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Fee Shifting and the Free Market

*Jonathan T. Molot**

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I. INTRODUCTION

It is uncontroversial that litigation is too expensive. Controversy abounds, however, over who is to blame and what is to be done about the problem. Plaintiffs and defendants each accuse the other of pursuing weak or meritless litigation positions that inflict needless expense. This Article suggests that regardless of who is correct—and who is more often at fault—the same set of solutions may be available to assuage the problem. The Article embraces a combination of procedural reforms and market mechanisms designed to improve matters for both sides and to make it less likely that a party with a meritorious litigation position will fall victim to an adversary’s sharp tactics. Specifically, I embrace an English-style approach, one which combines a loser-pays, fee-shifting regime with a market-based, risk-allocation mechanism designed to counterbalance the evils of fee shifting and to protect risk-averse litigants against losing a meritorious case and being forced to bear their opponents’ legal fees as well as their own.

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Although I suggest a single set of reforms to address the problems identified by plaintiffs and defendants alike, it is important to acknowledge at the outset that different constituencies view the problem from very different perspectives and tend to favor very different solutions. First, consider the perspective of corporate defendants. Corporate America is perhaps the most vocal critic of litigation expense—understandably so, given that large, deep-pocketed businesses so often are targeted as defendants and bear a disproportionate share of litigation's burdens. Corporate defendants blame plaintiffs for litigation's inordinate expense, observing that it is plaintiffs who choose to initiate litigation, imposing significant burdens on American businesses. Corporate America's prescription is to make it more difficult for plaintiffs to pursue those suits. Defendants seek to erect additional hurdles to the filing of new lawsuits—embracing heightened pleading standards, greater use of motions to dismiss and summary judgment, and fee shifting for weak or meritless cases. Corporate defendants' goal is, at bottom, to reduce the number of lawsuits they face and to make litigation more difficult for plaintiffs to initiate.

But plaintiffs—and not just individuals, but also small companies in business disputes—place the blame elsewhere. If litigation is too expensive, they argue, it is because corporate defendants purposely make it expensive in order to render litigation prohibitively burdensome for cash-strapped plaintiffs. Imbalances in litigant resources can dramatically affect the litigation process, enabling the stronger party to obtain a better outcome than the merits warrant and depriving the weaker party of a fair and just result. Defendants can exploit these imbalances to force plaintiffs to settle for too little or to give up a case. Given that defendants already impose significant burdens on plaintiffs—by doing everything they can to escalate expense and delay justice—any effort to erect *new*, additional hurdles against the filing of lawsuits would only aggravate the problem from plaintiffs' perspective. Plaintiffs thus embrace reforms that would level the playing field, streamline their path to recovery, and make it easier, not harder, to pursue their claims. Plaintiffs support fee shifting, provided it is one-way fee shifting in favor of prevailing plaintiffs, as is found in civil rights and antitrust actions.

Finally, courts blame plaintiffs and defendants alike for excessive litigation. It may sometimes be the plaintiffs' fault for filing suits or the defendants' fault for escalating them, but either way, courts bear part of the burden. From a court's perspective, plaintiffs should file fewer suits, defendants should defend suits less vigorously, and parties should resolve their disputes peacefully in a manner that

conserves judicial resources. Although defendants would like courts to punish plaintiffs for pursuing weak claims, and plaintiffs would like courts to punish defendants for resisting strong claims, courts lack the resources to do either effectively.

It may appear at first glance that the perspectives of plaintiffs, defendants, and courts are irreconcilable, but they in fact share an important common ground. True, defendants want to erect additional hurdles to litigation while plaintiffs want to eliminate some of the hurdles they already face, but both recognize a key distinction between meritorious and meritless suits. Defendants might, as an absolute matter, prefer fewer lawsuits overall. But, a reform that at least frees them from the burdens of defending meritless suits would likely be sufficient. And plaintiffs might, as an absolute matter, prefer to clear away any obstacle that stands between them and a large recovery. But a compromise that facilitates their pursuit of meritorious cases, even if it discourages meritless ones, would likely satisfy them too. Courts, likewise, are of course happy to embrace reforms that distinguish meritorious from meritless suits. Indeed, it is the courts' core mission to ensure that meritorious claims prevail and meritless ones fail. It is only because courts lack resources that they are unable to ensure that this happens in every case. A set of reforms that screens cases at the outset—so as to advance meritorious claims and deter meritless ones—would go a long way toward minimizing the burdens about which plaintiffs, defendants, and courts complain.

The real question for reformers, then, is not whether we should erect new obstacles to litigation or clear away existing ones, but whether we can effectively distinguish meritorious from meritless claims and can encourage or discourage litigation accordingly. The problem, of course, is that we use our unduly expensive litigation process to distinguish good cases from bad. Our system does not do this early enough to conserve litigation resources. If a case survives a motion to dismiss and proceeds to discovery, it will receive largely the same treatment under our system regardless of how strong or weak it is on the merits. The parties will engage in expensive, burdensome discovery and, in most cases, will settle based only in part on their perceptions of the merits. The resulting settlement will also reflect the parties' relative abilities to bear the risk and expense of continued litigation and their need for certainty and finality. Judges may intervene to promote a settlement, sometimes offering their views on the merits in the process. But to the extent that judges actively promote settlement, they typically advocate compromise, encouraging defendants to pay more and plaintiffs to accept less than they think the merits would warrant. Courts might take responsibility for promoting *accurate* settlements, as

opposed to just promoting *any* settlement. Indeed, I have elsewhere advocated for active judicial engagement on motions to dismiss and summary judgment, which can narrow the scope of claims and defenses and therefore increase the chances of a merits-based resolution.¹ But such additional judicial efforts would only aggravate the problems that courts face with overcrowded dockets and overburdened judges. By the time we complete enough of the litigation process to decide whether a case has merit, we generally have already exhausted most of the resources that reformers would like us to save.

What we need, then, is a set of reforms that enables us to promote meritorious lawsuits and to discourage meritless lawsuits at the outset, or at least *before* we devote substantial resources to those disputes. We need a mechanism that from the start can protect defendants against weak suits and can clear hurdles for plaintiffs to pursue strong suits. But how can we do so without using up the very resources we are seeking to conserve and placing additional burdens on already overburdened courts?

The most obvious potential reform—one that has been embraced by some scholars² and some countries,³ but which has also been plagued by seemingly insurmountable problems—is a fee-shifting regime. A fee-shifting regime should incentivize plaintiffs with weak cases to stop and think before they file a suit, or even a bit later when confronted with a

1. Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 110–18 (2003); Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1026–50 (1998); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 61–62, 108–16 (1997).

2. See, e.g., Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 62–64 (2006) (arguing a change to the English Rule of fee shifting would be efficient); Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 156–73 (1995) (proposing a federal statute requiring two-way fee shifting upon summary judgment, involuntary dismissal, or a granted motion to dismiss and concluding that the benefits of two-way fee shifting outweigh its costs); Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 739–45 (2010) (proposing a one-way fee-shifting rule tailored to a party's resources); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1241–42 (1988) (proposing a two-way fee-shifting rule tied to parties' Legal Services Corporation eligibility); see also Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 652–53 (examining, generally, rationales supporting a fee-shifting regime).

3. W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why Is the United States the "Odd Man Out" in How It Pays Its Lawyers?*, 16 ARIZ. J. INT'L & COMP. L. 361, 403–04 & n.328, 409–13 (1999) (explaining that the English Rule of two-way fee shifting is used extensively outside of the United States and specifically discussing its use in England, Germany, Austria, and Mexico); see also Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, 47 LAW & CONTEMP. PROBS. 321, 323 (1984), available at <http://scholarship.law.duke.edu/lcp/vol47/iss1/13/> (cataloging this country's departures from the American Rule, finding nearly two thousand examples of "attorney fee shifting statutes").

solid defense. The risk of losing a suit and bearing the defendant's legal fees offers a significant deterrent against the filing of weak or meritless lawsuits. For this reason, fee shifting is something that pro-business organizations like the Chamber of Commerce have been championing for some time. Conversely, where plaintiffs have meritorious claims, fee shifting is the only mechanism that can truly compensate them for their injuries by reimbursing them for the expenses they have incurred in litigation as well as for the underlying harm they have suffered. Indeed, only a fee-shifting regime can enable plaintiffs to bring meritorious, low-value suits, which plaintiffs routinely must forego in a non-fee-shifting regime. And plaintiffs are much more likely to enjoy early, fair settlements for meritorious suits in a fee-shifting regime, as defendants facing the prospect of bearing both sides' legal fees have stronger incentives to settle rather than to impose burdens on their opponents by dragging out the litigation. Fee shifting also should be appealing to courts, as it discourages weak suits and encourages settlement of strong ones, provided that we have an automatic loser-pays regime and that courts do not have to undertake the additional work to decide whether to shift fees in favor of the winner.

But for all of its obvious attributes, a fee-shifting regime also has fundamental problems that have been the subject of a great deal of scholarship. First and foremost, fee shifting is premised on the existence of a level playing field in which litigants weigh the risks and rewards of litigation similarly. But where a plaintiff is risk averse or resource constrained, it may simply be unable to bear the risk of losing a case and being stuck with the defendant's legal fees.⁴ In a system characterized by imbalances in resources and risk preferences, fee shifting may unduly inhibit already risk-averse plaintiffs—and aggravate, rather than assuage, existing problems. Instead of incentivizing plaintiffs to file meritorious claims, as it is intended to do, fee shifting may discourage them from filing for fear of making a mistake and being saddled with a large liability. Second, fee shifting may have negative consequences even in cases between well-matched adversaries. Where a case is close and the merits are unclear, equally matched adversaries may spend more on litigation in the hope that they

4. See, e.g., Mark S. Stein, *The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT L. REV. 603, 605 & n.11, 606 (1995) (internal quotation marks omitted) (citing Herbert M. Kritzer, *The English Rule: Searching for Winners in a Loser Pays System*, 78 A.B.A. J. 54, 55 (1992)) (noting how two-way fee shifting can discourage risk-averse plaintiffs from bringing suit and quoting an English judge's conclusion that in a two-way fee-shifting regime, "for the ordinary citizen unqualified for Legal Aid, a lawsuit is quite out of the question").

will prevail and recoup those expenses.⁵ In a fee-shifting regime, optimism on each side may actually lead to an escalation in legal fees.

I suggest that the most important problem with fee shifting—its tendency to aggravate imbalances in resources and risk preferences—can be overcome through some very simple reforms. If we combine fee shifting with market mechanisms designed to level the playing field between unequal adversaries, we can reap all of fee shifting's benefits while avoiding its principal problems. Indeed, I will argue in this Article that if our goal is to promote socially optimal litigation spending—so that litigants spend money on strong, meritorious positions but not on weak, meritless ones—then the most promising path available is to combine a fee-shifting regime with a market solution that supplies insurance and financing to litigants with meritorious positions. Litigation would become free (or close to free) for the winner and more costly for the loser. Moreover, a litigant with a meritorious case that is fearful of being the loser could buy insurance (and obtain financing) to protect against the risk of loss.

My solution will not necessarily eliminate all of fee shifting's problems. Fee shifting might still lead to additional spending in close cases where the ultimate winner cannot be predicted. I concede that this potential additional spending may be a cost of my proposal. I believe, however, that this potential cost is worth my proposal's benefits and that there are aspects of my proposal that may well alleviate those costs. My principal purpose is to promote spending that advances the merits and to discourage spending that frustrates the merits. If my proposal incentivizes additional spending by both sides in close cases—and not just spending by the winning party in clear cases—that is a cost I am willing to accept in exchange for strongly discouraging spending on weak positions. Moreover, some of my market-based reforms are likely to combat the problem of mistaken optimism by bringing in a neutral third party to evaluate litigants' claims with a critical eye.

Before proceeding to lay out the problem and describe my solution, it is worth locating my position in the existing scholarship on litigation spending—and pointing out how it differs from other

5. James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 230–31 (1995) (explaining the “optimism effect,” where litigants optimistically anticipate shifting fees to their adversaries, causing the litigants to spend more); see also STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 431 (2004):

[F]ee-shifting means that a party will not necessarily have to pay the bill for legal services that he orders, making legal services effectively cheaper. If the plaintiff has a lawyer spend \$1,000 more of time and expects to win with a probability of about 70 percent, the odds that he will have to pay for the extra \$1,000 of services are only 30 percent, so their effective cost to him is only \$300.

scholarly efforts to tackle the problem of litigation expense. I am by no means the first scholar to argue that we should promote a socially optimal level of litigation.⁶ But most of the relevant scholarship does not begin from my premise that a merits-based resolution is the socially optimal outcome. Where a suit is a so-called “negative-expected-value suit”⁷—where the costs of litigation outweigh the benefits the prevailing party can expect to reap (and perhaps even the broader social benefits of deterrence)—most scholars have urged that it not be pursued.⁸ I begin from the very different premise that litigation in pursuit of the merits, whether by plaintiffs or defendants, is a social good. The costs of this good are appropriately characterized as costs of the conduct that forced the litigant to pursue its meritorious position. Where a plaintiff’s claim is meritorious, the costs incurred to pursue that claim are not separate, distinct costs of litigation, but rather costs of the conduct that triggered the litigation in the first place. When a person commits a tort or a commercial party breaches a contract, the true cost of that tort or contract breach must include not only the physical injury or monetary loss suffered, but also the costs of litigating the ensuing dispute. An “efficient” contract breach is not truly efficient if the resulting benefits do not exceed the full harm to the counterparty, including the transaction costs associated with that counterparty’s pursuit of expectancy damages.

The only true costs of litigation are those triggered by the pursuit of a position at odds with the merits. When a plaintiff pursues a meritless claim, and a defendant is forced to defend against that claim, both parties’ litigation expenses (and the court’s wasted resources) are a cost of litigation—specifically, a cost of the plaintiff’s decision to file suit. Conversely, when a defendant advances a meritless defense or otherwise resists paying a meritorious claim, both the defendant’s costs and some portion of the plaintiff’s costs are costs of litigation—in this case, costs of the defendant’s decision to resist.

6. See, e.g., Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 738 (2005) (arguing in favor of permitting occasional buying and selling of legal claims); Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and of Settlement*, 19 INT’L REV. L. & ECON. 99, 99–101 (1999) (analyzing formulas to achieve a socially optimal level of litigation via taxes and subsidies).

7. Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1, 1 (1996) (defining the “negative-expected-value suit”).

8. See *id.* at 2 (stating that a negative-expected-value suit will be brought only if the plaintiff “expects to extract a positive settlement offer from the defendant”); SHAVELL, *supra* note 5, at 423 (concluding that certain negative-value suits—suits in which the plaintiff would definitely not prevail if the facts known to the plaintiff were also known to the defendant—are socially undesirable).

The framework I am advancing is one that puts a great deal of emphasis on whether a position is meritorious. If a plaintiff's claim is meritorious, then its pursuit is a cost of the defendant's conduct giving rise to the suit. Conversely, if a plaintiff's claim is meritless, then both its pursuit and the defendant's defense are attributable to the plaintiff's decision to sue. Whether a claim or defense is meritorious or meritless, then, will determine whether that claim or defense is something we want to promote or deter.

My heavy emphasis on the merits—which I hold out as the key to accommodating the concerns of plaintiffs, defendants, and courts—may lead readers to ask both why I deem the merits to be so important and how I propose to distinguish between “meritorious” and “meritless” positions. On the first question—the “why”—I suggest that accurately enforcing the law through litigation achieves our legal system's goals. Whether the goal is deterrence of wrongdoing, compensation of victims, or some other objective, we cannot achieve it if the procedural system does not accurately enforce the substantive law.⁹ I am most concerned about the way in which expense can stand in the way of litigation accuracy, leading defendants to forego their rights and pay too much or leading plaintiffs to forego their rights and accept too little. If we achieve the desirable level of accuracy for less money, that is attractive, and I address that efficiency question as well. But my principal focus is to ensure that we spend resources on litigation wisely: in pursuit of the merits. I argue that the accurate application of law to fact, and thus the resolution of disputes based on their merits, is a social good we should maximize, even as we seek to reduce transaction costs.

The question of “how” best to encourage spending on meritorious positions and to deter spending on meritless ones—and *how to tell the difference between the meritorious and meritless*—is, of course, a much more difficult question. As noted at the outset, every actor sees this differently. Defendants believe that plaintiffs' claims too often are meritless, inflicting needless expense and burden. Plaintiffs believe that their claims are meritorious and that it is defendants who inflict needless expense by advancing meritless defenses and refusing to capitulate. Courts see plenty of both but lack the resources to do much about it.

Rather than come up with my own definition of “meritorious”—and invent a new way to decide what counts as the accurate application of law to facts—I accept Oliver Wendell Holmes's framework. Holmes

9. See Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 106 (2010) (arguing that “that the principal goal of civil procedure should be to enforce substantive law accurately”).

said that the law is nothing more than “[t]he prophecies of what the courts will do in fact.”¹⁰ When we look at a lawsuit at the outset, we can use Holmes’s conception of law to decide which claims and defenses to encourage and which to discourage. If law is a matter of predicting litigation outcomes, then we should encourage plaintiffs to file suits we expect will win and to forego suits we expect will lose. Likewise, we should encourage defendants to defend suits we expect will lose and to settle suits we expect will win.¹¹

With that background on my project, here is how I will proceed. In Part II, I lay out the attraction of fee shifting as a mechanism to cure litigation’s ills and discuss the problems that fee shifting entails. I suggest that while fee shifting holds promise, the cure in some settings may be worse than the disease. In Part III, I suggest that the principal problems of fee shifting can be addressed through market mechanisms. I explore insurance and finance solutions that can enable risk-averse or cash-strapped litigants to pursue meritorious positions in a fee-shifting regime. Some of these solutions are already in place in other common-law countries, notably the United Kingdom. Finally, in Part IV, I compare litigation in the United States and in the United Kingdom, suggesting some needed adjustments to import fee-shifting rules and market mechanisms across the pond.

II. WHY FEE SHIFTING ALONE CANNOT WORK

Litigants blame one another for imposing needless litigation expense. Defendants accuse plaintiffs of filing meritless claims, and plaintiffs accuse defendants of escalating litigation in the hope that plaintiffs will give up meritorious claims, or at least settle for less than their entitlement. To the extent that these accusations are correct—and we can blame litigation expense on litigants who pursue weak or meritless positions—the logical remedy is a loser-pays system. If we want to incentivize plaintiffs to forego meritless claims and defendants to forego meritless defenses, we should punish them when they advance

10. Oliver Wendell Holmes, Justice, Supreme Judicial Court of Mass., Address at the Dedication of the New Hall at Boston University School of Law: The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 461 (1897) (“The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”).

11. I recognize that a potential cost of this approach is its tendency to discourage test-case litigation designed to change the law rather than to apply existing law. Rule 11 allows litigants to pursue legal change without penalty. For a discussion of this potential problem, see *infra* text accompanying note 27.

a losing position.¹² Conversely, if we want to encourage plaintiffs and defendants to pursue meritorious positions, we should reward them when they do. By shifting legal fees in favor of the prevailing party, we reward winners and punish losers, incentivizing disputants to resolve their disputes based on the merits and to avoid unnecessary expense.¹³

In some areas, the American system already uses fee shifting to incentivize litigant conduct. Concerned about underenforcement of the law, Congress has passed statutes awarding legal fees to prevailing plaintiffs, for example, in antitrust and civil rights cases.¹⁴ The American system also employs two-way fee shifting to discourage meritless positions in all types of cases with procedural rules like Federal Rules of Civil Procedure 11 and 37.¹⁵

But American fee shifting is quite limited. The statutory fee-shifting regimes that reward winners and punish losers are confined to particular subject areas and provide fee shifting only in favor of prevailing plaintiffs. In contrast, procedural rules like Rule 11 apply broadly to all cases, working in favor of defendants as well as plaintiffs. They do not, however, seek to punish all losing positions and reward all winning positions, but rather only to punish positions that are frivolous.

Some scholars have advocated a broader fee-shifting regime analogous to that found in England. This regime would require the loser to bear the winner's legal fees in *all* cases, without regard to whether the loser's position was credible and without regard to whether the winner is plaintiff or defendant.¹⁶

Such a broad fee-shifting regime makes sense for several reasons. First, it incentivizes litigants to advance positions they expect to win and to settle cases based on their predictions for trial.¹⁷ If we

12. Note, *supra* note 2, at 1246–48 (explaining that two-way fee shifting should bring cases to trial when each side is “rationally optimistic about its chances of prevailing” and stating that “[t]hese are probably the cases that should be tried”).

13. The extent of the incentive may depend upon the ratio of costs to damages.

14. Clayton Act § 4(a), 15 U.S.C. § 15(a) (2012); 42 U.S.C. § 1988(b) (2012).

15. FED. R. CIV. P. 11(c), 37(b)(2)(C), (c)(1)(A), (c)(2), (d)(3).

16. See, e.g., Bungard, *supra* note 2, at 63–64 (arguing for a shift to the English Rule as a means to increase the efficiency of the litigation process, incentivize potential tortfeasors and potential victims to take optimal care ex ante, and encourage acceptance of personal responsibility); Feuerstein, *supra* note 2, at 156–73 (proposing a system awarding reasonable attorney fees to the prevailing party on a motion for summary judgment or dismissal in most state cases); Rosen-Zvi, *supra* note 2, at 739 (suggesting a progressive fee-shifting rule awarding attorney fees to low- and middle-income parties who prevail in civil litigation against “moneyed litigants”); Note, *supra* note 2, at 1241–42 (recommending a fee-shifting system exacting attorney fees from the losing party's attorney).

17. See Bungard, *supra* note 2, at 51–52 (concluding that the English Rule “promotes efficiency by encouraging the optimal amount of care and discouraging the filing of suits with less than a high probability of success”); see also Keith N. Hylton, *Fee Shifting and Incentives to Comply*

believe that adjudication accurately applies law to fact, then we would like settlements to reflect as closely as possible what would occur at trial. A broad two-way fee-shifting regime imposes the costs of further litigation on the loser. In theory, this should incentivize parties to pursue only those positions they expect to win.¹⁸

Second, English fee shifting works not only for a case as a whole but also for interim decisions that are put to a court. For example, prevailing parties can collect fees in pretrial skirmishes over procedural or substantive issues. This interim fee shifting incentivizes parties to avoid wasting litigant and judicial resources on motions that they are likely to lose.¹⁹

Third, English fee shifting contains an offer-of-settlement rule to address disputes regarding damages, as opposed to liability. This rule shifts legal fees in the aftermath of a settlement offer or demand in favor of the party who does better at trial than the last settlement offer on the table. It thereby incentivizes litigants to make and accept fair settlement offers (and demands) rather than to continue litigating.²⁰

Finally, fee shifting effectively distinguishes the costs of litigation from the costs of the underlying conduct that triggers litigation.²¹ Where a plaintiff is injured—whether by a contract breach or a tort—the plaintiff cannot be made whole if its recovery does not include the legal fees it must devote to obtaining a recovery. Fee shifting in favor of prevailing plaintiffs appropriately internalizes legal fees as a cost of the defendant's litigation-triggering conduct. Conversely, where defendants prevail, the legal fees are not appropriately

with the Law, 46 VAND. L. REV. 1069, 1121 (1993) (modeling the differences between the American and English rules of fee shifting and concluding that fee shifting “in favor of prevailing plaintiffs enhances . . . incentives to settle disputes”).

18. Of course, the strength of this incentive will vary depending on the ratio of fees to the amount in controversy. Where fees are large relative to the amount in controversy, fee shifting provides a powerful disincentive to pursue positions that are likely to lose. Where fees are small relative to damages, the incentive will be much weaker.

19. Cf. Lindsey D. Blanchard, *Rule 37(A)'s Loser-Pays "Mandate": More Bark than Bite*, 42 U. MEM. L. REV. 109, 116–18 (2011) (quoting Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 DRAKE L. REV. 483, 515 (1987)) (explaining that Rule 37's potential for fee shifting on every motion to compel discovery will reduce “needless costs and delays”).

20. Cf. Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 821 (1984) (explaining how an offer-of-settlement rule works to encourage efficient settlement in the context of Rule 68 of the Federal Rules of Civil Procedure); Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 159 (2006) (finding a general offer-of-judgment rule reduced the length of time suits took to reach resolution).

21. Cf. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 28, 251–52 (1970) (explaining the tertiary costs of accidents: the transaction costs associated with assigning responsibility for an accident to the guilty party).

internalized as a cost of the defendants' lawful behavior. Rather, they are treated as a cost of the plaintiff's mistaken decision to litigate a losing claim and are therefore logically imposed upon the plaintiff.

At first glance, fee shifting would appear to address the principal concerns regarding litigation expense. Defendants should like fee shifting because it discourages plaintiffs from pursuing weak or meritless claims. Plaintiffs should like fee shifting because it provides more complete compensation for meritorious claims and encourages defendants to make early, fair settlement offers. Courts should like fee shifting because it should incentivize the parties to resolve disputes amicably based on their *predictions* of what courts will do, thus saving courts from actually having to adjudicate cases.

But if fee shifting can solve some of litigation's core problems, the cure in some circumstances may be worse than the disease. Most important, the core problem facing plaintiffs with meritorious claims is that imbalances in risk preferences and resources may lead them to forego their claims or to settle for too little, particularly when confronted with an aggressive defendant waging a war of attrition. By increasing the stakes of litigation—so that a losing plaintiff is stuck not only with its own legal fees but also with its opponent's—fee shifting may render litigation just too expensive and risky for plaintiffs to bear. While fee shifting certainly will incentivize wealthy, confident plaintiffs to pursue the merits aggressively, it is likely to have the opposite effect on cash-strapped or risk-averse plaintiffs. Fee shifting may be intended to favor the stronger litigation *position*, but in a regime characterized by imbalances, it may instead favor the stronger *litigant*, even if that litigant has the *weaker* litigation position.²²

Moreover, even where parties are equally matched in resources, fee shifting may not have its desired effect if the parties are uncertain about the likely trial outcome. Given imperfect information, information asymmetries, and inherent optimism, fee shifting can sometimes lead *both* sides to spend *more* than they otherwise would in the hope of receiving some of that money back following a victory.²³

These two problems, which I will label "litigant imbalances" and "litigant uncertainty," are more pronounced in some cases than in

22. See John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1596 (1993) ("The disparity of resources between litigants may result in one party outspending the other and, as a result, affecting the result of the controversy.").

23. See SHAVELL, *supra* note 5, at 431 (comparing the situations where fee shifting can decrease legal costs with those where fee shifting can increase legal costs); Hughes & Snyder, *supra* note 5, at 231 (arguing that optimistic litigants will anticipate shifting their costs to their rivals, thus shrinking the acceptable settlement range).

others. In David-versus-Goliath disputes—cases that a small plaintiff simply cannot afford to lose—litigant imbalances are likely to cause fee shifting to have the opposite of its desired effect. In these cases, fee shifting may reinforce our system's tendency to favor the stronger *party* rather than the stronger *position*. Moreover, asymmetries between the parties may aggravate the problem of litigant uncertainty, as differently situated parties view the case through very different lenses and cannot agree on a framework within which to settle. In contrast, the problems of fee shifting are less intense in straightforward commercial disputes between equally matched, sophisticated corporate counterparties. If both litigants have ample resources to bear both their own and their opponent's expenses, fee shifting will favor the stronger litigation *position*, rather than the stronger *party*. Moreover, similarly situated parties are less likely to embrace diametrically opposed perspectives on the merits and are more likely to agree on a framework for a commercially reasonable resolution.

Given that fee shifting's costs are more pronounced in some circumstances than others, policymakers interested in fee shifting could draw one of two conclusions. First, they could conclude that we should only employ fee shifting in certain narrow circumstances where we can reap its benefits without its costs. This targeted use of fee shifting is largely the approach we have embraced in the United States. As noted above, we use fee shifting in favor of prevailing plaintiffs in certain subject areas to incentivize particular kinds of lawsuits. We also use broader fee shifting through Rule 11 to disincentivize particularly egregious conduct. But we have rejected a widespread fee-shifting regime because of its potential pitfalls.

A second approach, which we have not adopted in this country but which I suggest is worth considering, is to examine the circumstances in which fee shifting works to see if we can replicate those circumstances in other settings as well. If fee shifting works where litigant imbalances are less pronounced, then perhaps we can combine across-the-board fee shifting with *other* reforms designed to level the playing field and assuage litigant imbalances. Indeed, Part III will explore how the introduction of a third-party risk bearer into the mix would offset the negative effects of litigant imbalances and might even alleviate the problems associated with litigant uncertainty.

III. COMBINING FEE SHIFTING WITH MARKET MECHANISMS: THE U.K. EXAMPLE

If the principal problem with fee shifting is its tendency to aggravate, rather than alleviate, the manner in which litigant

imbalances can skew litigation outcomes, then we should consider market-driven reforms that have the potential to level the litigation playing field. In the United Kingdom, the availability of “after the event” (“ATE”) litigation insurance offsets the negative side effects of a broad fee-shifting regime. A party with a meritorious claim that is nonetheless fearful of losing at trial can purchase insurance to cover its opponents’ legal fees in the event of a loss. Moreover, the leading ATE providers in the United Kingdom are willing to accept contingent premiums for their coverage. The claimant, in other words, can pay out of a recovery from the defendant instead of paying up front. Indeed, until April 2013, the ATE insurance premium was treated as a recoverable cost, so that a losing defendant had to pay a prevailing claimant’s ATE insurance premium as part of its litigation costs.

ATE insurance offers benefits to both claimants and defendants. Claimants able to purchase ATE insurance can proceed with meritorious claims without fear of bearing their opponents’ costs. Moreover, where ATE insurance has been purchased, defendants know that if they prevail, their costs will be reimbursed by the insurer, without regard to whether the claimant has the financial wherewithal to pay them. Given a deep-pocketed legal-fees insurer, then, both sides have incentives to pursue meritorious positions knowing that their costs will come back to them if they prevail.

One may worry that a claimant covered by ATE insurance will become overconfident and overly aggressive, pursuing weak as well as strong positions. There are two protections against this risk. First, for the case as a whole, the insurer will engage in substantial due diligence before deciding to provide coverage. As with any insurer, ATE insurers will only provide coverage where they believe that the risk of loss is low. Indeed, ATE insurers who charge contingent premiums have even stronger incentives to insure only those cases they expect to win—for in a losing case, the insurer will have to pay an insurance claim without ever earning a premium to offset even a portion of that loss. Second, once a case is proceeding, the terms of an ATE policy may restrict coverage if the claimant is overly aggressive. For example, a reasonable settlement offer may count as a “win” under the terms of the ATE policy and deprive the claimant of coverage if it unreasonably insists on pursuing the case.

In the United Kingdom, cash-strapped or risk-averse plaintiffs can combine ATE insurance with financing from lawyers or third parties to pursue their claims. Effective April 2013, clients have the choice of financing from third parties or financing from their lawyers in the form of contingent fee arrangements (known as “damages based agreements” or “DBAs”) or conditional fee arrangements (“CFAs”).

These options are largely the result of the so-called Jackson reforms, proposed by Lord Justice Jackson and adopted by parliament.²⁴ Historically, the only option available to clients in the United Kingdom who needed litigation financing were CFAs, under which lawyers would work for a discounted hourly fee in exchange for an equal uplift in the event of success. Lawyers could discount fees by as much as one hundred percent, effectively charging nothing upfront in exchange for up to two hundred percent of their fees at the end. This arrangement was particularly attractive to clients because prevailing claimants could recover from the other side not only their lawyers' hourly fees but also the uplift associated with a CFA. This allowed prevailing plaintiffs to cover their lawyers' compensation and the ATE premium from a separately calculated cost reimbursement paid by the defendant, which would leave the client with almost all of the damages awarded. But by restricting lawyers to CFAs—and an upside that could be no greater than the downside lawyers would risk—the former regime did not encourage top-flight hourly fee London lawyers to accept cases for clients who could not pay traditional hourly fees. Top U.S. law firms that bill by the hour generally will not consider taking a case on a contingency unless they expect to make more than twice their hourly fees in the event of success; indeed, they generally hope to triple (or more) their hourly fees. Given that U.K. lawyers on a CFA could never earn more than two hundred percent of their hourly fees, the most profitable hourly fee law firms in London were reluctant ever to accept a case on a CFA basis.

The Jackson reforms sought to expand client options, first by embracing third party litigation funding as a tool to promote access to justice and then, ultimately, by allowing DBAs as well. Where clients sought to bring large, complex cases of the sort that demanded the services of the top law firms, they could now obtain third-party funding to cover the law firms' hourly fees. Moreover, as of April 2013, the Jackson reforms permit law firms to enter into DBAs so that they earn a percentage of the damages recovered rather than an uplift on their

24. See RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT 108 (2009), available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf> (stating Lord Justice Jackson's proposals regarding excessive or disproportionate civil litigation costs in the English court system); see also Mark Shelton et al., *Litigation Update: Reforms to Civil Justice Procedure—Implementation of Jackson Report*, LEXOLOGY (Feb. 11, 2013), <http://www.lexology.com/library/detail.aspx?g=f06a7081-79cf-46b0-9900-fde389b92509> (explaining the reforms and considering the changes made to the U.K.'s Federal Rules of Civil Procedure equivalent, the Civil Procedure Rules). See generally *Legal Aid, Sentencing and Punishment of Offenders Act 2010-12*, PARLIAMENT OF THE U.K. OF GR. BRIT. & N. IR., <http://services.parliament.uk/bills/2010-12/legalaidsentencingandpunishmentofoffenders.html> (last visited Sept. 5, 2013) (describing the Act, pending its final publication).

hourly rate. For large, promising cases, the best law firms may see DBAs as a way to earn a great deal more than they can earn for hourly work.

The only drawback to the Jackson reforms is that ATE premiums and lawyer uplifts will not be reimbursable for cases filed after April 2013. While defendants will have to pay prevailing plaintiffs for the actual hours worked by their lawyers over and above the damages awarded, defendants will not have to cover the cost of purchasing ATE insurance or financing those fees (via CFAs, DBAs, or third-party funding). If claimants decide to seek financing or insurance, they ultimately will have to pay for it out of the damages they collect.

When one considers the way fee-shifting and market solutions work together in the United Kingdom, one sees a regime designed to promote merits-based dispute resolutions. Claimants with weak or meritless claims hoping to extract a nuisance settlement will not want to pursue their cases because doing so exposes them to liability for their opponents' legal fees. Nor can claimants with weak claims shift the risk of loss to a third party because ATE insurers will not cover weak cases and lawyers and third-party funders will not finance those cases. Indeed, because the United Kingdom imposes costs liability on losing litigation funders as part of the two-way fee shift (so that prevailing defendants can collect from the claimant or the funder), most U.K. funders require claimants to line up ATE insurance as a prerequisite to funding the case.²⁵ This means that there are two additional sets of eyes critically evaluating a claim's merits. Many claimants, therefore, cannot proceed unless a third-party funder *and* an ATE insurer both agree that the claim is meritorious.

From a defendant's perspective, this regime is quite attractive. The U.K. regime reduces the chances that defendants will face weak or meritless claims in the first place: the system disincentivizes claimants from bringing weak claims on their own and makes it unlikely that insurance or financing will be available for weak claims. Moreover, when a defendant is confronted with a weak claim, the defendant can resist strongly, knowing that if it is successful on the merits, it will recoup its defense costs from the claimant, its insurer, or its funder.

The U.K. regime is also attractive to claimants. Claimants with strong claims now have the choice of financing those cases themselves (if they have the resources and risk tolerance to do so) or looking to

25. See Grania Langdon-Down, *Litigation Funding: An Overview of a Contentious Area of Growth*, LAW SOC'Y GAZETTE (May 21, 2009), <http://www.lawgazette.co.uk/features/litigation-funding-an-overview-of-a-contentious-area-of-growth> (quoting a U.K. funder as saying, "You can insure a case without funding, but you cannot fund a case without insurance").

lawyers and third-party financiers and insurers. Claimants, lawyers, third-party financiers, and insurers can all take into account that if the claim prevails, the claimant can expect to recoup not only its damages but also the costs of the case. The Jackson reforms have scaled back cost shifting in a way that prevents a claimant from being made truly whole, because it cannot recover the costs of having to finance or insure its case. This dampens the salutary effects of the fee-shifting model. But fee shifting in favor of prevailing plaintiffs in the United Kingdom still makes it easier for funders and lawyers to finance cases there than in the United States, because at least hourly fees will be added over and above damages to the successful claimant's recovery. In the United States, if the costs of litigation are too large relative to the damages at stake, it simply will not be worth it for a client, lawyer, or third-party financier to finance the claim. Prevailing claimants in the United Kingdom at least recover their fees, which expands the pie to which clients, lawyers, and third-party financiers can look in the event of success and makes it easier for claimants to pursue meritorious claims, even if they are small relative to the costs of pursuing them.

Because ATE and litigation funding are widely available to claimants in the United Kingdom, the problems that would plague fee shifting in the United States are less pronounced. In the United States, the core problem with fee shifting is its potential to deter meritorious suits by risk-averse plaintiffs who simply cannot chance losing the case and bearing their opponents' legal fees; in other words, fee shifting may tend to aggravate litigant imbalances. In the United Kingdom, by contrast, risk-averse plaintiffs with meritorious claims can purchase ATE insurance to pursue their claims. In this manner, market mechanisms offset the litigant imbalances that would otherwise plague a fee-shifting regime, enabling the U.K. system to reap the benefits of fee shifting without its principal drawback.

Indeed, not only do market mechanisms reinforce the effectiveness of fee shifting in the United Kingdom, but the converse is true as well. As noted, fee shifting increases the chances that a plaintiff can find a lawyer or third party willing to finance its claim, even if the claim is small relative to the size of the merits. In the United States, a contingent-fee lawyer or litigation funder will not fund a meritorious claim unless the damages are large enough to cover the costs of litigation and to compensate for bearing the risk and costs of financing the suit, while still leaving enough to compensate the plaintiff for its injury. In the United Kingdom, the expected recovery will include not only the compensatory damages but also the costs of pursuing the case, which increases the chances that a lawyer will take it on a contingency or a funder will provide the requisite financing. The Jackson reforms

undermine this salutary feature of the U.K. system by confining fee shifting to actual hours spent and no longer shifting the cost of ATE insurance or lawyer uplifts. The United Kingdom, however, still provides prevailing plaintiffs with more complete compensation than the United States and thereby facilitates investment by lawyers and financiers in small, meritorious claims.

The United Kingdom's policies favoring litigation funding and ATE insurance are designed to combat the problem of litigant imbalances, but they also may assuage the problem of litigant uncertainty. Recall that fee shifting may be costly because it will incentivize optimistic litigants in close cases to spend more in the hope of recouping those additional costs. While ATE insurance and litigation funding cannot eliminate this problem, they can help to assuage it by introducing a neutral third party into the mix. A third-party financier or insurer offers an experienced, critical eye with which to evaluate litigation at the outset. Claimants who feel wronged may overestimate their chances of prevailing in court. Lawyers may bring a more critical eye than clients—especially when they are contemplating a CFA or DBA. But given a lawyer's general inclination to support his client's perspective and to sympathize with his client's plight, even a lawyer concerned about losing money may be unduly optimistic about its prospects for success. This will be especially true if the lawyer is not fully occupied with hourly fee work, and if the opportunity cost to the lawyer is not nearly as great as his or her stated hourly rate. In contrast, a third party litigation funder or insurer brings no biases or sympathies to its evaluation of a case. It must place dollars, not opportunity cost, at risk.

This is not to say that market mechanisms entirely offset the inefficiencies that may arise from a fee-shifting regime. An optimistic party in a close case may spend more where it has offloaded the cost and risk of that expenditure to third parties. But the introduction of neutral third-party evaluators should offset this risk somewhat.

IV. ADAPTING MARKET MECHANISMS AND FEE SHIFTING FOR THE U.S. MARKET

Although fee-shifting rules and market mechanisms work well together in the United Kingdom, one cannot simply embrace the wholesale import of the U.K. model without considering differences between the two legal systems and cultures. I suggest there are at least four differences that we must consider in evaluating whether the U.K. system could work in the United States.

First, the U.S. litigation system is more expensive than the U.K. system, for reasons that have nothing to do with fee shifting or market mechanisms. Pretrial discovery and motion practice in the United States tend to be more elaborate and expensive than in the United Kingdom.²⁶ The U.S. system is geared toward unturning every stone during the pretrial process and deposing every potential witness so that the litigants are prepared for trial before a jury. The system also includes a summary judgment procedure that is intended to save the cost of a trial but that in most cases ends up imposing additional costs. In the United Kingdom, by contrast, pretrial witness statements are substituted for depositions, motion practice is less extensive, and there are no jury trials. Thus, to the extent that fee shifting incentivizes parties to spend more money in close cases, this cost may be more pronounced in the United States than in the United Kingdom.

I suggested at the outset that our goal should be to incentivize parties to pursue meritorious positions and to forego meritless ones, and that litigation in pursuit of the merits is a social good. But for those who think our system already is too expensive, my proposals may simply not be worth the extra cost in close cases. Even if fee shifting tends to discourage weak positions and improve accuracy by rewarding winners and punishing losers, one may believe the improved accuracy is just too expensive. For someone principally concerned with expense, the attractiveness of a regime that combines fee shifting with market mechanisms would depend upon the answers to two empirical questions: (1) how does the extra spending in close cases under this regime compare to the saved costs in cases that are not close, and (2) how much does the introduction of neutral third parties offset the tendency of a fee-shifting regime otherwise to incentivize additional spending?

A second difference between the U.S. and U.K. cultures is the very different value placed upon litigation as a driver of beneficial social change. Whether the issue is civil rights, consumer protection, or workplace safety, to name a few, litigation has been an engine of social progress in the United States. Consistent with that commitment to progressive litigation, Rule 11 does not penalize litigation positions that make nonfrivolous arguments for the extension of existing law, even if

26. See NICHOLAS M. PACE & LAURA ZAKAROS, INST. FOR CIVIL JUSTICE, WHERE THE MONEY GOES: UNDERSTANDING LITIGANT EXPENDITURES FOR PRODUCING ELECTRONIC DISCOVERY 103–15 (2012), available at http://www.rand.org/content/dam/rand/pubs/monographs/2012/RAND_MG1208.pdf (showing in tabular form the costs of discovery under the Federal Rules of Civil Procedure in the United States). Compare FED. R. CIV. P., with MINISTRY OF JUSTICE, CIVIL PROCEDURE RULES (2013) (Britain's Civil Procedure Rules) (showing a complexity to the pretrial discovery and motion system in the United States not found in the United Kingdom).

those positions ultimately fail. In contrast, a U.K.-style fee-shifting regime would punish losing positions even if those positions were brought with a view toward effecting legal change—and no for-profit litigation finance company or ATE insurer would be willing to back a claim that is likely to lose. The U.K. approach would therefore make it much more difficult for plaintiffs to use litigation as an agent of social change. This may be a cost of fee shifting we are unwilling to accept.²⁷ It is not by accident that we have thus far rejected broad two-way fee shifting in the United States and that where we have embraced fee shifting, we have done so in favor of prevailing plaintiffs to promote particular categories of litigation that are socially beneficial. A two-way fee-shifting regime would undermine the policy choices embedded in our system and make it more costly (and in some cases impossible) to use litigation to effect social change.

A third related, though distinct, difference between the U.S. and U.K. legal regimes is the availability of class actions in the United States. In the United Kingdom, when lawyers pursue group actions, they must sign up the clients individually. This means that when it comes time to seek financing and ATE insurance, there is a client with whom the third-party risk bearer can do the deal. If the group is large enough, individual members will authorize their shared lawyer to negotiate the ATE policy and financing contracts. But the lawyer will expressly do so on behalf of the clients and will have the power to bind those clients. In the United States, by contrast, lawyers initiate class actions *before* a class has been certified and *before* they have authority to bind their purported clients. Although class representatives and class counsel exercise some powers on behalf of a purported class before it is certified, they generally cannot bind class members. The class action mechanism presents a challenge to implementing a broad fee-shifting regime in the United States: if the class is not certified, or ultimately loses on the merits, to whom is the defendant supposed to look for its fees? Class actions also pose a problem for market mechanisms like ATE insurance and third-party litigation finance: who, after all, has the power to bind the class at the outset by committing to pay a financier or insurer a portion of the ultimate recovery? A litigation funder will naturally be reluctant to finance a lawsuit before a class has been

27. Feuerstein, *supra* note 2, at 152 & n.193 (stating that some authors believe two-way fee shifting can chill novel legal theories and listing these authors' works); cf. Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 506 (1989) (explaining that fee shifting in the Rule 11 context can result in the chilling of novel claims, particularly in civil rights cases). On the other hand, see Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1312–18 (2011), where Professor Steinitz has argued that it may be in third-party funders' interests to pursue rule changes.

certified and class counsel has been approved, for there is nobody available to guarantee that the funder will be repaid in the event that the case succeeds. If courts were willing to supervise the process, class representatives and class counsel could, in theory, line up court-approved insurance and funding deals. Provided that insurance was available, courts could implement two-way fee shifting in class actions—a move that defendants almost certainly would welcome. But courts might be reluctant to devote resources to questions of fee shifting, insurance, and financing before deciding whether a class can even be certified.

A fourth important distinction lies in the differing historical evolution of the bar and of financing mechanisms in the United Kingdom versus in the United States. In the United Kingdom, fee shifting has existed for centuries,²⁸ and litigation finance and ATE insurance have been around for a number of years.²⁹ For the United Kingdom to expand plaintiffs' and lawyers' options by introducing contingent fee arrangements (DBAs) in April 2013 seemed like a relatively small development, particularly given that U.K. lawyers could already work for a conditional fee. By contrast, in the United States, contingent fee arrangements are embedded in the culture and have come to dominate particular aspects of the legal system (e.g., personal injury cases and class action litigation). The plaintiffs' bar would view the imposition of a new fee-shifting regime as yet an additional, unwelcome obstacle to the institution of a lawsuit. Whereas today, a contingent fee law firm need only decide whether it is willing to bear the expense and risk associated with taking a case, if fee shifting were implemented the firm would also have to line up ATE insurance to cover that risk. While U.K. lawyers are accustomed to this practice, it would be a new, additional burden for U.S. plaintiffs' lawyers. This is not to say that fee shifting's lack of popularity among plaintiffs' lawyers would doom it to failure. Some plaintiffs' lawyers would see the virtue of fee shifting for strong claims, and provided that ATE insurance was readily available and easy to line up, they might not view it as too burdensome. Moreover, if an embrace of fee shifting were accompanied by an embrace of insurance and financing mechanisms that expanded the financial options for lawyers and clients—as the Jackson reforms in the United Kingdom have done—some members of the plaintiffs' bar would view this positively. And regardless, the defense bar would likely

28. See *supra* text accompanying notes 24–25 (discussing “The U.K. Example”).

29. Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 *CARDOZO J. INT'L & COMP. L.* 343, 396–99 (2011) (tracing the history of third-party litigation funding in the United Kingdom).

welcome a fee-shifting regime, so a tepid response from plaintiffs' lawyers might be accompanied by strong enough support from business groups to make implementation of the regime feasible.

Given the differences between the two legal systems and cultures, the challenge for reformers is to consider what kinds of adjustments could be made to U.K. fee shifting to facilitate its importation into the United States. One potential solution would be to retain the U.S. approach of using fee shifting only in specified contexts but to expand those contexts to additional areas where insurance and financing solutions would be available to offset fee shifting's ills. This incremental approach to reform might, for example, impose fee shifting in conventional commercial disputes, even if they involve unequal adversaries, because we would at the same time enable risk-averse or cash-strapped parties to obtain insurance and financing to level the playing field. But we might refuse to apply fee shifting to social-impact litigation, where we fear that fee shifting would interfere with the progressive, salutary effects that litigation can otherwise have on our society (and we might follow Jackson's recent move to abolish two-way fee shifting in small, personal injury cases). Likewise, we could impose two-way fee shifting and facilitate financing and ATE insurance in class action litigation *after* class certification but refrain from imposing this regime *before* that point. Such limitations on fee shifting would also go a long way toward winning over a plaintiffs' bar that would vehemently oppose fee shifting if they saw it as an obstacle to initiating meritorious class actions.

Dealing with the extra costs associated with American discovery poses a more difficult problem, primarily because the most promising solution is one that would impose additional burdens on judges. Recall that if fee shifting succeeds in incentivizing litigants to pursue meritorious positions and to drop meritless ones, it also can have the adverse effect of increasing expenses in close cases where the problem of litigant uncertainty is at its worst. The solution would be to impose fee shifting based on the strength of the winning and losing positions rather than simply based on whether they win or lose. Fee shifting might go beyond Rule 11's effort to deter meritless positions by imposing rewards for strong claims and punishments for weak (but not meritless) claims. But to avoid incentivizing parties to overspend in close cases, the regime might refuse to shift fees where cases are close and either party could easily have won. In this manner, we would bolster incentives to pursue strong positions and forego weak ones without altering incentives with respect to positions in between.

But to require judges to review fee-shifting motions with yet another nuanced standard—somewhere between the automatic U.K.

rule and the U.S. Rule 11 approach—would impose additional burdens on an already overburdened judiciary. The burden might not be inordinate. After all, judges would only have to decide whether to shift fees in cases that are actually adjudicated, which is small in comparison to the number of cases settled. But there is no doubt that the more we stray from the straight loser-pays English standard, the more complicated implementing any reform would become.

It is beyond this Article's scope to manage all the differences between the U.K. and U.S. systems and come up with a definitive proposal for importing U.K. fee-shifting rules and market mechanisms for adaptation in the United States. If, however, we want to solve one of litigation's principal ills—and incentivize parties to pursue or drop positions based on their merits—the effort is likely to be worth it.

V. CONCLUSION

The best way to accommodate the competing interests of U.S. defendants, plaintiffs, and courts may lie in a combination of fee-shifting rules and market mechanisms similar to those found in the United Kingdom. If we implement more widespread fee shifting and use market mechanisms to ensure that it favors the stronger *position* rather than the stronger *party*, we could go a long way toward improving the accuracy of litigation resolutions in this country.

