THE END OF THE PUBLIC INTEREST EXCEPTION: PREVENTING THE DETERRENCE OF FUTURE LITIGANTS WITH RULE 82(b)(3)(I)

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ABSTRACT

The public interest exception to Alaska's loser-pays attorneys' fees rule has been overruled, but, under Rule 82(b)(3)(I), courts may still vary fee awards on a case-by-case basis to avoid deterring future litigants. The result of this transition is that the costs of litigation are highly unpredictable for prospective plaintiffs. While the cases that developed the public interest exception are no longer good law, their logic does offer some guidance for judges wishing to protect court access. Even if courts tend to follow these principles, however, plaintiffs will remain unable to adequately gauge the costs of undertaking a lawsuit until new doctrine is developed that alleviates the uncertainties of the current regime. For plaintiffs bringing particular types of claims, Alaska's courts may be an insuperably risky destination. Even meritorious claims can become bad investments when the potential costs too significantly outweigh the prospective benefits.

"The first thing we do, let's kill all the lawyers."[1]

So goes the most famous crack ever taken at our profession's expense. As Jack Cade, leader of a popular revolt against King Henry VI, describes the utopia that awaits his followers, his clever henchman Dick the Butcher coins one of Shakespeare's most well-known lines: "let's kill

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1. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.1, 239 (Oxford 2003).

all the lawyers."[2] It is to be the first step towards a better world. The devil, of course, is in the details, for Cade's wonderland is a world where his whim alone rules the land; where life, liberty, and property know not the protections of the law.[3] The freedoms we enjoy are only as firm as the laws that protect them, and if a man cannot bring his claim before a court, what claim does he have? We are lucky not to live in Cade's dystopian fantasy. When laws are violated, we can hire a lawyer. The only question for us is who has to pay.

INTRODUCTION

In today's world of increasingly expensive litigation, Alaska remains unique in the United States for awarding partial attorneys' fees to prevailing parties in most civil cases.[4] While other states use the so-called "American Rule," where each party pays its own way independently,[5] Alaska uses a variant of the "English Rule."[6] Jurisdictions using the English Rule make the losing party responsible for all or a part of the prevailing party's attorneys' fees.[7] In Alaska, the default is either a scheduled percentage of the monetary damages awarded,[8] or 30% of the prevailing party's "reasonable actual" attorneys' fees when no money judgment is recovered.[9]

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2. *Id.*

3. Cade detests that the law should bind him:

> Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment; that parchment, being scribbled o'er, should undo a man? Some say the bee stings, but I say, 'tis the bee's wax; for I did but seal once to a thing, and I was never mine own man since.

Id. at sc. 4.2, 71–76.

4. There are some exceptions that pepper the general rule. *See, e.g.*, Dodson v. Dodson, 955 P.2d 902, 914 (Alaska 1998) (stating special standard for awarding attorneys' fees in divorce cases).

5. BLACK'S LAW DICTIONARY 98 (9th ed. 2009). *See also* Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2097 (1985) ("In the U.S. the so-called 'American rule' is the norm; under it attorneys' fees are not ordinarily paid by the losing party, though courts have power so to order when the loser is deemed to have litigated frivolously or in bad faith, and under certain statutes, *e.g.*, some dealing with civil rights and conservation.").

6. *See* Theodore Eisenberg, et al., *When Courts Determine Fees in A System with A Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452, 1454 (2013) ("In the state of Alaska and in most Western legal systems other than the United States, the prevailing norm is the English rule, under which the losing party is required to pay the reasonable litigation costs incurred by the winning party.").

7. BLACK'S LAW DICTIONARY 609 (9th ed. 2009); Leff, *supra* note 5, at 2097.

8. ALASKA R. CIV. P. 82(b)(1).

9. ALASKA R. CIV. P. 82(b)(2).

Judges retain discretion to vary these awards,[10] and considerable case law has evolved to guide judges in this exercise. Alaskan citizens have a right under both the Alaskan and Federal Constitutions to access the courts as a forum for resolving their disputes,[11] and so judges must prevent attorneys' fees awards from becoming so onerous that they might deter similarly situated litigants from bringing claims in the future.[12] One of the most significant remedies created to address the possibility of deterrence was the public interest exception, which exempted qualifying plaintiffs from paying their opponents' attorneys' fees if they lost, but awarded the plaintiffs full (rather than partial) attorneys' fees from the other side if they won.[13] The public interest exception applied whenever a litigant's case: (1) effectuated strong public policies, (2) would benefit numerous people, (3) could only have been brought by a private party, and (4) would not have been otherwise motivated by sufficiently strong economic incentives.[14] For better or worse, this exception was abolished in 2003 by the Alaska state legislature.[15]

The public interest exception was overturned by an act informally referred to as "HB 145."[16] After its passage, this law was challenged in *State v. Native Village of Nunapitchuk*.[17] Although the supreme court ultimately upheld HB 145,[18] it was only able to save it from unconstitutionality by finding that it in no way modified Rule 82(b)(3)(I), which expressly grants trial courts the authority to vary an attorneys' fees award based on "the extent to which [the] 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."[19] In other words, after HB 145, trial courts remain free to consider all relevant factors, including all of those identified in the public interest

10. ALASKA R. CIV. P. 82(b)(3).
11. *See* Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (finding a right of access to civil courts under the Due Process Clause of the Fourteenth Amendment to the United States Constitution); State v. Native Vill. of Nunapitchuk, 156 P.3d 389, 405 (Alaska 2007) ("Our cases have recognized that the due process clause of the Alaska Constitution guarantees the right of access to Alaska's courts.")
12. *Nunapitchuk*, 156 P.3d at 406 (holding that courts can still shield litigants from attorneys' fees awards in order to prevent deterrence despite legislative action appearing to limit this ability).
13. *Id*.
14. *Id*. at 394.
15. HB 145, 2003 Alaska Sess. Laws ch. 86 (codified as amended at ALASKA STAT. §§ 09.60.10, 09.68.040 (2014)).
16. *Id*.
17. 156 P.3d 389.
18. *Id.* at 406.
19. *Id.* at 404 n.68.

exception, when deciding whether or not to reduce attorneys' fees awards to avoid unconstitutional future deterrence.[20] Nonetheless, which factors to use, and their respective weights, is no longer clear. The structure and attendant predictability of the public interest exception are gone; instead, courts may apply Rule 82(b)(3)(I) "on a case-by-case basis," considering whichever factors they deem relevant and weighing those factors however they find appropriate.[21]

This renders the costs of litigation highly unpredictable for prospective plaintiffs. While the logic of the cases that developed the public interest exception is still sound, the cases themselves are no longer good law after HB 145. One can distill some guiding principles from a close study of the case law, but, until new doctrine is developed, plaintiffs will remain unable to adequately gauge the costs of undertaking a lawsuit. For plaintiffs bringing certain types of claims, this may make Alaska's courts an insuperably risky destination; even meritorious claims can become bad investments when the potential costs are too high.

Alaska has struggled over the years to find a balance between its English Rule and the constitutional rights of litigants to access its courts.[22] After the passage of HB 145 and the *Nunapitchuk* decision, it is clear that this endeavor has not yet reached its end.

I. BACKGROUND

Use of the English Rule in Alaska arrived with the adoption of Oregon law in the mid-1800s and never left.[23] After Alaska achieved statehood, the English Rule became codified in Alaska's Rule 82 of Civil Procedure and was adopted by the Alaska Supreme Court in 1960.[24] Thereafter, as Alaska's court system matured, the supreme court undertook the gradual process of carefully delineating the outer edges of trial courts' discretion in assessing awards of attorneys' fees under Rule 82. Awards so onerous that they could deter similarly situated litigants were emphatically marked as an abuse of discretion.[25] It was

20. *Id.* at 406.
21. *Id.*
22. *See* discussion in Part II, *infra*.
23. Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 38 (1996).
24. *See* Alaska Sup. Ct. Order No. 17 (1960) (activating Alaska's state court system); ALASKA R. CIV. P. 82.
25. *See, e.g.*, Malvo v. J.C. Penney Co., 512 P.2d 575, 587 (Alaska 1973) (finding it "manifestly unreasonable" and an abuse of discretion to automatically award full attorneys' fees against a losing party).

from this line of cases that the public interest exception emerged.[26]

Rule 82, Alaska's fee shifting rule, provides partial recompense for the prevailing party's attorneys' fees to effect a more complete recovery.[27] It was never intended to punish losing parties.[28] Commentators have held out Alaska's English Rule as a tort reform solution, but this was never its stated purpose, nor has empirical evidence suggested that it is actually achieving this goal.[29] Nonetheless, policy-makers and commentators persist in discussing the prevention of frivolous claims as a de facto rationale for using the English Rule in Alaska.[30]

A. The Public Interest Exception

While the English Rule seems no closer to ending its reign in Alaska now than it did in the 19th century, there has been considerable discussion over the years about its capacity to deter litigants.[31] Plainly,

26. *See* HB 145, 2003 Alaska Sess. Laws ch. 86 § 1(b) (listing major cases in the development of the public interest exception for the purpose of overruling them); *Nunapitchuk*, 156 P.3d at 394 (citing *Malvo* as the first major case in the development of the public interest exception). *See also, e.g.*, Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974) (citing deterrence as rationale); Anchorage v. McCabe, 568 P.2d 986, 990 (Alaska 1977) (citing deterrence as rationale); Kenai Lumber Co., Inc. v. State, 646 P.2d 215, 222 (Alaska 1982) (citing deterrence as rationale).

27. *See Nunapitchuk*, 156 P.3d at 398 ("Without the rule, the rights of the prevailing party would be less completely vindicated because of the uncompensated expense of litigation.").

28. *See Malvo*, 512 P.2d at 587 ("The purpose of Civil Rule 82 is to partially compensate a prevailing party for the costs and fees incurred where such compensation is justified and not to penalize a party for litigating a good faith claim.").

29. *See* Douglas C. Rennie, *Rule 82 & Tort Reform: An Empirical Study of the Impact of Alaska's English Rule on Federal Civil Case Filings*, 29 ALASKA L. REV. 1, 2–3 (2012) (noting that "some academic and media commentators have [recently] suggested that other states use Alaska's Rule 82 as a model for tort reform"); *id.* at 43 ("Data from the federal courts show that civil and tort filings in the District of Alaska, while below the national average, resembled those in a sample of similar districts.").

30. *See, e.g.*, *HB 145–Attorney Fees: Public Interest Litigants*, Committee Minutes, ALASKA H. JUDICIARY STANDING COMM., 23rd Leg. (May 7, 2003) (statement of Benjamin Brown, Legislative Assistant, Alaska State Chamber of Commerce at 1:40 PM) ("The [Alaska State Chamber of Commerce] supports Rule 82 [attorneys'] fees because this modification of the English rule puts an incentive into the litigation process that makes people not file frivolous suits and realize that there may be a downside to their causing others to spend money to defend a suit that is not likely to be prevailed upon."), *available at* http://www.legis.state.ak.us/pdf/23/M/HJUD2003-05-071340.PDF.

31. *See* Kevin Michael Kordziel, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 444–45 (1993) ("[T]he most significant divergence

anything that can potentially increase the cost of a lawsuit runs the risk of dissuading prospective litigants. One tool that developed to address this concern was the public interest exception.

Prior to the legislature's passage of HB 145 in 2003, the public interest exception granted special status to plaintiffs bringing claims that exhibited the following four attributes: (1) "the effectuation of strong public policies"; (2) "the fact that numerous people received benefits from plaintiffs' litigation success;" (3) "the fact that only a private party could have been expected to bring this action," and (4) "whether a litigant claiming public interest litigant status would have a sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance."[32] The defensive element of the exception held that no attorneys' fees could be assessed against such a plaintiff, if she lost. The affirmative component provided that, if such a litigant prevailed, she was "generally entitled to full, reasonable attorney's fees."[33] Even winning on "some but not all issues" would entitle a plaintiff to full fees, so long as Alaska law indicated she was the prevailing party in the suit.[34]

This exception developed from a line of cases preoccupied with court access for plaintiffs deemed especially vulnerable to deterrence.[35]

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of opinion between plaintiffs' and defense lawyers [in a survey of the Alaska Bar] occurred over the questions that specifically focused on [court access]."). *See also, e.g.*, Bozarth v. Atl. Richfield Oil Co., 833 P.2d 2, 4 n.3 (Alaska 1992) ("It may be . . . that costs of litigation have increased to such an extent that the prospect of having to pay Rule 82 fees deters a broad spectrum of our populace from the voluntary use of our court."). There has also been significant scholarly discussion over the years regarding deterrent effects of the English Rule as a general fee shifting paradigm outside of Alaska. *See* Jonothan T. Molot, *Fee Shifting and the Free Market*, 66 VAND. L. REV. 1807, 1811 (2013) ("[W]here 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. 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.").

32. *Nunapitchuk*, 156 P.3d at 394.

33. *Id.* at 395.

34. *Id. See* Dansereau v. Ulmer, 955 P.2d 916, 920 (Alaska 1998) (holding that awards of attorneys' fees to public interest litigants should not usually be partitioned once the party has been determined to have prevailed).

35. *Cf. Nunapitchuk*, 156 P.3d at 394 (recounting history of public interest exception); HB 145, 2003 Alaska Sess. Laws ch. 86 § 1(b) (codified as amended at ALASKA STAT. §§ 09.60.10, 09.68.040 (2014)) (listing the main cases it was intended to overrule in abolishing the public interest exception). *See also* discussion *infra* Parts I.B–C.

These cases subdivide, usefully, into two strands.[36] The first deals with the protective component of the exception: immunizing losing plaintiffs from having to pay for the defendants' attorneys' fees. These cases were primarily concerned with making sure that the cost of accessing the courts was not too high. The second strand added the affirmative component: entitling prevailing public interest plaintiffs to full reasonable attorneys' fees. These cases dealt less with the potentially chilling cost that could arise from having to pay a *defendant's* attorneys' fees, and focused instead on who would have to pay for the *plaintiff's* attorney. While both sets of cases had the underlying goal of ensuring that plaintiffs could bring their claims before Alaska's courts, they each approached a different half of the problem.

B. The Protective Strand: Court Access

The public interest exception was born from a series of cases beginning in 1973.[37] When it was first created, the public interest exception was only protective in nature, concerned primarily with ensuring that Alaska's English Rule did not infringe upon court access. In *Malvo v. J.C. Penney Co.*,[38] the Alaska Supreme Court held that it was manifestly unreasonable to award full attorneys' fees to a prevailing party automatically, unless the losing claim or defense had been brought in bad faith.[39] The court reasoned that "where in order to seek judicial remedies, a plaintiff must risk liability for the full amount of attorney's fees the other side sees fit to incur, it takes little imagination to foresee that the size of a party's bank account will have a major impact on his access to the courts."[40] Although the court made a point of not actually reaching the constitutional issue in this case,[41] it expressly noted that

36. *Cf.* Krone v. State, Dep't of Health & Soc. Servs., 222 P.3d 250, 253 (Alaska 2009) (discussing differences between two components of the public interest exception); *Nunapitchuk*, 156 P.3d at 403–04 (detailing differences between two components of the public interest exception).

37. *See Nunapitchuk*, 156 P.3d at 394–95 (recounting history of public interest exception); HB 145, 2003 Alaska Sess. Laws ch. 86 § 1(b) (listing the main cases HB 145 was intended to overrule in abolishing the public interest exception).

38. 512 P.2d 575 (Alaska 1973).

39. *See id.* at 587 ("If a successful litigant were to receive full reimbursement for all expenses incurred in the case with no requirement of justification and no consideration of the 'good faith' nature of the unsuccessful party's claim or defense, there would be a serious detriment to the judicial system.").

40. *Id.*

41. *See id.* ("We do not have to reach the constitutional issue since it is 'manifestly unreasonable' to establish a policy under Civil Rule 82 that would enable a store owner to receive such a sizeable allowance for attorney's fees against a party who has brought suit in good faith.").

such a cost requirement could jeopardize a party's due process rights under the Fourteenth Amendment of the United States Constitution.[42]

A year later, in *Gilbert v. State*,[43] the court extended *Malvo* and formally established the protective component of the public interest exception, holding that it was an abuse of discretion to award *any* attorneys' fees at all "against a losing party who [had] in good faith raised a question of genuine public interest before the courts."[44] The plaintiff, Gilbert, sought a declaratory judgment regarding the State's residency requirement for those who wished to hold public office.[45] After Gilbert lost the case, the trial court awarded attorneys' fees against him, and Gilbert appealed.[46] Overturning the fees award, the supreme court built upon *Malvo*'s proposition that Rule 82 was not intended to penalize losing litigants.[47] The court noted that it had considered adopting a public interest exception to protect losing litigants twice before, but that the facts presented in each of the earlier cases had weighed against doing so at the time.[48]

The cases referenced by the *Gilbert* court were *Jefferson v. City of Anchorage*[49] and *Mobil Oil Corp. v. Local Boundary Commission*.[50] In *Jefferson,* the court remarked that an award of $2,000 might have been excessive in light of the public interest nature of the suit, but for the fact that the plaintiff's case "so clearly lacked merit" as to nullify any claim that the public interest was being vindicated.[51] In *Mobil Oil Corp.*, a group of corporations sought a declaratory judgment regarding the lawfulness of a state agency's decision.[52] After they lost, the plaintiffs appealed the award of attorneys' fees against them and argued that the fear of incurring an adverse fee award would deter citizens from litigating questions of general interest to the community.[53] However, as in *Jefferson*, the court refrained from exploring the idea of a public

42. *Id*. *See also Nunapitchuk*, 156 P.3d at 394 ("In *Malvo* . . . [t]he court noted that such a cost requirement could offend due process by limiting access to the court."); Bozarth v. Atl. Richfield Oil Co., 833 P.2d 2, 5 (Alaska 1992) (Matthews, J., dissenting) (explaining the supreme court had previously "recognized the right of access to the courts in the specific context of court awarded attorney's fees" in its *Malvo* opinion).

43. 526 P.2d 1131 (Alaska 1974).

44. *Id*. at 1136.

45. *Id*. at 1131–32.

46. *Id*. at 1136.

47. *Id*.

48. *Id*. ("We have previously intimated that denial of attorneys' fees might be appropriate where the public interest is involved.").

49. 513 P.2d 1099.

50. 518 P.2d 92.

51. *Jefferson*, 513 P.2d at 1102.

52. *Mobil Oil Corp.*, 518 P.2d at 96.

53. *Id*. at 104.

interest exception, because the financial stakes in the *Mobil Oil Corp.* controversy were "large enough to prompt a suit without consideration of the public interest" at all.[54]

As in these cases, the plaintiffs in *Gilbert* argued "that awarding fees in this type of controversy [would] deter citizens from litigating questions of general public concern for fear of incurring the expense of the other party's attorneys' fees."[55] Unlike in the prior cases, however, the court saw no fault with the facts presented in *Gilbert* and held that attorneys' fees should not be awarded against litigants who, in good faith, bring claims of public interest before the court.[56]

The court's hesitance to reach a similar result in *Mobil Oil Corp.* where there were powerful financial incentives to bring the suit regardless of the public interest, emphasizes that the potential for deterrence was the primary rationale underlying these holdings, rather than some policy of affirmatively encouraging suits in the public interest. In *Mobil Oil Corp.*, unlike in *Gilbert*, the court was satisfied that the benefits of litigation for those similarly situated to the plaintiff corporations would sufficiently outweigh the potential costs.[57] Similarly, once the supreme court began to unify its public interest exception holdings under a single, multi-factor test,[58] it was quick to include a factor that queried "whether the litigant claiming public interest status would have had sufficient economic incentive to bring the lawsuit even if it involved only narrow issues lacking general importance."[59] Had the court simply wanted to promote suits that it deemed beneficial, such a limitation on the exception would have been unnecessary.

C. The Affirmative Strand: Incentives

The court's 1977 opinion in *Anchorage v. McCabe*[60] marked the addition of the public interest exception's affirmative component: automatic full fee shifting to prevailing plaintiffs.[61] Where, previously,

54. *Id.* The sums of money referred to were not monetary damages from the case itself, but rather investments whose value would have been affected by the outcome of the declaratory judgment sought. *Id.* at 96.

55. Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974).

56. *Id.*

57. *Mobil Oil Corp.*, 518 P.2d at 104.

58. *See* Anchorage v. McCabe, 568 P.2d 986, 991 (Alaska 1977) (establishing a three-factor test for identifying public interest litigants to whom the exception would apply).

59. Kenai Lumber Corp. v. LeResche, 646 P.2d 215, 223 (Alaska 1982).

60. 568 P.2d 986 (Alaska 1977).

61. *Id.* at 993–94 ("[T]he successful public interest plaintiff, acting as a 'private attorney general,' should not be penalized by Rule 82 by failing to receive full compensation for the costs of litigating issues of public

prevailing plaintiffs only received partial attorneys' fees as the default, the default after *McCabe* was to award prevailing public interest litigants the *full* amount they had spent on the litigation, provided, of course, that the expense was reasonable.[62] Because public interest litigants were already protected from attorneys' fees awards against them, the public interest exception now looked just like the full unilateral fee shifting system used in various federal statutes.[63] The court premised the award of full fees under the public interest exception on the same rationale that supported full unilateral fee shifting in federal civil rights cases:

> When a plaintiff brings an action under (Title II), he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorney's fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.[64]

Although the court claimed that this served as the basis for its *Gilbert* decision, no such language appears anywhere in the history of the public interest exception prior to *McCabe*.[65] *McCabe* was the case that first adopted this rationale in support of a new, affirmative component to the public interest exception.

The *McCabe* opinion also contained the court's first formalized test for identifying public interest cases.[66] An action by private citizens could be considered "public interest litigation because of the presence of three factors: '(1) the effectuation of strong public policies; (2) the fact that numerous people received benefits from plaintiffs' litigation success; (3)

importance.").

62. *Id.*

63. In all other Alaska cases, Rule 82 continued to provide that the default was partial, bi-directional fee shifting. *See id.* at 989 ("[C]osts and attorney's fees are normally awarded to the prevailing party.").

64. *Id.* at 990 (citing Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968)) ("The basis for [the *Piggie Park*] holding was the same policy articulated by this court in *Gilbert* to encourage plaintiffs to raise issues of public interest by removing the awesome financial burden of such a suit.").

65. The only use of the "private attorney general" phrase in a published opinion prior to *McCabe* was in *Lynden Transport, Inc. v. State*, 532 P.2d 700 (Alaska 1975), where plaintiffs contended that the trial court's award of attorneys' fees against them should have been reduced "in consideration that they were acting as private attorney generals [sic] in initiating" the action. *Id.* at 717. Citing *Mobil Oil Corp.*, the supreme court rejected this argument because there was sufficient financial incentive for the *Lynden Transport* plaintiffs to bring the case without any regard for the public interest. *Id.*

66. *McCabe*, 568 P.2d at 991.

the fact that only a private party could have been expected to bring this action.'"[67] The court borrowed this test from federal fee shifting case law.[68]

In *Dansereau v. Ulmer*,[69] the supreme court extended *McCabe*'s fee shifting policy by holding that, absent exceptional circumstances, trial courts could not partition fee awards to public interest litigants that were considered prevailing parties under Alaska law. Generally, as long as the litigant prevailed on at least one of the issues they raised, they were entitled to their full fees.[70] The court decided that the test to determine a prevailing party under Rule 82 was sufficiently comprehensive. This finalized the modern form of the public interest exception's affirmative component.

As noted before, *McCabe*'s holding that public interest plaintiffs were entitled to full attorneys' fees made the public interest exception comparable to the unilateral fee shifting statutes that American Rule jurisdictions sometimes used.[71] Plaintiffs in all jurisdictions typically pay their attorneys through a contingency fee agreement: if they lose, they pay the attorney nothing, and if they win, the attorney gets a percentage of the damages awarded. Most unilateral fee shifting statutes operate in contexts where contingency fees are inappropriate because the lawsuits are for little or no economic damages.[72] For example, if not for the Civil Rights Attorney's Fee Awards Act of 1976,[73] a civil rights plaintiff seeking an injunction would have to pay her legal fees up front and out-of-pocket to vindicate her legal rights—there are no monetary damages

67. *Id.* (quoting La Raza Unida v. Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972), *aff'd*, 488 F.2d 599 (9th Cir. 1973), *cert. denied*, 417 U.S. 968 (1974)).

68. *See La Raza Unida*, 57 F.R.D. at 101 (applying the same test to determine applicability of the now defunct common law private attorney general doctrine).

69. 955 P.2d 916 (Alaska 1998).

70. *Id.* at 920.

71. *See generally* HENRY COHEN, CONG. RESEARCH SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (2008), *available at* http://www.fas.org/sgp/crs/misc/94-970.pdf (listing and describing all federal fee shifting statutes and doctrines).

72. See *id.* for examples of federal fee shifting statutes and doctrines. *See also* Newman v. Piggie Park Enters., Inc., 390 U.S. 400, 402 (1968) ("If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees . . . to encourage individuals injured by racial discrimination to seek judicial relief . . . ."); *La Raza Unida*, 57 F.R.D. at 98 (holding that the plaintiff should have been awarded attorneys' fees under the federal private attorney general doctrine where, in addition to other necessary factors, "the necessity and financial burden of private enforcement are such as to make the award essential").

73. 42 U.S.C. § 1988 (2012).

to split with the attorney in such a case. While there is no constitutional guarantee to counsel in civil litigation, it may make sense, as a policy matter, to ensure that these cases can be effectively brought before the courts.

This was the motivation for *McCabe's* unilateral fee shifting rule as well; the *McCabe* court sought to ensure that important lawsuits could be reasonably brought before the courts, regardless of the size of a plaintiff's bank account.[74] One of the requirements of the public interest exception was always that the incentives for the suit needed to be primarily non-economic.[75]

When full unilateral fee shifting applies to a case for non-monetary damages, the plaintiff is put in much the same position as a normal plaintiff under the American Rule, bearing no liability for a loss and paying her attorney out of proceeds from the case, should she prevail. The victim of such a policy decision is the defendant, upon whom the burden of these fees will fall. This seems unfair to the extent that the defendant's legal position was reasonably justified in a particular case. At the same time, without some transfer of attorneys' fees, plaintiffs could end up footing significant costs to enforce their rights when seeking non-economic relief.[76] To the extent that a defendant's legal position was *not* reasonably justified, this would be incredibly unfair to plaintiffs. The real problem is that litigation is very expensive, creating an inevitable tension between guaranteeing court-access for plaintiffs, which may require that someone else pay their costs, and fairness to defendants, who may be left bearing an undeserved burden if all the costs fall to them. When either side's claim is clearly unreasonable, the solution is easy: make that party pay. But where real uncertainty exists in the applicable law, this conflict may become irreconcilable.

This conflict is what ultimately distinguished the affirmative component of the public interest exception from the protective component. Affirmative fee shifting creates a positive right of access to

74. Anchorage v. McCabe, 568 P.2d 986, 990 (Alaska 1977) ("When a plaintiff brings an action under [the federal statute], he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general'" (quoting *Piggie Park Enters.*, 390 U.S. at 402)). *See also* COHEN, *supra* note 71, at 5–6 (explaining the rise and fall of the common law private attorney general doctrine in federal courts).

75. *E.g.*, State v. Native Vill. of Nunapitchuk, 156 P.3d 389, 394 (Alaska 2007) (describing the "sufficient economic incentive" inquiry in determining whether an action is public interest litigation). *Cf.* Mobil Oil Corp. v. Local Boundary Comm'n, 518 P.2d 92 (Alaska 1974) (refusing to create public interest exception because sufficient alternative economic incentives existed to bring the case at bar).

76. *See generally* COHEN, *supra* note 71 (comprehensively describing federal fee shifting statutes).

the courts, not merely a negative right.[77] A negative right implies that the government cannot do something to you—impose a cost, take something away, etc.—while a positive right requires the government to *give* you something, to allocate a resource in a certain way.[78] When a resource is limited, conferral of a positive right becomes a policy decision to favor one possible allocation over others.[79] By way of comparison, consider the constitutional right of free speech: while the government cannot interfere with the use of a printing press, it has no obligation to provide an individual with a press in the first place, indicating there is a negative, but not a positive, right.

When the affirmative component of the public interest exception required others to pay for a prevailing plaintiff's right of access to the courts, it created a positive right to the courts, comparable to a criminal defendant's right to counsel.[80] This is what Alaska's general fee shifting rule does to a lesser extent, and without favoring either plaintiffs or defendants. In either case, though, someone has to pay for the right. This sharply contrasts with the negative right guarded by the protective component of the public interest exception: that the government shall not *deny* a citizen's access to the courts.[81]

McCabe's holding that prevailing public interest litigants should be entitled to full attorneys' fees created a positive right where one had not previously existed.[82] Unlike the protective component of the public interest exception, this was fundamentally a policy decision, allocating the costs of litigation in a certain way and imposing a burden on some parties in order to ensure a right for others.[83]

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77. *See* CHARLES FRIED, RIGHT AND WRONG 110 (1978) (discussing the differences between positive and negative rights).

78. *Id.*

79. *Cf. id.* ("Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim.").

80. *See id.* (referring to the "attentions of a lawyer" as a positive right). For background on the positive right to counsel in criminal cases, see also Gideon v. Wainright, 372 U.S. 335, 342–45 (1963) (requiring states to *provide* counsel to criminal defendants who are unable to afford their own).

81. For more information on the court access rights conferred by the federal and Alaska constitutions, see Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971) (finding a right of access to civil courts under the Due Process Clause of the Fourteenth Amendment to the United States Constitution); Bush v. Reid, 516 P.2d 1215, 1219 (Alaska 1973) (finding a right of access to the civil courts under ALASKA CONST. Art. I § 7).

82. *Cf.* Anchorage v. McCabe, 568 P.2d 986, 995 (Alaska 1977) (Boochever, C.J., dissenting) (arguing that the court's proper role in this context was to prevent the courts from becoming inaccessible, not to encourage particular forms of litigation).

83. *See id.* at 991 (declaring the first factor in the public interest exception test to be "the effectuation of strong public policies" (quoting La Raza Unida v.

II. HB 145 AND *STATE V. NATIVE VILLAGE OF NUNAPITCHUK*

After mounting pressure from unhappy defendants, the legislature finally abolished the public interest exception in 2003 with an act referred to in Alaska as HB 145.[84] The stated intent of the act was "to expressly overrule the decisions of the Alaska Supreme Court in *Dansereau v. Ulmer*; . . . *Anchorage v. McCabe*; *Gilbert v. State*, and their progeny, insofar as they relate to the award of attorney fees and costs to or against public interest litigants in future civil actions and appeals."[85] The main implementing provision of the act stated as follows:

> (b) Except as otherwise provided by statute, a court in this state may not discriminate in the award of attorney fees and costs to or against a party in a civil action or appeal based on the nature of the policy or interest advocated by the party, the number of persons affected by the outcome of the case, whether a governmental entity could be expected to bring or participate in the case, the extent of the party's economic incentive to bring

Volpe, 57 F.R.D. 94, 101 (N.D. Cal. 1972)); *cf.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 268–69 (1975) (striking down the common law private attorney general doctrine defined in *La Raza Unida*—which extended the doctrine to statutes that had no explicit fee shifting provision—and holding that the implementation of such measures is a policy matter that Congress has reserved for itself).

84. HB 145, 2003 Alaska Sess. Laws ch. 86 (codified as amended at ALASKA STAT. §§ 09.60.10, 09.68.040 (2014)). Although much of the debate over HB 145 centered on the costs of litigation against the state over natural resources issues, the underlying facts were highly disputed. *See, e.g*, *HB 145–Atty Fees: Public Interest Litigants*, ALASKA H. JUDICIARY STANDING COMM. MINUTES, 23rd Leg. (May 7, 2003), *available at* http://www.legis.state.ak.us/pdf/23/M/HJUD2003-05-071340.PDF. For one, a research report authored by the Legislative Legal and Research Services found that, of the nineteen natural resources cases that had used the public interest exception in the ten years between 1993 and 2003, the plaintiffs had prevailed in seventeen and not one of the cases was found to be frivolous. *Id.* at 65 (statement of Rep. Les Gara).

85. HB 145 § 1(b) (emphasis added) (internal citations omitted). HB 145 also mentioned two other cases by name: *Southeastern Alaska Conservation Council, Inc. v. State*, 665 P.2d 544 (Alaska 1983), and *Thomas v. Bailey*, 611 P.2d 536 (Alaska 1980). *Bailey* confirmed that *McCabe*'s three-factor test for public interest litigation applied at the appellate level as well as in trial courts. 611 P.2d at 539. *Bailey* also offered some insight into factors a court might consider when calculating reasonable attorneys' fees to award, and resolved that fees were to be based on the actual work done by the attorneys, charged at a reasonable rate, and not based on a speculative valuation of the public benefit created by the litigation. *Id.* at 540–43. *Southeast Alaska Conservation Council, Inc.* rejected the existence of any distinction between public and private defendants for purposes of the public interest exception. 665 P.2d at 553.

the case, or any combination of these factors.[86]

The act also prohibited decisions regarding interlocutory relief from bonds and other security measures from being based on any of these factors.[87] The Act distinguished constitutional claims and codified an exception for them that largely mirrors the former public interest exception, though narrower in scope.

A. *State v. Native Village of Nunapitchuk*

After its passage, HB 145 was challenged by a number of plaintiffs concerned that it would limit their ability to ensure proper application of the laws.[88] In *State v. Native Village of Nunapitchuk*,[89] the village and other plaintiff groups sought a declaratory judgment that HB 145 was invalid for both procedural and constitutional reasons.[90] First, the plaintiffs argued that if the act changed a procedural rule promulgated by the supreme court under article IV, section 15 of the Alaska Constitution, then it would have needed a two-thirds supermajority in both houses to be amended by the legislature.[91] Second, the plaintiffs argued that HB 145 unconstitutionally infringed upon the plaintiffs' access to courts.[92]

The *Nunapitchuk* court upheld HB 145,[93] but did so with the sizeable caveat that "litigants advancing public interest claims may still, on a case-by-case basis, be shielded from awards of attorney's fees under Rule 82(b)(3)(I) for much the same reason that [the court] accepted when [it] first adopted the exception in its original protective form: awarding fees in public interest cases may 'deter citizens from litigating questions of general public concern.'"[94] Comparing the public interest exception to "fee shifting provisions intertwined with substantive statutes that call for attorney's fee awards in particular cases," the court found that the public interest exception was substantive in nature and could therefore be overruled by the legislature, just like a statute.[95] At the same time, to save it from being unconstitutional, the court read the Act narrowly to prevent it from infringing on citizens'

86. HB 145 § 2(b).
87. *Id.* § 3(c) at 2.
88. *Nunapitchuk*, 156 P.3d at 393.
89. 156 P.3d 389, 394 (Alaska 2007).
90. *Id.*
91. *Id.* at 393; ALASKA CONST. art. IV § 15.
92. *Nunapitchuk*, 156 P.3d at 393.
93. *Id.* at 404.
94. *Id.* at 406 (quoting Gilbert v. State, 526 P.2d 1131, 1136 (Alaska 1974)).
95. *Id.* at 403–04.

right of access to the courts.[96]

The result of the opinion is that the public interest exception is dead, but Rule 82(b)(3)(I) may be used to reduce attorneys' fee awards in its place when the fees would "be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts."[97] Courts may consider any of the factors used by the public interest exception in making this determination,[98] but because trial courts are no longer limited by the clear structure of the exception, courts may also consider other factors they deem relevant,[99] and are free to reduce an award by whatever extent they determine will cure its potential deterrent effect.[100] This creates considerable uncertainty for plaintiffs, because both their eligibility for a fee reduction and the amount of that reduction are now very unclear. A closer study of the *Nunapitchuk* opinion, in light of the cases that preceded it, helps to clarify the current doctrine to some extent, but further developments in the law are needed to help Alaska find a truly optimal balance between the constitutional rights of plaintiffs and the affirmative fee shifting policy enshrined in Rule 82.

B. The *Nunapitchuk* Court's Analysis

In *Nunapitchuk*, the court first had to decide whether HB 145 had modified a rule governing practice and procedure in the Alaska court system. If so, the Alaska Constitution would have required that the Act be passed with a two-thirds supermajority in both houses.[101] The first step in this inquiry was to take a closer look at Rule 82 itself. Although the court struggled to clearly delineate the substance-procedure dichotomy, the court relied heavily on the test described in *Nolan v. Sea Airmotive, Inc.*[102] in its determination regarding Rule 82.[103] *Nolan*

96. *Id.* at 404–06. The court determined that construing the act so as to not substantially affect Rule 82 was "supported by the rule of construction that statutes should be construed, if possible, to avoid the risk of unconstitutionality." *Id.* at 405.

97. ALASKA R. CIV. P. 82(b)(3)(I).

98. *See Nunaptichuk*, 156 P.3d at 406 ("Litigants advancing public interest claims may still, on a case-by-case basis, be shielded from awards of attorneys' fees under Rule 82(b)(3)(I).").

99. *See id.* (allowing courts to consider "all relevant factors").

100. ALASKA R. CIV. P. 82(b)(3).

101. *See* ALASKA CONST. art. IV § 15 (granting authority to supreme court to promulgate rules of practice and procedure, and specifying that these rules may only be changed by the legislature with a "two-thirds vote of the members elected to each house"); *Nunapitchuk*, 156 P.3d at 393 (summarizing arguments of plaintiffs).

102. 627 P.2d 1035 (Alaska 1981).

emphasized that an important part of the inquiry into whether a rule is substantive or procedural should be "an examination of whether the rule or statute under scrutiny is more closely related to the concerns that led to the establishment of judicial rule making power, or to matters of public policy properly within the sphere of elected representatives."[104] Examining the history and purposes of Rule 82, the *Nunapitchuk* court determined that it was indeed a procedural rule.[105]

The court also had to determine whether the public interest exception itself was a substantive or procedural doctrine. The court began its analysis of the public interest exception by comparing it with Rule 82, which it described as a policy neutral, two-way fee shifting regime, designed to partially recompense prevailing parties for their legal fees.[106] The court contrasted this system with the many state and federal substantive statutes that incorporate one-way fee shifting provisions as a means of furthering their public policy goals.[107] Like these statutes, and unlike Rule 82, the public interest exception only shifted fees to prevailing plaintiffs, and awarded those plaintiffs actual, reasonable attorneys' fees.[108] Describing the public interest exception as "intended to encourage litigation that [would] further public policies," the court found the exception fit within *Nolan*'s characterization of a substantive rule, "closely related to . . . matters of public policy properly within the sphere of elected representatives."[109] Accordingly, the court held that the legislature had the authority to overrule it with a statute.[110]

Second, the court resolved the plaintiffs' constitutional claim by finding that, properly construed, HB 145 was not facially invalid because it did not preclude courts from exercising their discretion to prevent awards that could unconstitutionally deter similarly situated future plaintiffs.[111] Noting that courts should strive to construe statutes

103. *Nunapitchuk*, 156 P.3d at 396.
104. *Nolan*, 627 P.2d at 1042–43.
105. *Nunapitchuk*, 156 P.3d at 395–402. Because the rule was procedural, the court also had to determine whether HB 145 modified it. As discussed *infra*, the court ultimately construed the statute so that it did not modify Rule 82, in order to avoid the constitutional issues that would have arisen; this avoided the potential procedural problem here as well.
106. *Id.* at 403. The court went as far as to note that "[t]he two-way and policy-neutral features of Rule 82 contribute in an important way to the rule's procedural character." *Id.*
107. *Id.*
108. *Id.*
109. *Id.* at 403–04 (quoting *Nolan*, 627 P.2d at 1042–43) (alterations in *Nunapitchuk*).
110. *Id.*
111. *See id.* at 405–06 ("As so construed, it is not possible to conclude that [HB 145] is facially invalid on denial of access to the courts grounds.").

to avoid the risk of unconstitutionality, the court determined that Rule 82 itself was not in any way modified by HB 145, except to bar consideration of the public policy nature of the litigation when varying awards under subsection (b)(3)(K)—an additional provision that allows courts to adjust fee awards "upon consideration" of "other equitable factors deemed relevant."[112] The court held that HB 145 did not modify subsection (b)(3)(I) at all, which allows courts to vary a fee award based on "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."[113] Furthermore, *Nunapitchuk* held that trial courts applying Rule 82(b)(3)(I) are able to consider the nature of the claim, the absence of economic incentives to bring the claim, and any other relevant factors that bear on the deterrence inquiry.[114] Emphasizing that HB 145 was to have *no* effect on Rule 82(b)(3)(I), [115] the court held that:

> [A]lthough HB 145 abrogates, in part, the public interest litigant exception, litigants advancing public interest claims may still, on a case-by-case basis, be shielded from awards of attorney's fees under Rule 82(b)(3)(I) for much the same reason that we accepted when we first adopted the exception in its original protective form: awarding fees in public interest cases may "deter citizens from litigating questions of general public concern."[116]

Although the court struck down the public interest exception in its entirety, the way in which it did so showed the real difference that the court saw between the exception's protective and affirmative functions. Because the court had refrained from reaching the constitutional court access issues in its prior cases,[117] there was no clear line where the

112. *Id.* at 405; ALASKA R. CIV. P. 82(b)(3).

113. ALASKA R. CIV. P. 82(b)(3)(I). *See also Nunapitchuk*, 156 P.3d at 406 ("[S]ubsection (b)(3)(I) is directly relevant to the issue of the right of access to the courts. . . . [HB 145] . . . makes no change to subsection (b)(3)(I).").

114. *Nunapitchuk*, 156 P.3d at 406 ("Trial courts remain free to reduce awards that would otherwise be so onerous to the losing party as to deter similarly situated litigants—including litigants that would have previously been identified as public interest litigants—from accessing the courts. In determining whether an award would deter similarly situated litigants from accessing the courts, trial courts may continue to consider all relevant factors, including the nature of the claim advanced and the economic incentives for similarly situated litigants to bring similar claims.").

115. *See id.* at 406 n.84.

116. *Id.* at 406.

117. *See* Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 587 (Alaska 1973) ("We do not have to reach the constitutional issue since it is 'manifestly unreasonable' to establish a policy under Civil Rule 82 that would enable a store owner to

constitutionally-required protection of the negative right ended and the affirmative encouragement of litigation began. Both parts of the exception had to be considered substantive in nature.[118] However, the court's treatment of the constitutional challenge demonstrates the true magnitude of the distinction it saw between the exception's protective and affirmative functions. Despite HB 145's express prohibition against trial courts varying fees based on the nature of the plaintiff's claim, the number of people that would be affected, whether a governmental entity could be expected to bring or participate in the case, or the extent of the party's economic incentives to bring the case,[119] the *Nunapitchuk* court specifically allowed courts to continue using these factors to prevent litigants from becoming deterred. The *Nunapitchuk* court's holding reveals its belief that some amount of protection is *necessary* to prevent the English Rule from infringing upon the right of access to courts.

Just like the affirmative component of the former public interest exception, Alaska's English Rule creates a positive right to court access by entitling a litigant to recover some of her attorneys' fees if she wins.[120] The right is different from the public interest exception in that it is available to *all* prevailing litigants and only provides for *partial* compensation,[121] but it too creates a cost that must be paid by someone other than the litigant. The purpose of the protective component of the public interest exception was to limit that obligation in order to prevent it from encroaching on other litigants' negative rights by inappropriately deterring them from access to the courts. For the court to uphold HB 145, it was imperative it be able to protect this negative right in some other way.

III. THE STATE OF THE LAW

Except as to constitutional claims,[122] the public interest exception is dead. Although some remnants of the protective component live on in Rule 82(b)(3)(I), the formalized, predictable test of the former exception is gone. Although *Nunapitchuk* reaffirms that trial courts should shield litigants from attorneys' fees awards when necessary to prevent

receive such a sizeable allowance for attorney's fees against a party who has brought suit in good faith.").

118. *Nunapitchuk*, 156 P.3d at 404–05.

119. HB 145, 2003 Alaska Sess. laws ch. 86 § 2 (codified as amended at ALASKA STAT. §§ 09.60.010, 09.68.040 (2014)).

120. ALASKA R. CIV. P. 82.

121. ALASKA R. CIV. P. 82(b).

122. HB 145 § 2(c)–(e) (preserving the public interest exception for constitutional claims).

deterrence,[123] trial courts are now left to decide whether or not to reduce attorneys' fees by way of Rule 82 "on a case-by-case basis."[124] Likewise, although *Nunapitchuk* allows courts to consider the same factors used by the public interest exception when doing this, they are no longer limited to considering *only* these factors.[125] The fundamental change worked by HB 145 and *Nunapitchuk* is that now trial courts are free to assign whatever weights they wish to whichever factors they prefer; there is no longer any structure to the inquiry, only an overarching goal.

Litigants must also beware that the analytical approach currently embraced under Rule 82(b)(3)(I) gives more discretion to trial courts in determining the *extent* to which a litigant qualifies for protection. Where previously, qualifying litigants would be fully shielded from awards of attorneys' fees, courts now have discretion to only partly exempt litigants if they wish. Authority remains to fully shield a litigant from a fee award, but this is no longer the default.[126]

In short, trial courts now have broad discretion. After *Nunapitchuk*, it is clear that trial courts do have a duty to prevent the deterrence of future litigants by shielding parties from unduly burdensome awards of attorneys' fees. But it is unclear how they will go about doing this—the dependable mechanisms of the public interest exception are gone. After HB 145 and *Nunapitchuk*, litigants are left with little ability to predict the real risks of litigation.

IV. PREVENTING DETERRENCE

In light of the broad discretion granted to trial courts by HB 145 and the *Nunapitchuk* opinion, courts must take heed of the responsibility conferred on them to prevent unconstitutional deterrence of court access. Although the underlying issue is the citizen's ability to avail herself of the courts, deterrence is often more dependent on the characteristics of the claim itself than on characteristics of the particular

123. *See Nunapitchuk*, 156 P.3d at 406 ("[L]itigants advancing public interest claims may still . . . be shielded from awards of attorney's fees . . . for much the same reason that we accepted when we first adopted the exception in its original protective form: awarding fees in public interest cases may 'deter citizens from litigating questions of general public concern.'").

124. *Id.*

125. *See id.* (allowing courts to consider "all relevant factors").

126. *See, e.g.*, Gold Country Estates Pres. Grp., Inc. v. Fairbanks N. Star Borough, 270 P.3d 787, 799–800 (Alaska 2012) (holding that "it was within the superior court's power to [fully] deny the [attorneys'] fee award under Civil Rule 82"). *Gold Country* emphasized that *Nunapitchuk* had left the door open for trial courts to consider all relevant factors in their Rule 82(b)(3)(I) inquiries, and to reduce awards as needed whenever they determine that the risk of attorneys' fees awards might chill similar claims in the future. *Id.* at 800.

plaintiff. The structure of the former public interest exception captured this; it gave no regard to the identity of the claimant herself, and focused instead on particulars of the claim, including the policies it might advance, how many people would be affected, who else might be able to bring it, and the potential economic incentives for doing so.[127] Characteristics of the claimant mattered inasmuch as they affected the analysis of these factors. For instance, it would change the deterrence analysis significantly if a particular plaintiff had significant economic incentives to bring a claim that formally sought only non-monetary relief—to that plaintiff and to those similarly situated, the claim *would* have economic value. Courts applying Rule 82(b)(3)(I) to prevent deterrence must ask whether the claim itself—as it will be viewed by litigants similarly situated to the one at hand—is a claim that is likely to be deterred. If it is, then courts bear a responsibility to ensure that plaintiffs do not become unable to reasonably bring such a claim before the courts.

In particular, courts ought to pay special attention to claims that lack otherwise compelling financial incentives. There is ample legal authority for courts to exercise their discretion protectively in these cases. When claims lacking financial incentives seek to address harms affecting numerous individuals, courts must be especially wary. Protection of these types of claims has nothing to do with the policies or political ideologies they may reflect. Rather, the nature of these claims renders them especially vulnerable to deterrence because they carry disproportionate risks relative even to the substantial value they may hold for plaintiffs. Accordingly, judges must be watchful in these cases to ensure that the English Rule does not infringe on plaintiffs' ability to avail themselves of the courts.

A. Weighing the Characteristics of the Claim: Poker for Plaintiffs

Adding a potential cost to bringing claims before the courts will deter financially secure plaintiffs as well as impoverished ones. While some plaintiffs may simply be unable to afford the ticket price, others will be similarly deterred when the cost of litigation starts to exceed its potential value to them. In the first instance, the financial conditions of a particular plaintiff may render her deterred by the anticipated cost of litigation, no matter how reasonable that cost may be. In the second case, the unreasonableness of the cost itself will deter the plaintiff, regardless of her financial prosperity. There is undoubtedly some overlap in these

127. *Nunapitchuk*, 156 P.3d at 394 (summarizing the exception's history and elements).

two scenarios, but the latter case demonstrates the importance of developing a doctrine, similar to the public interest exception, that protects certain kinds of claims and does not focus only on the attributes of particular plaintiffs.

To see the difference between the two types of deterrence that courts must prevent vis-à-vis future litigants, imagine how a card shark plays a hand of poker. Presume that, based on what she knows about her opponent's hand, she can determine that there is a thirty-five percent chance that her hand is the strongest. If her opponent bets $100,000, there are two independent reasons why this should give our protagonist pause. The first is that she might have less than that in her bank; on the chance that she loses, she is going to be bankrupt. This corresponds to the question of whether or not the cost is reasonable for *her*. The second reason she should be deterred is that it is a bad hand. Experts can quantify this by looking at the "expected value" of the hand. Supposing there is no other money on the table, the expected value of her hand is (0.35) × (100,000) – (0.65) × (100,000) = $35,000 – $65,000 = –$30,000. This is a bad bet to take, because the odds say that if our card shark played the hand many times, she would average a loss of $30,000: a net cost. In other words, the hand is a bad investment.

Unlike in poker, the amount a plaintiff stands to win in litigation under the English Rule is independent of what the plaintiff might lose—the amount she risks depends on her opponent's investment in defending the case. If she stands to win $30,000 but could lose $100,000, then even with a seventy percent chance of prevailing the investment is a bad one: the expected value of the "hand" is (0.70) × (30,000) – (0.30) × ($100,000) = $21,000 – $30,000 = –$9,000.[128] Unless the value of the non-monetary relief the plaintiff seeks is independently worth at least $9,000 to her, the case is not worth taking. In practice, she might win, or she might lose a lot more, but the odds tell us it would be a terrible hand to play because the expected result would be a loss. The judgment the plaintiff seeks may be worth the given price to her, but where the price is higher than the value of the relief sought, the case becomes an unreasonably expensive investment to bring before the courts, regardless of its likely merits.

Under the American Rule, plaintiffs must ask if addressing a particular harm is worth the cost of their attorney. When the damages

128. For an example of the analogous calculations under the American Rule, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5, 764–65 (8th ed. 2011) ("Under the American rule, . . . the plaintiff's net expected gain from litigating is the judgment if he wins discounted by his estimate of the probability that he will win, minus his litigation costs.").

sought are non-economic, plaintiffs are essentially asked to value their claim directly: "Is getting this injunction worth the $10,000 I would have to pay my lawyer?" Under the English Rule, plaintiffs are compensated for a part of this cost if they win, but may have substantially increased liability if they lose, especially if the defendant has reason to spend a lot. The total expected cost of the case is the expected cost of the plaintiff's attorneys' fees plus whatever the plaintiff should expect to pay of the defendants' fees. The cost of the plaintiff's attorneys' fees might be viewed as a market constraint operating to ensure a reasonably efficient allocation of attorneys' time. On top of these fees, however, the English Rule itself can contribute a substantial expected cost to court access. Alaska courts must be vigilant when awarding attorneys' fees so that they are not responsible for turning otherwise reasonable future claims into bad investments—this would be the very definition of deterrence.

Beyond fairness to the plaintiff at hand, the fundamental question is how rational, *future* plaintiffs will weigh their claims. Obviously, many of these values—the exact chance of winning, the potential cost—are unpredictable and incalculable in practice; no one needs to crunch actual numbers when awarding attorneys' fees. But judges must be cognizant of the way their habits in awarding attorneys' fees will affect the implicit balancing undertaken by prospective plaintiffs in the future. A pattern of awarding fees in a particular type of case will lead plaintiffs to expect that a similar cost may await them, and shielding individual plaintiffs because they lack the means to pay a more severe award offers no suggestion of protection in the general sense. Will the expected cost make plaintiffs think twice about bringing their claim in the first place? When a suit lacks economic incentives, and especially when it is also one that affects a large number of people, this becomes a very real possibility. Courts can only prevent this by routinely protecting these types of claims, so that future plaintiffs will not come to expect such claims to cost more than they are worth.[129]

B. Lack of Economic Incentives

The supreme court acknowledged the importance of economic incentives in one of its earliest public interest exception cases, *Mobil Oil*

129. Other writers have used similar expected value calculations to predict the effects of different fee shifting systems. *See* Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173, 176–77 (Winter 1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 56–58 (1982).

Corp v. Local Boundary Commission,[130] and thereafter adopted it into the formal test for "public interest" litigants in *Kenai Lumber Co. v. LeResche*.[131] In *Nunapitchuk*, the court specifically recognized the importance that should be given to economic incentives and expressly permitted courts to continue considering this factor.[132] Lack of economic incentives means that plaintiffs will have a hard time justifying the risks imposed by the English Rule and renders these claims especially susceptible to being deterred.

If a suit is for non-monetary damages, or if the monetary damages are small relative to the complexity of the case, the plaintiff is not able to pay her attorney through a contingency fee agreement. This usually means that the plaintiff must pay out-of-pocket.[133] Assuming the plaintiff will not derive some other economic benefit from prevailing in the case, the claim is already vulnerable to deterrence by its cost alone. On top of this, however, comes the English Rule, which imposes a risk that the plaintiff will end up liable for a part of her opponent's fees as well. If it appears that these fees could be significant,[134] then this risk can quickly become prohibitively significant. Litigation is often unpredictable because the plaintiff has no control over the fees that will be accumulated by the opposing party, and the trial court has broad discretion with respect to how it will award fees at the end of the day. If the suit has economic value, that might outweigh this potential cost; but where the suit lacks economic incentive, this risk essentially becomes the expected price of the relief sought by the plaintiff. As the risk grows, plaintiffs may quickly find that even the most significant of claims become unreasonable investments to bring before the courts.

Trial courts should consider the risk-reward calculation that future litigants will implicitly undertake when deciding whether or not to bring a case. Other factors may also affect deterrence,[135] but in cases where economic incentives are scant or lacking, courts should shield litigants from attorneys' fees awards in order to prevent the potential

130. 518 P.2d 92, 104 (Alaska 1974).

131. 646 P.2d 215, 223 (Alaska 1982).

132. State v. Native Vill. of Nunapitchuk, 156 P.3d 389, 406 (Alaska 2007).

133. Alternatively, the attorney might take the case pro bono.

134. *See*, *e.g.*, Lisa Demer, *Pebble Foes Face Paying $1 Million in Legal Fees*, ANCHORAGE DAILY NEWS (Oct. 15, 2013), http://www.adn.com/2013/10/15/3126803/the-fight-over-whether-pebble.html. The state sought $483,579 in legal fees plus reimbursement of $66,485 in costs from the plaintiffs, and Pebble Mine sought an additional $283,543 plus costs of $104,454 as legal expenses it incurred as an intervener. *Id*.

135. *Nunapitchuk*, 156 P.3d at 406 (allowing consideration of the "nature of the claim" and all other relevant factors, in addition to the claim's economic incentives).

costs from deterring meritorious claims by future litigants.

C. The Number of People Affected by the Alleged Harm

The number of people affected by a claim compounds the problems presented when a claim is for non-economic damages. Like the absence of economic incentives, the number of people affected by a claim was also one of the original factors evaluated by the public interest exception.[136] *Nunapitchuk* similarly permits trial courts to continue to consider this factor when varying awards of attorneys' fees under Rule 82.[137]

The number of people potentially affected by litigation is also the number of people actually affected by whatever alleged harm the claim seeks to address. When this number is large, organizing *all* of the affected individuals can present insuperable costs, and, as a result, these cases are frequently brought by a small group of the potential plaintiffs or by a non-profit organization.[138] The benefit to these small subsets of the possible plaintiffs will only be a fraction of the total benefit. When deciding whether or not to bring such a claim, these litigants have only their small slice of the pie to weigh against the case's potential cost to them.[139] These plaintiffs still have to pay the full cost of litigating the case, making these cases incommensurately expensive from the start. Awarding attorneys' fees under Alaska's English Rule exacerbates the problem, because these plaintiffs will also find themselves liable for the full risks of the litigation.

This leaves the plaintiffs' risk-reward analysis severely skewed. Because these claims carry such a disproportionately large financial risk for the plaintiffs that typically bring them, trial courts should be

136. Anchorage v. McCabe, 568 P.2d 986, 991 (Alaska 1977).

137. *Nunapitchuk*, 156 P.3d at 406.

138. Additionally, because the harm applies to so many, potential plaintiffs may hold out from joining the suit in the hope that others will carry the risk in their place. *Cf.* JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY 276 (1998) (discussing the general problem of "free-riders" who hold out from litigation affecting many people in the hope that someone else will pursue the claim and bear the costs of litigation in their stead).

139. In short, where many people are affected, a collective action problem frequently arises where the seemingly optimal short-term action for individuals (e.g., waiting for someone else to sue) undermines long-term wellbeing for the group (e.g., no one ends up suing) and is hindered in its resolution by the transaction costs involved in effectively organizing all of the affected parties. *See generally* Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 74 (2007) (defining and discussing collective action problems); DWYER, *supra* note 138, at 276 (discussing various problems created by positive transaction costs when a harm affects many people).

especially cognizant of how little countervailing incentive may exist to balance the risk of a fee award. When the potential cost significantly outweighs the potential benefit to plaintiffs, future plaintiffs will be deterred from availing themselves of the courts to redress these types of harms.

CONCLUSION

More data is needed to conclusively determine how HB 145 and *Nunapitchuk* have affected plaintiffs in Alaska, but anecdotal reports give reason to be worried. The Sierra Club, which in the past has filed numerous cases to protect Alaska's natural resources, "has not brought a single action in Alaska state court since the Nunapitchuk decision because there has been no reliable way to predict its potential liability for fee and cost awards."[140] Likewise, the Northern Alaska Environmental Center "has filed only one non-constitutional case" since the *Nunapitchuk* decision, "which had eight plaintiff organizations to share the burden of any potential adverse fee award."[141] The risks for potential plaintiff groups in other contexts are similar.

The unpredictable standard enunciated in *Nunapitchuk* undermines the supreme court's concern that future litigants not be deterred by onerous awards of attorneys' fees. Even where courts follow fairly regular practices, their decisions will be made on a fact-intensive, case-by-case basis. Litigants may take some solace from seeing awards reduced against similarly situated plaintiffs; however, they will never be able to rely on a similar reduction happening in their own case until doctrine evolves that regularly protects certain types of *claims*, independent of the plaintiff's identity. The current standard is simply too open-ended, and the uncertainty this creates for litigants may be chilling in its own right.

* * *

Uncertainty is a recurrent problem for Alaska's English Rule. The supreme court's unwillingness to reach the constitutional issues underlying the public interest exception provides an illustrative example. Because the law was unsettled, neither party to the *Nunapitchuk* litigation knew whether the constitutional claim would succeed. Indeed, few observers could likely have predicted the nuances of the court's eventual holding. This is not to say that the court's exercise

140. Brief for Council on Foundations et al. as Amici Curiae Supporting Petitioners and Applicants at 4–5, Nos. S-15059, S-15060, S-15089, 2013 WL 5297623 (Alaska 2013).

141. *Id.*

of restraint was wrong. Rather, it serves to highlight that the law is often unclear.

Reversals by appellate courts occur with regularity, and issues of first impression are by no means uncommon, especially in a court system as young as Alaska's. This is an essential part of the common law system that we practice in, but Alaska's English Rule takes no account of this. If lawyers could predict with certainty how litigation would resolve itself, there would be little need for judges. All cases would settle because parties would know their chance of success and settle for the expected value of any payout. The problem is that legal claims are often uncertain, and the number of civil cases that make it to trial and that get appealed demonstrates the important role the adversarial system plays in resolving factual and legal uncertainties.

The English Rule offers prevailing parties a potentially unbounded positive right to a percentage of their lawyers' fees by considering fees to be part of a complete recovery.[142] This right comes into tension with the protection of a litigant's negative right to argue her case in court.[143] Both plaintiffs and defendants are affected adversely, as plaintiffs may refrain from bringing meritorious cases before the courts, because they perceive too much financial risk in a loss, and defendants may feel compelled to settle despite meritorious defenses, because they too bear an increased financial risk should they lose.[144] When the parties' lawyers can predict with some accuracy the expected results of the litigation, these problems recede because the risk to the meritorious party is diminished, and allocation of costs to a wrongful party is less troubling. But, in cases where the law is unsettled, parties may have no way of

142. The right is unbounded in the sense that the amount of fees potentially recoverable depends only on how much the party spends. The recovery may only be a percentage of the total amount, but it still grows linearly with how much the party spends. *Cf.* Bozarth v. Atl. Richfield Oil Co., 833 P.2d 2, 6 (Alaska 1992) (Matthews, J., dissenting) ("If a $10,500 attorney's fee award is so great as to 'foreclose a particular party's opportunity to be heard' it has that effect independent of whether it represents the prevailing party's full, or merely partial, fees.").

143. *Cf.* Malvo v. J.C. Penney Co., Inc., 512 P.2d 575, 587 (Alaska 1973) ("For where in order to seek judicial remedies, a plaintiff must risk liability for the full amount of attorney's fees the other side sees fit to incur, it takes little imagination to foresee that the size of a party's bank account will have a major impact on his access to the courts.").

144. *Cf.* Theodore Eisenberg et al., *Attorney Fees in a Loser Pays System* 23 (Cornell Law Sch. Legal Studies Research Paper Series, No. 13-95, Oct. 6, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2336669 (finding favorable treatment of individual plaintiffs who prevailed against corporations relative to individual plaintiffs who prevailed against other individuals in Israel, which uses a predominantly loser pays system while granting trial judges full discretion to award attorneys' fees as they see fit).

accurately assessing the true strength of their claims, allowing the financial risk created by the English Rule to become determinative.[145]

To make matters worse, litigants have no way to predict how much their opponent may spend in litigation or how the trial judge is likely to exercise her discretion at the end of the proceedings. This makes the *magnitude* of the risk uncertain, as well. This can be a chilling combination. When the probability of success on a claim approaches zero percent or one hundred percent its expected value becomes clear: the value will quickly approximate either the rewards of winning or the cost of losing. However, when the probability wanders between these extremes, nearing fifty percent, the potential cost of the other party's fees can become the determinative factor in the decision whether or not to bring the claim. If the potential cost of paying for part of the defendant's fees becomes too large, it can quickly overwhelm the other terms in the calculation and become the decisive factor in whether or not to bring the claim.

If parties refrain from litigating these cases, precisely because of the uncertainty they entail, then how is the law ever to clarify itself? Without opportunities for courts to resolve these claims, how is the law to evolve? Moreover, how will the parties themselves resolve these disputes? Perhaps a third factor courts should consider when assessing attorneys' fees is the legal uncertainty surrounding the claim. The federal system provides a model for this in one of its major fee shifting statutes, the Equal Access to Justice Act (EAJA),[146] which provides that parties prevailing in actions against the United States are entitled to attorneys' fees, "unless the court finds that the position of the United States was *substantially justified* or that special circumstances make an award unjust."[147] Importantly, this standard requires significantly more than merely being "undeserving of sanctions for frivolousness."[148] Rather, the EAJA test requires the Government's position to have been reasonable in light of the law and facts pertaining to the case.[149] The

145. *Cf.* Shavell, *supra* note 129, at 59–60. Shavell conducts similar expected value calculations to those undertaken here, and finds that, in general, as the certainty of prevailing on a claim diminishes, plaintiffs become less likely to bring the claim under the English Rule than under the American Rule because of the attendant risks; specifically, there is a critical point, in terms of the claim's certainty, below which the English Rule starts to deter litigants. *Id.*

146. The Equal Access to Justice Act, Pub. L. No. 96-481 (codified as amended at 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012 & Supp. V 2011)).

147. 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

148. Pierce v. Underwood, 487 U.S. 552, 566 (1988).

149. H.R. REP. NO. 96-1434, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5003, 5011 (stating that the EAJA test "is essentially one of reasonableness in law and fact"). *See also Pierce*, 487 U.S. at 563–68; COHEN, *supra* note 71, at 10.

problem with the EAJA standard is that it is still vague and creates its own uncertainties.

Nonetheless, Alaska might do well to consider adoption of a similar premise as it continues to tune its English Rule. Litigation is an expensive process, and when its costs can be meaningfully attributed to a party's wrongfulness, it may make sense to have that party bear the burden of its actions. But when the real source of the problem is the law's imprecision, litigation costs may just be the price we pay for the flexibility of a common law system.[150] No one party should bear these costs alone.

First, however, Alaska courts must focus on the uncertainties unleashed by HB 145 and *Nunapitchuk*. Until plaintiffs can predict with some certainty what the potential costs of litigation will be, and until those costs are reasonable in light of the claim being brought, Alaska courts will be unable to fulfill their constitutional purpose as a forum for all people.[151]

150. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 123–32 (1965) (discussing the important flexibility afforded by the "open texture" of law and the centrality of this feature to our legal system).

151. *Cf.* Bozarth v. Atl. Richfield Oil Co., 833 P.2d 2, 6 (Alaska 1992) (Matthews, J., dissenting) ("If the superior court is to serve its constitutional purpose as a forum available to all the people, superior court judges must consider whether an award of attorney's fees will impair the constitutional right of access to the courts."); *accord* Rhodes v. Erion, 189 P.3d 1051, 1054–55 (Alaska 2008) (remarking Justice Matthews's concern about court access, expressed in his *Bozarth* dissent, "played a role in the addition of Rule 82(b)(3)(I) in 1993").