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FOREWORD

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This symposium explores the basic question of who should bear the burden of paying attorney fees in litigation. It is a question with a variety of answers that differ not only in their theoretical basis but also in the ways in which they are applied. Under the "American rule," each party pays the fees of its own attorney. Under the "English rule," the losing party bears the expense not only of its own attorney but of the winning party's attorney as well. "One-way" shifts of attorney fees exclusively favor either plaintiffs or defendants. Other systems adopt one or another of these approaches but with significant modifications.

Those who read the articles in this symposium seeking an unequivocal answer to the basic question will be disappointed. The pages that follow make clear that the problems are very complex, that things are often not what they seem, and that it is inordinately difficult if not impossible to develop a satisfactory general answer to the question posed by attorney fee shifting. Nevertheless, the articles make a substantial contribution to the consideration of the question. At least as significantly, they exemplify how scholars from a variety of disciplines can illuminate an important social problem with insights from both the law and the social sciences.

Prior to the conference for which these articles were prepared, there seems to have been very limited scholarly support for the American rule. The literature assumed that the burden of justifying a rule that was applicable only in the United States was too heavy to overcome.¹ The articles, however, make clear that the American rule is entitled to more credit than its opponents have given it; they also make clear that the English rule has its own severe limitations.

John Leubsdorf provides an original and very plausible explanation of the origin of the American rule in the early nineteenth century (while posing a different historical puzzle). Leubsdorf's argument is that the earlier "English rule"

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1. See Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, LAW & CONTEMP. PROBS., Winter 1984, at 9; Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 651.

applicable in the colonies resulted in the award of very low attorney fees to the prevailing party, and that the American lawyer's response was to charge his own client, so that the English rule fell into desuetude.² Werner Pfennigstorf's survey of European law indicates that a pure form of the English rule is a rarity on the books and that the term masks a wide variety of formulas.³ Herbert Kritzer's on-the-scene examination of actual practices in Ontario reveals that where the English rule is on the books, other types of fee arrangements, supposedly banned, develop. The use of contingent fee arrangements in Ontario is an example. Under this fee arrangement the defendant effectively pays the fees of the plaintiff's lawyer if the plaintiff wins; if the plaintiff loses, however, the plaintiff's attorney bears the cost of his or her own legal services.⁴

The functional arguments in favor of and against one rule are largely the obverse of the arguments in favor of and against the other.⁵ There is an argument based on unfairness. The American rule assumes that, given the uncertainties of litigation, it is unfair to penalize the loser with the payment of the winner's fees. The English rule assumes that it is unfair to force one who wins a law suit to pay for the needless expense occasioned by the loser's erroneous contest of the winner's position. The winner should be made whole. There is also an argument based on access to the legal system. The American rule does not discourage those with little financial means from using the judicial system by saddling them with the winner's fees if they lose. The English rule, on the other hand, although it has a "punitive" potential for those who bring or defend "bad" legal positions, encourages those with "good" legal positions to instigate law suits by recompensing their legal expenses if they prevail. Finally, there is an argument based on judicial efficiency. The American rule avoids the sometimes difficult and contentious determination of the proper amount of attorney fees to be awarded the winner. In application, though, the English rule handles this issue of amount of fees quite routinely.

Irrespective of the strengths of the arguments in favor of the English rule, there is little prospect that the United States will adopt the English rule in whole, although, as is made clear in a number of articles, particularly that of Frances Zemans, the English rule is now in effect in this country to a limited extent.⁶ Moreover, a move toward adoption of the English rule outright should be made with great caution. Both Tom Rowe⁷ and Braeutigam, Owen and Panzar⁸ conclude that it is impossible to predict whether more or fewer claims would be made under the English rule as opposed to the American rule. Indeed, the latter study

2. Leubsdorf, *supra* note 1.

3. Pfennigstorf, *The European Experience with Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 37.

4. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, LAW & CONTEMP. PROBS., Winter 1984, at 125.

5. The arguments appear throughout symposium. See generally Zemans, *Fee Shifting and the Implementation of Public Policy*, LAW & CONTEMP. PROBS., Winter 1984, at 187; Braeutigam, Owen & Panzar, *An Economic Analysis of Alternative Fee Shifting Systems*, LAW & CONTEMP. PROBS., Winter 1984, at 173; see also Rowe, *supra* note 1, at 139.

6. Zemans, *supra* note 5 at 195-202.

7. Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 147.

8. Braeutigam, Owen & Panzar, *supra* note 5, at 182.

also concludes that, although the American rule probably results in a lower total expenditure per case than the English rule, it is not possible to say in general under which rule a party will individually spend more or less.⁹

What about a one-way shift? No scholars seriously advocate an asymmetrical system favoring defendants. What then of a one-way system favoring all (or most) plaintiffs? A one-way pro-plaintiff system would encourage at least three classes of plaintiffs who may require this type of financial inducement to litigate their claims: (1) those plaintiffs with legitimate but uncertain small-to-moderate claims who are obligated to pay their lawyers out of their own resources; (2) those plaintiffs with very strong claims but whose attorney fees exceed or are a high percentage of the value of the claim, a group that includes individual members of a plaintiff class, and persons bringing law suits in the public interest; and (3) those plaintiffs who have nonmonetary claims such as suits for injunctions.¹⁰

A general shifting of attorney fees to *all* prevailing plaintiffs, however, might also encourage some odd-sounding and questionable complaints and races to the courthouse, and might include plaintiffs with no special claim to the benefit. For example, Tom Rowe cautions us to recognize that a general pro-plaintiff fee shift would impose heavy burdens on "medium-sized" defendants.¹¹ He also persuasively points out that a one-way general fee shift will not necessarily increase the rate of settlement. The reason is that the "aware" plaintiff, recognizing the increased potential liability on the part of the defendant because of the possibility of a fee shift, will increase the settlement demand. This in turn negates any added pressure for the defendant to settle due to the prospect of paying attorney fees.¹²

The effects of a fee-shifting incentive system upon litigants and upon their lawyers must be distinguished. First, unlike the client, a lawyer convinced that a case is a loser is not likely to take it on a contingent fee basis merely because the fee will be paid by the defendant should the case be won. Whether the lawyer receives no fee from the client or from the defendant would not seem to make much difference in the lawyer's behavior.

Second, there are serious professional problems inherent in the award of attorney fees to the prevailing plaintiff, a point made clear by Alfred Conard in his examination of shareholders' derivative suits¹³ and by Charles Wolfram in his detailed discussion of the lawyer-client conflict in the settlement of litigation when the attorney fee is negotiated at the same time as the plaintiff's damages.¹⁴ One other pervasive professional problem is discussed by Marshall Breger: how the prevailing plaintiff's attorney fees should be calculated.¹⁵ Breger reveals that the calculation issue is more than a problem of arithmetic by his review of the under-

9. *Id.* at 180-82.

10. Rowe, *supra* note 7, at 147-48.

11. *Id.* at 153-54.

12. *Id.* at 157-58.

13. Conard, *Winnowing Derivative Suits Through Attorneys Fees*, LAW & CONTEMP. PROBS., Winter 1984, at 269.

14. Wolfram, *The Second Set of Players: Lawyers, Fee Shifting, and the Limits of Professional Discipline*, LAW & CONTEMP. PROBS., Winter 1984, at 293.

15. Breger, *Compensation Formulas for Court-Awarded Attorneys Fees*, LAW & CONTEMP. PROBS., Winter 1984, at 249.

lying theory of attorney fee awards and the ways in which that theory affects how the awards are computed. Although the Supreme Court of the United States has recently established certain benchmarks,¹⁶ there is a good deal of litigation and legislation on this issue yet to come.

Can there be a precise determination of which plaintiffs would or should not receive the benefit of a one-way shift, or conversely, which defendants should or should not bear the burden? To date, the determination appears to have been made on an *ad hoc* basis, with recent legislative and judicial activity greatly increasing the circumstances in which one-way shifts take place. There are over 130 federal statutes providing for attorney fee awards¹⁷ and over 1900 state statutes providing for such awards.¹⁸ How should the general categories of favored plaintiffs or disfavored defendants be defined? Some possibilities follow:

- policy (private attorney general or public interest) cases versus routine cases
- rich versus not-so-rich parties
- good faith versus bad faith claims or defenses
- individuals versus corporations or government
- large claims versus small claims
- ad hoc*—statute by statute

The articles in the symposium pay the greatest attention to “public interest” litigation. Robert Percival and Geoffrey Miller review the justifications for support of public interest litigation, and the need for the award of attorney fees to support it.¹⁹ Bruce Fein is unsympathetic on political and structural grounds to the general concept of public interest litigation. If such litigation is to be permitted or encouraged, he would limit attorney fee awards to a much smaller set of cases than is true today.²⁰ Marshall Breger points in the same direction as Fein with his suggestions for establishing the level of attorney fees to be awarded.²¹

At bottom, the shifting of attorney fees is one aspect of the financing of legal services. The legal services distribution system—of which the financing of legal services is a fundamental part—has changed drastically in recent years and there is no indication of a deceleration of the rate of change of that system. In the past

16. *Blum v. Stenson*, 104 S. Ct. 1541 (1984) (a “reasonable attorney’s fee” under 42 U.S.C. § 1988 is to be calculated at prevailing market rates, whether the plaintiff is represented by private or nonprofit counsel; upward adjustments to fees (“multipliers”) that have been determined by hours actually worked should not normally be made); *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3274, 3276 & n.5 (1983) (to be awarded attorney fees under § 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f)(1976), and certain other statutes, party must achieve some success on the merits); *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983) (under Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. § 1988 (1976), attorney fees awarded only for work done on those counts that are successful); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (under § 706(k) of Title VII, 42 U.S.C. § 2000e-5(k) (1976), prevailing plaintiffs normally awarded attorney fees; prevailing defendants only when plaintiffs’ claims are “frivolous, unreasonable or groundless”).

17. *Ruckelshaus v. Sierra Club*, 103 S. Ct. 3275, 3276 (1983); see ATT’Y FEE AWARDS REP., Feb. 1984, at 2-3.

18. See Note, *State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?*, LAW & CONTEMP. PROBS., Winter 1984, at 321.

19. Percival & Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 233.

20. Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government—“Subsidized” litigation*, LAW & CONTEMP. PROBS., Winter 1984, at 211.

21. Breger, *supra* note 15, at 267.

twenty years we have seen (1) the expansion of the right to counsel in criminal cases to misdemeanants sentenced to jail terms; (2) the beginnings of a constitutional right to counsel in civil cases; and (3) the geometric expansion of federally funded legal services, including Federal Public Defenders and Civil Legal Services Programs. An imperfectly regulated for-pay services system has been largely converted into a market mechanism with the breakdown of the restrictions on solicitation and advertising, growth of mass-merchandised legal services, group legal services, and prepaid "legal-cost insurance." The public interest movement has been born and has prospered.

The number and complexity of law-producing units—firms, corporate counsel, government agencies—have expanded to degrees that would have been inconceivable forty years ago, and would not have readily been believed even twenty years ago. The ratio of U.S. lawyers to the general population is close to double the traditional 1 to 700 ratio, while the profile of the bar has significantly changed from its previous all-white all-male image.

A social change that is harder to quantify than the demographic ones is the widely perceived shift of popular attitude toward greater acceptance of the use of the judicial process by average men and women—and children—to vindicate or create legal rights.²² We have always been a society preoccupied with law, and our economic philosophy is rooted in theories of private enterprise. It is not surprising that we consider the problem of judicial accessibility by asking who should pay for litigation attorneys. In our dedication to sports terminology, it is not surprising that we talk about the issue in terms of winners and losers.

What does all this signify? Herewith some speculation:

1. More pro-plaintiff fee shifting will mean an increase in the instigation of litigation. Some plaintiffs whose attorney fees will be paid by the losing party will be more inclined to go forward in certain kinds of cases. Whether there will be a comparable increase in the rate of settlement cannot be predicted.

2. There will be greater scrutiny of lawyers' methods of charging fees and the amounts sought, leading to greater regulation by courts and legislatures. Government agencies that are forced to pay the attorney fees of those who have triumphed against them will be more inclined to examine carefully the fee statements of their opponents' attorneys and to challenge them. Further, there may be downward pressure from the courts and legislatures on the amount of attorney fees to be paid by losing public agencies. Consider, for example, the low fee schedules in Veterans Administration cases,²³ and under the Criminal Justice Act (\$30 per hour for court time and \$20 per hour for out-of-court time).²⁴ Indeed, if the award of attorney fees turns out to produce a very low fee to the prevailing party's attorney, lawyers may insist upon separate fee arrangements

22. *But cf.* Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983).

23. 38 U.S.C. § 3404(c) (1976) (maximum \$10 fee for representation of veterans in certain administrative hearings before Veterans Administration).

24. Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(1) (1982). The Equal Access to Justice Act, 28 U.S.C.A. § 2412(C)(z)(A) (West Supp. 1983) limits attorney fees to \$75 per hour. *See also* Percival & Miller, *supra* note 19, at 245; Breger, *supra*, note 21, at 264.

with their clients. If that were to happen, we would be back to John Leubsdorf's explanation of the genesis of the American rule.²⁵

3. There will be a clearer separation of lawyer from client. Evidence of that phenomenon abounds. Lawyers are themselves charged for frivolous litigation and delay. Legal Services offices and public interest attorneys are awarded attorney fees according to a more general market rate rather than their own salaries, although in neither of these situations does the attorney fee award have much to do with the actual attorney costs of the successful party.²⁶ Courts have become increasingly concerned about the conflict between attorney and client in these situations leading to increased judicial intervention.²⁷ All in all, professional responsibility problems undoubtedly will receive a good deal more attention.

4. To the extent that attorney fees are more frequently awarded by courts or legislatures in cases involving the "public interest," more lawyers will litigate "in the public interest." There will then be a blurring of the line between the public interest law firm that depends heavily upon awards of attorney fees as a source of revenue²⁸ and other private attorneys who may depend partially upon such a source of revenue. All plaintiffs' lawyers may claim to be public interest litigators.

The likely consequences of a shift to increased use of a one-way pro-plaintiff fee rule also may be examined from several different perspectives:

The Public. There will be an important symbolic consequence to the public. Courts will appear more accessible and less costly. This symbolism may, however, run counter to the public's self-conception as taxpayer when the fee awards are against governmental units.

Potential Litigants. How much will judicial accessibility in fact increase? We know little about how much potential litigation lies awaiting the encouragement of a one-way fee shifting rule. There are constraints, among them the significant opportunity costs in litigation, the reluctance of lawyers to take very marginal cases, and the counterattack in the form of a counterclaim that today would not be brought because of the legal costs involved, but may be used to discourage the plaintiff with a threat of net financial loss if the plaintiff's lawsuit is pressed.

If we assume that current patterns of lawyer use by individuals reflect current litigable grievances—with the most egregious cases litigated—the prediction about judicial accessibility may be made more accurate. With a one-way shift we should have more of the same.

The patterns of lawyer use reflected by Legal Services, Lawyers Reference, and more general surveys show that family matters lead the list; there are numerous landlord-tenant and collections problems, but the individual is not usually the plaintiff in these cases. It is possible that shifting the fee may change those patterns, but the amount of change is unclear. It is likely that there will be more consumer litigation, the incidence of which will be determined largely by matters such as opportunity costs, risk aversion, and whether the parties deal regularly

25. Leubsdorf, *supra* note 1, at 9.

26. Compare Percival & Miller, *supra* note 19, at 245-46 with Breger, *supra* note 21, at 249.

27. See, e.g., Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977).

28. Percival & Miller, *supra* note 19, at 241.

with each other. How much nondamage-award litigation—suits for injunctions and the like—will result is impossible to predict, although this sort of litigation potentially presents a fruitful area for increased litigation volume.

Courts. Although it is impossible to predict the impact of fee shifting on the rate of settlement, one can assume that the volume of litigation will increase, applying even more pressure for judicial reform or for removal of certain types of cases to alternative dispute-resolving mechanisms. Perhaps ironically, many of these alternatives are structured to exclude lawyers.

Lawyers. It is important to emphasize that as litigious a nation as the United States is, most lawyers' work is not litigation-connected. Fee shifting has been limited, so far at least, to the litigation process and will not affect the bulk of lawyers' work.

On the other hand, the impact of the demographic changes cannot be ignored. We have the largest number of lawyers in our history. Our lawyer-population ratio continues to increase. We are adding over 30,000 lawyers per year, with some 50% of the bar in practice about ten years or less. That means we have a very large number of young lawyers.²⁹ Although the large institutional firms seem to continue to absorb significant numbers of graduates, only 20% of the lawyers in private practice in the United States are in firms of over ten lawyers. Three percent of those in private practice are in law firms of 100 or more lawyers. Almost two-thirds of the private bar practice in units of three lawyers or less, and almost half are solo practitioners.³⁰ This is the segment of the bar most likely to be adversely affected by the competition created by the greatly increased lawyer-population ratio. This is the group most likely to have excess hours, and to take on marginal, low-value cases for plaintiffs who cannot pay reasonable attorney fees even if they win. This group of lawyers will likely look to the shift of attorney fees for their own economic salvation. Thus, a shift of attorney fees should, at least in the short run, increase litigation and improve the economic welfare of one class of lawyers.

Moreover, an increase in litigation necessarily increases the demand for defendants' lawyers. From the standpoint of the bar's self interest, the optimum arrangement is the one-way plaintiff fee shift, for that will increase litigation, which in turn will require more lawyers for both sides.

The fact that fee shifting may be beneficial to the welfare of lawyers is not, however, enough of a redeeming social value. It is essential that the social choice of fee-shifting regimes proceed upon better theoretical and empirical understanding than has been the case in the past. Otherwise, we run the risk of being overtaken by self-interest. It is equally essential that we more carefully consider the problems of professional responsibility that fee-shifting regimes create. This symposium is a significant step in that direction.

29. The data in the text are derived from Smith, *A Profile of Lawyer Life Styles*, 70 A.B.A. J. 50 (Feb. 1984); LAW & BUSINESS, INC., *THE LAWYERS ALMANAC* 81 (Feb. 1984).

30. See *THE LAWYERS ALMANAC*, *supra* note 29, at 82.

