delegation to the state courts the "authority to develop the English Common Law in accordance with the 'public policy' of the state. These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries."¹ Not unlike many states' reception statutes and provisions, Indiana's reception statute provides:

The law governing this state is declared to be:

First. The Constitution of the United States and of this state.

Second. All statutes of general assembly of the state in force, and not inconsistent with such constitutions.

Third. All statutes of the United States, in force, and relating to subjects over which congress has power to legislate for the states, and not inconsistent with the Constitution of the United States.

Fourth. *The common law of England, and statutes of the British Parliament made in aid thereof prior to the fourth year of the reign of*

*James the First (except the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of thirteenth Elizabeth, and the ninth chapter of thirty-seventh Henry the Eighth), and which are of a general nature, not local to that kingdom, and not inconsistent with the first, second and third specifications of this section.*²

One such statute of the British Parliament is the Statute of Gloucester.³ The Statute of Gloucester is one of those specific statutes purportedly adopted by many states pursuant to their reception statutes and constitutional provisions. The Statute of Gloucester reads:

Whereas heretofore Damages were not awarded in Assises of Novel disseisin, but only against the Disseisors: it is provided, That if the Disseisors do aliene the lands, and have not whereof there may be Damages levied, that they to whose Hand such Tenements shall come, shall be charged with the Damages, so that every one shall answer for his Time. It is provided also, That the Disseisee shall recover Damages in a Writ of Entry, upon Novel disseisin against him that is found Tenant after the Disseisor. It is provided also, that where before this Time Damages were not awarded in a Plea of Mortdauncestor (but in case where the Land was recovered against the chief Lord) that from henceforth Damages shall be awarded in all Cases where a Man recovereth by Assise of Mortdauncestor, as before is said in Assise of Novel disseisin: And likewise Damages shall be recovered in Writs of Cosinage, Aiel, and Besaial.

*“And whereas before Time Damages were not taxed, but to the Value of the issues of the Land, it is provided, That the Demandant may recover against the Tenant the Costs of his Writ purchased, together with the Damages above-said. And this Act shall hold Place in all Cases where the Party is to recover Damages. And every Person from henceforth shall be compelled to render Damages, where the Land is recovered against him upon his own Intrusion, or his own Act.”*⁴

The Statute of Gloucester has been held to apply to all actions for damages at law, not just “real actions and possessory assizes.”⁵ This general concept is referred to as the English Rule or the “loser-pays” rule.

As defined in Black’s Law Dictionary,⁶ the English Rule requires a losing litigant pay the

winning litigant’s costs and attorney’s fees. The alleged opposite⁷ of the English Rule is the American Rule, defined as “[t]he general policy that all litigants, even the prevailing one, must bear their own attorney’s fees. *The rule is subject to bad-faith and other statutory and contractual exceptions.”⁸

In 1976, the U.S. Supreme Court overruled the inclusion of attorney fees in a damage award, and held:

We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.⁹

Moreover, the Supreme Court recently found, “Just as the early state governments did not leave reception of common law to implication, then, neither did they receive it as law immune to legislative alteration.”¹⁰ Based upon the manner in which the English Rule was rejected and the American Rule became prominent, it appears that no state statutes ever explicitly rejected the English Rule.

II. The Origins of the English and American Rules

England cannot claim the concept of “loser-pays” as its own. During the Byzantine Empire when lawyers and then client bills appeared, government began to regulate legal costs.¹¹ The Byzantine Empire’s regulatory control led to the rule that the losing party reimburse the winner for costs when the sitting court determines that the litigation was frivolous, or instigated in bad faith.¹² This rule progressed during the Byzantine Empire, and eventually, “reimbursement for the winner in all cases became the norm.”¹³ As early as 486 A.D., “Byzantine Emperor Zenon is credited with first announcing, . . . the general rule that the loser must pay the legal costs of the winner.”¹⁴ Only fifty years later, the rule was codified in the Code of Justinian, which heavily influenced the English court system.¹⁵

“In actions at law prevailing parties were entitled to costs as of right; in actions at equity the Chancellor exercised discretion when deciding whether to allow costs to the victors.”¹⁶ The

English Rule continued to progress and by 1487, "English law had codified the common law practice 'that if a judgment be affirmed on writ of error, the writ be discontinued, or if the party suing it be nonsuited then the defendant in error was to have his costs.'" ¹⁷ Even later English statutes continued the "tradition" of providing costs, including attorney fees, to the winning party. ¹⁸ And now, the English Rule that generally requires the losing party to pay attorneys' fees and expenses of the winner "governs in every other common law country." ¹⁹

The benefits of the English Rule are not without consequences, such as the heavy regulation of recovery amounts, and limitations on an attorney's ability to charge his own client. ²⁰ Additionally, because of the English Rule, "the English courts have developed an elaborate system of taxing costs." ²¹ These downfalls associated with the English Rule arguably contributed to the demise of the English Rule in America.

In Colonial America, almost all legislation regarding attorney fees was intended to control the amount attorneys charge clients, rather than shifting fees to the losing party. ²² The propensity to control attorney fee amounts was thought to be due, in large part, to jealousy and suspicion:

In every one of the Colonies, practically throughout the Seventeenth Century, a lawyer or attorney was a character of disrepute and of suspicion, of whose standing or power in the community the ruling class, where it was the clergy as in New England, or the merchants as in New York, Maryland and Virginia, or the Quakers as in Pennsylvania, was extremely jealous. In many of the Colonies, persons acting as attorneys were forbidden to receive any fee; in some, all paid attorneys were barred from the court; in all, they were subjected to the most rigid restrictions as to fees and procedure. ²³

Not surprisingly, the bars' desire for adequate compensation clashed with the legislatures' rigid control of attorney fees. ²⁴ Some have argued this conflict led to the emergence of the American Rule. ²⁵ Other reasons for the drifting away from the English Rule and the emergence of the American Rule include: 1) the growth of the judicial policy that all parties should be on equal standing in a court of law; 2) the idea that

awarding attorney fees to prevailing parties could become incentive for parties to abuse the system by using delaying tactics to increase attorney fee amounts where chances of winning are favorable; and 3) the difficulty in proving attorney fee awards. ²⁶

As stated above, the U.S. Supreme Court's support of the emerging American Rule was visible as early as 1796. At the time of the *Arcambel* decision, courts had statutory authority to award fees. ²⁷ The lack of historical information about the American Rule's policies has led to the argument that "[i]n the nineteenth century, payment of attorney's fees by the client rather than through recovery from a defeated opponent seemed so natural that no justification appeared necessary." ²⁸ Nevertheless, in 1967 the U.S. Supreme Court expressed the "modern" view of the policies underlying the American Rule:

Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration. ²⁹

The English Rule was among the various British statutes "adopted" pursuant to the various states' reception statutes and provisions; it was not contrary to existing constitutions or statutes; and it was never explicitly statutorily rejected. Notwithstanding the public policy concerns cited by the courts in the American system, therefore, the Statute of Gloucester, technically could still be considered available for use.

III. Criticisms of the American Rule

Both the English and American Rules have been highly criticized over the years. These criticisms logically stem from the goals of the critics, whether it be to resolve court congestion, provide equal access to the courts for all people, limit the filing of frivolous lawsuits, and/or encourage people to comply with law.

The American Rule has been criticized for "encouraging intolerably congested courts[;]" for preventing an injured party from ever being made completely whole because although he might win the lawsuit, he still has to pay his attorney; for encouraging the filing of "less than meritorious claims in the hope of recovering, at a minimum, the nuisance value of a suit, since the party risks nothing but his attorney fees[;]" and for preventing the "little man" from seeking justice in the courts.³⁰

One critic concludes that if the goal is to prevent plaintiffs from being dissuaded from bringing suit, fee shifting in favor of prevailing plaintiffs only provides the greatest incentives for parties to merely comply with the law. He reasons that a rule under which fees shift in favor of plaintiffs "nearly eliminates" the significant obstacle of litigation costs that face victims wishing to bring suit.³¹

This same critic concludes that fee-shifting in favor of prevailing plaintiffs acts to reduce litigation. The reasoning is that when there are more incentives to sue, there are more incentives for compliance with the law. Therefore, the conclusion follows, under the prevailing plaintiff fee-shifting rule, the "pool of defendants contains the smallest proportion of guilty defendants relative to the other fee shifting rules. Since plaintiffs will then rationally estimate that the probability that a defendant is innocent is reasonably high, they are more likely to settle" when the prevailing plaintiff also recovers costs and fees.³² A counter to this argument is that if the plaintiff can be assumed to be able to rationalize his estimations of winning, will not the defendant be equally aware of the plaintiff's rationalizations, thereby causing more guilty defendants to enter back into the "pool" based upon the assumption that the plaintiff believes that the percentage of guilty defendants in the pool is low?³³

Despite the widespread criticism of the American Rule, it remains in effect in the United States. The purported justifications for the American Rule are as follows:

First, because "litigation is at best uncertain one should not be penalized for merely defending

or prosecuting a lawsuit." Second, awarding fees to prevailing parties might discourage the poor "from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." Third, "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees" would pose substantial burdens for judicial administration. Finally, the American Rule seeks to avoid the possibility that attorneys might sacrifice their clients' best interests for fear of upsetting the judge who will later determine their fees.³⁴

The first three justifications are identical to the policies the U.S. Supreme Court set out as the bases for the adoption of the American Rule.³⁵ The problem with using the bases for the adoption of the Rule as the justifications for the Rule avoids any conclusion about the practical effects of the Rule in each specific context.

IV. Loser-Pays Rule in Insurance Coverage Litigation

Insurance coverage litigation might be well-suited for the English Rule. Individuals and companies maintain insurance policies to protect against injuries and damages that might occur to them or their property, or others' injuries for which they might be found liable. Imagine a common situation in which a person purchases liability insurance for his business. One day the company's product results in property damage or personal injury. The other party involved sustains significant losses. Believing coverage exists, the insured reports the claim to his insurance company, but instead of paying or defending the claim, the insurance company files a declaratory judgment action against its insured asking for a determination of non-coverage.

"Insurance coverage litigation might be well-suited for the English Rule."

In a very short period of time, the business owner who elected to buy insurance is arguably worse off than if he never purchased a policy. He is faced with the prospect of paying costs of another's personal injuries or property damage, costs and fees associated with litigation that might arise from that loss, hiring an attorney to

defend him against his own carrier, and all other fees, costs and expenses related to defending the declaratory judgment action brought by his own insurance company.

The small business owner is not likely to be able to afford to defend himself against his insurance carrier. But when faced with the possibility of being held liable for six or seven figure sums, can he really afford not to defend? Assume that the business owner in the hypothetical decides that based upon the large amount of damages he might face in the underlying claim, he will subject himself to the risk and expense of defending himself against his insurer's coverage action. Most insureds presented with such a predicament, and a valid claim, would likely agree that fee-shifting to a prevailing party is a good idea. Additionally, would the insurer be as quick to pursue the declaratory judgment action if the loser-pays rule applied? Might the insurer subject to that rule be more inclined to settle early if discovery indicates that there likely is coverage? Is this not a desirable goal?

Some may argue that a loser pays rule may deter risk adverse insureds from pursuing coverage claims or defending coverage litigation. But the loser pays rule, properly applied, need not *always* result in an award of attorneys' fees. The English Rule, like the American Rule, after all is a general rule that is subject to exceptions in the proper case. In any event, many would agree that sparing the courts of the burden of unfounded coverage litigation is another desirable goal.

"[T]he loser pays rule, properly applied, need not always result in an award of attorneys' fees. The English Rule, like the American Rule, after all is a general rule that is subject to exceptions in the proper case."

The bottom line is that the policies underlying the American Rule are suspect in coverage actions. It is illogical to require a prevailing insured to incur expenses that he would not have otherwise had to incur had the insurer rightfully provided coverage in the first place. Insurers

might be deterred from denying coverage out-of-hand, without reasonable investigation, if they face the prospect of paying for the insureds' attorneys' fees in declaratory judgment actions. And there is no reason why courts would be required to award attorneys' fees to the prevailing party in every case, if the specific facts and circumstances present indicate an award could lead to undesirable outcomes. Thus, it could be argued that the loser-pays rule would only discourage coverage litigation that should not be filed in the first place.

"[T]he policies underlying the American Rule are suspect in coverage litigation. It is illogical to require a prevailing insured to incur expenses that he would not have otherwise had to incur had the insurer rightfully provided coverage in the first place . . ."

V. Conclusion

The loser-pays rule arguably makes more sense in coverage litigation than the American Rule. If the goal is to cure congested courts, the loser-pays rule will reduce the case load on the courts by discouraging the filing of coverage actions that should not be filed. Only those parties who are substantially certain that coverage was properly or improperly denied will defend coverage suits. Prevailing insureds in coverage litigation can never be made whole in a significant coverage action without an award of attorneys' fees. The American Rule thus favors the party with the deepest pockets, the insurer.

Only under the English Rule is the winner made whole. Under the American Rule, neither party is made whole because each is out the cost of prosecuting or defending the case. These considerations suggest it may be time to reassess whether it makes sense to apply the English Rule in coverage litigation, even if there is good reason for creating exceptions to that rule to avoid undesirable consequences in a particular case. In some states, the Statute of Gloucester and the common law reception statute may already provide the authority for this approach.

* Research for this article is current as of March 7, 2005. This article does not represent the views of Ice Miller or its clients, nor is anything contained herein intended to constitute legal advice.

¹ Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 252 (2000) (citing Kent Greenwalt, *The Rule of Recognition and the Constitution*, 85 Mich. L. Rev. 621, 648-50 (1987)).

² Ind. Code § 1-1-2-1 (2000) (emphasis added). See also S.C. Code Ann. § 14-1-50 (1976) (cited in *Pond Place Partners, Inc. v. Poole*, 567 S.E.2d 881, 891 (S.C. Ct. App. 2002), *reh'g denied* ("All, and every part, of the common law of England, where it is not altered by the Code or inconsistent with the Constitution or laws of this State, is hereby continued in full force and effect in the same manner as before the adoption of this section."); Wash. Rev. Code § 4.04.010 (cited in *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 853 (9th Cir. 2001) ("The common law, so far as it is not inconsistent with the Constitution and the law of the United States, or of the state of Washington, nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.")). For thirteen variations of reception provisions, see *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 161, 116 S. Ct. 1114, 1174 n.55 (1996) (Souter, J., dissenting).

³ The Statute of Gloucester, 6 Edw. I, c. 1 (1278).

⁴ *Hosts, Inc. v. Wells*, 443 N.E.2d 319, 322 n.1 (Ind. Ct. App. 1982) (Staton, J., dissenting) (quoting Statute of Gloucester, 6 Edw. I, c. 1 at §§ 1, 2) (emphasis added by *Hosts* court). Judge Staton concluded in his dissenting opinion that the Statute of Gloucester is arguably the law in Indiana and should be considered in fee-shifting disputes.

⁵ *Hosts*, 443 N.E.2d at 322 n.1 (Staton, J., dissenting.)

⁶ Black's Law Dictionary (Garner, ed.) (8th ed. 2004).

⁷ An interesting argument for later discussion is whether, contrary to most commentators' beliefs, the English Rule and the American Rule are very similar. While the rules are based upon opposite basic premises and presumptions, numerous exceptions apply to both. Therefore, after a more complete analysis of those exceptions, it might be argued that the two systems in practice are very similar.

Exceptions to the American Rule, pursuant to which fee shifting is allowed, include 1) contract provisions providing for allocation of attorney fees; 2) the common fund doctrine, which has been used as an equitable exception to the American Rule; 3) the substantial benefit doctrine, which shifts fees to prevent the inequitable enrichment of absent beneficiaries; 4) recovery of attorney fees for enforcement of contempt orders; 5) recovery of attorney fees against plaintiffs for bringing unwarranted, baseless, and vexatious actions; and 6) the over 200 federal and 2,000 state statutory provisions that provide for fee shifting. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U.L. Rev. 1567, 1578-89 (Summer, 1993) (citations omitted) (providing explanations of the exceptions, and arguing that federal and state fee-shifting statutes are not exceptions to the American Rule, but rather, are part of the rule).

Exceptions to the English Rule, pursuant to which fee shifting does not occur, include 1) mandatory no-fault proceedings (i.e. no fault divorce proceedings); 2) cases involving social and economic imbalances (i.e. landlord-tenant proceedings); 3) sovereign immunity cases. The following types of cases are not exceptions to the English Rule, but rather, are cases in which courts have discretion to waive the English Rule fee shifting: 1) unprovoked actions; 2) excusable ignorance of material facts; 3) substantial mutual doubts about facts; 4) doubts about the law; 5) settlement after case filing; 6) appeals; 7) vexatious actions; 8) unnecessary procedures as expenses; and, 9) actions among relatives. See W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is The United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 Ariz. J. Int'l & Comp. Law 361, 405-07 (1999) (citations omitted) (also noting that all of the waiver exceptions listed above are not available in all countries utilizing the English Rule).

⁸ Black's Law Dictionary (Garner, ed.) (8th ed. 2004).

⁹ *Arcambel v. Wiseman*, 3 U.S. 306, 306 (Mem. August term 1796). See also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 249 (1975) (stating that the Court's *Arcambel* opinion had the appearance of ruling "that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys' fees in federal courts").

¹⁰ *Seminole Tribe of Florida*, 517 U.S. at 161-62, 116 S. Ct. at 1174-75.

¹¹ *Davis*, *supra* note 6, at 404 (citing Werner Pfenningstorf, *The European Experience with Attorney Fee Shifting*, 47 Law & Contemp. Probs. 37, 41-42 (1984)).

¹² *Davis*, *supra* note 6, at 404 (citing Pfenningstorf, *supra* note 15, at 41-42).

¹³ *Davis*, *supra* note 6, at 404 (citing Pfenningstorf, *supra* note 15, at 42).

¹⁴ *Davis*, *supra* note 6, at 404 (citing Pfenningstorf, *supra* note 15, at 42).

¹⁵ *Davis*, *supra* note 6, at 404 (citing Pfenningstorf, *supra* note 15, at 42).

¹⁶ *Beaz v. United States Dept. of Justice*, 684 F.2d 999, 1002 (D.C. Cir. 1982). In footnote 11, the *Beaz* court stated: "The Statute of Gloucester, 6 Edw. I, c. 1 (1275), specified that on certain writs 'it is provided, that the (victorious) Demandant may recover . . . the Costs of his Writ purchased.' As Lord Coke noted, the terms 'Costs of his Writ purchased' 'extendeth to all the legall cost of the suit.' Coke, 2d Institutes 288." *Beaz*, 684 F.2d at 1002 n.11.

¹⁷ *Beaz*, 684 F.2d at 1002 n.11x (quoting Goodhart, *Costs*, 38 Yale L.J. 849, 853 (1929) (citing Hen. VII, c. 10 (1487))).

¹⁸ *Beaz*, 684 F.2d at 1002 n.10 (citing Goodhart, *supra* note 20, at 853-54 n.26 (citing 13 Car. II, c. 2, f. 10 (1661); 8 & 9 W. III, c. 11, f. 2 (1696); 4 Anne c. 16, f. 25 (1705))).

¹⁹ *Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 35 n.4 (D.C. Ct. App. 1986) (citing Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 Law & Contemp. Probs. 187, 188 (1984)).

²⁰ *Bernstein*, 517 A.2d at 35 n.4 (citing Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 *Law & Contemp Probs.* 9, 13–17 (1984)).

²¹ *Vargo*, *supra* note 11, at 1571 (citing Goodhart, *supra* note 20, at 855 (“describing taxing scheme that included validation of costs and right to appeal costs award”)). See also *Alyeska Pipeline*, 421 U.S. at 247 n.18 (quoting *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967) (“It is now customary in England, after litigation of substantive claims had terminated, to conduct separate hearing before special ‘taxing Masters’ in order to determine the appropriateness and the size of an award of counsel fees. To prevent the ancillary proceedings from becoming unduly protracted and burdensome, fees which may be included in an award are usually prescribed, even including the amounts that may be recovered for letters drafted on behalf of a client.”) (footnotes omitted)).

²² *Vargo*, *supra* note 11, at 1571 (citing Leubsdorf, *supra* note 24, at 10–11).

²³ *Vargo*, *supra* note 11, at 1572 (citing Charles Warren, *A History of the American Bar* 4 (1913)).

²⁴ *Vargo*, *supra* note 11, at 1573 (citing Leubsdorf, *supra* note 24, at 13).

²⁵ It has also been argued that the downfall of the English Rule was in part due to the fact that “the dependence on English law was a galling circumstance.” Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 *U. Pa. L. Rev.* 1231, 1238 (July 1985). “Why should Americans turn to these ‘ancient British Judges,’ demanded the fiery Matthew Lyon, ‘who have derived their greatness and sucked their principles from the very poisonous breast of the monarchy itself?’” Jay, *infra* note 29, at 1238 (citation omitted).

²⁶ Raymond A. Nolan, *Ohio’s Frivolous Conduct Statute: A Need for Stronger Deterrence*, 21 *Cap. U. L. Rev.* 261, 265 (1992) (citations omitted).

²⁷ *Davis*, *supra* note 11, at 400–401 (citing Richard L. Marcus et al., *Civil Procedure: A Modern Approach* (1995) (quoting *Arcambel v. Wiseman*, 3 U.S. 306 (1796))), and (citing Act of Sept. 29, 1789, ch. 21, 1 *Stat.* 93, 93–94 (repealed 1792); Act of Mar. 1, 1793, ch. 20, 1 *Stat.* 332, 332 (expired 1798)).

²⁸ *Vargo*, *supra* note 11, at 1634.

²⁹ *Vargo*, *supra* note 11, at 1634–35 (citing *Fleishmann Distilling Corp.*, 386 U.S. at 718).

³⁰ Nolan, *supra* note 30, at 266 (citations omitted) (commenting on the first three of the four criticisms); *Vargo*, *supra* note 11, at 1591 (stating that critics argue that courts are congested because of nonmeritorious claims or defenses). See also *Alyeska Pipeline*, 421 U.S. at 270 n.45 (listing eight law review or journal articles that criticize the American Rule).

³¹ Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 *Vand. L. Rev.* 1069, 1071–72 (Oct. 1993) (This Article provides a detailed economic comparison between several variations of fee-shifting, which might be interesting to those not averse to numbers and equations.).

³² Hylton, *supra* note 35, at 1072.

³³ Another criticism of the American Rule is that it led to the inception of contingency fee arrangements, which, prior to the late 1800s, were prohibited by the common law in many United States jurisdictions “because they were seen as either maintenance or champerty, both illegal practices.” *Davis*, *supra* note 11, at 375 (citing Arthur L. Kraut, *Contingent Fee: Champerty or Champion?*, 21 *Clev. St. L. Rev.* 15, 16–17 (1972)). “Maintenance is the ‘maintaining, supporting, or promoting of litigation of another person;’ champerty is ‘the division of the proceeds of litigation between the owner of the litigated claim and a party supporting or enforcing the litigation.’” *Davis*, *supra* note 11, at 375 (citing Kraut, *supra*, at 17).

³⁴ Jay E. Rosenblum, *The Appropriate Standard of Review for a Finding of Bad Faith*, 60 *Geo. Wash. L. Rev.* 1546, 1548–49 (Sept. 1990 — Aug. 1991) (internal citations omitted).

³⁵ *Fleishmann Distilling Corp.*, 386 U.S. at 718.