Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative

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I. INTRODUCTION

The early weeks of the newly Republican Congress in 1995 may turn out to have been a high-water mark for the idea of English-style, loser-pays attorney fee shifting in America. Bills to implement the Contract with America, on which the House Republicans had fought and won the 1994 election, included major proposals for replacing the "American rule" in some types of federal-court civil litigation. Long-standing American practice leaves civil litigants responsible for their own attorneys' fees, win or lose;1 early Contract bills, described below, would have introduced some form of either-way fee liability against losing civil plaintiffs and defendants, which to some extent is the rule in nearly all other nations.2 Despite the legislative juggernaut that put many Contract with America bills through the House quickly and with few amendments, however, the new majority quickly retreated from the loser-pays proposals and sent to the Senate much more limited measures. Only a limited sanctions measure, applicable in private securities-fraud class actions and targeted on misconduct, eventually became law.

This essay briefly recounts the history of the major Contract with America fee-shifting proposals and the retreat from the loser-pays idea, with observations on some apparent reasons for its abandonment. Most

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2. See generally Werner Pfennigstorf, The European Experience with Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS., Winter 1984, at 37 (describing history and practice in several European nations).
prominently, in the American context with sharply limited civil legal aid and very little legal-expense insurance, broad loser-pays fee shifting (also referred to as "indemnity") creates levels of risk for moderate-income claimants that many regard as too high, and too much of an impediment to access to legal redress, for it to win wide acceptance. Recent experience and fee-policy changes in Britain, sketched in Geoffrey Woodroffe's admirable contribution to this issue of the Washburn Law Journal, seem to confirm this point about the significance of risk levels as a prod to modification of loser-pays fee liability.

Risk that is perceived as excessive can be dealt with by shifting it to others better able to bear it, or by various means of reducing the risk. The new English "conditional fee," like the American contingent fee, shifts some of the risk of defeat from client to lawyer, with the latter likely to have a portfolio of cases among which to spread the risk. The House majority retreated from the fairly widespread risk on clients created by the initial loser-pays proposals to considerably narrower measures, either tied to settlement offers or focused on misconduct in litigation.

A very different way of reducing the troubling degree of risk to claimants created by indemnity, while maintaining access and serving other ends such as compensation and fairness, is a predominantly one-way fee shift in favor of prevailing plaintiffs. Such ideas have been advocated by several commentators, and a detailed proposal for such an approach to fee awards in tort litigation was developed in a Reporters' Study on Enterprise Responsibility for Personal Injury sponsored by the American Law Institute some years ago. The current

4. See id. at 348-55 (describing English "conditional fee" arrangement and issues concerning its adoption and features).
5. See e.g., Hicks, infra note 50; Hylton, infra notes 55, 74; Krent, infra note 72; Leubsdorf, infra note 73; O'Connell, infra note 75.
6. See 2 AMERICAN LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 267-316 (1991) [hereinafter REPORTERS' STUDY]. The Reporters' Study was the product of a wide-ranging project considering such matters as liability in different areas (environmental, product defect, medical malpractice, etc.); mass-tort processing; and measures of damages (pain and suffering, punitive damages, collateral-source rule, etc.), as well as attorney-fee liability. The governing body of the ALI, the Council of the Institute, has commended the Reporters' Study as "a comprehensive, systematic, and scholarly analysis that should occupy a prominent place in the continuing discussion of tort liability." Statement of the Council Re: Restatement of the Law Third, Torts: Products Liability, 14 A.L.I. REP., Oct. 1991, at 1.

To avoid any possible misunderstanding: From the project on Enterprise Responsibility for Personal Injury, one may not properly refer to an "ALI proposal" on attorney fees or any other aspect of enterprise tort liability. The Institute speaks as a body only through materials approved by the annual membership meeting and additionally by the Council. The Reporters' Study discussed here was the subject of considerable floor discussion at the 1991 annual meeting but was
political climate does not seem auspicious for such mainly one-way proposals, but they have much merit. This essay takes the opportunity offered by the theme of this issue of the Washburn Law Journal to increase the limited publicity previously given to the Reporters' Study package of fee-shifting proposals, in the hope that some day and place they may receive more favorable consideration.

II. LOSER-PAYS IN THE 104TH CONGRESS: A BRIEF HISTORY

A. Rationales for Fee Awards and Origins of the Contract Proposals

Attorney-fee award provisions can have different rationales and serve one or more of several distinct purposes — such as fairness, full compensation for legal wrong, punishment for misconduct either in litigation or out of court, encouragement of favored types of actions, equalization of sides in types of cases that usually involve resource imbalances, and impact on litigants’ incentives to raise and pursue claims and defenses. The particular ends sought will, of course, affect the form of fee-award device chosen. A major impetus behind the recent swelling of interest in loser-pays fee shifting seems to have been concern for excessive litigation and frivolous claims: the Contract with America itself promised to “stop excessive legal claims, frivolous lawsuits, and overzealous lawyers.”

The immediate source of the broadest loser-pays proposal in Contract with America legislative proposals was a recommendation in the “Agenda for Civil Justice Reform in America,” produced by the Bush Administration President’s Council on Competitiveness under the chairmanship of Vice President Dan Quayle in 1991. Recommendation 16 advocated adoption of

a “loser pays” rule in cases involving state law brought under the federal courts’ diversity jurisdiction. The loser would pay the winner’s costs of vindicating its prevailing position, subject to two limitations: 1) fee
shifting would be restricted to the amount of fees the loser incurred and 2) could be further limited by judicial discretion where appropriate.9

The Competitiveness Council’s report sounded several themes of both equity and incentives in its rationale for the proposal:

Adopting a “loser pays” rule for payment of attorney’s fees will provide those bringing suit with a choice of methods to finance their litigation. The rule would help fund meritorious claims not currently initiated because the cost of pursuing the claim would have exceeded the expected recovery. The “loser pays” rule (sometimes called the English Rule) is grounded in fairness — in the equitable principle that a party who suffers should be made whole. Where the rule operates, it also prompts more realistic case evaluation. Because the losing party will be obligated to pay the winner’s fees, this approach will encourage litigants to evaluate carefully the merits of their cases before initiating a frivolous claim or adopting a spurious defense.10

Whether from sound-bite compression, showing of truer colors, or political salability, by the time of the 1994 Contract’s promise to “stop excessive legal claims, frivolous lawsuits, and overzealous lawyers,” the emphasis had become much less evenhanded and markedly more anti-plaintiff and anti-lawyer. The proponents of H.R. 10, the initial bill in the 104th Congress to implement the Contract with America’s plank on civil justice reform, restored some of the emphasis on fairness and full compensation but still sounded major concern at litigation excess and frivolous claims.11

B. The H.R. 10 Diversity Loser-Pays Proposal and Its Vulnerabilities

The fee-shifting proposal in H.R. 10 followed the Competitiveness Council’s recommendation closely. It would have adopted limited loser-pays attorney fee shifting in state-law cases filed in, but not removed on the basis of, the federal courts’ diversity jurisdiction.12 The filing-but-not-removal wrinkle may have been necessary to avoid unfairness to

10. Id. at 1003.
11. See Attorney Accountability: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary, 104th Cong., 1st Sess. 15 (1995) [hereinafter House Hearings] (statement of Rep. Jim Ramstad) (“Overuse and abuse of the legal system impose tremendous costs upon American taxpayers, businesses, and consumers.”); id. at 17 (“In order to discourage frivolous lawsuits and promote settlement of meritorious cases, H.R. 10 also adopts a modified version of the English Rule . . . ”); id. at 22 (statement of Rep. Christopher Cox) (“Something must be done to stop the virulent spread of . . . abusive and wasteful litigation. That’s why the central element of the Common Sense Legal Reform Act is the full recovery rule . . . a necessary part of the cure to America’s lawsuit epidemic. It expedites the resolution of strong cases and deters the filing of frivolous ones.”).
plaintiffs who filed in state court where no loser-pays rule would apply, and the proponents were fully aware of the distinction and some of its effects. Still, this aspect created a plaintiffs' dream in a predominantly pro-defendant bill – pick your fee-shifting rule when you pick your forum. But since the bill at first lacked any offer provision that would have let defendants affect fee liability by making formal offers of settlement, the fee entitlement would have remained tied to the outcome on liability on the merits, meaning that plaintiffs with strong cases on liability but much shakier damage claims would have been among those who might benefit most greatly from filing in federal court. A main example of the type of case I have just described — strong on liability, but highly speculative or weak on damages — is a whiplash claim, and it seems doubtful that the proponents meant to make the federal courts magnets for such actions. There are also, of course, federalism questions of a nonconstitutional magnitude about the appropriateness of federal overriding of state choices on applicable attorney fee rules in state-law cases.

More broadly, the loser-pays rule, if applied generally to make fee liability follow the result, amounts to strict liability without fault for unsuccessfully suing or defending a claim, which sweeps far beyond the deterrence and sanctioning of frivolous claims. Other forms of rules may accomplish the ends of full compensation for legal injury and sanctions for litigation misconduct, without the strong deterrence of medium-strength claims of middle-class plaintiffs that flows from broad loser-pays liability. The initial fairness appeal of such indemnity loses some of its force when one thinks of applying it to close cases, which are the most likely to be hard-fought and expensive — yet reasonably so, precisely because the outcome was hard to foresee and the stakes worth a substantial, if risky, investment. Double the risk, though, with fee liability exposure, and the deterrent to standing on your view of your rights — especially if you are the more risk-averse of the parties

action commenced under this section shall award to the party that prevails with respect to a claim in such action an attorney's fee . . . .
13. See House Hearings, supra note 11, at 23 (statement of Rep. Christopher Cox) ("If I am a plaintiff and I believe my case is strong, I can file even my State claims in Federal court in diversity cases. By doing so, I can ensure that I will be made whole if the courts vindicate my claim. On the other hand, if . . . I am more risk averse, I can avoid the loser-pays rule by filing in State court.").
15. See Rowe, supra note 7, at 670-71.
— may become overpowering. Some of these difficulties were the basis for criticism and concern that may have helped lead to the retreat from indemnity in the “attorney accountability” bill that eventually passed the House, to which I will turn after sketching the fee proposal in early versions of proposals to reform securities-fraud class actions.

C. The Securities-Fraud Bill and Loser-Pays Attorney Fee Liability in Class Actions

At first part of H.R. 10, but soon broken out into H.R. 1058, the “Securities Litigation Reform Act” proposals for extensive changes in federal securities-fraud class actions had much of their origin in bipartisan legislation previously developed by Senators Christopher Dodd (D., Conn.) and Pete Domenici (R., N.M.). The Contract with America version, though, was draconian in many ways, including a loser-pays provision adopted by the House that would have applied in unclear but potentially explosive ways to plaintiff class actions. H.R. 1058 as it passed the House would have required fee awards on motion by a winner if the court found that “(A) the position of the losing party was not substantially justified, (B) imposing fees and expenses on the losing party or the losing party’s attorney would be just, and (C) the cost of such fees and expenses to the prevailing party is substantially burdensome or unjust.” A companion provision would have mandated advance posting of security for fees and expenses that might be awarded, to be put up by the plaintiff class, counsel for the plaintiff class, or both.

The somewhat dry legislative language may have obscured several potential bombshells. In the case of a losing plaintiff class, just about any approach to who would bear loser-pays fee liability would pose grave problems and perhaps virtually wipe out the affected class actions. Individually named plaintiffs would ordinarily expect small gains from success in a securities-fraud class action; yet they could face ruinously large fee liability far beyond their share of the potential recovery, deterring claims vastly more than even the threat of substantial fee liability in an individual case. Any efforts to collect from a losing plaintiff class would ordinarily be hopelessly impractical.

16. See Tim Cornwell, Quayle Likes the “English Rule” but Briss Have Their Doubts, LEGAL TIMES, Feb. 10, 1992, at 1, 12-13 (describing “double or quits” effect of threat of liability for other side’s attorney fees).
19. See id. (proposed 15 U.S.C. § 78t-1(c)(2)).
Attorney liability, which the bill allowed, is an interesting yet explosive idea that would reflect and extend the plaintiffs' attorney's entrepreneurial role in class actions for money damages. It would both override many present ethical constraints and probably raise the hackles of the plaintiffs' bar as little else would, in the view of some creating serious conflict problems. An additional complication with attorney liability could be that to compensate for its imposition in losing cases, plaintiffs' attorneys might raise their fees for cases in which they win — at a time when much concern is already expressed about high fees for lawyers and low recoveries for plaintiffs in successful class and individual actions.

D. The Retreats from Loser-Pays to Offer Devices and Rule 11 Amendments


Difficulties of the sorts just sketched contributed to major changes in the bills as they went through the legislative process, sometimes even when the Republicans had the votes in the House to put through much Contract with America legislation without needing to compromise with

20. See supra text accompanying note 18.
21. See, for example, N.C. REvised RULES OF PROFESSIONAL CONDUCT, Rule 1.8(e) (1997), which states in pertinent part, "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that a lawyer may advance court costs and expenses of litigation . . . provided the client remains ultimately liable for such costs and expenses."
22. See, e.g., Bradley L. Smith, Note, Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives, 90 Mich. L. Rev. 2154, 2165-67 (1992) (arguing that both philosophical problems of making agents personally liable for decisions ostensibly made by their principals, and practical effects such as misalignment of settlement incentives of attorney and client, amount to "serious policy drawbacks" with proposals for attorney-borne indemnification responsibility).
23. See, e.g., Clement v. American Honda Finance Corp., 1997 WL 693645 (D. Conn. Oct. 30, 1997) (rejecting proposed class settlement and revoking conditional class certification when, inter alia, unnamed class members would receive virtually useless coupons and class counsel would be paid $140,000); JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES 86, 89 (1984) (stating that in a sample of closed asbestos claims, compensation received by plaintiffs on average was 39% of total amount paid for asbestos litigation by defendants, insurers, and plaintiffs); Cf. LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 13-23 passim (1994) (noting high contingent percentage rates in many cases and arguing that low level of risk assumed by attorneys often does not justify high returns); Lester Brickman, Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?, 37 UCLA L. Rev. 29, 100 n.280 (1989) (despite common impression that contingent fee rate is one-third, fees quoted are "one-third if settlement, 40% if there is a trial, and 50% if there is an appeal"); id. at 127-28 ("Contingent fee setting today operates in a milieu substantially devoid of fiduciary oversight. Overcharging clients is routine and typically unquestioned . . . .").
the Democratic minority. The House broke some of the general parts of its civil justice reform bill out into H.R. 988, the “Attorney Accountability Act of 1995,” which passed the House in early March of 1995.\(^{24}\) Section 2 of the bill would have added to the general diversity jurisdiction statute\(^{25}\) a new subsection creating an offer-of-judgment mechanism available to any party — unlike present Rule 68, which is usable only by defendants.\(^{26}\) This provision replaced the loser-pays proposal originally developed by the Competitiveness Council and prominently included in H.R. 10. The measure would have left the American rule of each party bearing responsibility for its own attorney fees untouched if no party made a formal offer, thus stopping short of indemnity. It provided, though, that if a party rejected a formal offer and did not do better in the final judgment, the offeror would be entitled to file for its post-offer attorney fees and other costs and expenses, which the court was to award unless doing so would be “manifestly unjust.” Detailed provisions would have imposed limits on the rates and total amounts awardable.\(^{27}\)

This fallback seemed, in general, a considerable improvement on the original loser-pays proposal, in that any party could use the rule to trigger a possible fee entitlement based on what it was willing to take or give to settle the case. It could still give a leg up to well-financed parties able to afford possible fee awards, though, perhaps giving considerable leverage to defendants’ “low-ball” offers to plaintiffs who have some but not extensive assets.\(^{28}\) However, an apparently hasty floor amendment — seemingly an attempt to promote more settlement offers\(^{29}\) — was adopted to provide that attorney fees would be awarded from the date of the offeror’s last offer or “if the offeree made an offer

\(^{26}\) See FED. R. CIV. P. 68 (“At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued . . . .”).
\(^{28}\) For a description of the “low-ball” offer concern, see Thomas D. Rowe, Jr. & Neil Vidmar, Empirical Research on Offers of Settlement: A Preliminary Report, 51 LAW & CONTEMP. PROBS., Autumn 1988, at 13, 18. In a later work, a colleague and I conducted empirical testing using practitioner subjects in a simulated litigation situation. The results confirmed some presence of the “low-ball” effect, but also produced an interesting indication that defendants may feel pressure to accept plaintiffs’ “high-ball” demands under offer rules affecting liability for post-offer attorney fees. See David A. Anderson & Thomas D. Rowe, Jr., Empirical Evidence on Settlement Devices: Does Rule 68 Encourage Settlement?, 71 CHI.-KENT L. REV. 519, 531 & n.29 (1995).
\(^{29}\) See 141 CONG. REC. H2677-81 (daily ed. Mar. 6, 1995).
... from the date the offeree's last such offer by the offeree was made." This addition would let offerees undercut the effect of an early, reasonable offer by making a late, unacceptable one, eliminating exposure to any award for pretrial attorney fees. The amendment reflected an unawareness that for a workable offer rule, the mere making of an offer cannot be what affects fee liability; the impact must relate to its terms.

Section 4 of H.R. 988, moving in the opposite direction from the offer device's moderating of the loser-pays proposal, stiffened an already considerable reinstatement — proposed in H.R. 10 — of Federal Rule of Civil Procedure 11 on sanctions as it had stood before the 1993 amendments. The H.R. 10 version had left intact the new rule's "safe harbor" requiring notice and opportunity to withdraw or modify allegations before a party could file a Rule 11 motion, while reinstating mandatory sanctions and authorizing compensatory awards unlimited by the new rule's deterrence focus. The H.R. 988 version as passed would have made several major changes in Rule 11, first changing the discretionary "may" of the post-1993 rule to "shall" and thus purporting to require rather than allow the imposition of sanctions when the standards of Rule 11 are violated. It would have eliminated the safe-harbor provision, thus nullifying a major part of the revised rule's effort to limit excessive satellite litigation. It would have said that the court "shall," not "may," award reasonable expenses and attorney fees, "if warranted," to the party prevailing on the motion. And it would have undone the new rule's deterrence limit on sanctions, instead requiring that they be sufficient not only to deter others similarly situated but also to compensate the injured parties.

This movement to stiffer sanctions was subject to criticism for ignoring or misunderstanding both the crafting of the revised rule and the reasons for many of the revisions, particularly the reduction of what

31. The same error appears in legislation pending in the 105th Congress. See H.R. 2603, 105th Cong., 1st Sess. § 3 (1997) (proposed 28 U.S.C. § 1332(e)(5)-(6)) (stating that liability for post-offer costs and expenses, including attorney fees, runs "if the offeree made an offer under this subsection, from the date the last such offer by the offeree was made").
32. See Fed. R. Civ. P. 11(c)(1) (requiring serving of Rule 11 sanctions motion 21 days before it can be filed with court for sanctions to be permissible on motion of serving party if served party does not withdraw or correct alleged Rule 11 violation); Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 104(b) (1995) (proposed amendments to Rule 11).
33. See Common Sense Legal Reforms Act of 1995, H.R. 10, 104th Cong., 1st Sess. § 104(b)(1)-(2) (1995) (striking "may" and inserting "shall"); id. § 104(b)(3) (adding requirement that sanction "be sufficient . . . to compensate the parties that were injured by" the sanctionable conduct, and striking requirement that award of sanction in form of payment to moving party be "warranted for effective deterrence").
had been burgeoning satellite litigation over Rule 11 sanctions.\textsuperscript{35} Still, despite the haste with which Contract with America legislation went through the House and the resulting ill-conceived provisions in both the offer proposal and the Rule 11 revision, the direction of movement was coherent and defensible: away from broad, questionable strict liability in the indemnity proposal and toward somewhat more focused provisions intended to encourage reasonable settlements and crack down, albeit in possibly counterproductive ways, on frivolous claims and defenses and harassing motions. In the end, none of these provisions was enacted into law.

2. The Securities-Fraud Class-Action Legislation and Mandatory Rule 11 Scrutiny

In H.R. 1058, the securities class-action legislation, pro and con views on some form of loser-pays seem to have led to an impasse broken by a curious provision concerning Rule 11 sanctions. The Senate did not go along with the House's loser-pays provision, but Senator Phil Gramm (R., Tex.) reportedly favored some form of loser-pays fee liability. He appears to have insisted, as the price for relenting somewhat, on requiring judges to review filings after the "final adjudication" of a securities-fraud class action for Rule 11 violations perhaps even in settled cases, as courts must approve class-action settlements, and in any event without initiative by any party to seek imposition of sanctions, which would be mandatory upon a finding of violation.\textsuperscript{36} This provision stayed in despite fierce opposition from the

\textsuperscript{35} See FED. R. CIV. P. 11 advisory committee notes (1993 Amendments) (stating that revisions "should reduce the number of motions for sanctions presented to the court").

\textsuperscript{36} See 15 U.S.C.A. § 77z-1(c) (West 1997). Section 77z-1(c) states:

c (c) Sanctions for abusive litigation.

(1) Mandatory review by court.

In any private action arising under this subchapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

(2) Mandatory sanctions.

If the court makes a finding under paragraph (1) that a party or attorney violated any requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion, the court shall impose sanctions on such party or attorney in accordance with Rule 11 of the Federal Rules of Civil Procedure. . . .

\textit{Id.}

The statements in the text about the position of Senator Gramm and its effect are based not on published reports, but rather on information I received as I worked in a consultative role on issues concerning the proposed legislation.
judiciary and an unsuccessful effort to revise it on the Senate floor, and became law when both Houses of Congress enacted the resulting bill over President Clinton's veto in December of 1995. The lack of any requirement for party initiative to find Rule 11 violations, even if the courts would often request briefing, puts judges in the position of having to make findings in what may be an essentially nonadversarial mode, especially when the parties have otherwise settled the case and may no longer be eager to have at each other about possible but long-past pleading violations. If observed, the Rule 11 scrutiny requirement may lead to judicial civil disobedience or at least fudging, and perhaps sometimes to findings — including findings of no violations, when the former adversaries have no stomach or purse for further wrangling — entered without adequate party presentations.

III. THE TROUBLE WITH INDEMNITY: IMPLICATIONS OF RECENT DEVELOPMENTS CONCERNING LOSER-PAYS ATTORNEY FEE LIABILITY

Although the current Congress has not so far included loser-pays measures in any proposed legislation making substantial headway, the idea is a perennial that will continue to play a role in civil-justice reform debates. Recent developments in the United States and England, sketched above and in the Woodroffe article, bear examination for what they can teach us about the desirability and crafting of fee-shifting provisions. A first point, illustrated by the removal anomaly in original H.R. 10 and the difficulties with loser-pays measures in the initial proposals for private securities-fraud class-action changes, is

37. See 141 CONG. REC. S9164-69 (daily ed. June 27, 1995) (proposal of amendment that would provide for consideration of possible sanctions under existing Rule 11 and other sanctions provisions "if an abusive litigation practice relating to the action is brought to the attention of the court, by motion or otherwise," with citations to judicial opposition to mandatory-consideration provision included in bill); id. at S9199-9200 (daily ed. June 28, 1995) (vote to table amendment).


39. For an early indication that the new Rule 11 procedure for securities class actions is being little used, see Phyllis Diamond, Panelists Dispute Reform Law's Impact on Private Class Securities Fraud Litigation, 66 U.S.L.W. 2127, 2128 (1997). Diamond quoted California attorney Norman Blears, noting that "'practical experience' suggests that the Rule 11 sanctions aspect 'means very little. The analysis has only been applied in a couple of cases.' " She added that Blears "'knows of no cases in which such sanctions actually have been imposed.' " Id. As of mid-December, 1997, a Westlaw search under 15 U.S.C.A. § 77z-1(c) turned up no reported cases under the new sanctions provision, and Moore's Federal Practice cited none. See 2 JAMES Wm. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 11.29 (3d ed. & Supp. 1997).

40. For a recent favorable discussion of the loser-pays concept and some developments at federal and state levels, see Walter Olson & David Bernstein, Loser-Pays: Where Next?, 55 Md. L. Rev. 1161 (1996).

41. See supra text accompanying notes 13, 18-23.
that despite the temptation to paint with a broad brush, the state rather than federal level may often be the more sensible locus for debate over sweeping loser-pays measures.\(^{42}\) Much of the concern for litigation abuse is over the general run of litigation, which is mostly governed by state substantive law; appropriate federalist deference to state authority can leave attorney-fee entitlements and liabilities in state-law actions up to state lawmakers whether the cases are litigated in state or federal court. Federal claims may often be of such a nature as to make them questionable candidates for loser-pays fee shifting, as seems true of civil rights claims\(^{43}\) and class actions.\(^{44}\)

Second, the removal provision in original H.R. 10 and the ill-fated offer amendment to H.R. 988 on the House floor\(^{45}\) illustrate that fee-shifting measures are complex, frequently have conflicting effects and unanticipated consequences, and require careful forethought and

\(^{42}\) See Olson & Bernstein, supra note 40, at 1175-80 (discussing recent developments in Oregon and Oklahoma).

By referring to "sweeping" loser-pays measures, I intend to distinguish between general provisions of the sort contemplated in original H.R. 10, which would have tied fee shifting to outcome on the merits in all original diversity actions, and more targeted approaches such as possible loser-pays fee shifting in connection with discovery disputes, independent of who wins or loses in the case as a whole. Cf. FED. R. CIV. P. 37(a)(4)(A)-(B) (stating that after resolving discovery-motion dispute, the court "shall . . . require [the losing party or attorney to pay to the winner] the reasonable expenses incurred in [making or opposing] the motion, including attorney's fees, unless the court finds" one of various circumstances including that making an unsuccessful motion or resisting the discovery sought "was substantially justified" "or that other circumstances make an award of expenses unjust").

The reasons for my skepticism about broad indemnity provisions, which rest in considerable part on the extent to which they may deter pursuit of medium-strength claims of persons with only moderate income and wealth, may lose some of their force in a more limited context such as discovery, where concern with abuse in the making of and response to discovery motions is especially strong. See Paul D. Carrington, Renovating Discovery, 49 ALA. L. REV. 51, 65-66 (1997) (advocating consideration of automatic loser-pays fee shifting to rulings on discovery issues). And such targeted measures may make at least as much sense on the federal level as in the states. Still, widespread non-enforcement of this targeted fee-shifting rule, even in its limited context, may reflect a degree of resistance to loser-pays fee shifting in American legal culture that bodes ill for efforts to adopt it on a wide scale. See, e.g., 7 James Wm. Moore et al., Moore's Federal Practice § 37.23(1), at 37-42 (3d ed. 1997) (referring to "[c]oncern that the 1970 amendments," which introduced the present presumption in Federal Rule 37 in favor of attorney-fee awards on discovery rulings, "had not succeeded in making the courts more assertive in monitoring discovery behavior and in sanctioning discovery abuse") (footnote omitted); id. § 37.23(2), at 37-44 ("Some courts appear to believe, despite the purposes that prompted adoption of the presumption, that they should err on the side of leniency when ruling on motions for expense sanctions.") (footnote omitted); id. at 37-46 (referring to "fear that imposing sanctions too freely on parties who lost motions to compel would create too great a risk of chilling legitimate efforts to uncover evidence needed to vindicate important rights").

\(^{43}\) See, e.g., Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-22 (1978) (prevailing civil rights plaintiff should ordinarily recover attorney's fee, but prevailing defendant should recover fee only if court finds that plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so").

\(^{44}\) See supra text accompanying notes 18-23, for a discussion regarding the difficulties with the loser-pays proposal for securities-fraud class actions.

\(^{45}\) See supra text accompanying notes 26-31.
drafting. The apparent simplicity of the indemnity idea is deceptive, and often the last thing that proponents should want is quick enactment of an initial proposal. The medical and insurance sectors in Florida played a major role in securing enactment of loser-pays fee shifting for medical malpractice cases in the state in 1980.46 Then, after a large fee award against a losing doctor and frequent inability of winning medical defendants to collect their fees from losing plaintiffs, and with rising skepticism about the law's incentive effects, Florida's medical organizations joined the consensus favoring repeal of indemnity only five years later.47

Third and most important for the future of fee-shifting policy, the recent debate in the United States and the changes in England bring out the significance of the impact of fee-shifting measures on litigants' risk levels and access to legal redress for claims, particularly those of persons who are likely to be risk averse because they have moderate income and wealth — enough to fear real loss but not so much as to be able to absorb it readily.48 Whatever the encouragement and redress that indemnity may provide to plaintiffs with strong claims,49 there is serious and repeatedly expressed concern that general loser-pays fee shifting is too harsh and too much of a deterrent to the medium-strength claims of the middle class.50


47. See id. at 608 (noting that $4.4 million fee award was given to a prevailing plaintiff and that Florida Medical Association supported repeal); F. Townsend Hawkes, The Second Reformation: Florida's Medical Malpractice Law, 13 FLA. ST. U. L. REV. 747, 766 n.94 (1985) ("The repeal was . . . deemed advisable since most interested parties agreed that [the Florida medical malpractice loser-pays provision] was ineffective to prevent suits or encourage settlements."); Thomas R. Tedcastle & Marvin A. Dewar, Medical Malpractice: A New Treatment for an Old Illness, 16 FLA. ST. U. L. REV. 537, 541 n.36 (1988) (mentioning as reason for repeal of indemnity provision that "after obtaining an award, defendants were seldom able to collect it"); G. Marc Whitehead & Robert B. MacDonald, The Truth About the "English Rule," 21 LITIGATION, Spring 1995, at 3, 4 ("Florida's experiment with the [loser-pays] rule in medical malpractice resulted in greatly increased costs, fewer settlements, and more litigation, so much so that the very doctors who lobbied for the experiment ultimately pushed for its abandonment.").

48. See, e.g., Thomas D. Rowe, Jr., Predicting the Effects of Attorney Fee Shifting, 47 LAW & CONTEMP. PROBS., Winter 1984 at 139, 153-54.

49. Cf., e.g., Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55, 59-60 (1982) (economic analysis indicating likely higher frequency of suit under British rule than under American rule when plaintiff believes that chance of prevailing is high enough).

50. See Gregory A. Hicks, Statutory Damage Caps Are an Incomplete Reform: A Proposal for Attorney Fee Shifting in Tort Actions, 49 I.A. L. REV. 763, 790-91 (1989). Professor Hicks states, "In the absence of institutional arrangements allowing plaintiffs of lesser means to avoid fee indemnity obligations in unsuccessful litigation, two-way fee shifting could deter such plaintiffs from bringing meritorious claims of uncertain outcome by exposing them to the risk of having to pay the defendant's legal fees." Id. (footnote omitted). See also, e.g., Herbert M. Kritzer, Searching for Winners in a Loser Pays System, A.B.A. J., Nov. 1992, at 55 ("It is generally accepted that the English rule discourages privately funded parties from bringing meritorious claims."); id. at 56-57 (considering effects of small chance of having to pay other side's large fee
These problems can be viewed both from the “ex ante” perspective of effects on incentives to pursue claims in the first place, and from the “ex post” viewpoint of one’s sense of justice and fairness after the fact when fee shifting is imposed.\(^{51}\) Whatever the desirability of ex ante deterrence of weak or frivolous claims, general indemnity applies to frivolous and nonfrivolous claims alike. Its deterrent effects, especially given risk aversion among many claimants, will extend quite far up the scale from frivolous into possibly meritorious claims, affecting in some degree nearly all but sure-fire winners — and the number of risk-averse claimants who can feel confident that theirs is a sure winner despite the down side of possible fee liability, and whose lawyers will feel they can speak of a virtual sure thing, is likely to be modest.\(^{52}\) General indemnity would not eliminate all claims other than “locks” as to liability; still, its deterrent effects on those that seemed to be likely, but not sure, winners would probably be substantial.\(^{53}\) These impacts would probably be all the stronger in the American context, where civil legal aid is limited to the indigent, in contrast to the somewhat more generous scheme in England.\(^{54}\) And the deterrent effect

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52. The deterrent effects seem likely to be especially strong because of an effect predicted in theoretical literature and confirmed by empirical study: loser-pays fee shifting will almost certainly reduce the number of cases pursued, but will actually increase the total expenditure on litigation because of a more-than-offsetting rise in the amount spent on each litigated case due to the increase in the stakes. See Avery Katz, Measuring the Demand for Litigation: Is the English Rule Really Cheaper?, 3 J.L. ECON. & ORG. 143, 171 (1987). In his article, Professor Katz states: [T]hose who favor the English rule of litigation finance on the grounds that it would lower the costs of litigation are probably mistaken. While it is conceivable that the English rule would lower the total number of cases brought to trial, it would likely increase the average expenditure per case. This is because the English rule both raises the effective stakes of the lawsuit, thus raising the marginal value of expenditure, and provides a probabilistic subsidy on the margin, thus lowering the marginal cost of expenditure.

53. See, e.g., The Economist: Calls for Contingency Fees and Abolition of the “Losers Pays” Rule in Britain’s Civil Justice System, CIV. JUST. DIG., Winter 1995, at 9 (hereinafter Contingency Fees) (asserting that in Britain “civil justice is now too expensive for all but the poorest and the richest,” and reporting studies indicating that “some 85 percent of accident victims ‘do not even try to claim compensation,’ at least in part out of fear of responsibility for opponents’ legal expenses”) (citations omitted) (quoting ECONOMIST, Jan. 14, 1995, at 29).

54. See, e.g., Napier, supra note 50 (describing “softening effect” of relatively generous Legal Aid System in England on English Rule).
on pursuit of plausible claims seems unnecessary, given the availability of other measures — such as sanctions targeted on frivolous actions, and offer devices that impose threats of fee liability only in connection with a serious settlement proposal.

After the fact, when a general loser-pays measure imposes fee liability on the unsuccessful party, its application can seem especially harsh in precisely the kind of case that each side had the most justification for litigating — the close case whose outcome on liability, damages, or both was hardest to foresee. Indemnity, again, is a form of strict liability, detached from notions of fault in pursuing a meritless claim or defense or compensation for inflicting legally wrongful injury. In the close case, when each side's insistence on going to verdict seems most reasonable, the harshness of imposing fee liability at all is likely to be compounded by the greater amounts expended by the winner and imposed on the loser.

Concerns about loser-pays rules often stress their problematic effects on medium-strength claims of the middle class. But theory and experience give reason for concern about their treatment of defendants as well. If the basis for fee shifting is not the wrongful infliction of cost necessary to provide full relief from a legal injury, linked to the idea of make-whole compensation for the underlying substantive wrong, it is hard to see why losing defendants any more than losing plaintiffs in close cases should foot the bill for the other side's fees. And in practice, the delicacy and practical difficulty of collecting from losing plaintiffs often turn a purportedly two-way loser-pays approach into a one-way system in which winning plaintiffs but not winning defendants actually realize the fee awards to which they are entitled. This one-sidedness in practice is unfair to defendants if they are supposed to benefit when they win; while I will go on to endorse a primarily one-way system involving awards to winning plaintiffs, any such system should come about not by stealth and slippage but only in the open and on the basis of a policy decision that it is justifiable. Indemnity systems, thus, seem

55. See Keith N. Hylton, Fee Shifting and Predictability of Law, 71 CHI.-KENT L. REV. 427, 456 (1995) ("The best way to discourage nonmeritorious suits is to enhance the power of courts to [distinguish between meritorious and nonmeritorious claims] and penalize bad-faith litigants, not to make it difficult to bring any claim regardless of merit.").

56. See supra text accompanying notes 15-16.

57. See Contingency Fees, supra note 53.

58. See, e.g., Suzanne Di Pietro, The English Rule at Work in Alaska, 80 JUDICATURE 88, 89 (1996) (stating that in interviews conducted for study of operation of fee shifting in Alaska, "[t]he attorneys who represented insurance companies in tort lawsuits observed that their clients always satisfied fee awards against them but seldom were able to collect fee awards in their favor from non-prevailing tort claimants"); Tedcastle & Dewar, supra note 47, at 541 n.36 (stating that under Florida medical-malpractice loser-pays provision, "after obtaining an award, defendants were seldom able to collect it").
damned if they don’t and damned if they do — falling short of their promise in a manner systematically biased against defendants when not enforced, and imposing excessive risk and questionable liability on many plaintiffs if their threats are made real.

I have spoken somewhat abstractly of indemnity systems’ risk-imposition and inhibition to claimants’ access to legal redress. Much experience, though, seems to me to bear out the argument, with several manifestations whose common trait can be summed up simply: one way or another, Anglo-American legal systems virtually always flinch when it comes to imposing full loser-pays fee liability on unsuccessful parties. We find a way to temper indemnity’s effects, often watering them down to token or derisory levels, especially but not exclusively when it comes to losing plaintiffs. And even when such limiting is done overtly, as with explicitly less-than-full fee liability, a result too often overlooked is that wherever loser-pay liability leaves off, the much-criticized American rule of each side’s responsibility for its own attorney’s fees picks up. Halfway indemnity schemes, in short, incorporate the very rule they purport to be escaping — yet nobody seems to have the stomach for full loser-pays liability.

A much-cited American example of loser-pays attorney fee shifting is Alaska, which does indeed follow a variant of the English rule. A feature of the Alaskan system given little prominence in debates over loser-pays policy, however, is that the amounts shifted are explicitly limited — percentages well below common contingent-fee shares for winning plaintiffs, and a modest fraction for winning defendants.59 England, too, differentiates between the basis on which a solicitor may bill a client and that on which losers are taxed for winner’s fees,60 although the amounts have been large enough to cause expressions of concern about their fairness and impact, especially with respect to plaintiffs.61 That, of course, is reason for worry only when the threat of collecting is real, as it often has not been — with the failure to follow

59. See Alaska R. Civ. P. 82(b)(1) (scheduling fee awards with maximum percentage of 20% of first $25,000 of money judgment recovered in contested case with trial and 10% of amounts above $25,000, and providing lower amounts in cases contested without trial and non-contested cases), 82(b)(2) (for “cases in which the prevailing party recovers no money judgment,” providing for awards of 30% of prevailing party’s “actual attorney’s fees which were necessarily incurred” in tried cases and 20% in cases resolved without trial).

60. See R.M. JACKSON, JACKSON’S MACHINERY OF JUSTICE 451 (J.R. Spencer ed., 8th ed. 1989) (In England, “[t]he costs that must be paid by the loser to the winner have always been calculated upon a different basis which is less generous” than that on which solicitors may charge clients, although 1986 revision introduced new formulation “intended to be more generous to the winner.”).

61. See, e.g., Cornwell, supra note 16; Napier, supra note 50.
through on fee shifting against losing plaintiffs\textsuperscript{62} being another example of the flinching to which I have referred.

Most telling, perhaps, is the illustration provided by the recent English experience recounted in Professor Woodroffe's article. England has had a generous system of civil legal aid that provided partial funding for one's own attorney even for many persons of middle income, depending on the expense estimated to be necessary to pursue a claim.\textsuperscript{63} Lacking American-style contingent fees with lawyers bearing the risk of defeat, English plaintiffs' liability for their own attorneys' fees if they did not prevail required some means of assuring access within the setting of an indemnity system, which legal aid available to those of modest means as well as the indigent provided. In practice, too, legal aid recipients are usually exempt from paying the other side's fees when they lose.\textsuperscript{64}

In recent years, however, English legal aid has been tightened considerably in both the amounts provided and in the percentage of the population eligible.\textsuperscript{65} Many more of the middle class thus became exposed to the threats of having to pay, if they did not win, both their own attorney's fees and a considerable part of the other side's fees as well.\textsuperscript{66} This increase in risk and its effect on access appears to have proven too great, and the system fairly promptly found a way to reduce the risk level with the new "conditional fee." The loser-pays rule seems strongly enough rooted in England that the new fee approach does not eliminate client liability for the fees of a prevailing adversary, but a plaintiff's own lawyer takes on part of the risk by agreeing to collect his or her own fee only in the event of success — and then with an "uplift" to reflect the risk of loss assumed by the attorney.\textsuperscript{67}

\textsuperscript{62} See supra note 58 and accompanying text.

\textsuperscript{63} See generally Jackson, supra note 60, at 463-73 (describing Legal Aid Scheme); id. at 482-87 (citing large increases in cost of legal aid and proposals for cost-cutting).

\textsuperscript{64} See id. at 472 (stating that frequently, "successful opponents [of Legal Aid recipients] get little or nothing awarded against them" for costs and attorney fees); see also Napier, supra note 50, at A17 ("only in exceptional circumstances are costs awarded against the Legal Aid Fund itself").

\textsuperscript{65} See, e.g., Woodroffe, supra note 3, at 348-49; Lisa Stansky, Changing of the Guard, A.B.A. J., June 1996, at 73 ("[S]ome 72 percent of the total British population was eligible for legal aid in 1979. That was drastically reduced in 1993 when funding cuts removed 12 million to 14 million people from the national legal aid program."). For a description of proposals for further cutbacks in legal aid by the new Labor government, including a requirement of a 75% expectation of success and a ban on using legal aid to fund claims for money, see Robert O’Connor, Blimey, What’s Legal Aid Coming To?, A.B.A. J., Feb. 1998, at 22.

\textsuperscript{66} See Stansky, supra note 65, at 73 ("When the government was footing the bill for litigation, there was less hesitation about bringing suit. Now, however, Brits in modest circumstances are feeling the effects of ‘loser pays.’").

\textsuperscript{67} See Woodroffe, supra note 3, at 353-55. The Labor government in Britain, in connection with other proposed cutbacks in legal aid, see supra note 65, is proposing to extend the conditional fee system "to all civil proceedings, except family cases." O’Connor, supra note 65, at 22.
Similarly, the increased exposure to risk has led to the usual market response, the provision of more insurance coverage. Such insurance is much less necessary in the United States because of the combination of attorney risk bearing on the plaintiff’s side and no liability for the fees of a winning adversary. If the English respond so swiftly to the increase in risk posed by wider exposure to the reality of the English rule, Americans should think at least twice about embracing it.

IV. The Rationale for and Possible Workings of Compensatory One-Way Fee Shifting

In any debate over possible reforms of attorney fee liability hinging on results in the underlying substantive litigation, one-way pro-prevailing-plaintiff approaches should play a role. The political climate in recent years has not been hospitable to such schemes, but they have been widely adopted as an American alternative to both the American and English rules and have drawn support from academic commentators emphasizing a notably wide range of rationales. Harold Krent has developed the case for one-way rules primarily in public-law contexts, and John Leubsdorf has argued for such rules primarily from the point of view of providing full compensation for legal wrongs from violations of private-law norms. Keith Hylton has developed theoretical models that focus on the likely impact of fee-shifting rules

Herbert Kritzer reports a less formal manner of softening risk under a loser-pays system in Ontario, which has also formally banned contingent fees — meaning that the client is obligated to pay the lawyer, win or lose. Interviewing Ontario lawyers, he found that despite the formal ban firms often did not expect to be paid if they did not win a recovery, and that they often charged winning clients 10% to 15% of the recovery in addition to the award from the other side. See Herbert M. Kritzer, Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario, 47 LAW & CONTEMP. PROBS., Winter 1984, at 125, 130-32.

68. See Woodroffe, supra note 3, at 355-56.

69. The qualifier about fee liability “hinging on results in the underlying substantive litigation” is meant to set aside situations such as fee liability resulting from the likes of sanctions for frivolous claims or defeat on discovery motions. When imposed, such fee shifting is targeted at controlling abuse of the litigation process, or the level of discovery activity; it should presumably be two-way, affecting plaintiffs and defendants alike. The justifications to be offered in the text for primarily one-way, pro-prevailing-plaintiff fee shifting do not call into question such two-way fee award systems aimed at controlling litigation behavior.

70. See, e.g., Gregory E. Maggs & Michael D. Weiss, Progress on Attorney's Fees: Expanding the "Loser Pays" Rule in Texas, 30 HOUSTON L. REV. 1915, 1921, 1937-44 (1994) (noting several loser-pays statutes for specific types of actions in Texas, including some recently adopted or under consideration, and advocating further measures); Olson & Bernstein, supra note 40 (tracing recent consideration or adoption of loser-pays measures in U.S. Congress, Oklahoma, Oregon, and Alaska).

71. See, e.g., Note, State Attorney Fee Shifting Statutes: Are We Quietly Repealing the American Rule?, 47 LAW & CONTEMP. PROBS., Winter 1984, at 321, 330 (surveying almost 2,000 state fee-shifting statutes and finding over half to designate prevailing plaintiff as beneficiary).


on primary conduct, and has found that on such measures as promotion of real-world norm observance and predictability of legal rules' meaning, the one-way approach should be the most efficacious. In the tort context, Jeffrey O'Connell almost two decades ago advocated legislative adoption of fee shifting to prevailing plaintiffs as an offset to abolishing damage recovery for pain and suffering. In addition, Gregory Hicks has urged that a "prevailing plaintiff fee shifting system" would best "reconcile the dual objectives of promoting plaintiffs' access to the torts system and protecting defendants from unjustified claims." I do not mean to imply that there is unanimity among commentators in favoring primarily one-way rules, but given the first-glance sense of unfairness they can evoke, it is significant that so many thoughtful writers examining the issue from several different perspectives have endorsed one-way approaches.

If primarily one-way rules are to resurface in the ongoing debate over fee-shifting policy, it is important that their possible features be developed carefully and their rationales and likely workings scrutinized for possible theoretical weaknesses and practical problems. Such an effort was undertaken in the Reporters' Study referred to earlier, and which the remainder of this essay will summarize and discuss. In the terms of its own conclusion, the Study's chapter on attorney fees recommends that:

(1) The reasonable attorney fees and other litigation expenses incurred by prevailing plaintiffs should be treated as a distinct category of compensable damages.

74. See Hylton, supra note 55 (arguing that one-way pro-prevailing-plaintiff fee shifting is superior to both American and British rules in its influence on predictability of meaning of legal rules); Keith N. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 VAND. L. REV. 1069, 1097 (1993) (stating that "pro-plaintiff fee shifting simultaneously promotes compliance and settlement more effectively than does any other fee shifting rule"); Keith N. Hylton, Litigation Cost Allocation Rules and Compliance with the Negligence Standard, 22 J. LEGAL STUD. 457, 459 (1993) (stating that on basis of theoretical model, "the proplaintiff rule generates the highest level of compliance and the least litigation").

75. See Jeffrey O'Connell, A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees, 1981 U. ILL. L. REV. 333.

76. Hicks, supra note 50, at 793.

77. See, e.g., Maggs & Weiss, supra note 70; Olson & Bernstein, supra note 40; Robert J. Samuelson, The Litigation Explosion: The Wrong Question, 46 Md. L. REV. 78, 81-82 (1986) (advocating British rule as preferable for fairness, screening out weak cases, and encouraging adequate settlements for strong claims); Mark S. Stein, The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal, 71 CHI.-KENT L. REV. 603 (1995) (exploring possible loser-pays system with tort plaintiffs' lawyers permitted to assume risk of adverse fee award and finding it generally preferable to conventional English approach); Mark S. Stein, Is One-Way Fee Shifting Fairer Than Two-Way Fee Shifting?, 141 F.R.D. 351 (1992) (hereinafter One-Way Fee Shifting) (arguing that make-whole principle of compensatory damages does not establish fairness of one-way fee shifting because prevailing defendant will often have had to establish claim of right conflicting with that of plaintiff).
(2) An offer-of-settlement procedure should be created under which once the defendant made a formal offer for settlement, if the rejecting plaintiff did not fare better (or at least come within a certain range) in the eventual recovery, he would forfeit his entitlement under proposal (1) to recover any legal fees incurred after a reasonably short period to consider the offer.

(3) For cases in which plaintiffs recover damages at trial, the courts should use a contingency-based, percentage-of-the-recovery formula as the standard approach for reckoning the amount of plaintiffs’ fee award . . . .

In addition, the Study discusses but makes no positive recommendation on a further significant issue: In light of the basic recommendation for a one-way prevailing-plaintiff fee entitlement, should prevailing defendants who incur “fees and other expenses because of the entirely groundless or frivolous institution or pursuit of claims . . . be able to recover reasonable attorney fees and expenses incurred in responding to such tactics”? Such an entitlement, if it existed at all, could run against either plaintiffs or their attorneys, and in some cases might go beyond the sanctions that already exist in such forms as Rule 11 of the Federal Rules of Civil Procedure and the tort action for malicious prosecution.

To give somewhat more detail on the Reporters’ Study proposals, saving for later most efforts at explaining and evaluating the rationales: The centerpiece is a basic departure from the American rule, urging that the “plaintiff’s attorney fees must be treated as an integral part of tort damages.” The fee entitlement thus rests primarily on substantive notions of compensation for tort victims and of appropriate incentives to bear upon the real-world behavior of actual and prospective tort defendants, rather than treating fees as costs to be recovered for reasons having to do with equity and likely incentives in the litigation process. The point of fundamental disagreement with recent loser-pays proposals comes in the Study’s rejection of “automatic indemnity of defendants for legal expenses when they win their cases,” which sets the Study’s proposed fee-shifting regime sharply apart from general indemnity.

78. REPORTERS’ STUDY, supra note 6, at 315-16.
79. Id. at 292.
80. For the Study’s full discussion of these issues, see id. at 290-96. See also generally RESTATEMENT (SECOND) OF TORTS § 674 (1977) (discussing tort of malicious prosecution); FOWLER V. HARPER ET AL. 1 THE LAW OF TORTS § 4.8 (3d ed. 1996 & Supp. 1998) (same).
81. REPORTERS’ STUDY, supra note 6, at 281.
82. See id. at 281-82.
83. Id. at 282.
If God is in the further details, the Reporters’ Study did not skimp on them. As part of the same package with the one-way prevailing-plaintiff fee shift, the Study proposed a formal offer device with the following characteristics: (1) After either a reasonable amount of discovery or an alternative proceeding such as early neutral evaluation or court-annexed arbitration, defendants should be able to make formal offers of settlement. (2) Such an offer would affect liability for attorneys’ fees accrued after the plaintiff had had a reasonable amount of time to consider the offer. (3) A plaintiff who rejected the offer would suffer fee consequences only if the verdict fell more than a certain fraction (say 25 percent) below the offer. (4) The consequence would be limited to the plaintiff’s loss of entitlement to his own attorney fees; the plaintiff would not assume liability for the defendant’s fees.84

The section on offer rules went on to note two contexts in which formal offer devices seem inappropriate and should not apply. The first is “when the judge or jury can make only a ‘binary’ ruling, such as a separate determination on liability or a claim for liquidated damages.”85 In such a situation “a defense offer would be pointless . . . [because] either the plaintiff wins and is entitled to fees [under the Reporters’ Study fee-shifting proposal] or loses and gets none anyway,”86 rather than winning bigger or smaller so that a formal defense offer could affect the fee entitlement. The second type of problem in making formal offer devices sometimes inapposite “arises when litigants do not have autonomy to accept or reject settlements on their own, such as when courts must approve class action settlements.”87 Court rejection of a settlement based on the plaintiff class’ acceptance of a formal defense offer, followed by a verdict that would ordinarily deny the class its post-offer fees, would create a conundrum of unavoidable unfairness to one side or the other.88 The only practical escape appears to be excepting such situations from a formal offer rule; the Study recommended leaving the basic one-way rule in place for such cases.89

After its previously mentioned, inconclusive discussion of possible plaintiffs’-side liability for defense fees in cases brought or continued frivolously,90 the Reporters’ Study turned to the vexing question of

84. Id. at 286.
85. Id. at 289.
86. Id.
87. Id.
88. See id. at 290 (“If the parties have agreed on a settlement that would avoid post-offer fees and other costs, in theory neither should have to bear them.”).
89. See id.
90. See supra text accompanying notes 79-80. For further consideration of the matter, see infra text accompanying notes 111-16.
reckoning fee award amounts. Up to this point the Study's proposals bear considerable resemblance to the regime prevailing in much litigation governed by federal fee-shifting statutes today: prevailing plaintiffs usually are entitled to a reasonable attorney fee,91 and prevailing defendants ordinarily are not,92 but a defendant can make a formal offer of settlement that if rejected (and depending on the result) may disentitle plaintiff from recovering post-offer fees.93 Despite the Supreme Court's adherence to the rate-times-hours "lodestar" formula for calculating fee awards under federal fee-shifting statutes,94 though, the Study recommended as a general approach use of "the existing contingency-based, percentage-of-recovery formula when plaintiffs recover money damages."95 For its tort context, then, the Study chooses not the hourly basis for calculating plaintiffs' fee awards but rather its main competitor, a percentage of the recovery.96

The discussion in the Reporters' Study largely speaks for itself, but because of the Study's limited circulation, it may be worthwhile to consider here some of the key features, rationales, and issues. A starting point is a rebuttable presumption that absent a strong positive reason (and the law recognizes many), losses — from both real-world litigation and from litigation costs — should be left where they initially fall, rather than invoking the costly and burdensome processes of the law to determine whether and to what extent they should be shifted. The Study finds such justification for plaintiffs' attorney fees in the substantive principle of make-whole compensation undergirding awards of compensatory damages, to which prevailing claimants, but of course not prevailing defendants, are generally entitled. Denying any award for attorneys' fees means that attorneys must get their payment from damage awards, which reduces their injured clients' compensation below the fullness that the law in theory seeks to provide. The Study considers other factors than make-whole compensation in the choice and shaping of its attorney-fee proposals — equity, incentives, and administrability97 — but the substantive make-whole principle, rather

94. See, e.g., City of Burlington v. Dague, 505 U.S. 557, 562 (1992) ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.").
95. Reporters' Study, supra note 6, at 297.
96. For a summary of criticisms of the lodestar method, see Charles Silver, Unloading the Lodestar: Toward a New Fee Award Procedure, 70 Tex. L. Rev. 865, 867-68 (1992) (citing complaints that lodestar approach is burdensome; lends itself to hour-churning and consequent litigation over fee-padding; is insufficiently objective and too manipulable, confusing, and unpredictable; and discourages early settlements).
97. See Reporters' Study, supra note 6, at 281.
than concerns for court administration or control of litigation behavior, is the foundation for its advocating a departure from the American rule of each side’s paying its own lawyer, win or lose.98

Both loser-pays and prevailing-claimant fee shifting, of course, aim to give full compensation to successful claimants. Thus, other factors must provide the basis for choosing one approach over the other if the American rule is to be abandoned. The Reporters’ Study finds the fairness appeal of the loser-pays rule, as applied to support awards to prevailing defendants, on examination less attractive for several reasons than it often initially appears. Usually, to qualify for make-whole compensation, a litigant must establish an adversary’s wrongful primary conduct that inflicted real-world loss; when the party causing the loss does not voluntarily agree to pay, attorney fees are often a necessary cost of establishing the entitlement to compensation to right a substantive wrong.99 Although defendants may sometimes have to establish the rightfulness of their own conduct to escape liability,100 the burdens are usually on plaintiffs, and their bad fortune in using a non-defective product may deny them compensation just as can their negligence in causing their own loss. Plaintiffs must show something in the defendant’s real-world behavior, causing plaintiffs’ loss, that the law regards as sufficient for awarding make-whole compensation; by contrast, what forces defendants to incur legal costs is ‘the plaintiff’s decision to litigate — which, without more, is not a wrong.’101

Beyond these somewhat philosophical positions about the relative fairness of indemnity and prevailing-plaintiff fee shifting, the Reporters’ Study finds additional practical reasons in incentives and administrability to favor the latter. Especially given the usual financing of the two sides, with tort plaintiffs — unlike insured or enterprise defendants — not in a position to pool or pass on down-side loss, the ‘disincentive to the pursuit of plausible though not clearly winnable claims,’ beyond the desirable ‘filtering effect that occurs when contingent-fee lawyers screen out evidently unpromising cases,’ is likely to be significant.102 Moreover, loser-pays at least in principle requires a fee award with all its headaches in every case. In addition:

98. See id. at 272 (“Our proposal for compensation of the successful plaintiff’s attorney fees rests primarily . . . on considerations of substantive tort policy rather than on the needs of judicial administration or on incentives for attorney behavior.”).
99. In situations such as strict liability that need not involve a finding of defendant’s wrongful conduct to support a claim for compensation, the same rationales such as cost-internalization that support awards of compensatory damages extend to the award of necessarily incurred claimants’ attorney fees as an element of those costs.
100. See One-Way Fee Shifting, supra note 77, at 356-57.
101. Reporters’ Study, supra note 6, at 278 (emphasis in original).
102. Id. at 279.
Even worse, awards to prevailing defendants would have to be calculated on the troublesome rate-times-hours lodestar basis rather than using the percentage-of-recovery formula available for plaintiff fees. Collection from losing tort plaintiffs would often be difficult, leading either to partial abandonment of the rule in practice or to even more contentious proceedings. Without a strong positive justification for the loser-pays approach — and we suggest that none is apparent — general indemnity does not appear worth the trouble.103

Although it rejected defendants’ claim for loser-pays fee shifting, the Reporters’ Study sought balance and fairness both externally in its treatment of elements of tort damages and internally in the construction of its fee-liability proposals. In other chapters, it recommended limits on recoveries when collateral-source payments are present, on damages for pain and suffering, and on punitive awards.104 Although the idea was not to suggest a horse trade, the Study noted critically that the generosity of American tort damage measures in these three respects is sometimes “explained as a sub rosa offset to the American rule” denying attorney-fee recovery.105 It would be better to end such disingenuous, imprecise back-door approaches by frankly awarding fees to winning claimants and deciding independently whether other elements and measures of tort damages were justified or should be limited.106 If this rethinking makes a resulting package more politically palatable by restricting some aspects of plaintiffs’ recovery and granting or expanding another, that can hardly count as a demerit.

Further, deciding on the basic one-way approach still leaves some issues of fairness to defendants with which to be reckoned. These include whether defendants should be able to stop the accumulation of their liability for plaintiffs’ fees with a formal offer should plaintiffs reject the offer and not do well enough at trial in relation to the terms of the offer, and whether in limited circumstances of plaintiffs’ baseless initiation or continuation of suit defendants should have a claim for their fees from plaintiffs, their attorneys, or both. Concerning the first, the Study espoused the principle of a formal offer device similar to present Rule 68 of the Federal Rules of Civil Procedure that would permit defendants to stop the clock on accumulation of their fee liability, but not to expose plaintiffs to liability for defendants’ post-

103. *Id.* at 281.
104. *See generally id.* chs. 6, 8, 9 (discussing collateral-source payments, pain-and-suffering damages, and punitive damages).
105. *Id.* at 270.
106. *See, e.g.*, O’Connell, *supra* note 75, at 351-52 (noting that pain and suffering payments have “served substantially to pay claimants’ lawyers”; suggesting that abolition of such payments and their replacement by awards for claimants’ attorney fees would be a “[b]alanced reform”; and citing “candor and openness” as among advantages of proposal) (footnote omitted).
offer fees. Such offer devices may serve the ends of fairness by exempting from fee liability those whose offers could have ended the litigation advantageously to their adversaries, and can create desirable incentives for the making and serious consideration of realistic settlement offers.

The Study's discussion of its offer proposal goes into much detail both on the pros and cons of the device and on the workings of the particular form proposed,\(^{107}\) which need not be repeated here. For present purposes, most important is the rationale for its intermediate approach — letting defendants make offers that affect their liability for plaintiffs' post-offer fees, but not providing for a reversal that could make plaintiffs liable for defense fees. An important reason for allowing such offers at all is that they "give the defendant with a good case against an inflated claim an effective way of countering groundless opposition to reasonable compensation by stopping the clock on the plaintiff's attorney fee entitlement."\(^{108}\) Whatever the difficulties and complexities of offer rules, there is little reason to leave plaintiffs with the ability to keep the fee clock running — with the effects that can have on bargaining positions — while they insist on unreasonably generous terms.

As for not making rejecting plaintiffs who do not do well enough at trial liable for defendants' post-offer fees, that limit follows in part from the Study's rejection of loser-pays fee shifting. Further, it may get the incentives about right:

Denying entitlement for fees incurred a certain time after the offer provides incentive enough for the plaintiffs to take an offer seriously, and the chance of having the clock on the plaintiff's fees stopped should exert pressure on the defendant to make early and reasonable offers. Finally, neutralizing rather than reversing fee entitlement reduces both the possibly excessive effect of a low-ball offer to a risk-averse plaintiff and the problematic dig-in impact of hardening the defendant's later bargaining position.\(^{109}\)

Significantly, in this respect the Study's offer proposal strongly resembles the regime prevailing for federal civil rights litigation as a result of the Supreme Court's much-criticized decision in Marek v. Chesny.\(^{110}\) But some of the strongest objections to Marek, its possible inconsistency with Congressional intent in civil rights fee-shifting statutes and its questionable interpretation of the language of present

\(^{107}\) See Reporters' Study, supra note 6, at 283-90. For a summary of the Study's offer proposal, see supra text accompanying notes 84-89.

\(^{108}\) Reporters' Study, supra note 6, at 284.

\(^{109}\) Id. at 288 (footnote omitted).

Rule 68, do not apply to a fresh proposal in the tort context. And on policy grounds if the aim is a balanced regime with reasonable incentives and without excessively harsh effects on either side, the Marek result — with, crucially, plaintiffs not liable for post-offer defense fees — may yield about as fair and workable a scheme as any. 111

But if plaintiffs should not be liable for defense fees when they fail to do well enough in relation to a rejected defense offer, their ability to inflict unrecoverable fee expense by bringing a baseless or frivolous action, or continuing one after its baselessness has become apparent, is another matter. Rejection of the strict-liability indemnity principle, and even limiting formal offers’ effect to canceling but not reversing fee liability, do not require letting plaintiffs and their lawyers escape with no losses except their time if they bring or continue claims when they clearly should have known better. Wrongful litigation conduct, as opposed to reasonably bringing and pursuing a reasonable claim that does not prevail, has a claim to being a basis for make-whole compensation just as does out-of-court tortious conduct. On this score the Reporters’ Study noted the problem and possible approaches but found both the present state of knowledge and the reaction of the plaintiffs’ bar such as to counsel against any strong recommendation, particularly for imposing liability for defense fees in baseless-litigation cases on plaintiffs’ counsel. 112

I once thought that this position was a cop-out, and I still think there is much to be said for the principle that wrongful litigation conduct-inflicting costs should be a basis for liability. The Supreme Court has recognized the legitimacy of a claim to reverse fee liability under pro-prevailing-plaintiff federal fee-shifting laws in Christiansburg Garment Co. v. EEOC. 113 The Court there held that a prevailing defendant could qualify for a fee award if the plaintiff’s “claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so,” 114 even in the absence of subjective bad faith. The Court also emphasized the importance of avoiding “the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.” 115 Litigation

111. For a discussion of criticisms of Marek with a defense of the result on policy grounds, see 13 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 68.08(4)[c] (3d ed. & Supp. 1997).
112. See generally REPORTERS’ STUDY, supra note 6, at 290-96.
114. Id. at 422.
115. Id. at 421-22 (emphasis in original).
conducted in violation of these standards is not only wrongful but a violation of norms of professional responsibility, and lawyers would have little defense in equity to being held personally liable for going along. The experience with burgeoning satellite litigation over sanctions that led to the 1993 amendments of Rule 11 of the Federal Rules of Civil Procedure, though, has tempered somewhat my zeal for dangling pots of gold before those who might hope to recover fees that would not be awarded as a matter of course. Experience under revised Rule 11 should be instructive on the adequacy of less draconian and tempting sanctions than fee awards.

A final significant feature of the Reporters' Study proposal was its recommendation for a percentage-based, rather than rate-times-hours, approach to reckoning the fee awards to prevailing plaintiffs. The rationales were straightforward:

[T]he existing contingency-based, percentage-of-recovery formula . . . has the signal virtue of maintaining the current incentive of the plaintiff's attorney to accept only cases worth bringing, rather than risk no compensation at all for the effort put into fruitless claims.

. . . .

The percentage approach has the virtue both of avoiding some of the incentive problems from the hourly element in the lodestar formula and of harmonizing attorney and client interests because both will receive more money if the tort recovery is greater. So far as we can tell, the percentage approach does not add any problems of lawyer-client conflict that do not exist already. The percentage formula is also simple and familiar, and should greatly reduce satellite litigation.

The Study recommended use of the percentage-of-recovery approach "[a]s often as is feasible," and for decent-sized plaintiffs' damage recoveries in the tort context that is often likely to be both possible and desirable. In several kinds of situations, though, use of the lodestar might be preferable or even unavoidable: (1) if ever defendants were entitled to a fee award, (2) when plaintiffs got injunctive or other specific relief rather than money damages, (3) when plaintiffs were entitled only to pre-offer fees after rejecting an offer of settlement, and (4) when plaintiffs appropriately pursued over defense resistance and ultimately recovered on a claim too small for percentage-based

116. See, e.g., 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDEURE § 1331, at 4 (2d ed. Supp. 1997) (citing "desire to curb some of the abuses surrounding Rule 11 motion practice" and to "reduce the litigation that the prior Rule had generated" as goals of 1993 amendments).

117. See supra text accompanying notes 90-96.

118. REPORTERS' STUDY, supra note 6, at 297.

119. Id. at 300-01 (emphasis in original).

120. Id. at 301.
calculation to yield a reasonable fee. The number of these situations serves as a reminder that even a fee-award system designed with the greatest possible simplicity in mind cannot escape a degree of complexity and administrative cost; I have sometimes said, only half in jest, that the lack of litigation over fee calculation and the unsatisfactory nature of our fee-award approaches are among the best arguments for the American rule.

V. CONCLUSION

I have done my best to be persuasive in support of a one-way fee-shifting proposal, that of the Reporters' Study, which I think has much merit. And I have made no secret, however isolated the United States may be in its adherence to the American rule, of my skepticism about broad loser-pays proposals. Still, at the end of the day (as the Brits are wont to say), those of us who write and argue about these issues probably have to admit that there is a great deal we just don't know — whether various fee-award proposals would have their desired effects, how strong these effects would be, how mercilessly the law of unintended consequences would show the limits of our analysis and foresight. For this reason at least part of me, the scientist rather than the citizen, wishes Walter Olson\(^{121}\) and Mark Stein\(^{122}\) well in their efforts to win some converts to one or another form of loser-pays. I hope they will extend the same wish to those advocating various one-way proposals. If in different states, but somewhat parallel legal contexts, we could see serious use of both the loser-pays rule and one-way approaches such as that of the Reporters' Study, we might actually begin to learn something.

\(^{121}\) See Olson, supra note 14; Olson & Bernstein, supra note 40.
\(^{122}\) See Stein articles cited supra note 77.