FEE SHIFTING AND AFTER-THE-EVENT INSURANCE: A TWIST TO A THIRTEENTH CENTURY APPROACH TO SHIFTING ATTORNEYS’ FEES TO SOLVE A TWENTY-FIRST CENTURY PROBLEM

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I. INTRODUCTION

The American litigation system is broken. In comparison to other
common law nations, the American system of litigation is far more
expensive for litigants.1 Americans spent $247 billion on the direct costs of
tort litigation in 2006 alone.2 The impact of tort litigation is felt by both
large and small businesses. For example, small businesses cave to the
threat of crippling legal costs and choose to settle nuisance lawsuits rather
than face the uncertainty of trial.3 Large businesses do not fare any better.
A 2007 report noted American stockholders lost nearly $684 billion in
wealth because of tort litigation in 2006.4 On the other side of counsels'
tables, an injured plaintiff is also cheated by the current litigation system,
as less than fifty cents of every dollar awarded to the injured claimant is
returned to the injured claimant.5

These statistics run contrary to what every American pledges—

1. See Michael R. Baye, Dan Kovenock & Casper G. de Vries, Comparative
   Analysis of Litigation Systems: An Auction-Theoretic Approach, 115 ECON. J. 583, 584
   (2005) (explaining the American litigation system is three times more expensive, in
terms of percentage of GDP, than litigation systems in the United Kingdom, and
noting Americans spend double the amount on tort litigation than they do on
purchasing new automobiles).
2. MARIA GRYPHON, GREATER JUSTICE, LOWER COST: HOW A “LOSER
   PAYS” RULE WOULD IMPROVE THE AMERICAN LEGAL SYSTEM 1 (2008), available at
3. Id.
4. LAWRENCE J. MCQUILLAN ET AL., JACKPOT JUSTICE: THE TRUE COST OF
5. Id. at 15.
“‘liberty and justice for all.’”6 Justice does not limit itself to persons armed with particular causes of action, persons or corporations with a requisite amount of money, or entities that can afford, both mentally and economically, to risk defeat in pursuit of achieving it. As established below, our system currently locks the courthouse doors to individuals who cannot afford to pay their attorneys, even after a successful claim or defense. Consequently, justice is too often sacrificed for economic practicality. By denying access to the American court system, we deny the same people pledging allegiance to our nation the opportunity to achieve or protect justice.

This Note will examine one way in which the courthouse doors have been closed to Americans—the rising cost of litigation, which thereby prohibits the achievement of justice—and will promote a proven method to address this problem: adopting England’s theory of shifting the successful party’s attorneys’ fees to the unsuccessful litigant and utilizing after-the-event insurance to hedge the risk of an adverse judgment. This proven method will once again allow parties access to the courtroom.

Part II of this Note sets forth the history of fee shifting in England, as well as an explanation of after-the-event insurance. After providing this foundation, this Note identifies potential objections to after-the-event insurance and lays out a framework successfully rebutting the same. Part III explains America’s history of fee shifting. This section presents the reasons America abandoned the English Rule of shifting attorneys’ fees. Part IV rebuts the objections provided in Part III—or the reasons America abandoned the English Rule—using after-the-event insurance to remedy the problems America once had when it routinely shifted the burden of fees to losing litigants. After clearing the way for reimplementing fee shifting, Part V explains how the combination of after-the-event insurance and fee shifting will also solve America’s current litigation problems.

II. INTRODUCTION TO THE ENGLISH RULE

In England, the losing litigant pays for the victorious party’s attorneys’ fees; this has been the tradition of the English litigation system for centuries.7 In addition and quite possibly because of attorneys’ fees shifting, England has developed an insurance product known as after-the-

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7. Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 247 & n.18 (1975) (“As early as 1278, the courts of England were authorized to award counsel fees to successful plaintiffs in litigation.”).
event insurance to provide funding for litigants who cannot afford the cost of the other party's attorneys' fees should they be unsuccessful in litigation. This section will provide a brief explanation of the basis for shifting attorneys' fees in England and will set forth the country's relatively brief history of after-the-event insurance.

A. History of Fee Shifting in England

As early as 1278, attorneys' fees were statutorily awarded to a prevailing plaintiff in certain types of cases in England. In 1531, fee shifting was expanded to include defendants in limited cases. By 1607, English courts were statutorily permitted to award fees to the defendant in a case in which the plaintiff would have received the same if the plaintiff would have been successful. This practice of two-way attorneys' fee shifting continues to be the routine practice in English litigation. With the risk of shifting attorneys' fees comes the risk of a losing litigant incurring the cost of the opposition's legal fees. To minimize this risk or to pass the risk on to a third party, litigants in England can purchase after-the-event insurance.


As suggested by its name, after-the-event insurance is purchased after a litigable event occurs. These insurance policies provide insurance coverage for litigation arising out of the same events as before-the-event insurance, including health insurance, automobile insurance, or

8. STUART SIME, A PRACTICAL APPROACH TO CIVIL PROCEDURE 40 (10th ed. 2007).
9. Statute of Cloucester, 6 Edw., c. 1 (1278) ("It is [p]rovided, that the [d]emandant may recover against the Tenant the Costs of his Writ purchased, together with the [d]amages abovesaid. And this Act shall hold place in all cases where the [p]arty is to recover [d]amages.").
10. 23 Hen. 8, c. 15 (1531).
11. 4 Jac., c. 3 (1607).
12. The phrase "two-way shifting" is used to distinguish from the former practice in England of shifting fees only to successful plaintiffs.
13. ENG. CIV. P. R. 44.3(1)–(2). available at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/pdf/parts/part44.pdf. ("(1) The court has discretion as to (a) whether costs are payable by one party to another . . . . (2) If the court decides to make an order about costs (a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party . . . .") The exceptions to this general rule are cases on appeal from the Family Division or cases that are derived from probate or family proceedings. Id. at 44.3(3).
homeowner’s insurance. Because the litigable event is the same, labeling the insurance product “after-the-event” may be misleading. After-the-event insurance must be thought of not as insuring against the triggering, litigable event that has already occurred, but against the risk of litigation or an adverse judgment after the suit is filed. For example, an individual may purchase automobile insurance to protect against liability from an accident at a date after purchase. After-the-event insurance does not insure such risk. Instead, after-the-event insurance could be purchased by the person injured in the car accident if she chooses to file a suit against the driver. In this situation, the insurance coverage insures the plaintiff against an adverse judgment at trial.

After-the-event insurance can be written to insure against various potential losses. First, plaintiffs can use after-the-event insurance to “cover the other side’s costs” if the plaintiff should lose in her suit against the defendant. Borrowing from the previous automobile example, the injured plaintiff would be insured against the risk of having to pay the defendant driver’s attorneys’ fees if the plaintiff loses in her suit to recover damages. Second, after-the-event insurance can be used by defendants to “protect [them] against a higher-than-expected loss.”

As with all contractual insurance policies, the method of calculating the premiums varies. A few common approaches are identifiable. First, insurers may set a single, initial premium. When calculating this amount, the insurer considers the overall business the insurer takes on, as well as “overall claims experience, selling, administration[,] and regulatory costs[,] and intended profit [to] set a uniform premium.”

Second, after-the-event insurance may use staged premiums. Using

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15. See Jonathan T. Molot, A Market in Litigation Risk, 76 U. CHI. L. REV. 367, 380 (2009) (explaining that after-the-event insurance “would not be insuring against the accident or business dispute that had triggered the lawsuit, for that event would already have occurred”).
17. See SME, supra note 8, at 40.
20. Id.
21. Id.
this approach, the insurer sets premiums that are payable as the litigation advances.\textsuperscript{22} The price of these premiums grows as the litigation reaches advanced stages because “[t]he risk being insured is the risk . . . of having to pay costs liabilities within the proceedings,” and as the proceedings advance, the costs increase.\textsuperscript{23} For example, the insurance company may set a premium to insure the case through the pleading and discovery stage. If the insured wants to extend this coverage, she will be required to pay a second—likely higher—premium to obtain the insurance through the next phase of litigation.\textsuperscript{24}

Following the principle of shifting costs to losing parties,\textsuperscript{25} England now allows courts to shift after-the-event insurance premiums to the losing litigant.\textsuperscript{26} This consistency is maintained because England considers both attorneys’ fees and after-the-event insurance premiums as costs of the litigant. An English report published in 2009 identified four rationales supporting the decision to shift insurance premiums to losing litigants:

To ensure that the compensation awarded to a successful party was not eroded by any uplift or premium—the party in the wrong would bear the full burden of costs.

To make conditional fees more attractive, in particular to defendants and to claimants seeking non-monetary redress.

To discourage weak cases and encourage settlements.

To provide a mechanism for regulating the uplifts that solicitors charge.\textsuperscript{27}

\textsuperscript{22} Id. at 3–4.

\textsuperscript{23} Id. at 4.

\textsuperscript{24} See id.


\textsuperscript{26} Id. at 44.3A (“(2) At the conclusion of the proceedings, . . . to which the funding arrangement relates the court may (a) make a summary assessment of all the costs . . . ; (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or (c) make an order for detailed assessment of all the costs.”).

C. Possible Objections to After-the-Event Insurance

The remainder of this Note will advocate for America’s adoption of the New English Rule. The phrase “New English Rule” labels the package of attorneys’ fees shifting and after-the-event insurance utilized in England. The phrase distinguishes the theory from England’s former policy of shifting only attorneys’ fees. The former policy is referred to throughout this Note as the “English Rule.” The New English Rule will advance the goal of litigation—justice—in two ways. First, the New English Rule will provide answers to the objections raised by scholars, legislators, and attorneys when America abandoned the practice of shifting attorneys’ fees from the successful litigant to the losing party. Second, adoption of the New English Rule will aid in repairing the high costs of America’s current litigation system.

Many of the objections alluded to are raised by scholars and judges who have experience with after-the-event insurance in England. The Author raises the others, anticipating such objections from American politicians, academics, and practicing attorneys. First, after-the-event insurance has yet to prove itself as a profitable insurance product. Second, after-the-event insurance may be costly for the insured. Third, after-the-event insurance may not be available for some litigants. Fourth, the use of after-the-event insurance, combined with shifting of attorneys’ fees, may create a “Super-Claimant.” Fifth, shifting after-the-event insurance premiums to losing litigants unjustly taxes the unsuccessful party with the successful party’s high litigation costs. Sixth, insurance companies may struggle to accurately calculate the risk of losing a case. Finally, as with all insurance, after-the-event insurance may be sought by individuals or entities with the highest risk of losing at trial.

1. Profitability of After-the-Event Insurance

At one time, some scholars suggested after-the-event insurance premiums in England were actually too low, thereby forcing the profitability of the insurance providers to an inoperable level. As a consequence of these decreasing profits, the number of insurance companies offering after-the-event insurance in England significantly declined. In April 2002, twenty-two after-the-event insurance products were offered through eight insurance companies. Four years later in...

29. Id.
2006, only half of those twenty-two products existed.30

The solution to such a problem occurring in the United States is not complicated. Insurance providers should charge a premium large enough to generate an income. By charging a larger premium, insurance companies will develop a profitable business. Insurance companies are entitled to charge a large enough premium to compensate for the risk the companies shoulder on behalf of insured parties. This Note does not seek to find the cheapest way for losing litigants to shoulder a judgment and assessment of costs to them. Rather, it focuses on methods by which the winning litigant is left in a whole position after either exercising her rights as a plaintiff or successfully defending her case as a defendant. The system as a whole benefits from profitable after-the-event insurance without unduly burdening a losing litigant. The solution of charging higher premiums raises the second objection: the high cost of after-the-event insurance.

2. High Costs of After-the-Event Insurance

Contrary to the above-discussed suggestion that after-the-event insurance premiums were too low, causing a decrease in the number of carriers,31 at least one commentator has opined that premiums for after-the-event insurance may be unnecessarily high because of the calculated risk of the proposed litigation.32

To address the possibility of high after-the-event insurance premiums in America, when adopting attorneys’ fees shifting,33 states should mirror England’s solution to this problem—shifting of insurance costs. Because

30. Id.
31. See supra Part II.C.1.
32. SIME, supra note 8, at 40 (noting the cost of after-the-event insurance and the increase in the cost based upon the risk of defeat and the level of the opponent’s cost).
33. The legislative branch is used as a vehicle for this change because the courts have been reluctant to recognize the shifting of fees. See, e.g., Arcambel v. Wiseman, 3 U.S. (3 Dall.) (1796) (overturning the inclusion of attorneys’ fees as costs, stating “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”). This ruling was reaffirmed in 1975, when the Court stated, “[T]his Court appears to have ruled that the Judiciary itself would not create a general rule, independent of any statute, allowing awards of attorneys’ fees in federal courts.” Alyeska Pipeline Serv. Co. v. Wilderness Soc’y, 421 U.S. 240, 249 (1975).
English courts are allowed to shift all costs or fees to the losing litigant, even if the after-the-event insurance premium is large, the successful litigant will not be burdened with its cost. Instead, the court can shift this cost to the losing party. A similar rule in America would allow a party, confident in her case, to move forward even with a high insurance premium because the successful party would be absolved from paying the insurance cost.

3. After-the-Event Insurance May Not Be Available for Some Litigants

Potential litigants may seek after-the-event insurance, but may find insurance companies are unwilling to provide them with insurance coverage. In this scenario, the potential litigant is faced with two options. The litigant can continue with her case, or she can decide the risk of loss is too great and not pursue her claim. Stated differently, the litigant can choose to shoulder the risk of having to pay her opponent’s litigation costs if she loses, or she can walk away from her case.

The reason the insurance company deems the litigation uninsurable should be strongly considered by the party seeking insurance. A practical reason for this refusal exists. The insurance provider may deem the litigant’s case too risky. If this is the reason for the unavailability of insurance, the litigant should consider this a check on her case. It is essentially an advisory opinion. At this point, a neutral third party has evaluated the claim and deemed it risky. Accordingly, the litigant should cautiously move forward, as her claim may not be winnable. It is this check on pursuing a claim that serves the purpose of deterring frivolous lawsuits because “the possibility of having to pay the lawyer’s bills of both parties to the action makes a plaintiff think twice before [she] sues out a writ . . . .”

This mechanism, however, does not make the insurance company the gatekeeper to the courthouse. After-the-event insurance is not a condition

34. ENGLAND CIV. P. R. 44.3A, available at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/pdf/parts/part44.pdf (“(2) At the conclusion of the proceedings, . . . to which the funding arrangement relates the court may (a) make a summary assessment of all the costs . . . ; (b) make an order for detailed assessment of the additional liability but make a summary assessment of the other costs; or (c) make an order for detailed assessment of all the costs.”).

35. Arthur L. Goodhart, Costs, 38 YALE L.J. 849, 876 (1929) (quoting FIRST REPORT OF THE JUDICIAL COUNCIL OF MASSACHUSETTS 63–64 (1925) (asserting fee shifting was desired by Massachusetts as a way to eliminate illegitimate or frivolous claims)).
precedent to suing out a writ or defending against the same. If the plaintiff is confident in her case, she may proceed to court without obtaining insurance. At this point, though, the litigant should fully understand the risk in going forward as the potential insurer, a neutral third party, deemed it too risky to insure.

If the litigant seeking the insurance is a defendant in a cause of action and the claim is deemed uninsurable, this serves as a warning to the defendant that settlement may be the best alternative. If the defendant likes her chances at trial, she may proceed in her defense. However, she must know that with each day the plaintiff spends preparing her case, the potential attorneys’ fees that may be shifted to her increase. This risk should be considered in every party’s litigation strategy—defendants and plaintiffs alike.

4. The New English Rule Will Create a Super-Claimant

An English report, published in 2009, identified a situation in which the plaintiff pursues a claim at minimal costs, while hedging the majority of the risk of litigation.36 Two factors contribute to the creation of such a situation. First, by having a contingent fee arrangement,37 the plaintiff has no costs associated with her own legal representation; under the agreement, she does not pay if she is unsuccessful.38 Second, after-the-event insurance enables the plaintiff to move forward without risk of incurring the other side’s costs upon defeat because after-the-event insurance will pay for such expenses.39 Combining these factors results in a package the report labels a “super-claimant.”40 The concern stemming from the creation of a super-claimant is that the plaintiff is then free to move forward with minimal, if any, constraints because the leverage possessed by the super-claimant would enable it to force early settlement upon the defendant.41

A super-claimant should be of no concern if after-the-event

36. J A C K S O N, supra note 27, at 98 (referring to this individual as a “super-claimant”).
37. Such agreements are referred to in England as “conditional fee agreements.” See id. at 94, 98.
38. Id. at 98 (describing as “a no win” type arrangement).
39. Id.
40. Id.
41. Id. (noting the concern that the defendant would settle early because of exposure to large expenses if unsuccessful).
insurance, contingent fee arrangements, and other methods by which a plaintiff hedges these risks are also available to the defendant. Both plaintiff and defendant actually have an equal opportunity to obtain the same insurance and risk-hedging mechanisms. If the defendant takes advantage of these opportunities, a super-defendant would then be established, resulting in litigation between super-parties. Even if a defendant cannot obtain a contingent fee arrangement with her counsel—a factor contributing to the creation of the super-claimant—the hourly fee paid to her counsel will be shifted if the defendant is successful in the litigation. Thus, even if the defendant may be unable to achieve the a similar “super” status as the super-claimant—the defendant lacks the ability to litigate on a contingent fee arrangement—the defendant can proceed with her defense without being forced into settlement by the super-claimant. This dismisses the concern of a contest between a super-plaintiff and a defendant, especially if the defendant has a meritorious defense.

5. **Shifting After-the-Event Insurance Premiums Unjustly Burdens the Losing Litigant with the Successful Party’s High Litigation Costs**

If states allow shifting of after-the-event insurance premiums, in addition to attorneys’ fees, the losing litigant will be left paying:

1. her own litigation costs;
2. the litigation costs of her opponent;
3. her own after-the-event insurance premiums if purchased;
4. the after-the-event insurance premiums of her opponent; and
5. a judgment levied against her if she is found liable.

As previously stated, the premise of this Note is not to allow a losing litigant to escape from these costs. Rather, this Note focuses on the litigation system as a whole. In order to achieve justice, the successful litigant should be left in a whole position. If the successful party is a plaintiff, she is entitled to both the judgment awarded to her and the

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42. Molot, *supra* note 15, at 378–81 (discussing the application of after-the-event insurance, particularly noting use by defendants compared to plaintiffs).
44. Jackson, *supra* note 27, at 98.
45. *Id.*
reimbursement for her costs in obtaining the judgment.

This raises the concern of how a losing defendant will shoulder such costs. Although this Note does not promote the theory that liable defendants should escape the consequences of such a judgment, defendants are not without the ability to hedge such a risk. For example, defendants can obtain after-the-event insurance, as discussed, to hedge against an adverse judgment. Additional legal commentary outlines methods by which unsuccessful defendants can protect themselves or shoulder the burden shifted to them by an adverse judgment.

If the successful party is a defendant, she is entitled to reimbursement for the cost of defending herself. This concept of leaving a successful party, plaintiff or defendant, whole is further developed later in this Note when discussing the problems with the current American litigation system.

6. Insurance Providers May Struggle to Accurately Calculate the Risk of a Particular Litigation Case

As Judge Posner stated, “You can’t insure just anything—only something in which you have an ‘insurable interest.’” Underwriting is very important to the profitability of after-the-event insurance, as with all insurance. Analysis can be detailed along these lines. However, this Note focuses primarily on the remedial and legal consequences of adopting attorneys’ fees shifting and after-the-event insurance. Potential insurance providers are encouraged to consult additional business resources and commentary on the insurance industry for a more thorough analysis of the nuances of after-the-event insurance. Although underwriting is a business concept and beyond the scope of this legal Note, a few possible factors are addressed below that will provide for accurate underwriting and prediction of the “insurable interest.”

After-the-event insurance “will not work if the information about relative riskiness is private to the insureds.” To avoid this problem, after-the-event insurance providers should require full disclosure from an applicant. Similar to applying for health insurance, automobile insurance,

47. See, e.g., id.
49. The “insurable interest” in after-the-event insurance is not the event causing the litigation. Molot, supra note 15, at 380. The “insurable interest” in after-the-event insurance is the litigation itself. Id.
50. See Posner, supra note 48, at 110.
or life insurance, the applicant should be questioned about the facts relevant to her claim. After-the-event insurance, like other forms of before-the-event insurance, is contract based. The contract can be written to allow the insurance company full access to all discovery, so the company can appropriately underwrite the insurable risk. Failure by the contracting party to provide such disclosure would then be deemed a breach of the insurance contract, resulting in termination of the insurance coverage.

Second, insurance providers can rely on litigation statistics and databases as a benchmark for assessing the applicant’s case. For example, WestLaw Publishing provides an online database—Jury Verdicts & Settlement Summaries—in which the facts of a case are summarized, and the corresponding damage award or settlement is provided. Use of these databases can provide the insurer with a control group against which the applicant’s case can be compared. Factors such as injuries suffered, jurisdiction, year, and age and gender of the injured party could be compared in the company’s assessment of risk involved.

Third, some English after-the-event insurers raise the premium amount as the litigation advances. To appropriately accommodate for the increased risk as the case moves closer to trial, the insurance company increases the premium at each stage, enabling the insurance company to correlate the prices charged with the risk of each respective stage of the litigation process.

Another factor that has troubled English after-the-event insurers when setting premiums is the unpredictability of the amount of costs shifted to the losing litigant. When English courts began shifting after-the-event insurance premiums to losing litigants, judges arbitrarily reduced the percentage of the premium shifted to the losing party. These judges shifted only modest percentages of the premiums. The remaining

51. Before-the-event insurance is the insurance product Americans are familiar with, such as homeowner’s, life, automobile, and health insurances.
53. See, e.g., LEIG Report, supra note 14, at 3–4 (explaining how these mark-ups are developed and applied case-by-case).
54. Id.
55. See JACKSON, supra note 27, at 98.
56. This practice was done in accordance with ENGLAND CIV. P. R. 44.3A. See supra, note 25.
57. LEIG Report, supra note 14, at 1.
58. See id. (noting judges reduced to levels seeming appropriate to them).
portion of the premium then had to be collected from the insured.59

Addressing this problem, a 2006 English case, Rogers v. Merthyr Tydfil, ordered the award of the entire after-the-event insurance premium.60 The case assisted in removing the discretion of judges when shifting the after-the-event insurance premiums.61 English commentators assert this case will eliminate the previous problem of only partial shifting of premiums instead of full recovery.62 When states in America statutorily allow the shifting of after-the-event insurance premiums, the rules should be drafted in this manner, similarly limiting judges’ discretion and requiring the entire amount to be shifted.

7. Adverse Selection: All Insurance Providers’ Worst Nightmare

Judge Posner identifies another problem with insurance:

A distinct problem of insurance is adverse selection. If an insurer offers to insure all comers against some risk at a uniform price, persons of above-average risk will be much more likely than those of below-average risk to accept the offer, because the effect of the uniform price will be that the below-average risks will be subsidizing the above-average ones . . . .63

Applying the statement in this regard, insurance companies may fear individuals with weaker cases will seek after-the-event insurance because of the litigant’s likelihood of losing at trial, resulting in the judge assessing costs to her.

Judge Posner provides a solution: “Insurers can try to prevent this downward cycle by charging different prices to insureds of different risk.”64 Applying Judge Posner’s solution, after performing a full analysis of the case, the insurer should set the insurance premium based on the strength of the case or the risk of an unsuccessful suit.65 Access to the litigant’s evidence is a prerequisite to assessing premiums based upon the strength of the case. As such, the insurance contract should require full disclosure, as

59. See id.
60. Id. (explaining Rogers v. Merthyr Tydfil Cnty. Borough Council, [2006] EWCA (Civ) 1134, [2007] 1 W.L.R. 808 (Eng.)).
61. Id.
62. Id.
63. POSNER, supra note 48, at 110.
64. Id.
65. See id. at 108–10.
previously discussed, allowing for proper analysis of the case.

Through good business practices and thoughtful drafting of the enabling statutes that will allow shifting of after-the-event insurance premiums, the objections to after-the-event insurance mentioned can be overcome. Further, this successful business answers America's objections to attorneys' fees shifting addressed below, and provides solutions to the current litigation problems in the United States.

III. HISTORY OF FEE SHIFTING IN AMERICA

Although the American common law system was derived from and maintains its roots in the English legal system, the general rule in America is that attorneys' fees will not be shifted to the losing party. In the United States, each party bears the cost of her representation. However, America once utilized the English Rule, in which the prevailing party's attorneys' fees were paid by the losing litigant. These statutes, mandating the shifting of attorneys' fees, were repealed or expired by 1800.

Various reasons have been set forth regarding the rationale behind the sweeping abandonment of the English tradition of fee shifting. First, “it was asserted that there was great diversity in practice among the courts . . . .” Second, it was believed “losing litigants were being unfairly saddled with exorbitant fees for the victor's attorney.” Third, some thought fee shifting “punish[ed] litigants for the honest exercise of their rights to go to court . . . .” These scholars noted the English Rule “discourage[d] valid and even important claims and defenses.” One scholar noted fee shifting favors the wealthy because “a poor man 'might often become a prey of a dishonest adversary from sheer want of funds to

67. See id.
68. Id. at 247–48.
69. Id. (noting Congress mandated federal courts follow the state courts' use of fee shifting).
70. Id. at 249.
71. Id. at 251 (citing CONG. GLOBE, 32d CONG., 2d SESS. 207 (1853) (statement of Sen. Bradbury)).
72. Id. (citing CONG. GLOBE, 32d CONG., 2d SESS. 207 (1853) (statement of Sen. Bradbury)).
73. DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 277 (2d ed. 1993).
74. Id.
To protect his rights.” 75 To avoid these consequences, America adopted the American Rule, by which “the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the [losing party].” 76

As outlined in Part IV, the above-mentioned objections to the English system of shifting attorneys’ fees are overcome through the adoption of the New English Rule, which utilizes after-the-event insurance to rebut the objections. After addressing these objections, states can overcome the current litigation problems by implementing attorneys’ fees shifting as the general rule.

IV. AFTER-THE-EVENT INSURANCE: THE ANSWER TO OBJECTIONS TO FEE SHIFTING

Recognizing the reasons by which the United States tried but eventually disregarded the English Rule of shifting attorneys’ fees, it is important the objections to shifting the burden of attorneys’ fees to unsuccessful litigants are addressed before one stands at the door of legislatures seeking a change in the current American Rule. Assuming, arguendo, the previously identified objections to fee shifting are legitimate, the following section illustrates these objections are overcome by the New English Rule—attorneys’ fees shifting coupled with after-the-event insurance. 77

A. Past Objection: Inconsistent Practice of Shifting Attorneys’ Fees

The first objection to the English Rule is “that there was great diversity in practice among the courts” regarding the administration of shifting attorneys’ fees. 78 This objection can be overcome by adopting uniform statutes throughout state legislatures.

The rule of shifting fees is not the exception in England; rather, it is a uniform guideline that shifts attorneys’ fees to either successful party. 79
such, English litigants are not left trying to make their suit fit into an exception so as to be awarded attorneys’ fees if successful on the merits.80 The appropriate response to the early recognition of inconsistency in the American attempt at utilizing fee shifting was not to abandon it, but to fix it.

When states are faced with inconsistent laws governing various issues, the states do not simply abandon the cause. To combat the problem, legal scholars, attorneys, professors, and judges convene to draft a uniform code all states could adopt for consistency. For example, to promote consistency in commercial transactions, the Uniform Commercial Code (UCC) was drafted in 1952 to be adopted later by states.81 When states lacked uniformity on issues of jurisdiction over child custody matters, the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) was drafted in 1997 and later adopted by states.82

A similar approach should be relied upon in addressing the inconsistency of shifting attorneys’ fees. Rather than abandoning this important theory,83 a uniform act or code should be drafted and submitted to states for adoption. A single piece of legislation, uniform across all states, will obviously promote consistency and successfully rebut this objection regarding inconsistent application.

B. Past Objection: Losing Litigants Were Burdened With Large Costs

The second objection to the English Rule was “that losing litigants were being unfairly saddled with exorbitant fees for the victor’s attorney.”84 To properly address this objection, it should be broken into two parts: the first focusing on the high cost of attorneys’ fees, and the second centering

83. As explained in the final section of this Note, shifting attorneys’ fees is an important remedy for the current litigation problems in the United States.
on whether a losing litigant can adequately saddle such costs.

1. **High Cost of Attorneys' Fees**

To properly dispose of the first part of the objection, various measures should be taken. England has adopted rules giving the court discretion in awarding the amount of such fees.\(^{85}\) The court can consider the proportionality and reasonableness of the amount\(^{86}\) in addition to the following:

\[\text{The conduct of all the parties . . . ; the amount or value of any money or property involved; the importance of the matter to all the parties; the particular complexity of the matter or the difficulty or novelty of the questions raised; the skill, effort, specialised knowledge and responsibility involved; the time spent on the case; and the place where and the circumstances in which work or any part of it was done.}\(^{87}\)

Alaska, a state that has adopted a limited use of fee shifting,\(^{88}\) has adopted a list of factors for a court to consider when awarding attorneys' fees. Alaska courts consider:

(A) the complexity of the litigation; (B) the length of trial; (C) the reasonableness of the attorneys' hourly rates and the number of hours expended; (D) the reasonableness of the number of attorneys used; (E) the attorneys' efforts to minimize fees; (F) the reasonableness of the claims and defenses pursued by each side; (G) vexatious or bad faith conduct; (H) the relationship between the amount of work performed and the significance of the matters at stake; (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts; (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and (K) other equitable

\(^{85}\) **ENG. CIV. P. R. 44.5.**

\(^{86}\) **Id.**

\(^{87}\) **Id.**

\(^{88}\) Rule 82 of the Alaska Rules of Civil Procedure sets forth a fee shifting schedule that allows the court to shift between one and twenty percent of the judgment amount for attorneys' fees. **ALASKA R. CIV. P. 82(b)(1).** The schedule sets forth the maximum amount that can be shifted by considering the size of the judgment as well as whether the case went to trial, whether it was contested and settled without progressing to trial, or whether it was uncontested. **Id.**
factors deemed relevant.89

Even the United States Supreme Court adopted factors to consider when awarding attorneys’ fees under federal statutes allowing such an award.90 For example, in *Fogerty v. Fantasy Inc.*, the Court noted the lower court on remand should consider the “‘frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence’” when awarding attorneys’ fees under the federal Copyright Act.91

State legislatures, when adopting a fee shifting statute, should include factors similar to those used in England and Alaska and by the United States Supreme Court to ensure parties do not improperly inflate the cost of litigation simply because the opposition may have to pay attorneys’ fees. These factors can be included in the uniform code or act as discussed. By doing so, each state will provide its judges with consistent factors by which they can assess and demand the reasonableness of the party’s attorneys’ fees.

2. *A Losing Litigant’s Ability to Shoulder the Attorneys’ Fees Shifted to Her*

After-the-event insurance protects both the plaintiff and the defendant from the second part of the objection above—whether a losing litigant can adequately shoulder such costs. If the plaintiff’s attorney took the case on a contingent fee basis and lost, the plaintiff will not have any attorneys’ fees to pay. However, if the unsuccessful plaintiff was represented by an attorney under an hourly fee agreement, after-the-event insurance will pay her attorneys’ fees.92 The insurance will also pay the

89. *Id.* at 82(b)(3). These factors are considered in determining the amount to be shifted if it varies from the amount listed in Rule 82(b)(1). *Id.* at 82(b)(1).

90. The cases in which Congress has enabled fee shifting are extremely limited. When Congress has allowed such fee shifting, it is generally one-way whereby only a successful plaintiff can obtain attorneys’ fees—a successful defendant is not allowed the same. *See, e.g.*, 42 U.S.C. § 1988 (2006). Patent, trademark, and copyright suits, however, allow “[t]he court in exceptional cases [to] award reasonable attorney fees to the prevailing party.” 17 U.S.C. § 505 (2006) (emphasis added); *see also* 35 U.S.C. § 285 (2006); 15 U.S.C. § 1117(a) (2006).


92. *See SIME, supra* note 8, at 40.
successful defendant’s attorneys’ fees shifted to the losing plaintiff.93

The same coverage would apply to an unsuccessful defendant who has after-the-event insurance. However, after-the-event insurance for a defendant may be expensive because the defendant risks having to pay attorneys’ fees in addition to the risk of a monetary judgment levied against her.94 The premise of the New English Rule is not concerned with the impact an adverse judgment will have on a defendant found liable. The purpose of this Note is not to absolve a liable defendant of the consequences of her conduct. If a jury deems a defendant liable, then it is the defendant’s responsibility to determine how to handle the burden of an adverse judgment and shifting of fees. For an analysis on diversifying or spreading out the risk of an adverse judgment, readers should consult additional commentary.95

C. Past Objection: Shifting Attorneys’ Fees Discouraged Valid Claims and Defenses

The third objection to the English Rule of shifting attorneys’ fees was that it “discourage[d] valid and even important claims and defenses.”96 This is another objection to which after-the-event insurance provides an answer. Plaintiffs obtaining after-the-event insurance no longer have to fear losing their cases and having their opponent’s attorneys’ fees assessed against them because the after-the-event insurance provider is then liable for the fees shifted to the litigant.97

From the defendant’s perspective, fees shifting may actually encourage asserting a valid defense. The defendant no longer needs to limit the time spent on her defense, as the additional time spent on a counter-claim or a sophisticated defense, possibly resulting in larger attorneys’ fees, is of no consequence to the defendant if she is successful. These costs will be shifted to the losing plaintiff.

V. THE NEW ENGLISH RULE: THE SOLUTION TO A GROWING AMERICAN PROBLEM

When America abandoned the English Rule in 1800, our legal system

93. See id.
94. See id. (noting the cost of after-the-event insurance and the increase in the cost based upon the risk of defeat and the level of the opponent’s cost).
95. See, e.g., Molot, supra note 15, at 380–81.
96. DOBBS, supra note 73, at 277.
97. See SME, supra note 8, at 40.
abandoned a tradition more than 500 years old.\textsuperscript{98} Just 200 years after the adoption of the American Rule, litigation costs total three times more in America than those in the United Kingdom.\textsuperscript{99} Many additional adverse consequences have resulted from the abandonment of fee shifting and adoption of the American Rule.

Fee shifting, in conjunction with after-the-event insurance, has potential to go beyond simply fixing the problems that led America to adopt the American Rule. This package is also a solution to the current broken civil litigation system in America. This Part identifies the problems in the current American litigation system and uses the New English Rule as a solution to these injustices.

A. Current Problem: Plaintiff Is Left in Less than Whole Position

Damages should place the plaintiff in a fully indemnified position;\textsuperscript{100} however, the American Rule leaves a successful plaintiff in a less-than-whole position. Even if the plaintiff is successful, the plaintiff is left paying her attorneys’ fees.\textsuperscript{101} Whether hourly or contingent fee, the amount of the damage awarded to the plaintiff is reduced by the plaintiff’s attorneys’ fees, leaving the plaintiff in a less than fully-indemnified position.

The New English Rule will leave a successful plaintiff in a whole position. If adopted by the United States, this rule would require a liable defendant to pay plaintiff’s attorneys’ fees, in addition to paying the plaintiff damages.\textsuperscript{102} In other words, the rule would allow a plaintiff to keep the entire judgment awarded to her rather than having to pay her attorney an hourly fee or one-third of the damage award on a contingent fee arrangement. A simple mathematical equation best exemplifies this. Consider the following facts:

\textsuperscript{98} As noted, the first English statute permitting the shifting of attorneys’ fees was instituted in 1278. Statute of Clou cester, 6 Edw., c. 1 (1278) (stating “it is [p]rovided, that the [d]emandant may recover against the Tenant the Costs of his Writ purchased, together with the [d]amages abovesaid”).

\textsuperscript{99} See Baye, Kovenock & de Vries, \textit{supra} note 1, at 584.
\textsuperscript{100} \textit{DOBBS, supra} note 73, at 210.
\textsuperscript{101} Alyeska Pipeline Serv. Co. \textit{v.} Wilderness Soc’y, 421 U.S. 240, 247 (1975) (“In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys’ fee from the loser.”).
\textsuperscript{102} \textit{See id.} at n.18 (explaining a similar application used as early as 1278, where England statutorily allowed attorneys’ fees to be awarded in addition to claims for damages).
Plaintiff is awarded $10,000 in damages. Plaintiff has $3,300 in attorneys’ fees.103

The current American Rule would require the plaintiff to pay her own attorneys’ fees, so the plaintiff would be left with $6,700—$10,000 in damages minus the $3,300 owed to her attorneys. The New English Rule would allow the plaintiff to keep the entire $10,000 because the defendant would pay the $3,300 to the plaintiff’s attorneys for their fees. Essentially, the current American Rule leaves the plaintiff in a position less than that which the fact-finder believed the plaintiff should be. If the fact-finder awarded the plaintiff $10,000, then the plaintiff was found to be entitled to this amount, not the amount minus her attorneys’ fees.104

B. Current Problem: A Successful Defendant is Left in an Unjust Position

The American Rule also leaves a successful defendant in an unjust position. Because each party is burdened with her own attorneys’ fees,105 the cost of litigation can leave the defendant severely in debt, even without being found liable. This means a successful defendant, even though found not liable, may still have to pay large amounts to her defense counsel. Consider this example of the broken American legal system:

Andrew sues Ryan for breach of contract, claiming $150,000 in damages. In his complaint, Andrew alleges Ryan failed to deliver goods as required by the contract signed by both parties. However, Ryan has a good reason for not delivering the goods: the contract requires payment before delivery, and Andrew has not tendered payment.

A claim for $150,000 is much too risky for Ryan to proceed pro se, so Ryan hires Kristin to represent him. Kristin successfully asserts his defense and wins the case on a motion for summary judgment. She then sends Ryan a bill for legal services totaling $25,000.

In this example, even though Ryan successfully asserted his defense, he is left paying a $25,000 fee to his attorney.106 This illustration is

103. This amount could be from either an hourly fee or a contingent fee arrangement.
104. The jury as the fact-finder looks to make the plaintiff whole and assumes the total damage award will do just that.
105. Alyeska Pipeline, 421 U.S. at 247.
106. It is recognized that some contracts shift attorneys’ fees should a party to the contract have to enforce it through litigation. However, this is likely the exception
extremely problematic for corporations, especially companies facing numerous litigious transactions. Two variables increase the cost to such defendants: the number of cases and the cost of each case. The general cost of litigation is calculated by multiplying these two variables.\textsuperscript{107} Using the illustration above, the more that plaintiffs, like Andrew, sue corporate entities and require them to litigate, the more money such corporate entities are forced to pay Kristin, their attorney. Further, the more each case costs Ryan, the defendant, the more expensive his overall expenses will be.

The adoption of the New English Rule will leave a successful defendant in a whole position by reducing the cost of each case and reducing the number of frivolous claims. After the adoption of the New English Rule, if a defendant is involuntarily dragged into court and found not liable, he will not be left with an exorbitant amount of attorneys’ fees to defend such innocence. Reflecting on the illustration above, when Ryan wins his case, Andrew would have to pay Kristin the $25,000 for the legal services she rendered in Ryan’s defense.

The New English Rule also reduces the number of frivolous cases filed against defendants. Fee shifting will be used to deter illegitimate claims as plaintiffs will be faced with the burden of paying the defendant’s attorneys’ fees. Because “[t]he possibility of having to pay the lawyer’s bills of both parties to the action makes a plaintiff think twice before he sues out a writ,” plaintiffs will more likely think twice before filing a frivolous lawsuit.\textsuperscript{108}

An argument can be made that the corporate-defendant has deeper pockets than a sole plaintiff and, accordingly, is rightfully saddled with the cost of paying its attorney. Such a position is remedially flawed. No to the rule of contracts—especially oral contracts. Regardless, as continuously asserted throughout, successful parties should not be left vulnerable because their ability to obtain a fully indemnified position rests on a particular writ or because they lacked the foresight to include it in a contract, which was likely drafted when the parties were amicable. The injustice in the system is best exemplified by those who did not have such foresight, so the example utilizes a contract absent a fee shifting provision.


\textsuperscript{108} Goodhart, \textit{supra} note 35, at 876 (quoting from an assertion as to why Massachusetts desired fee shifting as a way to eliminate illegitimate or frivolous claims).
remedies treatise relies upon the wealth of a party when determining that party’s rightful position. Considering the wealth of either the plaintiff or the defendant in determining which is in a better position to be burdened with the cost of litigation is not only irrelevant, but also unjust.\(^{109}\)

C. Current Problem: High Cost of Litigation Deters Meritorious Claims

The high cost of litigation in the current American civil litigation system deters even meritorious claims.\(^{110}\) This problem occurs when a plaintiff needs to spend more on representation than the claim is worth. For example, it is not economical for a plaintiff to file suit over a $10,000 contract claim when it would cost the plaintiff $30,000 under the current American Rule to obtain a judgment against the defendant. Such a venture would result in the plaintiff losing $20,000, even if she is successful and collects on the judgment. Because the fact-finder sought to award $10,000 to the plaintiff, this is a much less than rightful position—an injustice to the plaintiff.\(^{111}\) Ironically, the concern of deterring meritorious claims was a reason for America ridding itself of the English Rule that allows fee shifting.\(^{112}\) Unfortunately, the system replacing it actually deters meritorious claims such as these.

In the example above, fee shifting would allow the plaintiff to successfully obtain the $10,000 and not have to pay any of the $30,000 owed to her attorneys. Instead, the losing party would pay such a bill. If the goal of remedies is truly to place the plaintiff in a fully indemnified position,\(^{113}\) then the American Rule, as now in place, certainly fails to achieve such a goal. Meanwhile, the New English Rule places the plaintiff in a fully indemnified position. Replacing the American Rule with the New English Rule would achieve this goal in all meritorious claims.

D. Current Problem: The American Rule Is Full of Exceptions

The American Rule is now full of exceptions. Again, one of the reasons listed by American courts and scholars for moving away from the

\(^{109}\) See DOBBS, supra note 73, at 210 (noting the goal is to put the plaintiff in the rightful place, without mention of money).

\(^{110}\) See Stephen Croley, Summary Jury Trials in Charleston County, South Carolina, 41 LOY. L.A. L. REV. 1585, 1587 (2008) (“Civil justice reformers selectively ignore the problems faced by plaintiffs with meritorious claims for whom the costs of litigation are too high relative to the small size of their damages.”).

\(^{111}\) See DOBBS, supra note 73, at 210.

\(^{112}\) Id. at 277.

\(^{113}\) See id. at 210.
English Rule was lack of consistency when implementing it in the United States. However, because attorneys’ fee shifting has become the exception as opposed to the norm, the general American Rule is filled with inconsistencies.

Some federal statutes allow fee shifting under specific circumstances. 42 U.S.C. § 1988 provides that when suing under certain enumerated federal statutes, “the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.” Also, Title VII of the Civil Rights Act of 1964 contains a fee shifting exception, which allows a court to award reasonable attorneys’ fees as part of costs to defendants who successfully defend against a claim under the statute.

States have also adopted statutes and rules allowing for shifting of attorneys’ fees. For example, Nebraska has adopted a statute that provides, in part:

In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy, except workers’ compensation insurance, or upon any certificate issued by a fraternal benefit society, against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney’s fee in addition to the amount of his or her recovery, to be taxed as part of the costs.

Finally, some contracts explicitly provide that if a party breaches her obligation, the breaching party is liable to the nonbreaching party for attorneys’ fees incurred while attempting to enforce or litigate the terms of the contract. These contracts represent voluntary steps taken by parties to ensure, should they have to litigate to enforce their rights under the contract, they will be left in a wholly indemnified position at the conclusion of the litigation.

As discussed above, by adopting a uniform code or act awarding

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116. 42 U.S.C. § 2000e-5(K); see also Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412 (1978) (holding a defendant may be awarded fees, though an award was not justified in this case).
117. NEB. REV. STAT. ANN. § 44-359 (LexisNexis 2010).
attorneys’ fees to successful litigants, parties are not forced to fit their case within a given statute or cause of action that shifts attorneys’ fees. Adopting the New English Rule would allow parties to litigate by asserting their best claims and defenses without constraints, while knowing if they are successful, the other party will pay their litigation costs.

VI. CONCLUSION

Justice is only achieved if litigants have a mechanism by which it can be exercised. Currently, the American litigation system denies individuals this opportunity because of the high cost of litigation. As exhibited above, neither successful plaintiffs nor successful defendants are left in a fully indemnified position. Through adoption of the New English Rule—attorneys’ fees shifting and after-the-event insurance—the courthouse doors will once again be opened to all litigants, regardless of wealth status. This solution rebuts the reasons set forth for America’s abandonment of fee shifting and places the cost of litigation on the rightful party: the losing litigant.

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