

THE PLAINTIFF'S PLIGHT: ALTERING ALASKA'S RULE 82 TO BETTER COMPENSATE PLAINTIFFS

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ABSTRACT

Alaska is unique among the fifty states in its use of a version of the English rule of attorneys' fees in civil cases. Alaska Rule of Civil Procedure 82, in combination with several other rules, effectuates a fee shift such that the losing party pays a portion of the winning party's attorneys' fees. Rule 82 has two fee schedules: one for monetary judgments and one for non-monetary judgments. The monetary judgment fee awards are based in part on the amount of the judgment, while the non-monetary judgment fee awards are based on the victorious party's actual, reasonable attorneys' fees. This difference in the way fee awards are calculated creates a disparity between plaintiffs, who seek damages, and defendants, who seek dismissal. While previous scholarship has noted this disparity, no commentator has proposed and defended a solution. This Note examines the English and American Rules historically and through a law and economics framework. It then analyzes Rule 82 and its companion rules. Ultimately, this Note concludes that the Alaska Supreme Court or the Alaska State Legislature should alter Rule 82 to create better parity between plaintiffs and defendants and cap the amount of fees that can be exacted from a defeated party.

I. INTRODUCTION

"The fundamental principle of damages is to restore the injured party, as nearly as possible, to the position he would have been in had it not been for the wrong of the other party."¹ "Fundamental" as this

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1. *United States v. Hatahley*, 257 F.2d 920, 923 (10th Cir. 1958). For an

principle may be, most states do not follow it; generally, most states do not award attorneys' fees to victorious plaintiffs.² Consider a motorist, who—after a car accident, a hospital stay, and a year of litigation³—is awarded \$20,000 for damage to her car, \$70,000 for her medical bills, and \$10,000 for her pain and suffering, for a total of \$100,000 in damages.⁴ Does she receive the \$100,000 the jury awarded?

Unfortunately for our motorist, she agreed to a one-third contingency arrangement with her lawyer.⁵ Of the \$100,000 the jury awarded, she will only receive two-thirds. As such, she is \$33,333.33 worse off than she was prior to the accident. This approach, used throughout most of the country, is known as the American Rule: parties to litigation each pay their own attorneys' fees.⁶

Unlike the rest of the United States, Alaska follows a version of the English Rule.⁷ Under the pure version of this rule, the losing party pays both its own attorneys' fees as well as those of the victorious party.⁸ Alaska, however, does not follow the pure English Rule;⁹ under Alaska Rule of Civil Procedure 82 ("Rule 82"), victorious parties are only eligible to receive a portion of their attorneys' fees from the losing party.¹⁰

Alaskan case acknowledging this rule, see *Beaulieu v. Elliott*, 434 P.2d 665, 670–71 (Alaska 1967).

2. Douglas 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, 1–2 (2012) (citing *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975)).

3. Median time to disposition in federal court presiding on state law issues in Alaska is ten months. *Id.* at 38 chart 4, 49 tbl.6.

4. This hypothetical does not consider expert fees or negotiation with insurance providers.

5. Alaska's Rules of Professional Conduct permit contingency fees in civil cases so long as they are not unreasonable. ALASKA RULES OF PROF'L CONDUCT 1.5. The typical contingency fee in Alaska is one-third, but the reasonableness of this fee is dependent on a number of factors. *How to Select a Lawyer*, ALASKA BAR ASS'N, <https://alaskabar.org/for-the-public/how-to-select-a-lawyer/> (last visited Dec. 15, 2021).

6. *Alyeska Pipeline*, 421 U.S. at 247; see also DOUGLAS LAYCOCK & RICHARD HASEN, MODERN AMERICAN REMEDIES 923–24 (5th ed. 2019) (laying out the American Rule).

7. See ALASKA R. CIV. P. 82 (defining Alaska's rule for attorneys' fees). See also LAYCOCK & HASEN, *supra* note 6, at 925, for a brief explanation of Alaska's rule.

8. Theodore Eisenberg & Geoffrey Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 329 (2013); see also Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 44–47 (1984) (discussing fee shifting in European jurisdictions).

9. See ALASKA R. CIV. P. 82 (setting out the amount of attorneys' fees awarded to recovering parties).

10. In the above hypothetical, the defeated defendants would pay \$12,500 of our motorist's \$33,333.33 attorneys' fees.

In Alaska, how attorneys' fee awards are calculated primarily depends on whether the prevailing party received a monetary judgment or a non-monetary judgment.¹¹ When Alaskan courts award monetary judgments, Rule 82(b)(1) dictates the amount of attorneys' fees that the prevailing party will be awarded according to the level of contestation¹² and the amount of the judgment.¹³ Fee awards range from 1% to 20% of damages awarded in the judgment.¹⁴ In instances where the "prevailing party recovers no monetary judgment," such as when the defendant prevails, Rule 82(b)(2) grants a prevailing party 20% or 30% of its actual, reasonable fees, depending on whether a trial took place.¹⁵ In effect, this split between monetary and non-monetary judgments creates two versions of Rule 82: one for victorious plaintiffs seeking damages, who are limited to a maximum of 20% of the judgment amount (with the percentage decreasing as the judgment amount increases), and a second for victorious defendants seeking dismissal, who are entitled to either 20% or 30% of their actual, reasonable fees.¹⁶ While these two systems are ostensibly designed to create parity,¹⁷ the differences between them cause a disparity between the fee awards available to prevailing plaintiffs and prevailing defendants.¹⁸

Previous scholarship within this *Journal* has empirically examined Rule 82's usefulness as a tort reform mechanism,¹⁹ argued against the elimination of Rule 82's public interest exception,²⁰ empirically and anecdotally studied Rule 82's operation and use,²¹ assessed recent changes to Rule 82,²² analyzed the "economic incentive factor" formerly

11. ALASKA R. CIV. P. 82.

12. The three levels of contestation are: the case is uncontested, the case is contested but did not go to trial, and the case went to trial. *See* discussion *infra* Section III.A.1.

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

14. *Id.*

15. *Id.* 82(b)(2).

16. *See Fee Arrangements*, ALASKA PERS. INJ. L. GRP., <https://www.alaskainjurylawgroup.com/fee-arrangements.html> (last visited Oct. 9, 2021) (highlighting that victorious plaintiffs should expect to recover roughly ten percent of their attorneys' fees but defeated plaintiffs may be liable for thirty percent of a defendant's reasonable fees).

17. SUSANNE DI PIETRO, TERESA CARNS, & PAMELA KELLEY, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES 38-39 (1995) [hereinafter ATTORNEYS' FEES 1995].

18. *See infra* Parts II, III.

19. Rennie, *supra* note 2.

20. Abizer Zanzi, Note, *The Constitutional Battle Over the Public Interest Litigant Exception to Rule 82*, 21 ALASKA L. REV. 329 (2004).

21. Susanne Di Pietro & Teresa Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33 (1996).

22. Kevin Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429 (1993).

associated with public interest litigation,²³ and investigated the operation of the rule at various points in time.²⁴ Much of this scholarship has noted Rule 82's shortcomings as a tort reform mechanism and that Alaska's litigation metrics do not differ significantly from similarly situated states despite the state's fee shifting rules.²⁵ Rather than arguing that the sword of Rule 82 should be sharpened for use against plaintiffs, this Note contends that Rule 82 should be bent into a plowshare that more fully compensates victorious plaintiffs and creates parity with defendants. Specifically, prevailing parties that receive monetary judgments should be allowed to calculate their Rule 82 attorneys' fees as a percentage of the judgment according to Rule 82(b)(1) or by taking a flat percentage of their actual attorneys' fees in accordance with Rule 82(b)(2). Further, to limit uncertainty, prevent runaway fee awards, incentivize more realistic pleadings, and encourage low-value, non-frivolous claims, a cap should be placed on the amount of awardable attorneys' fees. The cap should be subject to its own schedule based on the value of the suit as pled.

Because fee shifting alters the incentives of bringing, prosecuting, and defending suits for both the litigants and their lawyers, Rule 82 reflects the conflicts between equity, economics, and access to the judicial system. Making the proposed alterations will result in a more equal civil justice system. Part II of this Note overviews the history of the English and the American Rules for fee shifting, compares the two rules using a law and economics framework, and highlights some shortcomings of assuming plaintiffs are rational. Part III primarily examines Rule 82 and its companion rules. This Part describes how the modern versions of these rules function and delves deeper into their mechanics than prior scholarship has. This Part also summarizes Rule 82's history and highlights its purposes to show how and why the rule has, and can be, changed. Part IV lays out the proposed changes to Rule 82 and argues in favor of these changes. This Note concludes that Rule 82 should be altered to create better parity between plaintiffs and defendants and to presumptively cap fee awards.

II. BACKGROUND

Rule 82's partial fee shifting sits uneasy atop the mountain of debate between proponents of the American Rule and proponents of the English

23. Virginia Cella Antipolo, Note, *The Impact of Economic Incentives on the Award of Attorney's Fees in Public Interest Litigation*, 1 ALASKA L. REV. 189 (1984).

24. Gregory Hughes, Comment, *Award of Attorney's Fees in Alaska: An Analysis of Rule 82*, 4 UCLA-ALASKA L. REV. 129 (1974).

25. E.g., Rennie, *supra* note 2, at 43; Di Pietro & Carns, *supra* note 21, at 88.

Rule.²⁶ Under the American Rule, each party pays its own fees irrespective of which party ultimately prevails.²⁷ Under the English Rule, the losing party pays all of the attorneys' fees associated with the litigation.²⁸ The rules have advantages and disadvantages in a range of categories: relative access to justice,²⁹ completeness of remedy,³⁰ incentivization or disincentivization of suit,³¹ and the improvement of claim quality,³² among others.³³ This Part outlines the divergent histories of the English and the American Rules, compares the expected value of suit under each of the two rules using a law and economics framework, and highlights some issues with this framework to provide background on Rule 82 and fee shifting generally.

A. Histories of the English Rule and the American Rule

Though not comprehensive, this Section demonstrates the divergent evolution of the English and the American Rules. Further, it details some modern abrogations of the American Rule in the United States.³⁴ Throughout the histories of both rules, plaintiffs and defendants have not

26. An exhaustive examination of the contours of this debate is beyond the scope of this Note.

27. Rennie, *supra* note 2, at 1–2.

28. In reality, the jurisdictions that make use of the English Rule allow the victorious party to recover between one-half and two-thirds of attorneys' fees. *See id.* at 5. However, when this Note refers to the English Rule it will typically refer to a simplified English Rule that grants full fees to the prevailing party.

29. Peter Karsten & Oliver Bateman, *Detecting Good Public Policy Rationales for the American Rule: A Response to the Ill-Conceived Calls for "Loser Pays" Rules*, 66 DUKE L.J. 729, 761 (2016). *But see* John Leubsdorf, *Does the American Rule Promote Access to Justice? Was That Why it Was Adopted?*, 67 DUKE L.J. ONLINE 257, 257 (2019) (arguing that the American Rule was not adopted to increase access to courts and actually does not increase access in some classes of cases).

30. *See* LAYCOCK & HASEN, *supra* note 6, at 923–24 (explaining the rightful position principle and the English Rule).

31. *See* Marie Gryphon, *Assessing the Effects of a "Loser Pays" Rule on the American Legal System: An Economic Analysis and Proposal for Reform*, 8 RUTGERS J.L. & PUB. POL'Y 567, 574 (2011) (noting that the English Rule should decrease frivolous, low-value suits and nuisance suits); *see also* Carl Cheng, *Important Rights and the Private Attorney General Doctrine*, 73 CAL. L. REV. 1929, 1929 (1985) (discussing the private attorney general doctrine and how its purpose is to incentivize socially useful suit).

32. *See* James Hughes & Edward Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 245 (1995) (noting that the English Rule may improve claim quality).

33. *See, e.g.,* Gryphon, *supra* note 31, at 568 (for an argument that the American Rule imposes costs on businesses that are ultimately passed to consumers and thus inefficient on a societal level); Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1164 (noting the lack of consensus among commentators on the effects of the two rules).

34. *See infra* Part II.

always been on equal footing, though imbalances usually favor plaintiffs.³⁵ Ultimately, the development of the American Rule stems from a fear of excessive attorneys' fees. The path to the modern versions of these rules was meandering; the twists reflect policy judgments, shifts in power, and changes in concepts of fairness.

The English Rule was statutorily imposed in England in 1607.³⁶ However, fee shifting existed in England prior to this statute. Under the powers of equity, early Chancellors of English courts issued fees to the prevailing party when the defeated party abused process or acted indecently.³⁷ In 1278, the Statutes of Gloucester granted victorious plaintiffs fees in certain actions, and two centuries later defendants were given limited access to fee shifting.³⁸ Parity between plaintiffs and defendants came with the 1607 statute,³⁹ but the rule has since evolved and increased in complexity.⁴⁰

The English Rule was not available at common law in the United States, and Americans did not seek to statutorily emulate the complex fee shifting system of their English counterparts.⁴¹ In the seventeenth century, colonial Americans generally maintained a distrust of attorneys, a desire to limit their control on society, and a belief that the law was a set of simple, easily ascertained rules.⁴² Moreover, in many jurisdictions attorneys were not allowed to charge for their services.⁴³ By the eighteenth century, a greater number of statutes allowed attorneys to charge for their services but limited the fee amount or created fee schedules.⁴⁴ In some jurisdictions, statutes limited the amounts that could be charged to the opposing party, but additional fees could be charged to the lawyer's client.⁴⁵ Following the American Revolution, Congress

35. See generally Susan M. Olson, *How Much Access to Justice from State "Equal Access to Justice Acts"?*, 71 CHI.-KENT L. REV. 547, 550-53 (1995).

36. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 n.18 (1975).

37. John Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV., 1567, 1570 (1993).

38. *Id.* at 1570-71.

39. *Id.* at 1571.

40. See *id.* (citing Arthur Goodhart, *Costs*, 38 YALE L.J. 849, 851-78 (1929)) (noting the system of taxing costs). In the many jurisdictions that utilize a form of the English Rule, the victorious party is typically entitled to between half and two-thirds of its actual attorneys' fees. *Id.* at 1599-1600.

41. Rennie, *supra* note 2, at 4-5.

42. Vargo, *supra* note 37, at 1571-72.

43. See *id.* at 1572 (quoting CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 4 (1913)).

44. *Id.* at 1572-73.

45. *Id.* at 1573 n.49 (citing John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 L. & CONTEMP. PROBS. 9, 11-12 (1984)) (illustrating how lawyers collected fees or "gifts" for charges not mentioned in regulations and

authorized federal courts to follow state laws regarding attorneys' fees, and when this statute lapsed, federal courts continued to borrow from state law.⁴⁶ The Supreme Court initially laid out the forerunner to the American Rule in 1796⁴⁷ but vacillated on its full implementation.⁴⁸

By the mid-nineteenth century, Congress became worried that defeated parties bore excessive litigation costs. In the words of Senator Bradbury, "[C]osts have been swelled to an amount exceedingly oppressive to suitors, and altogether disproportionate to the magnitude and importance of the causes in which they are taxed, or the labor bestowed."⁴⁹ In 1853, Congress enacted a fee bill to limit fee recovery to docket fees capped at twenty dollars.⁵⁰ This law cemented the American Rule within federal jurisprudence but left the door open for over 200 federal and nearly 4,000 state statutory exceptions currently in place.⁵¹

While numerous, these exceptions are narrower than Alaska's Rule 82.⁵² On the federal side, consider 15 U.S.C. § 15(a) and 42 U.S.C. § 2000e-5(k). The former grants attorneys' fees to those injured by antitrust violations.⁵³ The latter ordinarily entitles prevailing parties to attorneys' fees in employment discrimination claims unless the prevailing party is the United States government.⁵⁴ Fee shifting in these examples is limited to specific claims and situations.

Several states, Alaska excepted, have granted fee shifting in similarly limited circumstances.⁵⁵ Take, for example, Utah's Gasoline Products

charged clients more than court would award as costs from losing opponent).

46. *Id.* at 1575-76.

47. *Id.* (citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796)).

48. *See id.* at 1575-78 (discussing the Supreme Court decisions on attorneys' fees between 1796 and 1853).

49. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 252 n.24 (1975) (quoting CONG. GLOBE, 32d Cong., 2d Sess. 207 (1853)).

50. Vargo, *supra* note 37, at 1578.

51. LAYCOCK & HASEN, *supra* note 6, at 925.

52. *See* HENRY COHEN, CONG. RSCH. SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES CRS-6 (2008) (noting that congressionally approved fee shifting is limited to "specific situations").

53. 15 U.S.C. § 15(a).

54. 42 U.S.C. § 2000e-5(k).

55. *See* Olson, *supra* note 35, at 552, 563 (noting that many state fee shifting statutes are associated with little-used laws and that most state Equal Access to Justice Acts are limited to certain types of actions against the state). There have been several incidents where states accidentally enacted the English Rule broadly. *See, e.g.,* Deborah Cassens Weiss, *Oklahoma Unintentionally Adopts Loser-Pays System for Attorney Fees in Civil Cases*, A.B.A. J. (May 18, 2017), https://www.abajournal.com/news/article/oklahoma_adopts_loser_pays_fees_in_civil_cases_as_a_result_of_oversight_by; William W. Savage, III, *Back to Normal: OK Legislature Restores American Rule*, NONDOC (May 25, 2017), <https://nondoc.com/2017/05/25/oklahoma-legislature-restores-american-rule/>.

Marketing Act, which provides for a fee shift toward the prevailing party in certain gasoline refiner-dealer disputes.⁵⁶ Beyond their narrowness in scope, the majority of state fee shifting regimes are pro-plaintiff.⁵⁷

B. Comparing Rules

The battle between proponents of the English and American Rules has been fought across multiple theaters, but there is still little agreement between the parties.⁵⁸ Generally, according to law and economics scholars, the American Rule seems to encourage litigation by allowing plaintiffs access to the justice system without excessive risk to their personal funds.⁵⁹ That scholars agree on this point does not mean the American Rule is superior or even that more litigation occurs in jurisdictions that use the American Rule.⁶⁰ However, the expected value of suit is useful in understanding how rational potential plaintiffs act. After explaining how the design of the American Rule mathematically encourages suit, this Section highlights how plaintiffs are not necessarily “rational.”

Imagine a rational plaintiff injured in a convenience store. Our rational plaintiff incurred \$200,000 worth of injury and is paying \$20,000 out of pocket for his personal injury attorney.⁶¹ The defendant will also expend \$20,000 on counsel. Which system does our rational plaintiff prefer, and under what circumstances will he bring suit?

Under the American Rule, if the plaintiff wins his suit, he will net \$180,000—the \$200,000 award minus the \$20,000 attorney fee. Should he lose, he would net negative \$20,000—the cost of his attorney. Because he is rational, he will bring suit only when his expected judgment—the probability of victory multiplied by the expected award—meets or

56. UTAH CODE ANN. § 13-12-7 (2021).

57. Olson, *supra* note 35, at 553–54.

58. Olson & Bernstein, *supra* note 33, at 1164 (noting the lack of consensus among commentators on the effects of the two rules).

59. See Avery W. Katz & Chris W. Sanchirico, *Fee Shifting in Litigation: Survey and Assessment*, 10 U. PA. L. SCH. INST. FOR L. & ECON., no. 30, 2010, at 1, 9 (citing Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982)) (noting that the American Rule encourages plaintiffs with large claims but low chances of victory).

60. See Rennie, *supra* note 2, at 43 (noting that civil and tort filing rates in Alaska’s federal courts do not significantly differ from other parts of the United States).

61. The following hypotheticals do not take into account the emotional or collateral costs associated with trial, such as time off from work, travel costs, and child care.

exceeds the costs of litigation.⁶² Here, the plaintiff will bring his claim if the chance of victory is 10% or greater.⁶³

Under the English Rule, if the plaintiff were to win his suit, he would net \$200,000—the amount of the award. Should he lose, he would net negative \$40,000—the cost of the two attorneys. Because he is rational, he will bring suit only when his expected judgment meets or exceeds his expected legal costs—the cost of the attorneys multiplied by the probability of paying that fee.⁶⁴ Here, the plaintiff will bring his claim if the chance of victory is 16.67% or greater.⁶⁵

Thus the American Rule “incentivizes suit.” Assuming the attorneys’ fees of both parties are equal, the value of the putative plaintiff’s suit is higher under the American Rule than it is under the English Rule when the chance of victory is below 50%. Once the chance of victory reaches 50%, plaintiffs would prefer the English Rule.

62. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 58 (1982). Shavell expresses this as $pw > x$ where p is the plaintiff’s likelihood of winning, w is the amount of the judgment, and x is the legal costs. *Id.* This formulation does not take into account the plaintiff’s net and only examines when suit will be brought. To take the net into account, the equation for expected value can be expressed as $p(w - x) - (1 - p)x$. When the result is zero, the plaintiff breaks even from an expected value standpoint. This is the equation that will be used below.

63. $p(200,000 - 20,000) - (1 - p)20,000 = 0$. Solving for p yields 0.1, which equals 10%.

64. Shavell, *supra* note 62, at 59. Shavell expresses this as $pw > (1 - p)(x + y)$ where the terms are the same as above and y is equal to the defendant’s fees. *Id.* This formula may also be expressed as $pw - ((1 - p)(x + y))$. When the result is zero, the plaintiff breaks even from an expected value standpoint.

65. $p(200,000) - ((1 - p)(20,000 + 20,000)) = 0$. Solving for p yields 0.16666 repeating, which equals roughly 16.67%.

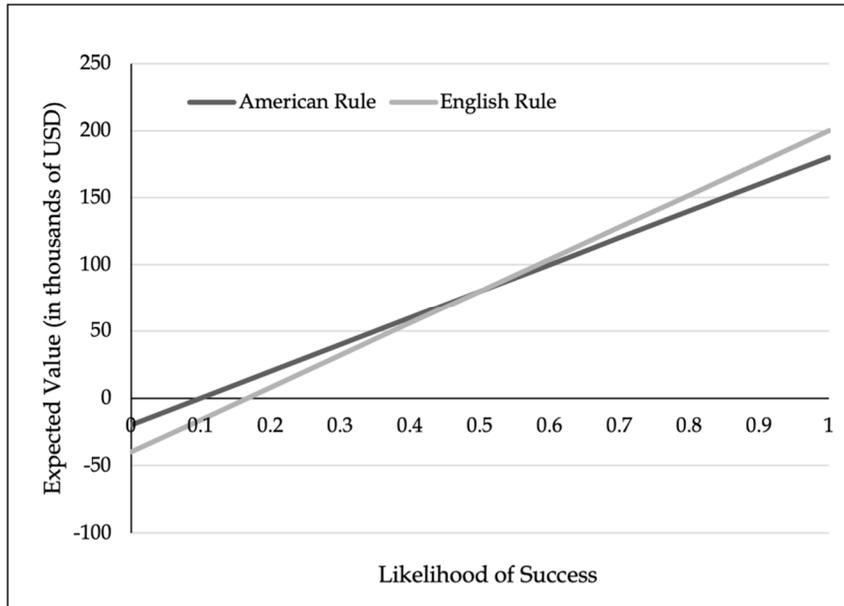


Figure 1. Comparison of the expected value of a suit under the American and English Rules.

The expected value of a suit under the American Rule is shifted farther in our rational plaintiff's favor when contingency fees are in play. Under a contingency fee arrangement, our rational plaintiff has no cost in the event of a loss.⁶⁶ Therefore, he would bring suit whenever there is a non-zero chance of success. Under contingency fee arrangements, attorneys, rather than clients, internalize the risk and costs associated with losing the suit. Contingency fee arrangements therefore shift the rational decision-making process of whether to bring suit from clients to attorneys. In making their decisions on whether to take a plaintiff's case, attorneys must consider their fee in the event of a victory and their expected costs independent of the outcome of the suit.⁶⁷ Thus, while contingency fee arrangements incentivize rational plaintiffs to bring suit, they shift the decision making process to the plaintiffs' attorneys, who will be forced to internalize their own costs in the event of a loss.

The examples above assume a risk-neutral plaintiff—that is, a rational plaintiff whose decisions are guided by the expected value of

66. This may be expressed as $p(w - x) - (1 - p)(\$0)$. The second term will always resolve to zero.

67. This can be represented as $p(x - s) - (1 - p)s$, where s is the cost to the attorney of providing legal services.

litigation but not by the level of uncertainty regarding that valuation.⁶⁸ However, not all plaintiffs are risk neutral. For non-risk-neutral parties, the expected value and the uncertainty of receiving that value are at play.⁶⁹ For example, a risk-averse plaintiff would rather accept a certain \$1,000 than a 10% chance at \$10,000.⁷⁰ However, a risk-seeking plaintiff would prefer the 10% chance of \$10,000 to the certain \$1,000.⁷¹ The degree of risk aversion or risk seeking alters plaintiff behavior.⁷²

Further, the level of uncertainty in the valuation will alter plaintiff behavior. Take, for example, a plaintiff injured snowmobiling who has a 50% chance of winning and a \$10,000 fee irrespective of outcome. Under the American Rule, the injured snowmobiler will bring suit when the expected award is greater than or equal to \$20,000. But, what if the accident and the legal outcomes could not be valued with certainty? Maybe the plaintiff knows that he has imperfect information or is not good at valuing claims. In other words, there can be uncertainty in the valuation itself, and this uncertainty has the potential to change how plaintiffs approach litigation.

Because they are human, neither plaintiffs nor defendants are perfectly rational, and they are subject to psychological biases such as endowment and framing effects. The endowment effect is an emotional bias that can cause overvaluation of owned objects.⁷³ The framing effect suggests that people are more risk averse when outcomes are positive than when outcomes are negative. For example, most people would prefer a guaranteed gain of \$1,000 to a one in five chance of gaining \$5,000, but would prefer a one in five chance of losing \$5,000 to definitely losing \$1,000.⁷⁴ Further, people tend to be loss averse and asymmetrically value equivalent losses and gains.⁷⁵ Thus, the cost of losing \$1,000 outweighs an equivalent gain.⁷⁶ These psychological biases affect plaintiff and defendant decisions.

Furthermore, the hypotheticals above do not take into account the plaintiff's financial resources. The Supreme Court noted the potential effects of the English Rule on the poor, stating that they "might be

68. Shavell, *supra* note 62, at 58.

69. *Id.*

70. *Id.*

71. *See id.* at 58 n.12 (describing a risk-seeking plaintiff).

72. For a discussion of decision theory, see HOWARD RAIFFA, *DECISION ANALYSIS: INTRODUCTORY LECTURES ON CHOICES UNDER UNCERTAINTY* (1968).

73. CHARLES CRAVER, *SKILLS & VALUES: LEGAL NEGOTIATING* 157-59 (3d ed. 2016).

74. *Id.* at 155-56.

75. Daniel Kahneman & Amos Tversky, *Prospect Theory: Analysis of Decision under Risk*, 47 *ECONOMETRICA* 263, 279 (1979).

76. *Id.*

unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel."⁷⁷ Stated plainly, plaintiffs of limited means may be particularly risk averse under the English Rule because they stand to lose what little they have.

This problem may sound foreign, but it is American reality. A 2021 survey of Americans suggested that 51% had less than three months of emergency funds, and about half of that group had no savings at all.⁷⁸ A 2019 survey suggested that 69% of Americans have less than \$1,000 in savings.⁷⁹ This is a double-edged sword: on the one hand, defendants may not be able to collect fees from insolvent plaintiffs; on the other, low and moderate income loss-averse plaintiffs will not bring meritorious claims, fearing the economic ramifications of a loss.

Assume our injured plaintiff is better off than most Americans; he is mostly living paycheck to paycheck but has an emergency fund of \$10,000. He cannot afford to hire one lawyer, let alone two, and is likely only able to proceed with a case if his lawyer works on contingency. Unlike someone of moderate or significant means, under the English Rule, our plaintiff would be financially crippled by a loss.

In some systems that utilize the English Rule, insolvent and nearly insolvent plaintiffs are given a reprieve from the harsh edge of the two-way fee shift. These systems intentionally grant these plaintiffs one-way fee shifting and relieve them of liability to victorious defendants.⁸⁰ In systems that do not utilize one-way fee shifting, poorer plaintiffs may still benefit from one-way fee shifting, as they are functionally judgment-proof and would be unable to pay fees levied on them.⁸¹ A defendant's likely inability to collect does not necessarily negate a plaintiff's fear of collection and the accompanying declaration of bankruptcy. Generally, bringing suit in a fee-shifting jurisdiction may present more of a dilemma to middle class plaintiffs than it would for the judgment-proof poor or the wealthy for whom an adverse judgment would not significantly affect their net worth.⁸²

77. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967).

78. Francisco Velasquez, *Over Half of Americans Have Less than 3 Months Worth of Emergency Savings*, CNBC (July 28, 2021, 12:02 PM), <https://www.cnbc.com/2021/07/28/51percent-of-americans-have-less-than-3-months-worth-of-emergency-savings.html>.

79. Cameron Huddleston, *Survey: 69% of Americans Have Less Than \$1,000 in Savings*, YAHOO! (Dec. 16, 2019), <https://www.yahoo.com/now/survey-69-americans-less-1-171927256.html>.

80. Vargo, *supra* note 37, at 1629.

81. Rennie, *supra* note 2, at 6 n.29.

82. See Di Pietro & Carns, *supra* note 21, at 79 (noting that this is the case in Alaska).

III. RULE 82 AND ITS COMPANIONS

Alaska's Rule 82 is the most expansive of the nearly 2,000 state abrogations of the American Rule, and it has a long history. But it is not the only mechanism for shifting the financial burden between parties in Alaska. Alaska Rules of Civil Procedure 79 ("Rule 79") and 68 ("Rule 68") also serve to rebalance the scales of payment. After discussing the current procedure and functionality of Rule 82 and its companions, this Section details Alaska's rationale for these rules and summarizes the history of Rule 82 to provide a sense of the procedure required to change it.

A. Mechanics of Rule 82

Barring judicial intervention, Rule 82 mandates that the prevailing party has ten days from the judgment date to bring a motion to recover a percentage of its attorneys' fees.⁸³ The defeated party has ten days to file opposition.⁸⁴ The prevailing party is the party that is "successful on the 'main issue' of the action and 'in whose favor the decision or verdict is rendered and *the judgment entered.*'"⁸⁵ As such, the prevailing party need not win every issue.⁸⁶ The court generally maintains broad discretion over fees,⁸⁷ and in the event that more than one party is successful on its main issue, the court may deny both parties attorneys' fees.⁸⁸ On review, appellate courts utilize the abuse of discretion standard and overturn the trial court's ruling only when it is "manifestly unreasonable."⁸⁹

Generally, the amount of the award is determined by Rule 82's fee schedules,⁹⁰ except where abrogated by law or the parties' agreement,⁹¹ or when the court determines a modification is warranted.⁹² When the prevailing party wins a monetary award, the amount of fees granted

83. ALASKA R. CIV. P. 82(c).

84. *Id.* 77(c)(2).

85. *Progressive Corp. v. Peter ex rel. Peter*, 195 P.3d 1083, 1092 (Alaska 2008) (emphasis added) (quoting *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327 (Alaska 1993)).

86. *Id.* (citing *Blumenshine v. Baptiste*, 869 P.2d 470, 474 (Alaska 1994)).

87. *Id.*

88. *See Taylor v. Moutrie-Pelham*, 246 P.3d 927, 929-30 (Alaska 2011) (determining that it was not an abuse of discretion for a trial court to conclude that neither party was the prevailing party when each party won a main issue).

89. *Progressive Corp.*, 195 P.3d at 1092 (citing *Interior Cabaret Ass'n v. Fairbanks N. Star Borough*, 135 P.3d 1000, 1002 (Alaska 2006)).

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

91. *Id.* 82(a). *See, e.g., Di Pietro & Carns, supra* note 21, at 73 (discussing post-trial settlements that exchange the right to appeal for the right to Rule 82 fees); *ATTORNEYS' FEES 1995, supra* note 17, at 45-52 (listing situations where Rule 82 does not apply).

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

ranges from 1% to 20% of that award depending on the level of contestation and the award amount.⁹³ Depending on the need for a trial, the schedule for non-monetary awards ranges from 20% to 30% of “actual attorney’s fees which were necessarily incurred.”⁹⁴ Where default judgment is entered, the clerk determines fees.⁹⁵ In all other cases, the court is the arbiter of fees.⁹⁶

1. Monetary Judgments

For cases resulting in monetary judgments, the court must first determine the amount of the judgment.⁹⁷ Judges determine the amount of the fee award based on the net, rather than the gross, judgment.⁹⁸ Thus, where counterclaims reduce the amount of a judgment, the amount used to determine the fee award is decreased accordingly.⁹⁹ In determining the net judgment, in addition to all forms of monetary judgment,¹⁰⁰ courts consider prejudgment interest.¹⁰¹ As such, the net judgment includes prejudgment interest, compensatory damages, nominal damages, and punitive damages less any amount awarded for counterclaims.

After calculating the net judgment, courts calculate the Rule 82 fee award. The fee schedule is a matrix that has two axes: judgment amount and contestation.¹⁰²

93. *Id.* 82(b)(1).

94. *Id.* 82(b)(2).

95. *Id.* 82(d).

96. *Id.*

97. *Id.* 82(b).

98. ATTORNEYS’ FEES 1995, *supra* note 17, at 57 (citing *Fairbanks Builders v. Sandstrom Plumbing & Heating*, 555 P.2d 964, 967 (Alaska 1976)). For example, if a court awarded \$11,000 to a plaintiff for her primary claim and \$1,000 to a defendant for his cross claim, the plaintiff’s net judgment would be \$10,000.

99. *Fairbanks Builders*, 555 P.2d at 967.

100. See ATTORNEYS’ FEES 1995, *supra* note 17, at 57–58, 58 n.293 (citing *Sturm, Ruger, & Co. v. Day*, 627 P.2d 204, 205 (Alaska 1981)) (stating that punitive damages are included because of their relationship to nominal damages). The article states that punitive damages are *permissively included*, but this is a slight misstatement as punitive damages are included by default and *permissively excluded*. *Sturm, Ruger, & Co.*, 627 P.2d at 205. Where excluded, the court must state its reasoning. *Id.*

101. ATTORNEYS’ FEES 1995, *supra* note 17, at 57 (citing *Era Helicopters v. Digicon Alaska*, 518 P.2d 1057, 1063 (Alaska 1974)).

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

Judgment and, If Awarded, Prejudgment Interest		Contested with Trial	Contested Without Trial	Non-Contested
First	\$25,000	20%	18%	10%
Next	\$75,000	10%	8%	3%
Next	\$400,000	10%	6%	2%
Over	\$500,000	10%	2%	1%

Figure 2. Rule 82(b)(1)'s schedule¹⁰³

An understanding of each axis is required to arrive at the correct fee award. The judgment amount axis is the more complicated of the two because it is marginalized—bracketed akin to the Federal Income Tax¹⁰⁴—and regressive—decreasing in percentage as the judgment increases. As the amount of the judgment increases from bracket to bracket, the percentage of the overall award paid in fees decreases. For example, compare the overall percentage of fee reimbursement between two clients who win at trial: Client A wins \$20,000, and Client B wins \$200,000. The attorney that wins Client A's \$20,000 case receives 20% of the judgment—\$4,000—as fees directly from the losing party. The award of \$20,000 is below the upper limit of the first bracket—\$25,000—and the fee is therefore assessed at the 20% rate. In comparison, the attorney that wins Client B's \$200,000 case receives 11.25%—\$22,500—as fees directly from the losing party. The award of \$200,000 is split between the first three brackets. The first \$25,000 is assessed at 20%, the next \$75,000 is assessed at 10%, and the remaining \$100,000 of the award is assessed at 10%. Assuming both clients employed counsel with a 30% contingency arrangement, Client A still owes 10% of the judgment—\$2,000—to her attorney, while Client B still owes 18.75% of the judgment—\$37,500—to her attorney. As the amount of the judgment increases, the victorious party owes a greater share of the award that was intended to compensate her to her attorney.

The final bracket operates somewhat differently because it is open ended. When the judgment is over \$500,000, additional dollars are assessed at the same percentage. As the judgment amount increases beyond the highest bracket, the overall percentage received from the losing party decreases asymptotically to the percentage assessed in that bracket.¹⁰⁵ Generally, as the award increases, the percentage of the Rule

103. *Id.*

104. 26 U.S.C. § 1.

105. This may be expressed as the following limit equation:

$$\lim_{w \rightarrow \infty} \left(\frac{52,500 + 0.1(w - 500,000)}{w} \right) = 10\%.$$
 Starting with the first 10% bracket,

82 fee award decreases toward the percentage specified in the final bracket. This decrease in attorneys' fees paid by the defeated party correspondingly increases the share of attorneys' fees that the prevailing party must pay.

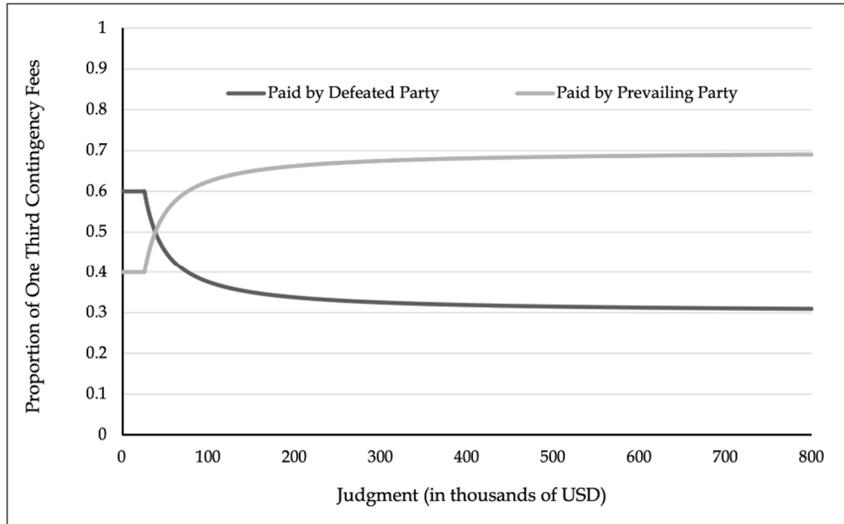


Figure 3. Proportions of prevailing party's attorneys' fees paid by each party under Rule 82(b)(1).

Unlike the judgment amount axis, the contestation axis is qualitative. It sets out three schedules: one for when the matter was uncontested, one for when the matter was contested, and one for when the case went to trial.¹⁰⁶ As the level of contestation increases from non-contested to contested with trial, the percentage of Rule 82 fees increases.¹⁰⁷ Thus, prevailing parties that undergo a trial receive a higher percentage of fees from their opponents than those who prevailed without a trial. Compare three clients who each receive a \$200,000 judgment. Client 1 has his judgment entered by default, Client 2 faces opposition but secures her victory in a summary judgment motion, and Client 3 takes their case to trial. Under Rule 82, Client 1 receives 3.75% of his judgment, or \$6,705. Client 2 receives 8.25% of her judgment, or \$16,500. Client 3 receives 11.75% of their judgment, or \$22,500. In essence, the more effort required by the party to prevail, the greater the percentage of Rule 82 fees.

$\lim_{w \rightarrow \infty} \left(\frac{5,000 + 0.1(w - 25,000)}{w} \right) = 10\%$
 106. ALASKA R. CIV. P. 82(b)(1).
 107. *Id.*

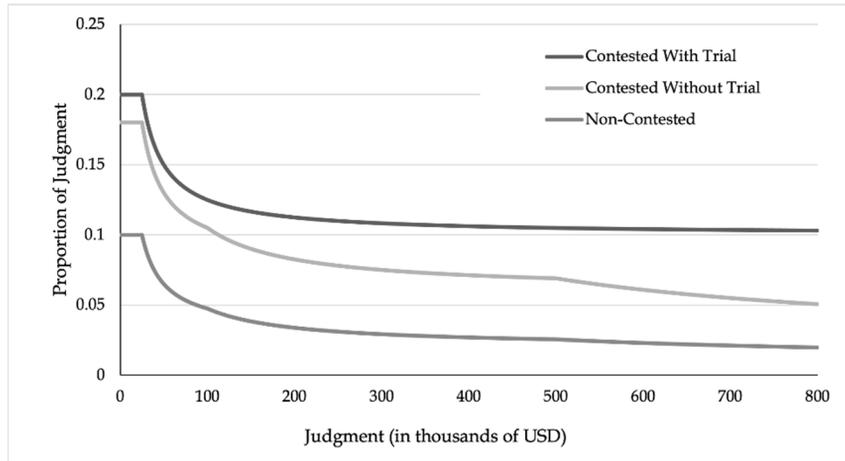


Figure 4. Proportion of judgment assessed to the non-prevailing party as fees.

2. Non-Monetary Judgments

In comparison to monetary judgments, which utilize the multi-axis schedule of Rule 82(b)(1), there are only two options for non-monetary judgments. When a non-monetary judgment is achieved without trial, the prevailing party is entitled to twenty percent of its “actual attorney’s fees which were necessarily incurred.”¹⁰⁸ When a trial is required, the prevailing party is entitled to thirty percent of its “actual attorney’s fees which were necessarily incurred.”¹⁰⁹ Unlike monetary judgments, which are determined by the amount of the judgment, each Rule 82 motion for fees from a non-monetary judgment requires an assessment of what fees were necessarily incurred.¹¹⁰ As such, the court must assess the reasonability of the party’s request, but reasonableness is untethered to the amount of damages originally sought by the other party.¹¹¹ Courts require evidence to perform this reasonability analysis,¹¹² and parties submit either bills provided to clients or affidavits.¹¹³ Courts are given discretion in the reasonability analysis, and decisions concerning these fees are reviewed under the abuse of discretion standard.¹¹⁴ Overall, Rule

108. *Id.* 82(b)(2).

109. *Id.*

110. ATTORNEYS’ FEES 1995, *supra* note 17, at 59 (citing *State v. Fairbanks N. Star Borough Sch. Dist.*, 621 P.2d 1329, 1335 (Alaska 1981)).

111. *Id.* (citing *Stevens v. Richardson*, 755 P.2d 389, 396 (Alaska 1988)).

112. *Id.* at 60 (citing *Hayes v. Xerox Corp.*, 718 P.2d 929, 939 (Alaska 1986)).

113. *Id.*

114. *Wickwire v. Arctic Circle Air Servs.*, 722 P.2d 930, 935 (Alaska 1986)

82 motions from non-monetary judgments are judicially more time intensive than those from monetary judgments.¹¹⁵

3. Variance

Courts may depart from the base schedules of Rule 82(b) of their own accord or at the request of one of the parties.¹¹⁶ Rule 82(b)(3) provides a list of eleven factors that courts may consider.¹¹⁷ The final factor – “other equitable factors deemed relevant” – is so open-ended that judges have discretion to modify fees as they please.¹¹⁸ The Alaska Supreme Court has stated that these factors are simply “a set of guidelines to aid the court in making its decision” and that discretion lies with the trial judge.¹¹⁹ However, when trial judges determine that a variance is necessary, they must explain the reasoning for the variance in writing.¹²⁰

4. Rule 79

Rule 79 is a companion provision to Rule 82 because it allows the prevailing party to recover costs and thus shifts some of the burden of litigation. Unless otherwise directed by the court, Rule 79 grants necessarily incurred costs to the prevailing party.¹²¹ Rule 79 is only available upon filing and serving an itemized and verified cost bill within

(citing *Stordahl v. Gov't Emps. Ins. Co.*, 564 P.2d 63, 68 (Alaska 1977)).

115. ATTORNEYS' FEES 1995, *supra* note 17, at 59.

116. See ALASKA R. CIV. P. 82(b)(3) (“The court may vary an attorney’s fee award . . . if . . . the court determines a variation is warranted”); see also Di Pietro & Carns, *supra* note 21, at 49–51 (discussing attorneys requesting variances). Justice Rabinowitz dissented when the court added the variance factors because he believed that “any attorney worth his or her salt will” request a variance and thereby increase litigation over fees. ALASKA S. CT. ORDER NO. 1118 amended, <https://courts.alaska.gov/sco/docs/sco1118.pdf> (Rabinowitz, J., dissenting).

117. ALASKA R. CIV. P. 82(b)(3) (“The court may vary an attorney’s fee award . . . upon consideration of . . . (A) the complexity of the litigation; (B) the length of trial; (C) the reasonableness of the attorneys’ hourly rates and the number of hours expended; (D) the reasonableness of the number of attorneys used; (E) the attorneys’ efforts to minimize fees; (F) the reasonableness of the claims and defenses pursued by each side; (G) vexatious or bad faith conduct; (H) the relationship between the amount of work performed and the significance of the matters at stake; (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts; (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and (K) other equitable factors deemed relevant.”).

118. *Id.*

119. *Bishop v. Mun. of Anchorage*, 899 P.2d 149, 156 (Alaska 1995). See Di Pietro & Carns, *supra* note 21, for a rough discussion of the frequency of awards and judicial modification.

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

121. *Id.* 79.

ten days of judgment.¹²² Rule 79(f)-(g) provides the lists of approved costs.¹²³ Some notable costs include filing fees, transcription fees, court ordered security stipulations, and computerized legal research expenses.¹²⁴

5. Rule 68

Though not unique to Alaska,¹²⁵ Rule 68 subverts the ordering of Rule 82 and allows the non-prevailing party to become the prevailing party.¹²⁶ If, at any time prior to ten days before trial, a party makes an offer to settle, the offer is not accepted, and the judgment is “at least 5 percent less favorable to the offeree than the offer,” the offeree “shall pay all costs as allowed under the Civil Rules and shall pay reasonable actual attorney’s fees incurred by the offeror from the date the offer was made” pursuant to a fee schedule.¹²⁷ The schedule varies the percentage of fees – 30 to 75% of “reasonable actual attorney’s fees” – based on when the offer was made.¹²⁸ Rule 68-eligible parties are entitled to the greater of Rule 68 fees or Rule 82 fees, but not both.¹²⁹ By naming the Rule 68 eligible offeror the “prevailing party” for the purposes of Rule 82, Rule 82 is functionally inverted.

To explain how Rule 68 functions, take the example of a risk-seeking, overly optimistic plaintiff and a generous but prescient defendant. At the

122. *Id.* 79(b).

123. ALASKA R. CIV. P. 79(f) provides the list of fees and ALASKA R. CIV. P. 79(g) states that some travel costs are includable.

124. ALASKA R. CIV. P. 79(f).

125. *See* FED. R. CIV. P. 68 (granting post-offer costs to a losing party if they made an offer more than fourteen days before trial, that offer was rejected, and the amount of the judgment was less than the amount of the offer).

126. ALASKA R. CIV. P. 68.

127. *Id.* 68(b).

128. *Id.* The table below excerpts and organizes the Rule 68 schedule:

Provision	Conditions	Percentage of Reasonable Actual Attorneys’ Fees
ALASKA R. CIV. P. 68(b)(1)	“[O]ffer was served no later than 60 days after the date established in the pretrial order for initial disclosures”	75%
ALASKA R. CIV. P. 68(b)(2)	“[O]ffer was served more than 60 days after the date established in the pretrial order for initial disclosures . . . but more than 90 days before the trial began”	50%
ALASKA R. CIV. P. 68(b)(3)	“[O]ffer was served 90 days or less but more than 10 days before the trial began”	30%

Figure 5. Rule 68 reasonable actual attorneys’ fees schedule.

129. ALASKA R. CIV. P. 68(c).

outset of litigation, the plaintiff believes his injuries are worth \$100,000. Two days after initial disclosures, the defendant believes herself to be liable for \$50,000 worth of harm caused to the plaintiff. To avoid the costs of mounting a defense and the increased fees associated with higher levels of contestation in Rule 82, the defendant makes an offer of \$60,000 exclusive—\$67,300 inclusive—of Rule 82 attorneys’ fees.¹³⁰ The plaintiff rejects the offer, the case goes to trial, and the jury awards the plaintiff \$50,000. Because the award was more than 5% less than \$60,000, the plaintiff is on the hook for 75% of defendant’s post offer attorneys’ fees, among other costs. The defendant incurred \$20,000 in attorneys’ fees,¹³¹ and 90% of these fees—\$18,000—were incurred after rejection of the offer. Defendant pays plaintiff \$36,500, which is equal to \$50,000 less 75% of \$18,000. The defendant’s total cost of the litigation and defense was \$56,500.¹³² Without Rule 68, the defendant would have spent \$77,500 on the litigation after paying her own attorney \$20,000 and the plaintiff’s Rule 82 fees of \$7,500. Under Rule 68, and assuming a one-third contingency fee, plaintiff would take home \$24,333.46 of the original \$50,000 judgment.¹³³ Intended to encourage settlement,¹³⁴ Rule 68 inverts the typical Rule 82 relationship between the prevailing party and the defeated party, granting attorneys’ fees at a special rate schedule.

B. Purposes of Rule 82

The Alaska Supreme Court primarily defines the purposes and function of Rule 82.¹³⁵ Unlike the legislature, the Alaska Supreme Court provides little in the way of contemporaneous statements of intent.¹³⁶ However, the court does speak to its intent through its subsequent judicial opinions. The court has suggested that Rule 82 is intended to provide

130. See ATTORNEYS’ FEES 1995, *supra* note 17, at 117–18 for a discussion of Rule 68 strategy.

131. For the sake of argument, the attorney expended eighty hours on the defense and billed at a rate of \$250 per hour. For a rudimentary list of average hourly fees by state, see *How Much Do Lawyers Cost: Fees Broken Down by State*, CONTRACTSCOUNSEL (Aug. 17, 2021), <https://www.contractscounsel.com/b/how-much-do-lawyers-cost>.

132. Defendant paid his attorney \$20,000 and paid Plaintiff \$36,500.

133. Plaintiff paid \$12,166.54 to his attorney, about one third of \$36,500.

134. Di Pietro & Carns, *supra* note 21, at 48 (citing Miklautsch v. Dominick, 452 P.2d 438 (Alaska 1969)).

135. See *id.* at 41–46 (overviewing the history of Rule 82).

136. See, e.g., ALASKA S. CT. ORDER NO. 497, <https://courts.alaska.gov/sco/docs/sco497.pdf> (providing no indication of the court’s intent). *But see* ALASKA S. CT. ORDER NO. 1118 amended, <https://courts.alaska.gov/sco/docs/sco1118.pdf> (providing indication of intent to maintain current case law and a dissent questioning the need for the updated rule).

partial compensation, discourage frivolous suit, dissuade bad conduct, encourage settlement, and help avoid protracted litigation.¹³⁷

The Alaska Supreme Court views Rule 82 as a vehicle for *partial* rather than *full* remuneration of fees. Granting full fees would punish parties for “good faith” litigation.¹³⁸ Parties typically do not know who will win when they enter litigation,¹³⁹ and paying full fees would discourage them from airing grievances in the courts. As such, granting full fees by default would limit access to the courts.¹⁴⁰ Partial fees that are too large may also have this effect, and this realization prompted the court to amend Rule 82 to include the Rule 82(b)(3) variance factors and the Rule 82(b)(2) schedule for non-monetary judgments.¹⁴¹ Overall, the court wants to provide compensation without hindering access to justice.¹⁴²

Though the court does not want to punish good faith litigation, Rule 82 is intended to discourage frivolous suits and bad faith litigation.¹⁴³ When parties behave poorly, the court can drop the hammer of Rule 82 and require full compensation of attorneys’ fees or deny fees to the winning party.¹⁴⁴ However, the court has not stated whether the award of full fees is to punish the misbehaving party or to compensate its victim.¹⁴⁵

In conjunction with Rule 68, Rule 82 is intended to shorten litigation and encourage settlement.¹⁴⁶ Without Rule 68, Rule 82 would be antithetical to this end because its percentage award increases with the

137. ATTORNEYS’ FEES 1995, *supra* note 17, at 52–55.

138. Malvo v. J. C. Penney Co., 512 P.2d 575, 587 (Alaska 1973).

139. Andrew Kleinfeld, *On Shifting Attorneys’ Fees in Alaska: A Rebuttal*, 24 JUDGES’ J. 39, 41 (1985) (“Attorneys’ fee awards imply that the loser should have recognized that the winner was right, and not fought the claim. The implication is often unfair in contract (and tort) claims where considerable justice can be found on both sides.”).

140. *Id.*

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

142. *Id.*

143. See Di Pietro & Carns, *supra* note 21, at 37 (stating that legislatures in the United States use fee shifting as a punitive measure to reduce frivolous and bad faith litigation); see also Kordziel, *supra* note 22, at 456 (noting that while the purpose of Alaska’s Rule 82 is to punish bad faith claims and defenses, fee shifting is not the optimal measure to achieve this end).

144. ATTORNEYS’ FEES 1995, *supra* note 17, at 53–54. See *id.* at 53 nn.269–71 for examples of Alaska cases where such action was taken.

145. *Id.* at 53–54 (citing *Tobeluk v. Lind*, 589 P.2d 873, 876 (Alaska 1979) and *Williams v. Eckert*, 643 P.2d 991, 997 (Alaska 1982) for the principle that Rule 82 is compensatory and remedial).

146. See Miklautsch v. Dominick, 452 P.2d 438, 441 (Alaska 1969) (“The purpose of Civil Rule 68 is to encourage the settlement of civil litigation, as well as to avoid protracted litigation.”); see also *Cont’l Ins. Co. v. U.S. Fidelity & Guar. Co.*, 552 P.2d 1122 (Alaska 1976) (highlighting the court’s intent that Rule 68 fees be tailored toward inducing settlement).

contestation level.¹⁴⁷ As such, Rule 82 incentivizes a party that has the upper hand to increase the contestation level so as to pay a lower percentage of its attorneys' fees. Rule 68 provides strong incentives for settlement, by punishing parties that continue litigation after receiving a settlement offer that was better than the ultimate award. Rule 68 increases uncertainty and in doing so encourages settlement.

C. History of Rule 82 as a Guide for Change

A look back at Rule 82's history will be helpful in looking forward to crafting meaningful change. Fee shifting in Alaska has a longer history than the state itself, but the retention of Alaska's modified English Rule is likely more the product of "historical accident" than a conscious rejection of the American Rule.¹⁴⁸ This Section briefly summarizes the history of Rule 82 to show the agents of its change across time and to highlight potential vectors of future change.¹⁴⁹

Congress originated fee shifting in Alaska, albeit in a roundabout fashion, in 1844 when it declared that the laws of Oregon would apply in the territory.¹⁵⁰ For much of the period between 1900 and Alaska's admission as a state, Congress promulgated rules, which it failed to later repeal, that maintained fee shifting in Alaska.¹⁵¹

Following Alaska's admission as a state in 1959, the Alaska Supreme Court promulgated the first iteration of Rule 82 as part of its rules of civil procedure.¹⁵² The court did so in accordance with its constitutionally granted power to promulgate procedural rules.¹⁵³ In 1962, the Alaska State Legislature repealed and replaced the code of civil procedure and granted the Alaska Supreme Court the authority to promulgate rules on fee-shifting under Alaska Statute section 09.60.010.¹⁵⁴ The Alaska Supreme Court modified Rule 82 seventeen times between 1959 and 2021¹⁵⁵ and resisted the Alaska bar's several transitory campaigns to

147. *Miklautsch*, 452 P.2d at 441.

148. ATTORNEYS' FEES 1995, *supra* note 17, at 29.

149. See *id.* at 29-44 for a full discussion of Rule 82's history with sources.

150. Di Pietro & Carns, *supra* note 21, at 38-39.

151. ATTORNEYS' FEES 1995, *supra* note 17, at 32.

152. *Id.* at 34.

153. See ALASKA CONST. art. IV, § 15 ("The supreme court . . . shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts."); see also *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 401 (Alaska 2007) ("Rule 82 is procedural and was promulgated under the power to make rules vested in this court by the constitution.").

154. ATTORNEYS' FEES 1995, *supra* note 17, at 34-35 (quoting § 5.14, 1962 Alaska Sess. Laws ch. 101).

155. ALASKA R. CIV. P. 82. See ATTORNEYS' FEES 1995, *supra* note 17, at 35-39 for a discussion of some of these changes.

repeal the rule.¹⁵⁶ One of these modifications came in 1993 at the behest of a committee formed to review Rule 82.¹⁵⁷ In an attempt to create parity between plaintiffs and defendants, the court adopted fixed percentages for non-monetary judgments to approximate the fee schedule for plaintiffs.¹⁵⁸ Over the dissent of Justice Rabinowitz, who feared a rise in litigation over fees,¹⁵⁹ the court also adopted its eleven Rule 82(f) variance factors to combat the access to justice and due process issues that may arise from excessive attorneys' fees.¹⁶⁰

Throughout much of Rule 82's history, the legislature left the court to its own devices. However, the two bodies butted heads in 2003 when the legislature passed House Bill (HB) 145 to abrogate a judicially created common law doctrine of one-way fee shifting for public interest litigants.¹⁶¹ The superior court held that the bill was unconstitutional because it overturned a rule of practice and procedure without a two-thirds vote of each house of the legislature as required by article IV section 15 of the Alaska Constitution.¹⁶² Further, the superior court held that the bill violated due process and equal protection by restricting access to courts.¹⁶³ The Alaska Supreme Court held Rule 82 to be procedural rather than substantive and held that it was promulgated under the court's constitutionally granted powers rather than under section 09.60.010 of the Alaska Statutes.¹⁶⁴ However, the court held HB 145 constitutional, as it overruled judicially created substantive law.¹⁶⁵ Further, the court held that HB 145 did not present due process or access to justice concerns so long as the court retains the ability to utilize its Rule 82(f) factors on a case-by-case basis.¹⁶⁶

Both the Alaska Supreme Court and the Alaska legislature can alter Rule 82. In relevant part, the Alaska Constitution reads:

The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal

156. ATTORNEYS' FEES 1995, *supra* note 17, at 36–37.

157. *Id.* at 38.

158. *Id.* at 38–39.

159. ALASKA S. CT. ORDER NO. 1118 amended, <https://courts.alaska.gov/sco/docs/sco1118.pdf> (Rabinowitz, J., dissenting).

160. ATTORNEYS' FEES 1995, *supra* note 17, at 37–38.

161. For the bill and its contents, see H.R. 145, 23d Leg., 1st Sess. (Alaska 2003), <http://www.akleg.gov/PDF/23/Bills/HB0145A.PDF>.

162. *Native Vill. of Nunapitchuk v. State*, No. 1JU-03-700CI, 2004 WL 5190042 (Alaska Super. Ct. Apr. 6, 2004).

163. *Id.*

164. *State v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 401 (Alaska 2007).

165. *Id.* at 404.

166. *Id.* at 406.

cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.¹⁶⁷

Thus, the Alaska State Legislature may change Rule 82 only with the approval of a supermajority of both houses. However, it may pass substantive fee shifting statutes that promote public policy and favor either plaintiffs or defendants by simple majority vote.¹⁶⁸ The Alaska Supreme Court retains the ability to alter Rule 82 in “policy neutral” ways that do not preference either plaintiffs or defendants.

IV. ALTERING RULE 82

The Alaska Supreme Court intends Rule 82 and its companions to perform a number of functions and to maintain parity between plaintiffs and defendants while doing so.¹⁶⁹ While the rule and its companions are facially neutral, they preference defendants and comparatively undercompensate plaintiffs. Notably, plaintiffs are typically limited to recovery of a percentage of the judgment, while defendants may recover a percentage of their actual fees.¹⁷⁰ Thus, plaintiffs’ fee awards are limited by the value of the suit, while there is no such limit for defendants. Either the Alaska Supreme Court or the legislature should amend Rule 82 to permit plaintiffs the same recovery as defendants and place a cap on attorneys’ fees recoverable under the rule.

A. The Problem

Rule 82(b)(1) and Rule 82(b)(2) appear to provide similar levels of compensation, but, functionally, they do not. The Rule 82(b)(2) non-monetary judgment fee schedule is ostensibly designed to approximate Rule 82(b)(1)’s monetary judgment fee schedule.¹⁷¹ Rule 82(b)(1) asymptotes to 10% of judgments in cases that go to trial, which, assuming a one-third contingency fee, is 30% of the plaintiff’s total attorneys’ fees.¹⁷² Rule 82(b)(2) grants 30% of reasonable attorneys’ fees when trial is

167. ALASKA CONST. art. IV, § 15.

168. See *Native Vill. of Nunapitchuk*, 156 P.3d at 403 (noting the existence of statutes promulgated by the legislature that contain substantive fee-shifting provisions to promote public policy by preferencing either plaintiffs or defendants).

169. See Di Pietro & Carns, *supra* note 21, at 46 (“The Civil Rules Subcommittee suggested these [1993 amendments to Rule 82] . . . to equalize the recovery available between plaintiffs and defendants in certain cases.”).

170. See *supra* Section III.A.

171. See Di Pietro & Carns, *supra* note 21, at 46 (noting the intent of the Civil Rules Subcommittee).

172. See ALASKA R. CIV. P. 82(b)(1).

necessary.¹⁷³ The two rules look functionally identical, as they both yield approximately 30% of attorneys' fees. Despite this seeming parity, Rule 82(b)(1) and Rule 82(b)(2) are apples and oranges: categorically similar but functionally different.

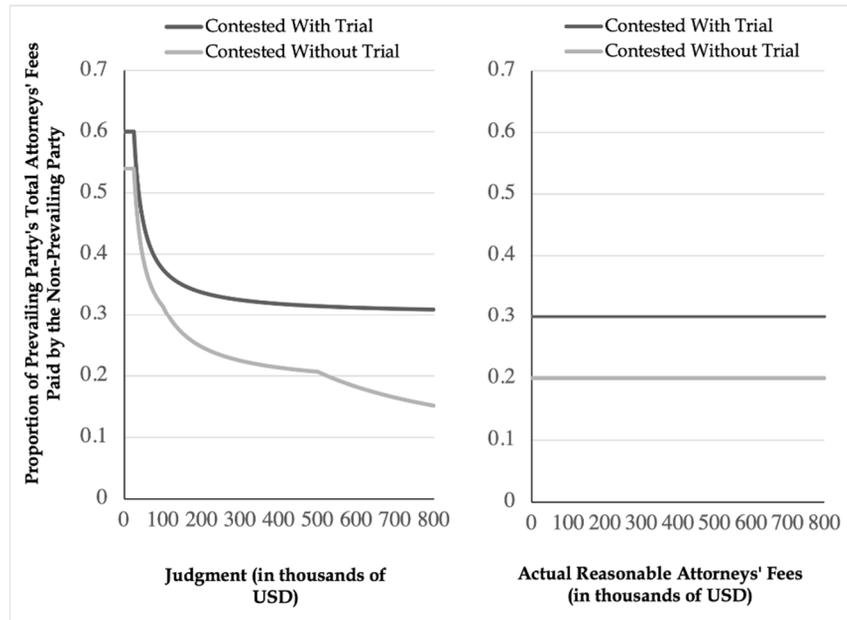


Figure 6. Comparison of percentage of fees paid by the defeated party under Rule 82(b)(1) (left) and Rule 82(b)(2) (right).

While plaintiffs and defendants could theoretically take advantage of either Rule 82(b)(1) or Rule 82(b)(2),¹⁷⁴ plaintiffs—seeking damages—primarily make use of Rule 82(b)(1), and defendants—seeking dismissal—primarily make use of Rule 82(b)(2). Parity generally requires that one-third of plaintiffs' attorneys' fees are equal to one-third of defendants' attorneys' fees. However, because plaintiffs' attorneys' fees are measured differently than defendants' fees, the two are likely to be unequal.

Take the example of a suit for \$25,000 that goes to trial and requires \$20,000 of attorney time to defend.¹⁷⁵ If the plaintiff is victorious, she is

173. *Id.* 82(b)(2).

174. For example, a plaintiff could seek injunctive relief, and a defendant could file a counterclaim for damages.

175. This is not unreasonable for a representation that requires a total of 100 hours of attorney time billed at a reasonable rate of \$250 per hour. See *How Much Do Lawyers Cost: Fees Broken Down by State*, *supra* note 131 (listing average attorney

entitled to 20% of the judgment, \$5,000, as attorneys' fees.¹⁷⁶ If the defendant is victorious, she is entitled to 30% of her reasonable attorneys' fees, or \$6,000.¹⁷⁷ Defendants' hourly fees can quickly overwhelm the value of the suit, but plaintiffs are limited by the value of the suit. This inequity has not been lost on commentators,¹⁷⁸ but none has fully explored a solution.

B. The Solution

The Alaska Supreme Court or the Alaska State Legislature by two-thirds majority should promulgate a new version of Rule 82(b)(2) that allows the prevailing party to collect a percentage of reasonably incurred attorneys' fees irrespective of judgment type. Further, the promulgating body should establish a set of bracketed ceilings on the percentage of fees collectable at the hourly rate under Rule 82(b)(2) that is pegged to the value of the suit as pled.

1. Rule 82(b)(2) Expansion

To create parity between plaintiffs and defendants, Rule 82(b)(2) should be modified so that all prevailing parties in contested proceedings or at trial can receive a percentage of their reasonable attorneys' fees. In cases where there is a monetary judgment, the prevailing party should have the right to choose between Rule 82(b)(1) and Rule 82(b)(2). Thus, where available, prevailing parties would choose between the Rule 82(b)(1)-determined percentage of the judgment and the Rule 82(b)(2)-determined percentage of reasonable attorneys' fees.¹⁷⁹ The promulgating body should leave the current schedule of Rule 82(b)(2) in place. Parties that prevail without any contestation should be limited to the schedule of Rule 82(b)(1).

costs in Alaska as between \$150 and \$300 per hour).

176. See ALASKA R. CIV. P. 82(b)(1).

177. See *id.* 82(b)(2).

178. See Kordziel, *supra* note 22, at 449 (noting that Rule 82 "institutionalize[s] inequitable fee awards favoring defendants"); see also Di Pietro & Carns, *supra* note 21, at 46 n.60 (recognizing that attorneys are unsatisfied with the inequities that remain in the reimbursement of plaintiffs and defendants); See, e.g., ATTORNEYS' FEES 1995, *supra* note 17, at 148-49 (noting objections to the current regime and potential changes).

179. The lodestar method should be used to determine reasonable fees. See LAYCOCK & HASEN, *supra* note 6, at 937-38 for a discussion of the lodestar and how to calculate it. The lodestar is the market rate for attorneys of comparable skill and experience in the relevant type of litigation multiplied by the number of hours worked. *Id.*

2. Rule 82(b)(2) Ceiling

While the variance factors allow judges to reduce extreme awards, the possibility of excessive attorneys' fee awards is nonetheless a specter hanging over Rule 82(b)(2). A cap on fees chargeable to the non-prevailing party mitigates this concern for both plaintiffs and defendants. Although this Note proposes a specific, graduated schedule capping attorneys' fee awards according to the value of suits as pled, the promulgating body could implement this cap structure with amended values or implement an entirely different cap structure, as it chooses.¹⁸⁰

The ceiling should have three brackets. For suits with pled values of \$0.01 to \$1,000, the cap on attorneys' fee awards should be \$1,000. For suits with pled values of \$1,000 to \$3,000, the cap should match dollar for dollar. And for suits with pled values above \$3,000, the cap should be \$2,100, plus 30% of the value of the suit as pled. In effect, as suits with pled values increase beyond \$3,000, the cap decreases from 100% of the pled value to 30% of the pled value. The promulgating body should preserve the power of the Rule 82(b)(3) variance factors, which allow judges to increase or decrease awards as equity demands. Retaining these factors creates a presumptive cap but allows for variance for good reason.

The cap on the amount of attorneys' fees collectible by the prevailing party is represented by the following schedule:

Amount of Suit as Pled (including counterclaims)	Maximum Amount of Attorneys' Fee Award
\$0.01 to \$1,000	\$1,000
\$1,000 to \$3,000	The amount of the suit as pled.
\$3,000 and above	\$2,100, plus the amount of the suit as pled multiplied by three-tenths.

Figure 7. Proposed cap on attorneys' fees assessable to the defeated party.

180. The values were selected to illustrate a possible structure and to avoid cliff effects.

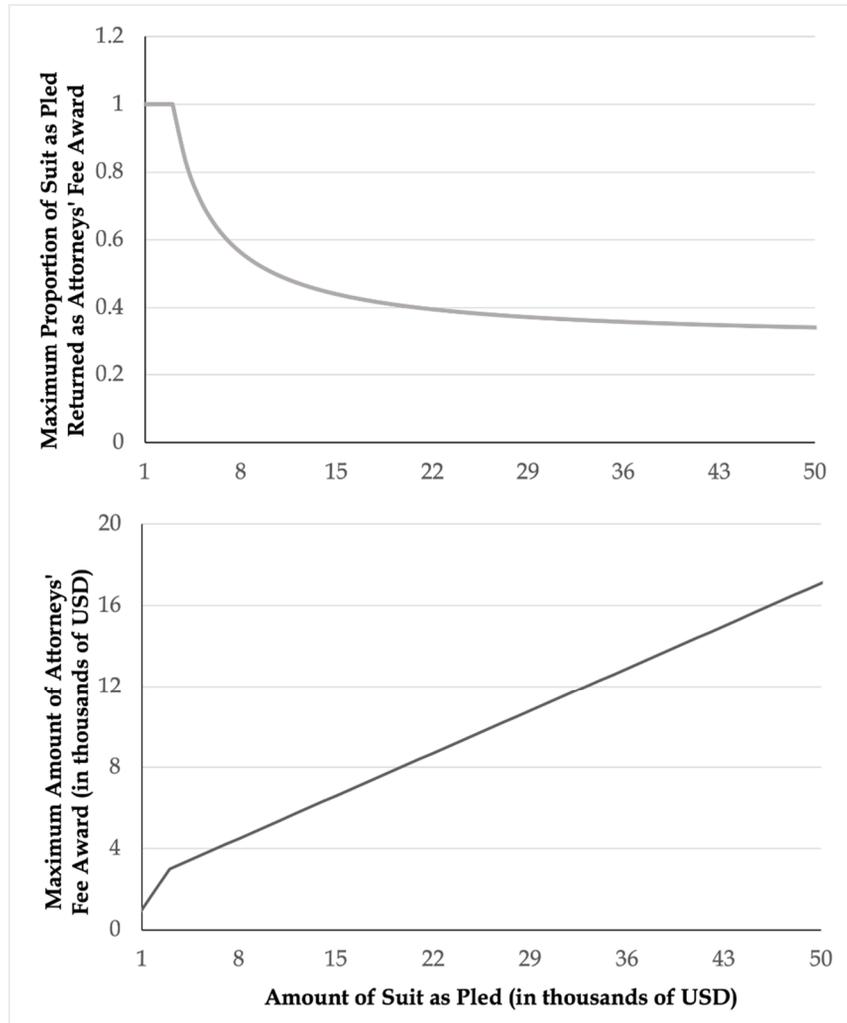


Figure 8. Proposed ceiling as a function of the amount of the suit as pled (bottom) and maximum proportion of suit as pled returned as attorneys' fee award (top).

3. Function

To help understand the proposed rule changes, consider a plaintiff who pleads damages of \$100,000 and ultimately wins a verdict of \$100,000, after 100 hours of work by a mid-level attorney who could charge \$250 per hour. Had the plaintiff's attorney not been working on a contingency basis, the plaintiff would owe her attorney \$25,000, for 100 hours of work at \$250 per hour. At this juncture, the plaintiff's attorney would submit a Rule 82 motion for the higher of \$12,500 – the amount due under the schedule in Rule 82(b)(1) – and \$7,500 – 30% of the plaintiff's

reasonable attorneys' fees, which amounted to \$25,000. In this scenario, plaintiff's counsel did not expend enough hours to earn a higher rate under the new rule. If, however, plaintiff's counsel expended 200 hours on the suit, for a total value of \$50,000, the new rule would grant plaintiff \$15,000—\$2,500 more than the Rule 82(b)(1) rate. If, instead, the defendant won, she would receive one-third of her actual, reasonable attorneys' fees. However, neither party would be able to receive more than \$32,100 in attorneys' fees, no matter how many hours expended.

4. *Effects*

These proposed rule changes have a number of benefits. By allowing plaintiffs and defendants to recover under the same method, the modified rule creates better parity between plaintiffs and defendants than currently exists. Further, the changes better compensate plaintiffs, incentivize attorneys to accept meritorious low-value suits, and reduce uncertainty for plaintiffs and defendants.

Ideally, our judicial system would bring plaintiffs to the position they occupied prior to the harm that occurred. The current rules in Alaska attempt to create parity by allowing plaintiffs and defendants to collect roughly 30% of their attorneys' fees from the defeated party.¹⁸¹ However, because plaintiffs and defendants calculate fees differently, there is no real parity. Allowing plaintiffs' attorneys and defense counsel to collect 30% of the cost of their labor from the defeated party evens the playing field by putting the same emphasis on defense and plaintiff lawyers' labor. The proposed rule refocuses on the hours expended by plaintiffs' attorneys in the same way that the current rule focuses on hours expended by defense counsel. Doing so allows plaintiffs to gain the benefit of their attorneys' labor. Low-value cases aside, the proposed rule does not increase the amount plaintiffs' attorneys receive, but it does shift the burden of the attorneys' labor and incentivizes efficient defense practice. Rather than burying plaintiffs in documents and motions, the defense is incentivized to cooperate with plaintiff's counsel to increase efficiency.

The proposed rule also provides an incentive for plaintiffs' attorneys to take high-merit, low-value cases while maintaining the incentive to reject low-merit, low-value claims.¹⁸² By allowing plaintiffs' attorneys to recover more than would traditionally be allowed under contingency arrangements, attorneys are encouraged to bring meritorious, low-value

181. ALASKA R. CIV. P. 82(b)(1)–(2).

182. Plaintiffs' attorneys still shoulder the risk of not being paid and will therefore not accept cases of low merit. Further, ALASKA R. CIV. P. 11 and 77(j) allow judges to sanction attorneys for vexatious and frivolous conduct.

suits that would have been uneconomical otherwise. Take the example of a plaintiff with \$10,000 in damages, a one-third contingency arrangement, and a reasonable but not absolute chance of victory. Under the current rules, few plaintiffs' attorneys would be willing to take this case knowing that it could require a trial. If the plaintiff prevails, the attorneys' fees would be only \$3,333.33. This is the rough equivalent of thirteen hours at \$250 per hour. The risk of loss further decreases the value of the suit to plaintiffs' attorneys, who are out of pocket for their expenses and time spent in the event of defeat. The hours spent on low-value claims can quickly overwhelm the value of the claim. Thus, the risk-to-reward ratio, despite being in the plaintiff's favor, is not great enough to encourage attorneys to take the case. Defense attorneys are not subject to this limitation because they are paid by the hour and compensated win or lose. Further, defense costs are essentially partially subsidized by Rule 82(b)(2).¹⁸³ Thus, plaintiffs' attorneys rather than plaintiffs themselves need incentivization to take low-value, high-merit cases.

For a \$10,000 suit, the proposed changes would allow plaintiffs' attorneys to earn up to \$5,100 rather than \$3,333.33 in fees. However, to earn this amount, plaintiffs' attorneys would need to perform \$17,000 worth of work. Plaintiffs would choose Rule 82(b)(2) over Rule 82(b)(1) once their attorney had performed \$6,666.66 of legal work, the equivalent of twenty-six hours at \$250 per hour, at which point the rule would award \$3,333.33 in fees. From \$6,666.66 to \$11,111.11 in legal fees, calculated hourly, there is no actual increase in the fee that the plaintiff's attorney would receive, since the amount awarded under the new rule would not exceed the amount that the attorney would receive under the contingency fee arrangement. Above this amount, but below the cap, each additional hour of work increases the plaintiff's attorney's take-home pay by three-tenths of the value of that time. This method encourages plaintiffs' attorneys to remain diligent by paying them, albeit at a lower rate, for their labor.

While the proposed rules could arguably foster inefficiency, bill padding, and increased pleading amounts, there are safeguards in place to prevent these outcomes. Judges still retain the authority to alter fee awards using the Rule 82(f) variance factors, and timesheets would be scrutinized by opposing counsel. Additionally, these actions are ethics violations.¹⁸⁴ Currently, plaintiffs have incentives to inflate damages at

183. Given that defendants will pay attorneys' fees to their counsel win or lose, their attorneys' fees are subsidized by the percentage likelihood of victory multiplied by the Rule 82(b)(2) fee award.

184. See ALASKA RULES OF PROF'L CONDUCT 1.5 (stating that for a fee to be reasonable it must correctly evaluate the time and skill required); see also *id.* 8.4 (proscribing dishonesty).

the pleadings stage. Outside of evidentiary limitations, the primary check on damage amounts is credibility with judges and fact finders. Pleading higher damages increases plaintiffs' bargaining positions and anchors both negotiations and jury deliberations.¹⁸⁵ Rule 68 may eliminate some puffery, but it does not apply to pleadings, and it is a relatively crude tool in helping defendants obtain information about how plaintiffs truly value the suit.¹⁸⁶ Because the proposed rule changes limit plaintiffs' risk to roughly three-tenths of the amount of the case as pled, the rule changes provide additional incentive to plead accurately and not exaggerate pleadings. While the amount that plaintiffs could receive under the rule is also limited, overcoming the amount awarded by Rule 82(b)(1) becomes increasingly difficult as the value of the case increases.

The proposed rule changes reduce uncertainty for plaintiffs and for defendants. Under the current rules, there is no limit on the attorneys' fees a losing plaintiff may be forced to pay. Allowing plaintiffs to recover in the same way as defendants and imposing a cap does not eliminate uncertainty, but it reduces it by limiting the amount of fees that can be recovered. For plaintiffs, their maximum liability is limited to three-tenths of the amount pled. The same is true for defendants. Further, the cap limits the amount of attorneys' fees that can be collected under Rule 82(b)(1) as a result of punitive damage awards, mitigating the concern of overbearing fee awards as a result of punitive damages.

While the proposed rule is balanced, it may meet resistance. It is possible that it would upset both the plaintiffs' bar and the defense bar because it is not overly conciliatory to either. Prior studies have examined attorney feelings towards Rule 82 and concluded that the rule is acceptable as is.¹⁸⁷ These studies based their results on attorney perceptions of Rule 82 as a proxy for how well the rule actually accomplishes its goals.¹⁸⁸ This perception-based proxy is crude at best. However, serious practical and theoretical difficulties hinder the creation and implementation of a study of the efficacy of the rule itself. Given these difficulties, prior studies concluded attorney perception was the best alternative.¹⁸⁹

185. See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 138 (1994) (describing anchoring).

186. See ALASKA R. CIV. P. 68.

187. See, e.g., ATTORNEYS' FEES 1995, *supra* note 17, at 143-44, 147-49 (concluding that most lawyers like the rule and suggesting only "limited changes"); NANCY MEADE, ATTORNEY'S FEE SHIFTING: PERCEPTIONS ON ITS IMPACT IN ALASKA 9, 43 (2012) (following up on ATTORNEYS' FEES 1995, *supra* note 17, and finding the general takeaway to be "it ain't broke so don't fix it").

188. MEADE, *supra* note 187, at 52.

189. *Id.* at 51-52 (summarizing why it is difficult to design a study that

One problem with these studies is that they did not report results based on the type of work each attorney performed. Though many attorneys reported working as both plaintiff and defense counsel,¹⁹⁰ a breakdown of constituency would aid in understanding underlying biases that may have altered the data. Further, the method of data collection could have resulted in skewed results. Attorneys likely responded to the email survey without combing through their records to ensure that their responses were accurate. Further, not all attorneys are similarly situated. A full-time plaintiffs' attorney at a firm that works on hundreds of cases a year likely has a different opinion than does someone who performs little plaintiffs' work or who has never truly practiced.¹⁹¹ A longer-term, more rigorous quantitative study is needed to accurately gauge the effects of Rule 82.

While these studies may not be determinative, they do provide some anecdotal data. Notably, some attorneys took issue with judgment-proof plaintiffs,¹⁹² others with defense "milk[ing]" fees,¹⁹³ and others still with institutional defendants using Rule 68 as a "club" against middle-income plaintiffs.¹⁹⁴ At least one attorney feared changes similar to those proposed and wrote, "A lawyer working on a contingency fee should not be able to change his/her fee agreement to hourly to punish the opposing party. An award of fees should be the actual fees the attorney would receive and not some hypothetical number."¹⁹⁵ Comments like these may reflect the feelings of some attorneys in practice.

At the end of the day, however, the focus should be on achieving clients' goals and creating a system that is fundamentally fair. While attorneys' views are important, they are not the touchstone of this system.

V. CONCLUSION

While designed to create parity, the current version of Rule 82 divides how it compensates litigants along plaintiff-defendant lines. Plaintiffs are limited to a percentage of the judgment while defendants receive a portion of their actual, reasonable attorneys' fees. Plaintiffs are thus subject to extreme uncertainty, as there is no limit on the defense's recoverable fees. There is no equivalent risk to defendants. This disparity

examines the effects of Rule 82); *see also* ATTORNEYS' FEES, *supra* note 17, at 144–45.

190. MEADE, *supra* note 187, at 82.

191. *See id.* at 87 (providing an example of a respondent who could not answer a survey question because they were a law clerk and did not have experience in practice).

192. *Id.* at 83.

193. *Id.* at 85.

194. *Id.* at 110.

195. *Id.* at 102.

can be solved by allowing plaintiffs to recover in the same manner as defendants and placing a cap on recoverable fees. Doing so creates better parity, decreases uncertainty, and has the potential to more adequately compensate plaintiffs. Further, it increases the incentive to bring high-merit, low-value suits that would not otherwise be attractive to plaintiffs' attorneys.