

RULE 82 & TORT REFORM: AN EMPIRICAL STUDY OF THE IMPACT OF ALASKA'S ENGLISH RULE ON FEDERAL CIVIL CASE FILINGS

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ABSTRACT

Alaska is the only American state that employs a variation of the "English Rule," whereby the losing party in a civil case must pay the prevailing party's attorneys' fees. In recent years, advocates of tort reform have praised Alaska's Civil Rule 82 as a model for tort reform to help rid the overburdened courts of low merit claims. But does Rule 82 really reduce meritless litigation? This study compares civil case filings in the District of Alaska to a sample of other comparable federal district courts. Although filings in the District of Alaska were lower than the national average, they were indistinguishable from the remainder of the sample. Other measures also failed to demonstrate any significant differences between civil cases in the District of Alaska and the other districts. These results suggest that reformers looking to reduce meritless litigation should look elsewhere for model reform measures.

INTRODUCTION

Alaska has long been unique among American states as the only jurisdiction that follows the "English Rule," whereby the "loser" in a

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civil litigation must pay the prevailing party's attorneys' fees.¹ Other states follow the "American Rule," which presumes that each party will bear its own attorneys' fees.² Alaska's version of the "English Rule" is codified as Alaska Rule of Civil Procedure 82.³

Rising concerns about defendants being forced to settle frivolous lawsuits—particularly tort claims—in order to avoid litigation costs have led some commentators to propose adopting the English Rule in the United States.⁴ As explained by one commentator, "[i]f one believes that there are a substantial number of what amounts to frivolous lawsuits in which a plaintiff obtains a settlement simply because of the defendant's concern about the costs of fighting the case, then fee shifting would probably serve to discourage suits of that type."⁵ Perhaps inspired by the increased public interest in Alaska in recent years (a likely side effect of former Governor Sarah Palin's rising profile), some academic and media commentators have suggested that other states use

1. See Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1946 (2002).

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

3. ALASKA R. CIV. P. 82(a).

4. See, e.g., Frank H. Easterbrook, *Discovery As Abuse*, 69 B.U. L. REV. 635, 644–46 (1989); see also Herbert M. Kritzer, *Fee Regimes and the Cost of Civil Justice*, 28 CIV. JUST. Q. 344, 345 (2009) ("In the United States, the issue of adopting a loser pays rule has reemerged yet again as a topic of discussion, being pushed by conservative think tanks such as the Manhattan Institute and Common Good."). Notably, similar concerns recently prompted the Supreme Court to reinterpret the long-settled pleading standard, now requiring plaintiffs to satisfy a higher threshold to survive a motion to dismiss at the outset of a lawsuit for failure to state a claim upon which relief can be granted. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007)); *Twombly*, 550 U.S. at 559 (citing, *inter alia*, Easterbrook, *supra*, at 638).

5. Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 LAW & CONTEMP. PROBS. 125, 137 (1984).

Alaska's Rule 82 as a model for tort reform.⁶ Indeed, this view appears to be gaining traction in some state legislatures.⁷

But does Alaska's "loser pays" rule really discourage meritless claims? This empirical study examines the rates of civil filings, tort filings, and other criteria regarding the civil cases in the United States District Court for the District of Alaska and compares them to data in a sample of federal district courts selected based on demographic, geographic, and legal similarities. The comparison shows that although Alaska's filing rates are lower than the overall filing rates for the nation as a whole, they are very similar to many courts in the sample. This suggests that Rule 82 does not have a significant impact on civil filings in Alaska.

Of course, this is not the first study examining fee shifting, either in general or with respect to Rule 82 in particular. Yet, much of the prior research comparing the American Rule with the English Rule has been theoretical.⁸ Alaska's rule has been the subject of significant scholarly commentary and studies, most prominently a comprehensive study led by Susanne Di Pietro and Teresa W. Carns in the 1990s.⁹ However, efforts to compare the impact of the procedure in Alaska with other jurisdictions have been limited. Comparative studies examining fee shifting rules are generally handicapped by significant cultural, legal,

6. See, e.g., Marie Gryphon, *Common-Sense Justice in Alaska: The Lower 48 Would Benefit From the Last Frontier's Loser-Pays Rule*, NAT'L REV. ONLINE (Oct. 28, 2008, 6:00 AM), <http://www.nationalreview.com/articles/226102/common-sense-justice-alaska/marie-gryphon> ("Perhaps U.S. state lawmakers whose attention has been captured by Governor Palin's sudden celebrity will embrace an Alaskan export other than fossil fuels or King crab: loser-pays principles could help to make court systems faster and cheaper—and outcomes more just—from coast to coast."); see also Walter Olson & David Bernstein, *Loser Pays: Where Next?*, 55 MD. L. REV. 1161, 1168–69 (1996) (predicting that other states will adopt fee shifting practices similar to Alaska's). Of course, Rule 82 predated Governor Palin's administration. See ALAN J. TOMKINS & THOMAS E. WILLING, *TAXATION OF ATTORNEYS' FEES: PRACTICES IN ENGLISH, ALASKAN, AND FEDERAL COURTS* 3 (Fed. Judicial Ctr. 1986) (noting that the rule has been part of the Alaskan judicial system for "many years").

7. See, e.g., Ashby Jones, *Texas Bill Takes Aim at Frivolous Lawsuits*, WALL ST. J., May 24, 2011, <http://online.wsj.com/article/SB10001424052702303654804576341783811532312.html> (comparing a "tort reform" bill being considered by the Texas state senate that would require the "loser" of a motion to dismiss to pay the winner's attorney fees with Alaska's system); Dave Williams, *Lawmakers to Consider 'Loser Pays' Tort Bill*, ATLANTA BUS. CHRON., Feb. 9, 2009, <http://www.bizjournals.com/atlanta/stories/2009/02/09/story10.html> (comparing a bill being considered by the Georgia state senate to Alaska's rule).

8. See *infra* note 60 and accompanying text.

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

and data keeping differences between nations and even states.¹⁰ Given the common procedural background and statistical collection efforts, federal district courts provide an ideal data pool for comparison. This study examines filing rates over a longer, more recent period of time (the fourteen year period from 1997 through 2010) than prior studies, within a set of otherwise procedurally similar jurisdictions, within the same country. The results suggest that policymakers looking for a “magic bullet” to eliminate low merit litigation should look elsewhere. They also suggest that Rule 82 is presently fulfilling its more modestly framed intended purpose—providing partial compensation to the prevailing party without limiting access to the courts.

This Article is divided into four parts. Part I provides background on the debate over fee shifting, describes prior commentary and empirical studies, and reviews Rule 82 in detail. Part II describes the methodology for the empirical analysis. Part III describes the results. Part IV analyzes the implications of those results.

I. BACKGROUND

This Part of the Article discusses the background necessary to understand the empirical data. The sections describe the English Rule and the American Rule, Alaska’s Rule 82, the commentary and theoretical research on fee shifting, several significant empirical studies on fee shifting, and the hypotheses about the effects of Rule 82 on federal civil cases that follow from the prior research.

A. The English Rule and the American Rule

At common law, a prevailing party could not recover attorneys’ fees from the loser.¹¹ In England, however, a prevailing party could recover attorneys’ fees from the losing party as a matter of statute by 1607.¹² Most jurisdictions¹³ have since adopted some variation of this presumption, which is commonly known as the “English Rule.”¹⁴ Under this system, the prevailing party will typically recover part, but not

10. *Id.* at 71 (“Overall, comparing Alaska’s filing trends and caseload composition to those in other states was difficult because the data often were not strictly comparable.”); *see also infra* notes 114–115.

11. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975).

12. *Id.* at 247 n.18.

13. James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225, 225 (1995) (“Throughout most of the Western world the English rule applies, and the losing party in a dispute is liable for the winner’s legal fees, up to a reasonable limit.”).

14. *See* Kritzer, *supra* note 1, at 1946.

necessarily all, of their fees.¹⁵ Recoveries in jurisdictions that follow the English Rule may range from one-half to two-thirds of actual attorneys' fees.¹⁶ Policymakers have favored partial, rather than full, recovery of attorneys' fees in order to deter parties likely to succeed from unnecessarily prolonging litigation and to encourage settlement.¹⁷ Fees are commonly factored into settlements in jurisdictions that follow the English Rule.¹⁸

The United States, however, is unique.¹⁹ Under the "American Rule," the prevailing party is generally not entitled to collect attorneys' fees from the losing party.²⁰ This anomaly developed out of an absence of specific statutory authorization in the United States, in contrast to countries such as England.²¹ The lack of a statute may have resulted from general hostility towards lawyers in colonial America and the fear

15. TOMKINS & WILLGING, *supra* note 6, at vii ("Even under the English rule, the winner can expect to pay a significant portion of its own costs."); Kritzer, *supra* note 5, at 128 (noting that in Ontario, "[t]ypically, in litigation, a successful litigant is awarded 'party and party' costs to be paid by the other side" and that "[p]arty and party' costs are only a partial reimbursement for a litigant's legal fees; the litigant is then responsible for the balance of his or her lawyer's fee"); John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1574 (1993) (noting that as the English system developed, "the prevailing attorney generally recovered less than the fee that could be obtained from his own client" (citing John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9, 12 (1984))).

16. See Vargo, *supra* note 15, at 1599–1600 & n.265 (noting that in many countries that use the English Rule, it is "only a partial shift that does not provide full compensation to the winner," and further indicating that in England, "winning parties are generally able to recover two-thirds of the actual solicitor charges" while "[i]n Australia, the winning parties usually recover between one-half and two-thirds of their costs").

17. TOMKINS & WILLGING, *supra* note 6, at 7–8 (noting that in England, policymakers considered whether "[r]equiring the loser to pay the full amount of fees might encourage the winner to prolong the litigation; on the other hand, requiring the winner to absorb a portion of the fees might encourage settlement or, at least, serve as a brake against dilatory tactics, harassment, or other abusive litigation practices" (citations omitted)); see also Olson & Bernstein, *supra* note 6, at 1162–63 ("As an added safeguard, most countries follow a policy of shifting less than the full monetary cost of litigation. Because parties must bear a significant share of the marginal costs of litigation even if they win, they are shielded from the temptation to over-litigate a winning case for strategic or fee-seeking reasons.").

18. See Kritzer, *supra* note 1, at 1960 (discussing the practice in England).

19. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975); see also Olson & Bernstein, *supra* note 6, at 1164 (arguing that "fee-shifting or the lack thereof . . . [i]s one of the great differences between America's legal system and the systems prevailing in other advanced countries").

20. *Alyeska Pipeline*, 421 U.S. at 247.

21. *Id.* at 247–57.

that such a statute might provide some justification for their legal fees.²² Despite being an aberration, the American Rule is generally considered to be “deeply rooted” in American “history and in congressional policy[.]”²³

There are, however, exceptions to the American Rule in the United States. Congress and state legislatures have authorized the recovery of attorneys’ fees, or “fee shifting,” under many statutes.²⁴ Some of these statutes operate in favor of the prevailing party, regardless of whether it is a plaintiff or defendant.²⁵ This is frequently referred to as a “two-way” fee shift.²⁶ Many statutes, however, provide that only one party—typically the plaintiff—may recover attorneys’ fees.²⁷ This type of law is known as a “one-way” fee shift, and it is the most common form of fee shifting in the United States.²⁸ Unlike two-way fee shifting, one-way fee shifting provisions are not policy-neutral and are typically designed to encourage suits that the legislature has deemed further public policy goals.²⁹

Courts in the United States have also carved out exceptions to the American Rule, including situations where parties seek to recover a fund or property for others in addition to themselves, where parties willfully disobey court orders, or where the losing party has acted in

22. See Gregory J. Hughes, *Award of Attorney’s Fees in Alaska: An Analysis of Rule 82*, 4 U.C.L.A.-ALASKA L. REV. 129, 131 (1975) (“[L]awyers in colonial America were generally considered disreputable and suspicious, so much so that in some colonies they were forbidden to receive any fees, or were barred from the courts altogether.” (citations omitted)).

23. *Alyeska Pipeline*, 421 U.S. at 271.

24. *Id.* at 254–55, 260; see also Vargo, *supra* note 15, at 1588 (“There are over 200 federal statutes and almost 2000 state statutes that provide for shifting of attorney’s fees.”); Kevin Michael Kordziel, Note, *Rule 82 Revisited: Attorney Fee Shifting in Alaska*, 10 ALASKA L. REV. 429, 430 (1993) (noting that as of the 1990s, “there are now well over 100 federal and 2,000 state fee-shifting statutes in the United States” (citing TOMKINS & WILLING, *supra* note 6, at 31)).

25. *Alyeska Pipeline*, 421 U.S. at 264 n.37.

26. Vargo, *supra* note 15, at 1589–90.

27. Kritzer, *supra* note 1, at 1946 (“Most of the statutes that abrogate the American Rule in the United States introduce a ‘one-way’ fee-shifting regime, whereby a successful plaintiff may recover some or all of its attorneys’ fees from the losing defendant, but a winning defendant cannot recover attorneys’ fees from the losing plaintiff.”); see also *Alyeska Pipeline*, 421 U.S. at 264 n.37.

28. Kritzer, *supra* note 1, at 1946; Vargo, *supra* note 15, at 1590, 1629; see also Olson & Bernstein, *supra* note 6, at 1165–66 (noting that “one-way” fee shifting in favor of plaintiffs is “a familiar element of the legal landscape” in the United States).

29. *Alaska v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 402–03 (Alaska 2007). Notably, the English Rule effectively produces a one-way shift where a losing plaintiff is judgment proof. Vargo, *supra* note 15, at 1629.

“bad faith.”³⁰ American courts have also typically honored contractual agreements to shift fees.³¹

Notably, cases in federal court based on diversity of citizenship jurisdiction have always represented a potential exception as well. As the Supreme Court has explained, a “state law denying the right to attorneys’ fees or giving a right thereto, which reflects a substantial policy of the state, should be followed” in diversity cases absent a contrary federal law or court rule.³² Deference to state fee shifting rules in diversity cases guards against forum shopping.³³ The diversity exception, however, has lost much of its “practical significance” since nearly all states follow the American Rule.³⁴

B. Alaska’s Rule 82

Dating back to before its organization as a territory, Alaska has been alone among American jurisdictions in awarding attorneys’ fees as a matter of course to the prevailing party.³⁵ Since statehood, that presumption has been codified in Alaska Rule of Civil Procedure 82.³⁶ The “primary,” arguably even exclusive, purpose of the Rule “is to partially compensate a prevailing party for attorneys’ fees incurred in enforcing or defending the party’s rights, regardless of the nature of those rights.”³⁷ The Alaska Supreme Court has explained that “[w]ithout the rule, the rights of the prevailing party would be less completely vindicated because of the uncompensated expense of litigation.”³⁸

30. *Alyeska Pipeline*, 421 U.S. at 257–59 (noting that courts are authorized to award fees under their inherent powers in particular situations, most notably for parties seeking to recover a fund or property for others in addition to themselves, where a party has willfully disobeyed a court order, or where the losing party “has ‘acted in bad faith, vexatiously, wantonly or for oppressive reasons’” (citations omitted)); see also Vargo, *supra* note 15, at 1579–87.

31. See, e.g., Vargo, *supra* note 15, at 1578–79.

32. *Alyeska Pipeline*, 421 U.S. at 259–60 n.31.

33. See Olson & Bernstein, *supra* note 6, at 1173 (proposing the adoption of the English Rule in federal court, but discussing reasons why the English Rule should not apply to diversity cases, including the fear that it would encourage forum shopping).

34. *Alyeska Pipeline*, 421 U.S. at 259–60 n.31.

35. *Alaska v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 398–99 (Alaska 2007).

36. *Id.* at 398–99, 398 n.24.

37. *Id.* at 398. Additionally, the Alaska Supreme Court has stated that Rule 82 “is not intended as a vehicle for accomplishing anything other than providing compensation where it is justified.” *Id.* at 403 n.60 (quoting *Ferdinand v. City of Fairbanks*, 599 P.2d 122, 125 (Alaska 1979)).

38. *Id.* at 398.

In its current form, Rule 82 provides that “[e]xcept as otherwise provided by law or agreed by the parties, the prevailing party in a civil case shall be awarded attorney’s fees” as calculated under the Rule.³⁹ Trial courts have broad discretion in determining which party is the “prevailing party.”⁴⁰ “The prevailing party is the one who has successfully prosecuted or defended against the action, the one who is successful on the ‘main issue’ of the action and ‘in whose favor the decision or verdict is rendered and the judgment entered.’”⁴¹ Where both parties prevail on a “main issue,” the court has discretion to deny attorneys’ fees to both parties.⁴²

The Rule sets out a schedule providing that a prevailing party recovering a money judgment may recover an additional percentage of the judgment as partial compensation for its attorneys’ fees as follows⁴³:

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%

In cases where the prevailing party does not recover a money judgment, the Rule provides that the court shall award thirty percent of the prevailing party’s reasonable actual attorneys’ fees in cases that go to trial and twenty percent of the party’s reasonable actual attorneys’ fees in cases that do not.⁴⁴

39. ALASKA R. CIV. P. 82(a)-(b).

40. *Progressive Corp. v. Peter ex rel. Peter*, 195 P.3d 1083, 1092 (Alaska 2008).

41. *Id.* (quoting *Hillman v. Nationwide Mut. Fire Ins. Co.*, 855 P.2d 1321, 1327 (Alaska 1993)).

42. *Taylor v. Moutrie-Pelham*, 246 P.3d 927, 929 (Alaska 2011).

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

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

The Rule then provides courts with a degree of discretion to vary the amount of the fee award based on consideration of the following factors:

- (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 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.⁴⁵

Courts must explain their reasoning for any variations.⁴⁶ There are also variations on the formula for default judgments and cases involving equitable apportionment.⁴⁷ A party must make a motion to the same judicial officer hearing the merits of the dispute to collect a fee award under the Rule,⁴⁸ and the amount is frequently part of the negotiation in a settlement.⁴⁹

The Alaska Supreme Court has recognized that "strict application" of Rule 82 may offend due process by limiting access to the courts.⁵⁰ Several significant amendments took effect in 1993 in response to these concerns.⁵¹ Those amendments added the variance factors over objections that they would increase the amount of litigation over

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

46. *Id.*

47. *See* ALASKA R. CIV. P. 82(b)(4), (e).

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

49. *See* Kritzer, *supra* note 1, at 1960 (suggesting that fees are usually not an "explicit[]" part of settlements in Alaska, but may also be "essentially a part of the negotiation").

50. *Alaska v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 394 (Alaska 2007) (citing *Malvo v. J.C. Penney Co.*, 512 P.2d 575, 587 (Alaska 1973)).

51. *Id.* at 406 & n.81; *see also* Kordziel, *supra* note 24, at 446, 448 (noting that the amendments were intended to address a "lack of uniformity in fee awards" and require judges to articulate their reasoning for awards, and that they "clearly benefit[ted] plaintiffs vis-à-vis defendants").

attorneys' fees.⁵² The Alaska Supreme Court also added the provisions limiting the amounts recoverable by prevailing defendants to twenty or thirty percent of actual fees, depending on whether trial was necessary.⁵³ Previously, prevailing defendants had been able to recover up to eighty percent of their attorneys' fees.⁵⁴

Notably, the Alaska Legislature has also sought to weigh in on the effect of the Rule. In 2003, it passed a bill abrogating a judicially created "public interest" exception, which had the effect of transforming Rule 82 into a one-way fee shift for qualifying public interest plaintiffs.⁵⁵ The Alaska Supreme Court upheld the law but noted that the variance factors, particularly subsection (I), still apply.⁵⁶

Rule 82 applies to many cases in the United States District Court for the District of Alaska. Specifically, the Rule applies in diversity cases, federal question cases with supplemental jurisdiction over state-law claims,⁵⁷ and certain other cases involving state interests that are sufficient to provide a "hook" for the Rule to apply.⁵⁸ The court's Local Rule 54.3 acknowledges Rule 82 as potential authority for an attorneys' fees award.⁵⁹

C. Commentary on Fee Shifting

This section summarizes some of the commentary and theoretical research on fee shifting. It discusses the predicted impact of fee shifting

52. See ALASKA S. CT. ORDER NO. 1118 (Rabinowitz, J., dissenting).

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

54. See Andrew J. Kleinfeld, *Alaska: Where the Loser Pays the Winner's Fees*, 24 JUDGES' J. 4, 6 (1985) ("Awards between 20 percent and 80 percent of actual defense fees are, as a practical matter, not reversible. These awards can amount to substantial four- or even five-figure judgments against unsuccessful plaintiffs.").

55. *Nunapitchuk*, 156 P.3d at 391-92, 403-05.

56. *Id.* at 405-06.

57. See *Disability Law Ctr. of Alaska, Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 941 (9th Cir. 2009).

58. See *Gentemann v. NANA Dev. Corp.*, No. 3:08-cv-221, 2009 WL 2486040, at *3 (D. Alaska Aug. 12, 2009); see also *United States v. GBC, L.L.C. Contractors*, No. A03-73, 2005 WL 846211, at *1 n.14 (D. Alaska Jan. 18, 2005) (noting that under the District of Alaska Local Rules, Rule 82 may constitute "authority for recovering attorney's fees in" cases other than diversity cases).

59. See D. Alaska Civ. R. 54.3(a)(2) (indicating that motions seeking an award of attorneys' fees should "set forth the authority for the award, whether Rule 82, Alaska Rules of Civil Procedure, a federal statute, contractual provision, or other grounds entitling the moving party to the award"); see also *Disability Law Ctr.*, 581 F.3d at 940-41 (indicating that Local Rule 54.3 does not permit Rule 82 to apply "[i]n a pure federal question case brought in federal court," but "merely acknowledges that Rule 82 can sometimes provide grounds for a fee award in the District of Alaska").

on litigation, arguments for and against adopting the English Rule in the United States, and commentary specific to Alaska's Rule 82.

1. *Predicted Impact*

There has been a great deal of theoretical discussion about the likely effects of the English Rule on civil litigation as compared to the American Rule.⁶⁰ Much of the debate concerns the impact of adopting the English Rule in the United States.⁶¹ Despite extensive discussion and debate, there remains a fair amount of disagreement among commentators.⁶²

Some have argued that adopting the English Rule in the United States would reduce low merit case filings,⁶³ causing an overall

60. See Olson & Bernstein, *supra* note 6, at 1164 (noting that the debate over the English Rule in the United States has been "largely theoretical"); Vargo, *supra* note 15, at 1619 ("Most analyses of competing fee-shifting systems have been based on theory and supposition.").

61. See *infra* notes 63–64.

62. See Kritzer, *supra* note 1, at 1947–48 (noting the "extensive" amount of "theoretical work" but "surprisingly little agreement among those who have undertaken these theoretical analyses"); Olson & Bernstein, *supra* note 6, at 1164 (indicating that commentators have been "unable to reach agreement on even such basic issues as whether the rules would be likely to affect the rate or speed of dispute settlement").

63. Brandon Chad Bungard, *Fee! Fie! Foe! Fum!: I Smell the Efficiency of the English Rule Finding the Right Approach to Tort Reform*, 31 SETON HALL LEGIS. J. 1, 44 (2006) ("American Rule plaintiffs are more likely to file frivolous suits and suits with a low probability of victory than English Rule plaintiffs."); 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) (suggesting that a "loser-pays" rule "can reduce or eliminate abusive lawsuits, especially nuisance suits"); Olson & Bernstein, *supra* note 6, at 1161 (arguing that the advantages of the English Rule "are manifold. Most obviously, it discourages speculative litigation—among the most persistent problems facing the American litigation system—and it limits the tactical leverage parties with weak cases can obtain by threatening to inflict the cost of litigation on their opponents. A claimant will hesitate before pursuing either a long-shot case, where a low or fluke chance of prevailing is made attractive by a high potential payoff, or an imposition-based case, whose settlement value arises from its threat of cost infliction, if he knows he will be responsible for the defendant's reasonable legal costs."); see also Hughes, *supra* note 22, at 163 ("[I]n at least one regard, payment of attorney's fees by the loser might be the more desirable system, since arguably, the claims and defenses most likely to be discouraged would be the doubtful and less justifiable ones."); Hughes & Snyder, *supra* note 13, at 229 (noting that one aspect of "[t]he most compelling, and certainly the most often repeated, argument in favor of the English rule is the idea that the rule . . . discourages plaintiffs with large, low-quality claims"); Kritzer, *supra* note 5, at 137 ("If one believes that there are a substantial number of what amounts to frivolous lawsuits in which a plaintiff obtains a settlement simply because of the defendant's concern about the costs of fighting the case, then fee shifting would probably serve to discourage suits of that type."); Edward A.

reduction in the amount of litigation.⁶⁴ In other words, these commentators believe that the American Rule causes unnecessary court congestion by encouraging litigants to file an inordinate amount of low merit or meritless claims.⁶⁵ The amount of these claims, in turn, arguably raises the cost of goods and services to consumers.⁶⁶ It is this potential for reducing low merit litigation that makes the English Rule most appealing to tort reform advocates.⁶⁷ Others, however, vigorously

Snyder & James W. Hughes, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345, 349 (1990) (observing that “the English rule discourages nuisance suits (i.e., claims that have a negative expected award for the plaintiff should the case go to trial) . . . [T]he plaintiff’s implied threat under the American rule case may be credible, especially when the plaintiff’s cost of litigating the case is small relative to the defendant’s. Under the English rule, the nuisance suit strategy is less credible since a defendant who recognizes that a claim lacks merit has a valuable counterclaim given his costs are likely to be shifted if the case goes to trial.”).

64. See Bungard, *supra* note 63, at 63 (arguing that a shift from the American Rule to the English Rule would result in a decrease in “the overall volume of litigation”); W. Kent Davis, *The International View of Attorney Fees in Civil Suits: Why is the United States the “Odd Man Out” in How it Pays its Lawyers?*, 16 ARIZ. J. INT’L & COMP. L. 361, 410 (1999) (“Many who have studied the English Rule as applied in England have concluded that it causes court dockets to be much less crowded there than in America.”); Gryphon, *supra* note 63, at 585 (suggesting that the English Rule will result in an overall reduction in civil filings because “[t]here are reasons to think that the reduction in nuisance suits following the adoption of loser pays would be greater than the increase in small, highly meritorious lawsuits”); Kritzer, *supra* note 5, at 132 (suggesting that “the possibility of having to pay the other side’s costs if one loses” may explain lower litigation rates in Canada as compared to the United States); see also Di Pietro & Carns, *supra* note 9, at 63 (noting that “[i]f fee shifting ha[s] strongly pronounced deterrent effects, one would expect a lower rate of civil case filings, on the hypothesis that fee shifting discourage[s] some potential plaintiffs from filing cases”).

65. See Gryphon, *supra* note 63, at 568 (“The American rule makes the civil justice system as a whole unnecessarily costly by encouraging the filing of [abusive] lawsuits, which defendants must either settle quickly or defend against at significant cost.”); Vargo, *supra* note 15, at 1591 (“It is argued that U.S. courts are congested because of nonmeritorious claims or defenses. Supporters of this argument suggest that the American Rule encourages frivolous suits . . .”).

66. See Gryphon, *supra* note 63, at 568 (arguing that “low-merit legal cases clog the American legal system and raise the cost of goods and services to consumers by forcing businesses that are sued to cover their legal expenses by raising prices”); see also Bungard, *supra* note 63, at 62 (arguing that the American Rule requires “the payment of an equivalent of a five percent tort tax on wages”).

67. See Kordziel, *supra* note 24, at 429 (“Segments of the business community and other tort reform advocates have called for modification or abandonment of the American rule.” (citing Bradley L. Smith, *Three Attorney Fee-Shifting Rules and Contingency Fees: Their Impact on Settlement Incentives*, 90 MICH. L. REV. 2154, 2156 (1992))); Olson & Bernstein, *supra* note 6, at 1164, 1169-71 (discussing the English Rule as a means of tort reform and noting that “[l]oser-

dispute the premise that the courts are overburdened due to a preponderance of low merit claims.⁶⁸

Many have also suggested that the English Rule would increase the quantity of high merit claims where there is a small amount in controversy by making these claims economically viable.⁶⁹ This effect would also arguably increase the overall quality of claims.⁷⁰ Others, however, have suggested that the English Rule may deter some valid claims.⁷¹ Advocates of the English Rule respond that if potential

pays, together with a range of other litigation reforms, made up one of the ten planks of the Republican 'Contract with America'). Tort reform advocates have traditionally favored measures such as caps on non-economic damages and the elimination of joint and several liability. *See, e.g.,* Christopher T. Stidvent, *Tort Reform in Alaska: Much Ado About Nothing?*, 16 ALASKA L. REV. 61, 71-77 (1999); Bungard, *supra* note 63, at 24-25.

68. *See* Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 103 (2010) (suggesting that "claims of excessive costs, abuse, and frivolousness in litigation may have much less substance than many think, and extortionate settlements may be but another urban legend" and criticizing "well-trodden clichés" to the contrary); Vargo, *supra* note 15, at 1631 ("The English Rule is offered as a cure for courts allegedly overcrowded with nonmeritorious claims and defenses. These assertions each require close scrutiny. U.S. courts are overcrowded; however, there is absolutely no empirical data from any source that indicates that the overcrowding is caused by nonmeritorious actions or defenses. To the contrary, evidence indicates that courts are overcrowded because they are inundated with criminal cases and are severely underfunded.").

69. *See* Gryphon, *supra* note 63, at 583 ("In addition to reducing the number of nuisance suits, most researchers agree that a loser pays rule would make viable some small, highly meritorious lawsuits that cannot be profitably tried in the current system."); Hughes, *supra* note 22, at 165-66 (suggesting that fee shifting may encourage just claims in cases involving smaller claims); Hughes & Snyder, *supra* note 13, at 229 (noting that the other aspect of "[t]he most compelling, and . . . the most often repeated, argument in favor of the English rule is the idea that the rule encourages plaintiffs with small, highly meritorious claims"); Kritzer, *supra* note 5, at 136 (noting that "if a litigant were confident of winning, fee shifting might encourage pursuit of a smaller case which it otherwise would not be economical to litigate"); Snyder & Hughes, *supra* note 63, at 349 (hypothesizing that the English Rule encourages filings of claims with low potential awards but high probabilities of success); Vargo, *supra* note 15, at 1590-93 (noting that the arguments against the American Rule include that it may prevent justice in small claims because lawyers will not take the cases without a substantial retainer); *see also* Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 747 (1988) (predicting that one-way fee shifting provisions would encourage more low stakes cases with a higher probability of success).

70. *See* Hughes & Snyder, *supra* note 13, at 244-45 (discussing "the popular hypothesis that the English rule improves claim quality by encouraging small, meritorious claims as well as deterring larger, more speculative claims").

71. *See* Davis, *supra* note 64, at 410 ("The downside of this effect in England is that the Rule discourages privately funded plaintiffs from bringing

plaintiffs are so easily discouraged from filing such claims, then perhaps they should never have been filed in the first instance.⁷²

To the extent that fee shifting does have an impact on the number of claims filed, a larger number of claims is not necessarily a completely negative development. Some have argued that if more claims are filed under the American Rule, it may generate a larger “stock of precedents” than the English Rule.⁷³ Having more precedents, in turn, arguably makes it easier for parties to predict legal decisions and comply with the law, which also provides the necessary conditions to spur economic activity.⁷⁴

Advocates of the English Rule argue that it actually inspires potential defendants to make extra efforts to comply with the law, given that they know they will also have to pay a plaintiff’s legal fees if they

meritorious claims, or forces them to settle early at a much lower recovery rate, in part because the cost of losing is always substantial.”); Kritzer, *supra* note 5, at 137–38 (“The opposite side of the question is whether fee shifting rules would serve to discourage a substantial number of persons who had valid grievances but were concerned that they might not be able to win in a court of law, thus suffering their own damages and also having to pay the other side’s costs. The impressionistic evidence obtained from this set of sixty interviews points clearly to the deterrent effect of fee shifting. Many cases that are filed in the absence of fee shifting would not be filed if the strong potential for fee shifting did exist.”).

72. James A. Parrish, *Plaintiff’s View*, 24 JUDGES’ J. 8, 53 (1985) (“I also question whether the system suffers that much when a plaintiff who lacks confidence in his position, even though it may be well-founded, elects not to pursue his claim.”); *see also* Bungard, *supra* note 63, at 43 (arguing that “the argument that the risk-averse plaintiff might be unjustly discouraged from instituting a tort claim to vindicate his rights if the penalty for losing included the fees of their opponents’ counsel appears to be theoretically unfounded” because a risk-averse plaintiff can settle or drop a claim before trial).

73. *Cf.* Hughes & Snyder, *supra* note 13, at 249. The American Rule may also make it less expensive for a plaintiff with an innovative claim to bring it to the appellate courts. *See id.*

74. *See, e.g.,* Arthur D. Hellman, *Jumboism and Jurisprudence: The Theory and Practice of Precedent in the Large Appellate Court*, 56 U. CHI. L. REV. 541, 544 (1989) (offering reasons why “a high degree of consistency and predictability in the law is necessary to the successful operation of the legal system,” including because consistency and predictability allow for “intelligent planning and structuring of transactions”).

fail to do so.⁷⁵ This “compliance effect” would theoretically magnify any reduction in tort claims under the English Rule.⁷⁶

Notably, while the English Rule is often offered as a means of reducing congestion in the courts, it may create additional burdens on the judiciary, which must determine the amount of an award.⁷⁷ Some jurisdictions employing the English Rule address this issue by appointing a distinct group of judicial officers to decide fee issues separate from those who preside over the merits of the dispute.⁷⁸ Of course, in such instances, resources are still being devoted to fee awards; they are merely being re-allocated from the judicial officers presiding over the merits to a separate group of officers hearing the fee issues.

Apart from decisions to bring claims in the first instance, commentators have attributed a variety of effects to fee shifting rules. Some argue that the English Rule generally “increases the stakes” in litigation and may accordingly increase the overall amount of legal expenditures⁷⁹ and encourage optimistic parties to litigate.⁸⁰ At the same time, parties who recognize that they are likely to lose may be more likely to abandon their claims or defenses.⁸¹

75. See Bungard, *supra* note 63, at 50–52 (arguing that “the English Rule encourages good behavior” and “greater compliance” with the law by increasing the penalties for bad conduct); Gryphon, *supra* note 63, at 592 (arguing that the English Rule produces a “compliance effect” by “mak[ing] legal compliance cheaper and legal culpability more expensive, [and by] motivating businesses and individuals to spend more money to ensure the blamelessness of their behavior”).

76. See Bungard, *supra* note 63, at 63 (suggesting that a shift to the English Rule will result in improved “future behavior” as well as “decreased filings of low probability suits,” leading to a decrease in “the overall volume of litigation”).

77. See Hughes, *supra* note 22, at 164–65 (acknowledging a number of problems with fee shifting, including the additional burden on the courts, the need to develop a standard to determine the amount of an award, and the impact on litigants who present good-faith claims or defenses but ultimately lose).

78. See TOMKINS & WILGING, *supra* note 6, at vii–ix (discussing the role of taxing masters in the English system).

79. Hughes & Snyder, *supra* note 13, at 227. *But see* Gryphon, *supra* note 63, at 589–92 (arguing that the English Rule will not actually increase litigation costs based on the parties’ beliefs that they will eventually prevail because other factors, like case complexity, drive litigation spending).

80. Snyder & Hughes, *supra* note 63, at 350.

81. See *id.* at 353 (“Rather than continue, a plaintiff may decide to abandon the case either before liability for legal costs is established or to curtail further liability. As a result, the English rule will encourage plaintiffs to drop their claims when (i) the claim appears weak, (ii) they receive credible signals from the defendant that the chances of settlement are remote, and (iii) when both parties are likely to incur large costs at trial.”); see also Olson & Bernstein, *supra*

There is also reason to believe that the English Rule may affect the likelihood of settlement. By increasing the cost of litigating, the English Rule may push the parties' settlement positions further apart.⁸² At the same time, the increased stakes may make settlement more likely if the parties are risk averse.⁸³

Although it is common to make broad claims about the effects of fee shifting, the impact of fee shifting rules is arguably more nuanced.⁸⁴ Some have noted that the impact may depend on both the size of the case and the type of litigant.⁸⁵ Professor Herbert M. Kritzer has argued that the effects of fee shifting should be evaluated in the context of an entire fee regime, including how fees are calculated and regulated in addition to who pays the fee.⁸⁶

2. Arguments For and Against

Commentators have made a number of arguments for and against fee shifting, typically within the context of considering whether American jurisdictions should adopt the English Rule.⁸⁷ Advocates of the English Rule contend that it is fundamentally fairer than the American Rule because it comes closer to making a winning party "whole."⁸⁸ As noted above, proponents of the English Rule also argue

note 6, at 1162 (arguing that the English Rule acts as a deterrent to "parties likely to lose").

82. See Gryphon, *supra* note 63, at 587 ("Loser pays, by increasing the amount of money in dispute in any given case (that is, by 'raising the stakes' of litigation), may reduce settlement rates by magnifying differences of opinion between the parties about what each is likely to gain by going to trial."); Hughes, *supra* note 22, at 167; Snyder & Hughes, *supra* note 63, at 350 (suggesting that according to one model of predicting settlement whereby the parties are optimistic of their chances of success, the English Rule encourages litigation); see also Bungard, *supra* note 63, at 63 (suggesting that settlement is less likely under the English Rule because the quality of claims is higher and "plaintiffs will tend to vigorously pursue cases to the end of trial where the probability of victory is high").

83. See Gryphon, *supra* note 63, at 587 ("On the other hand, higher stakes could induce risk-averse parties to settle."); Vargo, *supra* note 15, at 1620 ("The English Rule also escalates legal expenses for those choosing to pursue litigation and can make settlements likely." (citations omitted)).

84. See Kritzer, *supra* note 5, at 133, 135-36 (noting that many interviewees in Toronto thought that the effects of fee shifting were stronger in smaller cases, and on individuals, as opposed to corporate entities).

85. See *id.*

86. See Kritzer, *supra* note 4, at 345, 365-66.

87. Cf. *supra* notes 63-64.

88. See Bungard, *supra* note 63, at 54, 59 (arguing that "[t]he American Rule . . . promotes the annihilation of the notion of personal responsibility" and that it "creates a type of moral hazard" because unsuccessful plaintiffs do not bear "the downside risks" of their behavior); Gryphon, *supra* note 63, at 568-69 (suggesting that the American Rule is unfair to successful defendants, who must

that it reduces court congestion by reducing filings of little or no merit, inspires compliance with the law by potential tort defendants, and reduces the cost of goods and services.⁸⁹ Some have also asserted that the American Rule may discourage productive activities by “well-meaning persons placed in danger of open-ended legal jeopardy.”⁹⁰ These commentators accordingly believe that the English Rule can help eliminate a major source of the larger public’s dissatisfaction with the legal system.⁹¹

Opponents of the English Rule argue that it represents an inappropriate barrier to the courts and suppresses legitimate claims.⁹² They question the premise that the courts are inundated with low merit suits and offer alternative explanations for problems with the civil justice system, including that it has suffered as a result of more resources being devoted to the criminal justice system.⁹³ They also note that other means of providing access to the courts in countries that follow the English Rule—such as more extensive legal aid and union funding—do not exist in the United States.⁹⁴ They further contend that Federal Rule of Civil Procedure 11 is a more effective tool in discouraging meritless lawsuits.⁹⁵

Some of these commentators have noted that litigation can be uncertain, and there is not a readily apparent hero and villain in every

still bear the costs of their legal expenses, and deserving plaintiffs, who often lose part of their compensation as a contingent fee or cannot get a lawyer to represent them because their claims are not worth enough); Hughes, *supra* note 22, at 169 (“The basic premise behind the practice is virtually beyond reproach: to shift the burden of the litigation to the party who is more likely to have caused it in the first place, either by having injured the plaintiff, or by having brought the defendant into court to defend against an unjustified claim.”); Olson & Bernstein, *supra* note 6, at 1162 (arguing that the English Rule is “ethically superior to the current system” because it provides compensation to the deserving party).

89. See *supra* notes 63–67, 75–76.

90. Olson & Bernstein, *supra* note 6, at 1189.

91. See *id.* at 1169–72 (noting growing public dissatisfaction with the legal system and public support for the English Rule).

92. See Vargo, *supra* note 15, at 1620 (“The English Rule deters claimants, especially the economically disadvantaged, from pursuing litigation more than the American Rule.” (citations omitted)).

93. See *supra* note 68.

94. Davis, *supra* note 64, at 410; Vargo, *supra* note 15, at 1599, 1607–09.

95. Kordziel, *supra* note 24, at 456–58 (arguing that fee shifting is not the optimal means of deterring “bad faith” litigation and that Rule 11 is a better vehicle for accomplishing this goal since it can be used to punish the attorneys rather than the clients); see also FED. R. CIV. P. 11(b) (providing that by presenting submissions to the court, attorneys certify that the submissions are not being presented for an improper purpose and are warranted under the law).

case.⁹⁶ They also point to the additional burdens of administering a fee shifting system on top of the civil justice system.⁹⁷ Additionally, even those who accept the argument that there is an excess of low merit claims might still believe that the American Rule is preferable because it gives the benefit of the doubt to individual plaintiffs, as opposed to institutional defendants who are in a better position to diffuse the impact of the injustice.⁹⁸

For their part, advocates of the English Rule have proposed various means of addressing potential access issues, such as developing insurance to provide coverage for attorneys' fees in the event that a plaintiff loses.⁹⁹ They have also suggested other reforms, such as applying the fee shifting to each individual "legal initiative" (e.g., a motion or discovery request) as opposed to cases as a whole, in order to discourage speculative tactics by all sides.¹⁰⁰ They have also noted that measures like Rule 11, which are aimed at reducing frivolous filings, do not necessarily address the problems created by low merit claims, which are not necessarily "frivolous."¹⁰¹

96. See Hughes, *supra* note 22, at 164–65 ("Courts exist to settle disputes and to resolve legal and factual issues about which reasonable men can disagree. There is not always a right side and a wrong side, and when a case could be decided in favor of either party, it seems unjust to penalize the loser simply because the court ruled against him." (citations omitted)); Kordziel, *supra* note 24, at 454 (noting that "[l]itigation outcomes are often unpredictable" and defeated parties may be "justified and reasonable in pressing a strong but ultimately unsuccessful claim or defense" (citations omitted)); Vargo, *supra* note 15, at 1634–35 ("Since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and . . . the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." (quoting *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967))).

97. See Vargo, *supra* note 15, at 1635 ("Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." (quoting *Fleishmann Distilling Corp.*, 386 U.S. at 718)); see also *supra* note 77.

98. Kritzer, *supra* note 5, at 138 ("There is a normative or political argument to be made that it is better for society to place the burden of injustice on organizations because the impact of such injustice is more limited and diffused than if the injustice were to be borne largely by individuals.").

99. See, e.g., Gryphon, *supra* note 63, at 602–07 (suggesting that legal expense insurance can ameliorate the negative effects of the English Rule on low and middle income potential plaintiffs, who otherwise might not seek justice "out of fear that they might be liable for a ruinous fee award").

100. Olson & Bernstein, *supra* note 6, at 1162. This would necessarily increase the amount of resources the courts would have to devote to addressing fee shifting issues.

101. See Gryphon, *supra* note 63, at 597 (distinguishing between mere "weak" claims and those which are "frivolous" as a matter of law).

3. *Commentary on Rule 82*

Despite being a long-standing fixture of the Alaska legal system, Rule 82's popularity has fluctuated over the years.¹⁰² Much of the debate over Rule 82 mirrors the greater debate over fee shifting. In particular, Rule 82's influence, or lack thereof, on filings is heavily disputed. As noted above, the Alaska Supreme Court has repeatedly stated that the purpose of the Rule is to partially compensate the prevailing party.¹⁰³ As several commentators have observed, the purpose is *not* to reduce or eliminate low merit filings.¹⁰⁴ The Alaska Supreme Court, as well as a number of commentators, has expressed concern that the Rule may impede access to the courts.¹⁰⁵ Some have also expressed concerns about the Alaska Legislature's elimination of the public interest exception.¹⁰⁶ Others, however, have suggested that if the potential award of partial compensation under Rule 82 is enough to deter someone from filing a potentially meritorious claim, the system does not suffer if they fail to pursue it.¹⁰⁷

Some have further emphasized that Rule 82, in conjunction with the offer of judgment mechanism in Alaska Rule of Civil Procedure 68, can cause "a catastrophic result" for a plaintiff.¹⁰⁸ This is because the offer of judgment procedure effectively transforms a prevailing plaintiff who recovers less than a refused offer into a losing party for the purposes of assessing a fee award, which may be more than the amount of the award on the merits.¹⁰⁹

Another issue of vigorous debate has been whether the Rule should be revised to provide full compensation. Some contend that full

102. Compare Kordziel, *supra* note 24, at 443 ("According to a survey of the Bar conducted in March of 1992 by the Civil Rules Committee, a majority of the respondents opposed rescinding or substantially amending Rule 82." (citation omitted)), with Hughes, *supra* note 22, at 130 (indicating that Alaska lawyers were "generally dissatisfied" with Rule 82 at the time and had called for repealing it at the 1973 Alaskan Bar Convention).

103. See *supra* note 37.

104. Kordziel, *supra* note 24, at 445 (noting that survey respondents frequently commented "that Rule 82 was not intended to be a weapon against frivolous litigation" (citations omitted)).

105. Alaska v. Native Vill. of Nunapitchuk, 156 P.3d 389, 405-06 (Alaska 2007) (citing Bozarth v. Atlantic Richfield Oil Co., 833 P.2d 2, 5-7 (Alaska 1992) (3-2 decision) (Matthews, J., dissenting)); Malvo v. J.C. Penney Co., 512 P.2d 575 (Alaska 1973)); see also Hughes, *supra* note 22, at 162; Kordziel, *supra* note 24, at 444.

106. See, e.g., Abizer Zanzi, Note, *The Constitutional Battle Over the Public Interest Litigant Exception to Rule 82*, 21 ALASKA L. REV. 329, 352 (2004) (arguing that the law repealing the public interest exception is unconstitutional).

107. Parrish, *supra* note 72, at 53.

108. Kleinfeld, *supra* note 54, at 6.

109. See *id.*

compensation is necessary for Rule 82 to provide deterrent effects.¹¹⁰ The Alaska Supreme Court has generally favored partial compensation for fear that full compensation would limit access to the courts.¹¹¹ Others have pointed out practical problems with full compensation, such as increasing insurance costs¹¹² and the fear that it will cause attorney billing rates to rise.¹¹³

D. Empirical Studies

There tend to be many significant differences between jurisdictions utilizing the English Rule and jurisdictions utilizing the American Rule.¹¹⁴ Thus, isolating any effects from fee shifting rules can be challenging, and this problem casts doubt on the validity of cross-cultural comparisons.¹¹⁵ Nonetheless, there have been a handful of

110. Gryphon, *supra* note 63, at 608 (arguing that Rule 82 does not provide enough compensation “to adequately influence a plaintiff’s decision about whether to file suit”).

111. *Alaska v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 406 (Alaska 2007) (discussing *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2, 5–7 (Alaska 1992) (3-2 decision) (Matthews, J., dissenting)).

112. Kleinfeld, *supra* note 54, at 7 (“If the Rule 82 schedule were raised to market rates, liability insurance premiums would have to be increased substantially in order to spread the much higher cost.”).

113. Parrish, *supra* note 72, at 54 (arguing that full attorneys’ fees compensation would cause rates to rise dramatically). *But see* Hughes, *supra* note 22, at 163–64 (suggesting that fee shifting has not led to the inflation of legal fees or abuse of the legal system).

114. *See* Gryphon, *supra* note 63, at 595 (noting that “arguments for loser pays in the U.S. should not rely too heavily on international differences in litigation rates uncontrolled by other relevant differences” because “myriad other differences between nations make it impossible to determine the size of that effect compared to the many other reasons why litigation rates differ between countries” (citing RICHARD A. POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* (Oxford: Clarendon Press, 1996))); Kritzer, *supra* note 1, at 1949 (“In significant part, there are few studies of the impact of fee shifting because few legal systems have fee-shifting regimes, and it is therefore difficult to assess their impact in a rigorous fashion. Cross-national studies, such as a study comparing the United States (generally governed by the American Rule) and Canada (generally governed by the English Rule), are problematic because of other substantive legal differences between countries.”); Snyder & Hughes, *supra* note 63, at 345 (noting that “the inherent difficulties in cross-jurisdictional comparisons and the lack of experimentation with alternative rules within jurisdictions have limited the opportunities for empirical research”); Vargo, *supra* note 15, at 1597–99 (discussing the problems with comparative analyses, particularly with respect to cross-cultural studies).

115. *See* Kritzer, *supra* note 1, at 1980 (noting that one of the problems “in assessing the truth of the proposition that fee arrangement affects broad patterns of litigiousness” is that “it is difficult to find good data comparing litigation patterns across countries” (citations omitted)).

notable empirical studies. Among the most significant studies are Edward A. Snyder and James W. Hughes's studies of Florida medical malpractice cases and Susanne Di Pietro and Teresa W. Carns's study of Rule 82. The findings of these studies, as well as two others of note, are summarized below.

1. *The Florida Medical Malpractice Study*

The State of Florida adopted a mandatory two-way fee shifting rule for medical malpractice cases from July 1980 through September 1985.¹¹⁶ The rule was adopted, and ultimately repealed, at the urging of the Florida Medical Association (FMA).¹¹⁷ The FMA initially argued that the rule would discourage low merit claims, but it changed its position once it appeared that filings actually increased after the rule was enacted.¹¹⁸ Some also contended that the rule had evolved into a one-way fee shifting rule in practice because prevailing defendants were generally unable to collect their attorneys' fees from unsuccessful, but insolvent, plaintiffs.¹¹⁹

The experiment offered a rare "opportunity for a within-jurisdiction evaluation of alternative" fee shifting rules.¹²⁰ Reviewing the data, Snyder and Hughes found that although the rule did not appear to affect a plaintiff's decision to file a case, plaintiffs did appear to be more likely to drop weak claims under the two-way fee shifting regime.¹²¹ Plaintiffs who proceeded with claims were more likely to settle them, which Snyder and Hughes took to indicate that the claims that went forward were of a higher quality under the English Rule.¹²² They also found some evidence that parties increased their litigation expenditures under the English Rule.¹²³

They did not find any evidence of an increase in small judgments, which they believed "cast[ed] doubt on the popular hypothesis that the English rule improves claim quality by encouraging small, meritorious

116. See Snyder & Hughes, *supra* note 63, at 346.

117. *Id.* at 355-56.

118. *Id.*

119. *Id.* Results like this may explain why business interests have generally been less supportive of efforts to adopt the English Rule than other potential tort reform measures. See Olson & Bernstein, *supra* note 6, at 1171.

120. Hughes & Snyder, *supra* note 13, at 234.

121. Snyder & Hughes, *supra* note 63, at 377.

122. *Id.* at 376 ("Not only does the rule increase the probability that plaintiffs will drop their claims . . . the frequency of settled cases rises relative to litigated cases. This result reflects substantial changes in the set of claims not dropped.")

123. *Id.* at 374; see also Hughes & Snyder, *supra* note 13, at 238 (noting that defense expenditures were generally "significantly higher" under the English Rule).

claims as well as deterring larger, more speculative claims.”¹²⁴ They also noted that plaintiffs were more likely to win and that judgments were higher.¹²⁵ They suggested that this result could come about because plaintiffs had to discount their anticipated victory against the possibility of a loss accompanied by liability for the defendant’s legal costs.¹²⁶

Ultimately, they concluded that it was unclear whether the English Rule had a “deterrence effect.”¹²⁷ They noted the higher proportion of dropped claims under the English Rule might be “due to plaintiffs dropping weak claims in lieu of pursuing nuisance strategies,” but it was also possible that risk aversion and the possibility of higher defense expenditures meant that “some meritorious claims” had been abandoned.¹²⁸

2. *Di Pietro and Carns’s Rule 82 Study*

In the 1990s, in the wake of the continuing debate over Rule 82’s effect on access to the courts,¹²⁹ the Alaska Judicial Council undertook an extensive study of the Rule led by Susanne Di Pietro and Teresa W. Carns.¹³⁰ The study drew on “the rule’s legal requirements with data taken from judge and attorney interviews and from state and federal case files.”¹³¹

Examining state court case filings, they found that “Alaska’s per capita civil filing rate did not seem to differ substantially from rates across the nation.”¹³² Per capita tort filings were relatively low, placing Alaska within the lowest group of states, yet still similar to some states that did not shift fees.¹³³ Tort cases also appeared to constitute a smaller percentage of the overall caseload in Alaska state courts than in the nation as a whole.¹³⁴ The authors also found that tort filings in the

124. Hughes & Snyder, *supra* note 13, at 244–45.

125. *Id.* at 238, 240–41.

126. *Id.* at 245.

127. Snyder & Hughes, *supra* note 63, at 378.

128. *Id.*

129. See *Bozarth v. Atlantic Richfield Oil Co.*, 833 P.2d 2, 5–7 (Alaska 1992) (3-2 decision) (Matthews, J., dissenting) (arguing that high attorneys’ fees awards limit access to the court system); see also ALASKA R. CIV. P. 82(b)(3) note (Rabinowitz, J., dissenting from ALASKA S. CT. ORDER NO. 1118) (noting that the Alaska Judicial Council would be conducting “an in depth empirical study of the workings of Civil Rule 82” and arguing that the court should await the results of the study before deciding whether the Rule should be amended).

130. See SUSANNE DI PIETRO, TERESA W. CARNS & PAMELA KELLY, ALASKA’S ENGLISH RULE: ATTORNEY’S FEE SHIFTING IN CIVIL CASES (1995), available at <http://www.ajc.state.ak.us/reports/atyfee.pdf> (last visited November 6, 2011).

131. Di Pietro & Carns, *supra* note 9, at 49.

132. *Id.* at 63.

133. *Id.* at 65, 71–72.

134. *Id.* at 66–67.

District of Alaska were slightly lower than other jurisdictions in 1993.¹³⁵ Overall, the authors thought that the data suggested that “if fee shifting affects case filing trends and trial rates in Alaska, the effects are complex and may result in a net situation little different from that found in states that do not shift fees.”¹³⁶

The interviews appeared to confirm these findings. Only 35% of those interviewed could remember a situation where Rule 82 influenced a client’s decision to file a case or counterclaim.¹³⁷ Interviewees also thought that it influenced strategy only in a minority of recent cases that they had handled.¹³⁸ Some thought that the Rule was most likely to influence parties of moderate means, who would be more inclined to drop a “decent” or “average” case in addition to weak cases.¹³⁹ A majority, however, did not believe that Rule 82 deterred “frivolous” filings,¹⁴⁰ which they believed were driven by “non-economic factors.”¹⁴¹ Some interviewees did think that it “occasionally encouraged a litigant to pursue more aggressively a case that he or she believed to be especially strong.”¹⁴²

Di Pietro and Carns made many other noteworthy findings apart from filing trends. Although tort filings were slightly lower than in the nation as a whole, they found that more Alaska tort cases appeared to go to trial.¹⁴³ They also found that most fee awards were *not* made in tort cases.¹⁴⁴ Additionally, fee awards were relatively infrequent—only about 10% of state cases and 6% of federal cases included a Rule 82 award.¹⁴⁵ The low frequency of awards appeared to be caused by frequent post-judgment settlements, with the prevailing party agreeing to forgo an application for a fee award and the losing party agreeing to

135. *Id.* at 71.

136. *Id.* at 72; *see also id.* at 66 (“In short, although the available data cannot exclude the possibility that Alaska’s relatively low tort filing rate is related to fee shifting, neither can one conclude from these data that Rule 82 perceptibly ‘chills’ the filing of tort claims.”).

137. *Id.* at 78.

138. *Id.*

139. *Id.* at 79–80.

140. *Id.* at 81.

141. *Id.* (“Comments from attorneys and judges suggested that ‘frivolous’ litigation was driven by factors generally outside the influence of Rule 82, particularly non-economic factors. These factors included litigating for a principle or because of emotion. A few attorneys described cases in which they thought their opponents had evaluated the case incorrectly at the beginning, giving their clients unrealistic expectations, and then felt obliged to follow through with litigation.”).

142. *Id.* at 79.

143. *Id.* at 69, 71.

144. *Id.* at 75–76.

145. *Id.* at 72–73.

forego an appeal.¹⁴⁶ Federal fee awards were generally larger than awards in state cases.¹⁴⁷

These findings led Di Pietro and Carns to conclude that “the three most apparent effects of Rule 82 were that it (1) discouraged some middle class parties from filing cases that either wealthy or poor plaintiffs would file, (2) discouraged some suits (or defenses) of questionable merit and (3) encouraged litigation in strong cases that might otherwise settle.”¹⁴⁸ The influence of the Rule on tort filings, however, was “by no means clear,” and to the extent that there was an impact, it was “selective.”¹⁴⁹

One key limitation of the study that the authors noted was the lack of a control group.¹⁵⁰ Indeed, the authors observed that even state-to-state comparisons are problematic because the differing “methods by which states count and classify civil cases affect filing rates, as do economic, social and cultural factors.”¹⁵¹ Nonetheless, the authors noted that many states within the low tort filing group “had significant rural populations and one or two large cities,” similar to Alaska.¹⁵²

146. *Id.* at 73–75.

147. *Id.* at 76 n.204 (noting that Rule 82 awards were larger in federal cases and that “[t]he federal cases contained seven awards greater than \$100,000. One reason for the difference may be that cases in federal court may involve larger damages and judgments than the average state court case. Another may be that attorneys spend more time on federal cases than on state court cases.”).

148. *Id.* at 84.

149. *Id.* at 80. As Di Pietro and Carns explained it:

Analysis of Alaska’s civil litigation trends did not foreclose the possibility that Rule 82 discouraged potential tort claimants from filing suit, although the picture was by no means clear. The rate at which tort cases were filed in Alaska’s courts may be lower compared to other states, and torts seemed to constitute a smaller proportion of the total civil caseload in Alaska than in other states. Many factors other than Rule 82 could account for these data, such as cultural, social and economic factors, local legal culture or lack of comparability of data. Moreover, Alaska’s overall civil filing rates were very close to the median for jurisdictions that did not shift fees. Attorneys did not believe that Rule 82 obstructed indigent plaintiffs’ access to the courts. Further, more than half (55%) of the attorneys denied that the rule discouraged potential plaintiffs with frivolous or extremely weak cases from filing, although some thought that it did. Thus, if the rule played a role in discouraging potential tort plaintiffs from using the courts, it had a selective impact that depended heavily on case strength and parties’ assets.

Id.

150. *Id.* at 77.

151. *Id.* at 65.

152. *Id.* (citation omitted).

3. *Other Studies*

Two other studies are also noteworthy for their findings with respect to the impact of fee shifting on case filings. In the first, Professor Kritzer conducted interviews with attorneys and executives in Toronto, where the English Rule applies.¹⁵³ He found that among the interviewees, there was an impression that fee shifting has a deterrent effect and that consequently, “[m]any cases that are filed in the absence of fee shifting would not be filed” under the English Rule.¹⁵⁴ The interviewees, however, thought that the impact was more significant in small or routine cases.¹⁵⁵ Professor Kritzer has also noted, however, that cross-national data “shows that the United States is not the most litigious nation,” and litigation rates are higher in some nations that follow the English Rule.¹⁵⁶

Second, Professors Stewart J. Schwab and Theodore Eisenberg studied constitutional tort filings in two federal district courts.¹⁵⁷ Based on dispute resolution models, they had predicted that a one-way fee shifting statute would increase the level of constitutional tort filings in those districts.¹⁵⁸ To their surprise, however, they found only “scant evidence” of such an effect¹⁵⁹ and suggested that additional research was needed on the “effect of other fees statutes on filing rates.”¹⁶⁰

E. **Hypotheses**

As the discussion to this point demonstrates, the theoretical and empirical literature does not suggest broad agreement on the effects of the English Rule on civil litigation.¹⁶¹ Nonetheless, assuming for the purposes of the study that fee shifting is an effective means of tort reform, one would expect that a jurisdiction utilizing a variant of the English Rule, such as Rule 82, should have a number of demonstrable differences with jurisdictions that utilize the American Rule. One of the most widely claimed effects is a reduction in the number of low merit

153. Kritzer, *supra* note 5, at 125–26.

154. *Id.* at 137–38.

155. *Id.* at 133.

156. Kritzer, *supra* note 1, at 1981 (citations omitted).

157. Schwab & Eisenberg, *supra* note 69, at 721.

158. *Id.* at 745–47.

159. *Id.* at 760; *see also id.* at 780 (“Surprisingly, there is little evidence that the fees statute led to significantly increased filings or to increased access for prisoners to the private attorney market. These last findings suggest that attorneys fees statutes may have less of an effect on filing rates than is commonly believed.”).

160. *Id.* at 780.

161. *See supra* note 62.

filings.¹⁶² The simplest way to test whether this effect is occurring would be to compare the number of low merit filings under the English Rule to those under the American Rule. Defining “low merit” cases and identifying them within broad sets of filings, however, is extraordinarily difficult.¹⁶³ Nonetheless, if there are fewer low merit filings under the English Rule, this should be evident in other data. The possible effects of Rule 82 on civil filings, tort filings, civil trials, and the time to disposition of civil cases are summarized below.

1. *Civil Filings*

Commentary suggests that the English Rule should reduce low merit civil filings and increase high merit, but low stakes, filings.¹⁶⁴ Some have also argued that the English Rule also reduces the amount of meritorious claims.¹⁶⁵ The overall number of filings should go down, as most expect that there would be more low merit claims dropped than additional low stakes claims pursued.¹⁶⁶ Indeed, Snyder and Hughes did not find any evidence of an increase in smaller judgments under the English Rule, as it appeared that potential plaintiffs were discounting their ability to obtain a favorable judgment against their own potential liability for fees.¹⁶⁷

2. *Tort Filings*

The reduction in filings should be even more dramatic when isolating tort filings. Unlike contract claims, tort claims are less likely to be governed by provisions altering general fee shifting rules.¹⁶⁸ The possible “compliance effect,” whereby potential tortfeasors make additional efforts to comply with the law, should further reduce the number of tort claims.¹⁶⁹ Di Pietro and Carns previously found that tort

162. See *supra* note 63.

163. See *infra* note 228 and accompanying text.

164. See *supra* notes 63, 69.

165. See Kritzer, *supra* note 5, at 137–38 (suggesting that the English Rule may “serve to discourage a substantial number of persons who had valid grievances but were concerned that they might not be able to win in a court of law, thus suffering their own damages and also having to pay the other side’s costs Many cases that are filed in the absence of fee shifting would not be filed if the strong potential for fee shifting did exist.”). In other words, if Rule 82 limits access to the courts by discouraging legitimate claims, this should also result in an overall reduction of filings. See *supra* note 105.

166. See *supra* note 64.

167. See *supra* note 124 and accompanying text.

168. See Jaime Dodge, *The Limits of Procedural Private Ordering*, 97 VA. L. REV. 723, 750 (2011) (noting that “parties commonly contract for fee-shifting provisions to disincentivize nuisance litigation or defenses”).

169. See *supra* notes 75–76 and accompanying text.

filings in Alaska were lower than the national average, although they were not unusual when compared to similar states.¹⁷⁰

3. *Trials*

If there are fewer low merit cases being filed, and potentially more high merit, low stakes claims under the English Rule, there should also be more trials.¹⁷¹ Di Pietro and Carns previously found some evidence of this effect in tort cases.¹⁷² Although such an effect might be less apparent in federal case statistics because of the amount in controversy threshold in diversity cases, some relative increase should still be evident.¹⁷³ Additionally, beyond possible effects on low stakes claims, if settlement rates are lower under the English Rule, as some have argued,¹⁷⁴ then that would suggest that more cases should go to trial under the English Rule.

4. *Time to Resolution*

On the one hand, under the English Rule, cases should take longer to resolve because they are expected to be of higher quality and less likely to be resolved with pretrial motions. Additionally, if the English Rule makes settlement less likely,¹⁷⁵ it is also possible that cases would take longer because more cases would have to be resolved on the merits. On the other hand, however, it is equally plausible that cases would be disposed of more quickly because there would be more small, highly meritorious claims, and fewer cases being pursued based on the possibility of imposing discovery costs on the defendant.¹⁷⁶ If the English Rule causes more cases to settle,¹⁷⁷ this would also weigh in favor of a shorter time to disposition. Either way, however, one would expect an impact on the amount of time until resolution.

II. METHODOLOGY

The combination of Alaska's Rule 82 and the comparability of federal case statistics provide a unique opportunity for studying the

170. Di Pietro & Carns, *supra* note 9, at 66–67.

171. *But see* Gryphon, *supra* note 63, at 586 (“High-merit, low damages injuries are also unlikely to be litigated to trial under loser pays because defendants would have no financial incentive to resist compensating those they have genuinely harmed. Loser pays should therefore promote immediate, appropriate, handling of small injuries in order to avoid litigation.”).

172. *See supra* note 143.

173. *See* 28 U.S.C. § 1332(a) (2012) (providing that the amount in controversy must exceed \$75,000 for federal diversity jurisdiction).

174. *See supra* note 82.

175. *See id.*

176. *See supra* notes 63, 69 and accompanying text.

177. *See supra* note 83.

effects of the English Rule on civil cases. This Part describes the methodology of the empirical comparison. The analysis was performed using publicly available data maintained by the Administrative Office of the United States Courts.¹⁷⁸ Any party filing a complaint in a United States District Court must report certain information about the case, including the “Nature of Suit,” in a “Civil Cover Sheet.”¹⁷⁹ The district courts maintain other information about civil suits, which the Administrative Office compiles.¹⁸⁰ The two primary methodological decisions involved in analyzing this data were selecting (1) the districts to compare to the District of Alaska and (2) the measures to compare the districts.

A. Selection of Comparable Districts

No two states are exactly alike. Each state has many qualities that make it unique. It is fair to say, however, Alaska may have more of these qualities than any other state. It is geographically isolated from the rest of the country, has a larger proportion of males than most states, has a younger population than most states, has a large percentage of the population (primarily, Alaska Native) that is not Caucasian, has an unusual climate (to say the least), and has the largest land area but one of the smallest populations.¹⁸¹ Notably, it is also the only state without a law school.¹⁸² Any one of these facts could potentially affect civil filing trends.¹⁸³ Needless to say, drawing analogies between Alaska and other

178. See *Statistics*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics.aspx> (last visited November 7, 2011).

179. See *Forms*, UNITED STATES COURTS, http://www.uscourts.gov/FormsAndFees/Forms/Viewer.aspx?doc=/uscourts/FormsAndFees/Forms/JS044_1207.pdf (last visited November 7, 2011).

180. Cf. *supra* note 178.

181. See Appendix, Table 2.

182. See Mary Berkheiser, *Legal Education Comes to Nevada: The Creation of the William S. Boyd School of Law*, NEV. LAWYER, Sept. 19, 2011, at 8 (noting that prior to the creation of the William S. Boyd School of Law at UNLV, Alaska was the only state other than Nevada without a law school). Alaska does not, however, appear to have the lowest number of lawyers per capita. See *Highest Per Capita Lawyers*, AVERY INDEX, http://www.averyindex.com/lawyers_per_capita.php (last visited Nov. 7, 2011) (indicating that Alaska ranks 36th on the list of the states with the highest number of lawyers per capita).

183. As noted above, many believe that cultural differences may affect civil filing trends in different countries. Cf. *supra* note 114. This may also be true of different states. Indeed, in addition to cultural and demographic differences, Alaska’s geographic isolation could potentially affect the level of diversity of citizenship filings in the District of Alaska. See 28 U.S.C. § 1332(a) (2012) (providing district courts with original jurisdiction over civil actions between citizens of different states where the amount in controversy exceeds \$75,000).

states can be a challenge.¹⁸⁴ Although no state shares all of Alaska's characteristics, some states do share more than one of them. The districts chosen in this study to compare to the District of Alaska were selected to maximize the number of characteristics in common.

In this study, the comparable districts were restricted to single-state districts. The civil caseloads of districts in states with more than one district may vary significantly depending on a number of factors. For example, the location of a major city, state capitol, or prison may all affect the civil case composition of a district in a multi-district state.¹⁸⁵ As there may also be variations in procedural law between circuits, this study concentrated on district courts within the Ninth Circuit.¹⁸⁶

These criteria led to the selection of Arizona, Hawaii, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Vermont, and Wyoming as comparable districts. Like Alaska, Montana, North Dakota, South Dakota, Vermont, and Wyoming all have relatively small populations (i.e., less than one million people).¹⁸⁷ Arizona, Hawaii, Idaho, Montana, Nevada, and Oregon are all within the Ninth Circuit, and New Mexico and Wyoming are both considered Western states.¹⁸⁸ Many of the states have large non-Caucasian populations, and Arizona, Hawaii, New Mexico, North Dakota, and South Dakota all have significant (i.e., more than five percent) Native American or Native Hawaiian populations.¹⁸⁹ Although no states have populations as young or as predominantly male as Alaska's, many in the sample have populations that are more male and younger than the national average.¹⁹⁰ Additionally, the only other non-contiguous state, Hawaii, was included in the sample. Data from the entirety of the United States District Courts was also included as a final comparison. Demographic and other data summarizing some of the similarities and differences

184. Cf. Gryphon, *supra* note 63, at 597-98 ("It is difficult to generalize from Alaska's experience with loser pays on account of Alaska's unique geography. The state has enormous natural resources reserves, a large indigenous population, and substantially more men than women. Any one of these factors could affect the rate of tort litigation alone or in combination in ways that are not fully understood. For example, there is some evidence that men are more likely than women to be involved in legal disputes.").

185. See, e.g., Richard L. Marcus, *Putting American Procedural Exceptionalism into a Globalized Context*, 53 AM. J. COMP. L. 709, 725 & n.37 (2005) (noting that there is a large percentage of prisoner pro se suits in the Eastern District of California because many of the state's prisons are located there).

186. See 53 AM. JUR. TRIALS 1 § 11 (Supp. 2011) ("Substantive and procedural law varies widely from state to state and among federal circuits.").

187. See Appendix, Table 2.

188. *Id.*

189. *Id.*

190. *Id.*

between districts, as well as the nation as a whole, appear in Table 2 in the Appendix.¹⁹¹

B. Selection of Measures

As discussed in Part I.E, if Rule 82 is an effective means of tort reform, the theoretical and empirical literature would lead one to hypothesize that it will have a number of effects on civil cases. These include a reduction in civil filings, a reduction in tort filings, an increase in civil trials, and either a potential increase or decrease in the time it takes to resolve civil cases.¹⁹²

Based on the available data, five measures were selected for examination in order to determine whether Rule 82 had any effect on the filing of low merit cases in the District of Alaska: the amount of civil filings; the amount of tort filings; the amount of civil trials; the median time to disposition of civil cases; and the percentage of civil cases pending three years or more. Annual figures for the fourteen year period were compared using the mean (or average), rather than the

191. This chart was compiled using U.S. Census estimates for population broken down by sex and race, as well as median age. See *Population Estimates, State Characteristics, Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin for States: April 1, 2000 to July 1, 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/asrh/SC-EST2009-03.html> (last visited Nov. 8, 2011) (including files for each state with the population estimates broken down by race and sex); *Population Estimates, State Characteristics, Annual Estimates of the Resident Population by Sex and Age for States and for Puerto Rico: April 1, 2000 to July 1, 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/states/asrh/SC-EST2009-02.html> (last visited Nov. 8, 2011) (including files for each state with the estimated median age by year); *Population Estimates, National Characteristics: Vintage 2009*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/national/asrh/2009/index.html> (last visited Mar. 7, 2012) (including files NC-EST2009-03, showing United States population estimates broken down by race and sex, and NC-EST2009-01, showing the estimated median age for the United States by year); see also *Court Locator*, UNITED STATES COURTS, http://www.uscourts.gov/court_locator.aspx (last visited Nov. 8, 2011) (including a map of the United States indicating the borders of the United States Circuit Courts of Appeal). The data in the chart were estimates as of July 1, 2004, which is the closest annual estimate in the Census estimates (which are all as of July 1) to the midpoint of the data range for the study (i.e., March 30, 2004). At the time of publication, the state population data was no longer available in the format utilized to compile the charts in this study (the websites last visited on November 8, 2011, cited above). However, much of the source information still appears to be available—albeit, in different formats—through the U.S. Census Bureau website. See *Population Estimates, Datasets for All Geographies*, U.S. CENSUS BUREAU <http://www.census.gov/popest/data/datasets.html> (last visited Mar. 7, 2012) (view the “Vintage 2009 State Population” datasets for information concerning state population estimates by race, sex, and age).

192. See *supra* Part I.E.

median, because the point of the comparison was to examine and account for as large of a sample as possible, rather than assessing a typical annual statistic for a particular district.¹⁹³

As discussed in Part I.E, the theoretical and empirical literature suggests that Rule 82 should reduce the level of civil filings in the District of Alaska as compared to other districts. The statistical reports prepared by the Administrative Office of the United States Courts include the annual civil filings for each district.¹⁹⁴ The level of civil case filings, however, is widely believed to fluctuate based primarily on population.¹⁹⁵ Accordingly, it was necessary to control for this variable by adjusting each year's civil filings to account for the district's Census population estimate for the same year.¹⁹⁶

Additionally, it is important to note that Rule 82 does not apply in certain federal civil cases—notably, cases that only involve issues of

193. See RUSSELL K. SCHUTT, *INVESTIGATING THE SOCIAL WORLD* 421 (7th ed. 2012) (noting that unlike the median, the mean “takes into account the value of all cases in the distribution”). Regardless, although some of the distributions may have been slightly skewed, use of the median would not have changed the conclusions. See Appendix, Tables 3–7.

194. See *Federal Management Court Statistics*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx> (last visited Nov. 10, 2011) (including links to annual district caseload profiles: select “District Courts” for the relevant year, select the relevant district court from the drop down box, select “Generate,” in order to view the “Judicial Caseload Profile” for selected district for the selected year); *Judicial Business of the U.S. Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx> (last visited Nov. 8, 2011) (including links to Table C-2 of the “Judicial Business of the U.S. Courts” report, which includes total civil cases commenced in the United States District Courts for each year: select the “Judicial Business” report for the relevant year, then select Table C-2). In years where multiple reports were available, the one for September was used to maintain continuity with earlier years, where only the September reports are available.

195. See, e.g., Di Pietro & Carns, *supra* note 9, at 65–66 (comparing Alaska's tort filing rate to other states “per 100,000 population”); Kritzer, *supra* note 1, at 1981–82 (discussing civil litigation rates in various nations “per 1,000 Population”).

196. See *Population Estimates, Evaluation Estimates - 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/research/eval-estimates/eval-est2010.html> (last visited Mar. 7, 2012) (including population estimates for the United States, the states, and Puerto Rico from 2000 through 2010 in file NST-PEST2010-01); *State Population Estimates and Demographic Components of Population Change: Annual Time Series, April 1, 1990 Census to July 1, 2000 Estimate*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/eval-estimates/national-regional-state/ST-2000-7.txt> (last visited Mar. 7, 2012) (including population estimates for the United States and each state from 1997 through 1999). Where the Census estimates conflicted, the more recent estimate was used. Also, as of the time of the publication of this Article, the data table for the 1990s was no longer available on the U.S. Census Bureau website. However, it remains on file with the Author.

federal law.¹⁹⁷ Arguably, isolating civil filings where jurisdiction is based on diversity of citizenship would provide a more accurate measure. Unfortunately, that data is not available.¹⁹⁸ Regardless, focusing solely on diversity filings would omit some cases where Rule 82 would potentially apply,¹⁹⁹ and in any event, prior research has utilized approximations to measure the effects of fee shifting rules on federal filings.²⁰⁰ Moreover, there are similar issues with the widely accepted data from the Alaska state courts, as Rule 82 does not apply where another state's law controls, federal law controls, a statute specifically provides otherwise, or the parties have otherwise agreed.²⁰¹ Nonetheless, if the Rule is as powerful and fee shifting is as ingrained in the Alaskan legal culture as some have suggested,²⁰² there should still be an identifiable reduction in civil filings in the District of Alaska when compared to other districts in the sample.

The data for tort filings was compiled in the same manner as the data for civil filings.²⁰³ Total tort filings were obtained by combining the Administrative Office's "Nature of Suit" codes for categories "Personal Injury/Product Liability" and torts other than "Personal Injury/Product Liability."²⁰⁴ The tort filing data likely represents a greater percentage of cases where Rule 82 may potentially apply than the general civil filing data because there are more diversity cases and because a relatively small percentage of tort cases are initiated by the federal government.²⁰⁵

197. See *supra* notes 57–58.

198. The information is collected, see *supra* note 179, but has not been reported by the Administrative Office on a district-by-district basis.

199. See *supra* notes 57–58 and accompanying text.

200. Schwab & Eisenberg, *supra* note 69, at 757 (making comparisons using "the Administrative Office category that most closely correspond[ed]" with the types of cases that the researchers were studying).

201. See ALASKA R. CIV. P. 82(a) (providing that the fee shifting rule applies "[e]xcept as otherwise provided by law or agreed to by the parties"); *Alaska v. Native Vill. of Nunapitchuk*, 156 P.3d 389, 403 (Alaska 2007) (noting that in cases where fee shifting provisions are "intertwined with substantive statutes" those provisions "govern the award of fees rather than Rule 82"); *Ferdinand v. City of Fairbanks*, 599 P.2d 122, 125 (Alaska 1979) (finding that attorneys' fees awards in federal civil rights actions in Alaska state court are governed by 42 U.S.C. § 1988 rather than Rule 82).

202. See *supra* note 6; *infra* note 225.

203. See *supra* notes 194–196 and accompanying text.

204. See *Nature of Suit/Offense Codes*, UNITED STATES COURTS, <http://www.uscourts.gov/cgi-bin/fcmcodes2009.pl> (last visited Apr. 19, 2011) (listing the tort codes as civil code categories "B" and "H").

205. See, e.g., *Table C-2 U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, During the 12-Month Period Ending September 30, 2004*, UNITED STATES COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/c2.pdf> (last visited Nov. 11, 2011) (showing that in 2004, 43,919 out of 55,023, or 79.82%, of tort filings were based on

Annual data for civil trials, median time from filing to disposition, and percentage of cases pending three years or more were compiled using the annual Judicial Business of the U.S. Courts reports.²⁰⁶ Civil trials included both jury and bench trials.²⁰⁷ Civil trials were controlled for population, while median time to disposition and percentage of cases pending three or more years were not.

III. RESULTS

Table 1 provides a summary of the results. Complete data appears in Tables 3 through 7.²⁰⁸ As discussed in more detail below, the data do not show any strong differences between the District of Alaska and the other districts in the sample.

diversity of citizenship and only 2,258, or 4.1%, involved the United States as a plaintiff or defendant).

206. See *Judicial Business of the U.S. Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/Statistics/JudicialBusiness.aspx> (last visited Nov. 11, 2011) (including links to the annual Judicial Business of the U.S. Courts reports for 1997 through 2010; data for civil trials appear in Table C-7, data for median time from filing to disposition appear in Table C-5, and data for the percentage of cases pending three years or more appear in Table C-6). Table C-6 is missing from the Judicial Business report for 2002, and accordingly, data for the percentage of cases pending three or more years for that year was omitted. With respect to the median time from filing to disposition, more precise (i.e., unrounded) statistics were available for the individual districts for the years 1997 through 1999 in the Judicial Caseload Profiles. See *supra* note 194. Accordingly, the more precise data was used for those years.

207. See, e.g., Table C-7 *U.S. District Courts-Civil and Criminal Trials Completed, by District, During the Twelve-Month Period Ended September 30, 1997*, UNITED STATES COURTS, <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2004/appendices/c7.pdf> (last visited Nov. 11, 2011).

208. See Appendix.

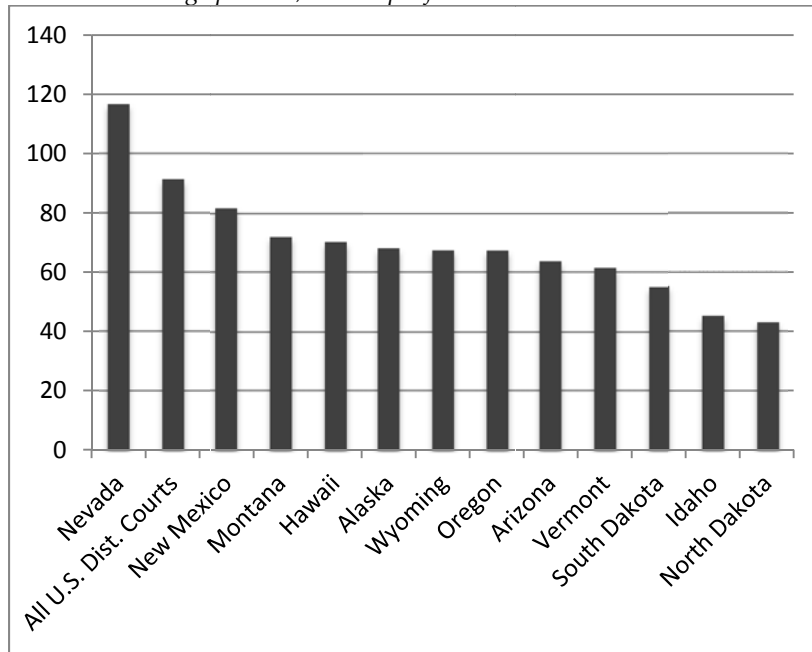
Table 1. Average Annual Statistics for
Sample of Federal District Courts for the 1997–2010 Period

Federal District Court	Civil Case Filings per 100,000 People	Tort Filings per 100,000 People	Civil Trials per 100,000 People	Median Time to Disposition	% of Civil Cases Pending 3 Years or More
All U.S. District Courts	91.31	19.60	2.29	8.53	11.06
Alaska	67.99	14.24	1.86	10.03	8.63
Arizona	63.59	6.01	1.39	10.01	5.80
Hawaii	70.08	12.84	1.32	10.06	8.53
Idaho	45.14	7.13	1.48	11.85	5.61
Montana	71.78	15.31	1.50	11.06	7.72
Nevada	116.63	12.55	2.73	8.49	4.15
New Mexico	81.78	12.75	2.98	9.91	5.78
North Dakota	42.95	9.88	1.31	9.26	2.98
Oregon	67.24	6.79	1.41	9.89	3.23
South Dakota	55.14	11.34	2.93	11.31	4.69
Vermont	61.39	12.62	2.73	8.40	4.65
Wyoming	67.30	16.97	4.80	9.43	12.95

As shown in Charts 1 and 2, civil and tort filings in the District of Alaska were lower than the national average but higher than many of the districts in the sample.²⁰⁹

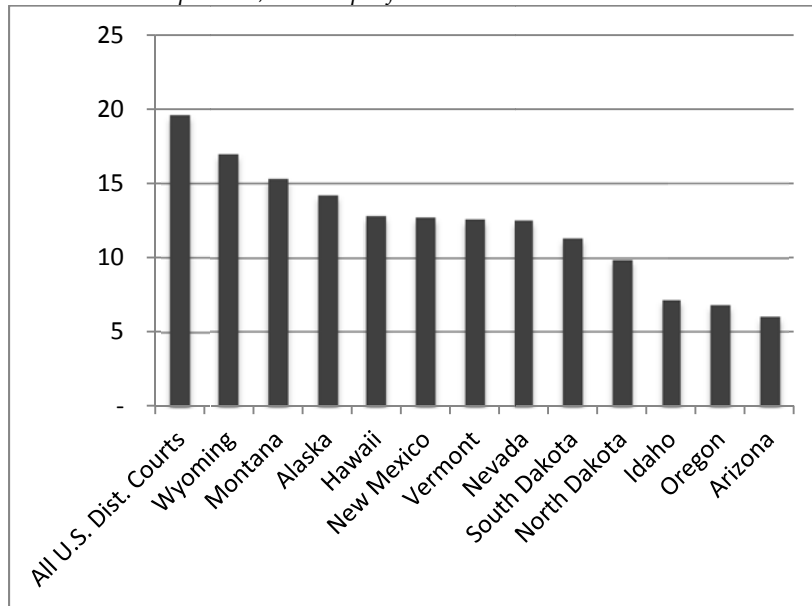
209. These results are consistent with Di Pietro and Carns's findings. *See* Di Pietro & Carns, *supra* note 9, at 65. They found that the tort filing rates in Alaska state court "fell in the lowest group" of states, but still resembled rates in some "jurisdictions that do not shift attorney's fees." *Id.* Notably, however, Di Pietro and Carns found that Alaska state court civil filings "did not seem to differ substantially from rates across the nation." *Id.* at 63.

Chart 1. Average Annual Civil Case Filings per 100,000 People for the 1997–2010 Period



The District of Alaska fell within the high to middle end of the sample for annual average civil filings. It was clearly below the national average for the period but significantly higher than several districts. For example, it had over fifty percent more filings than the Districts of Idaho and North Dakota.

Chart 2. Average Annual Tort Filings
per 100,000 People for the 1997-2010 Period



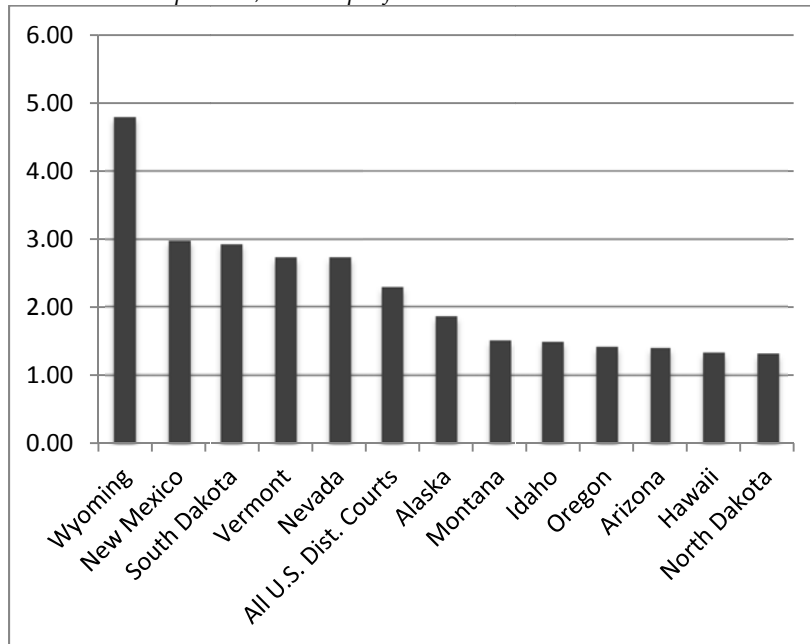
Even more surprising, the District of Alaska had a higher average annual tort filing rate than most districts in the sample. Indeed, it was more than double the rates in the Districts of Oregon and Arizona. If anything, Rule 82 should have a stronger impact on tort filings because it is more likely to apply in tort cases.²¹⁰ The result is also inconsistent with theoretical research suggesting that the English Rule should lead to an overall reduction in filings due to a reduced number of low merit cases and a “compliance effect,” whereby potential defendants are incentivized to comply with the law.²¹¹

As shown in Chart 3, the District of Alaska’s average annual civil trials for the period was higher than many districts in the sample, but lower than the national average and nearly as many other districts in the sample.

210. See *supra* note 205 and accompanying text.

211. See *supra* notes 75-76 and accompanying text.

Chart 3. Average Annual Civil Trials
per 100,000 People for the 1997–2010 Period



Although the results may have been affected by the amount in controversy requirement, which precludes diversity jurisdiction in cases involving \$75,000 or less in dispute,²¹² this result is at odds with the theoretical literature that predicts that the English Rule should increase the overall quality of claims.²¹³ It is, however, consistent with Snyder and Hughes's findings that the English Rule did not appear to cause an increase in small judgments when applied in Florida medical malpractice cases.²¹⁴

As shown in Charts 4 and 5, the data on the amount of time until civil case disposition is split. Similar to many other districts in the sample, the District of Alaska had a higher average annual median time from filing to disposition than the national average but a lower average annual percentage of cases pending for three years or more.

212. See 28 U.S.C. § 1332(a) (2012).

213. Di Pietro and Carns had found that there were more tort trials in Alaska state courts as compared to other states. Di Pietro & Carns, *supra* note 9, at 69.

214. See *supra* note 124 and accompanying text.

Chart 4. Average Annual Median Time Interval From Filing to Disposition of Civil Cases for the 1997-2010 Period

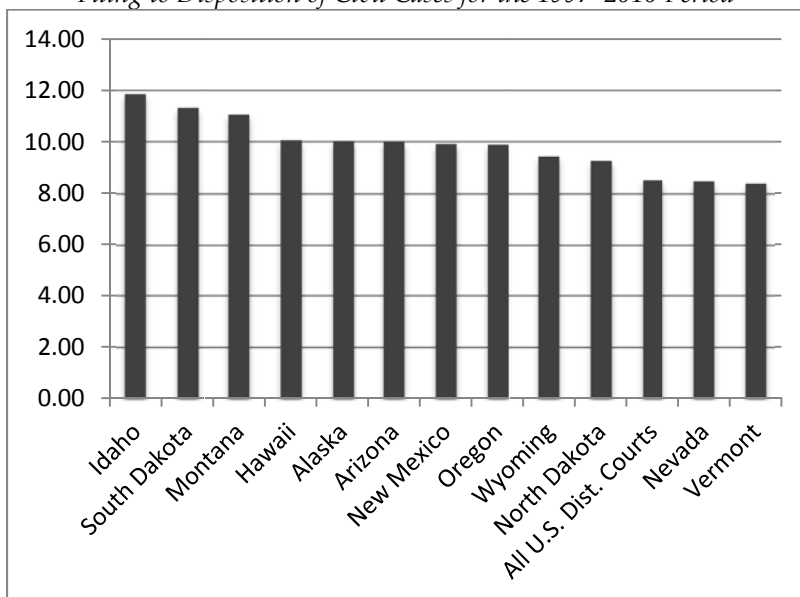
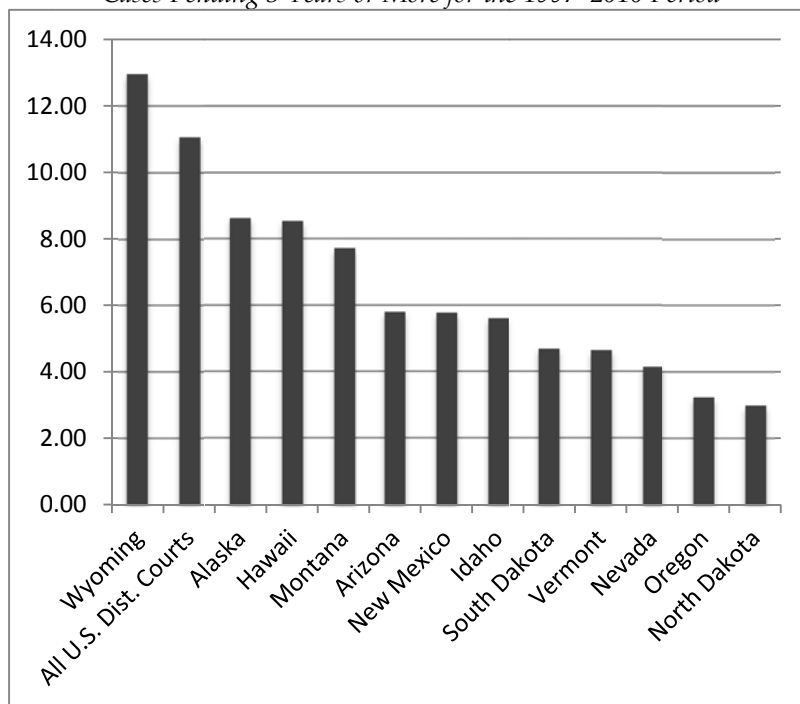


Chart 5. Average Annual Percentage of Civil Cases Pending 3 Years or More for the 1997-2010 Period



Contrary to expectations based on the theoretical research,²¹⁵ these results suggest that Rule 82 did not have a significant impact on the amount of time to disposition of civil cases in the District of Alaska.

It is possible that the results are consistent with the presence of a larger number of small but highly meritorious claims that were not so complex as to require more than three years to resolve but tended to take longer to resolve than a typical claim because they were pursued more aggressively. The problem with this explanation is that most of the other districts in the sample display the same pattern.

The data do not appear to show any significant differences between the District of Alaska and the other districts in the sample. This suggests that Rule 82 did not have a significant impact on civil filings in the District of Alaska.

IV. ANALYSIS

The results do not show any significant difference between civil and tort case filings in the District of Alaska and other district courts in the sample. These results raise a number of questions. First, why did the expected results fail to materialize in the District of Alaska? Second, and most prominently, what is the impact on proposals for instituting the English Rule in the United States? And third, if the results do not necessarily resolve the second question, what further information is needed in order to do so? This Part explores those questions.

Advocates of the English Rule are likely to point out, as they have previously, that Rule 82 provides less compensation than fee shifting provisions in other English Rule jurisdictions.²¹⁶ Thus, the lack of any significant differences between the filings in the District of Alaska and the other districts in the sample may be due to the fact that Rule 82 is simply not strong enough to produce the desired results.²¹⁷ The level of compensation provided by Rule 82 has been debated over the years, but has been set at its current, relatively modest, but stable, level since the early 1990s.²¹⁸ Concerns over limiting access to the courts and rising liability insurance costs have prevented anything approaching a full compensation standard.²¹⁹ The potential effects on court access for persons of little or moderate means, in particular, has been a lightning rod for critics of the English Rule.²²⁰ Some advocates of the English Rule

215. See *supra* Part II.E.

216. See *supra* note 110.

217. See *id.*

218. See *supra* notes 50–54, 110–113.

219. See *supra* notes 111–112 and accompanying text.

220. See *supra* notes 105, 111.

have proposed alternate means of ensuring access to the courts, such as through legal expense insurance.²²¹ It remains debatable, however, whether these proposals would work in practice.²²²

It could also be that the lack of differentiation between the District of Alaska and the other districts in the sample can be explained by the fact that those jurisdictions employ a sufficient level of fee shifting for particular claims so as to influence overall civil and tort filing rates.²²³ Although not out of the question, this explanation is not convincing simply because many fee shifting statutes impose a one-way fee shift in favor of plaintiffs, which, if anything, should increase filings.²²⁴ Moreover, fee shifting is unlikely to be ingrained in the legal culture when employed on a piecemeal basis.²²⁵ It would seem unlikely that claim-specific fee shifting would have the broad impact on claim filing that general two-way fee shifting is thought to have. Indeed, Schwab and Eisenberg's study of one-way fee shifting in constitutional tort cases suggests that it did not have the anticipated impact on those claims.²²⁶

More than anything, these results suggest that more empirical research is needed on the nature of low merit and frivolous claims. It is evident that what sounds correct in theory does not always pan out in reality. Just a few of the important questions that need to be answered are: (1) what is a frivolous case; (2) what causes frivolous case filings; and (3) is the number of frivolous filings great enough to require

221. See *supra* note 99 and accompanying text.

222. Marie Gryphon's proposal, which would require plaintiffs to purchase insurance before proceeding with a claim, depends on insurers being willing to offer insurance for potential low and middle income plaintiffs and plaintiffs' attorneys being willing to subsidize the cost of insurance premiums. Gryphon, *supra* note 63, at 602-08. Regardless, the English experience with insurance suggests that it may create other problems. See LORD JUSTICE RUPERT JACKSON, REVIEW OF CIVIL LITIGATION COSTS: FINAL REPORT xvii (2009), available at <http://www.judiciary.gov.uk/NR/rdonlyres/8EB9F3F3-9C4A-4139-8A93-56F09672EB6A/0/jacksonfinalreport140110.pdf> (proposing various reforms aimed at reducing civil litigation costs in England, including curtailing broad two-way fee shifting so as to reduce the need for after-the-event insurance). Walter Olson and David Bernstein's proposal, which would require fee shifting for each individual "legal initiative" as opposed to a case as a whole, would require a considerable amount of additional court resources to administer. See Olson & Bernstein, *supra* note 6, at 1162.

223. See, e.g., Jessie R. Walters, Jr., *A Primer for Awarding Attorney Fees in Idaho*, 38 IDAHO L. REV. 1, 17-53 (2001) (describing the numerous statutory bases for attorneys' fees awards in Idaho).

224. See *supra* note 27.

225. Cf. TOMKINS & WILLGING, *supra* note 6, at 61 ("Unlike in Alaska, where fee shifting has become an accepted part of litigation, the typical attorney in federal court who represents a losing party will not acquiesce to fee shifting without some opposition.").

226. See *supra* note 159 and accompanying text.

reform? Then, if there is a problem, reformers can craft measures to address the cause of the problem.

There is a substantial amount of disagreement among commentators as to whether a low merit or frivolous claim problem exists.²²⁷ Of course, the fact that there is a lack of agreement is no accident. Developing research studies to answer these questions is easier said than done. Indeed, defining a “low merit” – or even “frivolous” – case is no easy task.²²⁸ Evaluating whether actual cases are objectively of “low merit” is even more difficult. Even an after-the-fact examination of a single completed case might not yield consensus.²²⁹ But the fact that the task is difficult does not mean that it cannot be accomplished, particularly given the immense amount of talented researchers interested in the issue.

This Author happens to be among those who, based on experience, believe that there are opportunities for abuse under the current system that are not adequately addressed by the existing rules.²³⁰ But drastic reforms should not be made based on supposition, regardless of whether it comes from this Author, other commentators, or five or more justices of the Supreme Court.²³¹

227. See *supra* notes 89–93 and accompanying text.

228. See *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994) (“[T]he term ‘frivolous’ . . . as a practical matter . . . is simply not susceptible to categorical definition.”); cf. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring in the judgment) (suggesting that “‘frivolous’ claims” might be “defined simply as claims with no legal merit”); *Andrews v. King*, 398 F.3d 1113, 1121 (9th Cir. 2005) (“[A] case is frivolous if it is ‘of little weight or importance: having no basis in law or fact.’” (citations omitted)). The definitions provided by the courts are not necessarily helpful. For example, is a “frivolous” claim one that lacks merit, or one that is imposed for an improper purpose? See *United States v. Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002) (defining “frivolous” as meaning “groundless . . . with little prospect of success; often brought to embarrass or annoy the defendant” (quoting *United States v. Gilbert*, 198 F.3d 1293, 1299 (11th Cir. 1999))). Presumably, a potentially meritorious claim could be brought for an improper purpose.

229. Furthermore, surveys, which are perhaps the easiest method to attempt to evaluate these issues, are also the most problematic because the respondents typically have an incentive to provide one answer or another. See, e.g., Miller, *supra* note 68, at 82 (indicating that based on discussions with practitioners, the “universal themes” from their comments were that “frivolous litigation is the lawsuit the other side brings against one’s client” and “abuse is whatever the opposing counsel does”).

230. I have previously written about the need to reform discovery procedures that are prone to abuse. See Douglas C. Rennie, *The End of Interrogatories: Why Twombly and Iqbal Should Finally Stop Rule 33 Abuse*, 15 LEWIS & CLARK L. REV. 191 (2011).

231. Cf. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (declaring that “it is self-evident that the problem of discovery abuse cannot be solved by

Just about every lawyer has probably been confronted, at one point or another, by someone who had a less than ideal experience with the legal system and has been called upon to defend the indefensible. It is obvious that the civil justice system is unpopular,²³² but this is not a new phenomenon.²³³ And there is more than one explanation for why that is the case.²³⁴ Depending on the cause, there may be more than one solution to the problem and each of them should be evaluated carefully.²³⁵ Drastic reforms should not be brashly undertaken for the sake of “doing something.” Or—to paraphrase Clint Eastwood’s iconic character, Dirty Harry—even if the current system is less than ideal, it is functional, and until reforms are developed that demonstrably improve it, we should stick with it.²³⁶

The English Rule does make some intuitive sense. As a fundamental question of fairness, Alaska has long favored partial compensation to prevailing parties.²³⁷ This tradition has been ingrained into Alaskan legal culture.²³⁸ Indeed, the results here suggest that since the reforms of the 1990s, Rule 82 appears to be fulfilling its intended

‘careful scrutiny of evidence at the summary judgment stage,’ much less ‘lucid instructions to juries,’ . . . the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings.”).

232. See, e.g., Olson & Bernstein, *supra* note 6, at 1169–70 (discussing dissatisfaction with the legal system).

233. See Miller, *supra* note 68, at 54 (arguing that concerns about litigation cost and delay “can be traced back to ancient times”).

234. For example, John F. Vargo has argued that “courts are overcrowded because they are inundated with criminal cases and are severely underfunded.” Vargo, *supra* note 15, at 1631. Recent comments by Justice Scalia, asserting that Congress unnecessarily expanded the federal drug laws, may lend some support to this theory. See Jess Bravin, *Scalia Criticizes Narcotics Laws*, WALL ST. J., Oct. 6, 2011, <http://online.wsj.com/article/SB10001424052970203476804576614733985897022.html>.

235. Indeed, the speed of the civil justice system is something that is frequently criticized. If claims were resolved faster, that could potentially also address the problem of defendants being forced to settle “anemic” cases based on the threat of having to pay extensive litigation costs. Cf. *Twombly*, 550 U.S. at 559.

236. See *MAGNUM FORCE* (Warner Bros. 1973) (“I hate the goddamn system, but until someone comes along with changes that make sense, I’ll stick with it.”).

237. See *supra* note 37–38 and accompanying text.

238. See *supra* note 225; see also Kritzer, *supra* note 4, at 360 (“Fee regimes are deeply embedded in legal systems and become part of the broad legal culture encompassing potential litigants, lawyers, and adjudicators. That is, fee regimes shape the understanding and expectations of participants. Whatever the existing system is, it comes to be seen as normal and appropriate.”).

purpose of providing partial compensation without limiting access to the courts.²³⁹

But that does not necessarily mean that it makes sense to label Rule 82 as a cure-all and package it for export alongside king crab and petroleum.²⁴⁰ Rule 82's long, contentious history and many revisions demonstrate that it is not such an obviously beneficial procedure.²⁴¹ Any states considering adopting similar rules should do so based on the primary justification for Rule 82: partial compensation.²⁴² The data, however, do not appear to support claims that Rule 82 is an effective means of reducing meritless litigation in Alaska. Indeed, there already are a number of safeguards in place to protect defendants from meritless suits – most prominently, Federal Rule of Civil Procedure 11 and the fact that the burden of proof lies with the plaintiff. Whether these alternative safeguards can be improved to provide a more effective means of deterring meritless litigation is a question that deserves further exploration.

CONCLUSION

In recent years, the English Rule appears to be riding a renewed wave of popularity among tort reform advocates.²⁴³ This has caused some commentators to invoke Alaska's fee shifting rule as a model for reform to rid the courts of low merit claims.²⁴⁴ The results of this study suggest that those proposals are misplaced. Data from the federal courts show that civil and tort filings in the District of Alaska, while below the national average, resembled those in a sample of similar districts. Other measures also failed to reveal any significant differences between civil cases in the District of Alaska and the other districts.

The results of this study, rather than supporting the widespread export of Rule 82 to jurisdictions unfamiliar with fee shifting as a matter of course, suggest caution is appropriate. Some states may ultimately decide, as Alaska has, that some amount of partial compensation is appropriate for the prevailing party in civil lawsuits. But Rule 82 is not a

239. See *supra* notes 37, 50. It is notable, however, that the elimination of the public interest exception occurred during the sample period. See *supra* notes 55–56. Because it occurred midway through the period covered by this study, and because “public interest” filings may be too small of a component of the overall amount of civil filings to affect the result, it is unclear from this data whether the elimination of that exception reduced public interest filings.

240. Cf. Gryphon, *supra* note 6.

241. See *supra* Part II.B.

242. See *supra* note 37.

243. See *supra* notes 4, 6–7.

244. See *supra* note 6.

“one size fits all” solution to the complex problems of our civil justice systems. Additional empirical research is needed on the nature of frivolous litigation and its causes before imposing solutions that may or may not address those problems.

APPENDIX

Table 2. Demographic Comparison (As of July 1, 2004)

	ALASKA	ARIZONA	HAWAII	IDAHO	MONTANA	NEVADA	NEW MEXICO	NORTH DAKOTA	OREGON	SOUTH DAKOTA	VERMONT	WYOMING	U.S.
TOTAL POPULATION	661,569	5,759,425	1,252,782	1,391,718	925,887	2,328,703	1,891,829	636,303	3,573,505	774,283	618,145	502,988	293,045,739
RACE													
One Race	95.39%	98.42%	81.21%	98.54%	98.39%	97.51%	98.41%	98.93%	97.66%	98.70%	98.91%	98.68%	98.46%
White	70.78%	87.35%	28.11%	95.17%	90.79%	82.40%	84.43%	92.05%	90.71%	88.56%	96.71%	94.37%	80.38%
Black	4.01%	3.67%	2.62%	0.71%	0.52%	7.56%	2.60%	0.92%	1.84%	0.92%	0.71%	1.08%	12.76%
AIAN	15.46%	5.03%	0.48%	1.47%	6.39%	1.45%	9.94%	5.22%	1.46%	8.45%	0.40%	2.47%	0.98%
Asian	4.52%	2.18%	40.59%	1.06%	0.62%	5.59%	1.31%	0.71%	3.37%	0.72%	1.06%	0.68%	4.16%
NHPI	0.62%	0.18%	9.40%	0.13%	0.06%	0.50%	0.13%	0.04%	0.27%	0.05%	0.03%	0.08%	0.18%
Two or More Races	4.61%	1.58%	18.79%	1.46%	1.61%	2.49%	1.59%	1.07%	2.34%	1.30%	1.09%	1.32%	1.54%
SEX (% Female)	48.16%	50.00%	49.77%	49.72%	50.07%	49.17%	50.61%	49.86%	50.40%	50.18%	50.86%	49.42%	50.81%
MEDIAN AGE (years)	33.25	35.83	38.65	34.69	39.79	36.04	36.44	38.36	38.52	37.80	40.37	38.09	37.36
CIRCUIT	9th	9th	9th	9th	9th	9th	10th	8th	9th	8th	2nd	8th	N/A

Table 3. Civil Filings Per 100,000 People

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
All U.S.D.C.	101.56	94.99	95.41	91.97	88.02	95.52	87.16	96.04	85.68	86.97	85.44	87.86	90.13	91.54	91.31
Alaska	104.29	81.18	122.18	77.10	72.77	61.06	60.83	56.73	53.96	53.75	51.04	52.66	54.99	49.37	67.99
Arizona	77.37	68.87	64.37	63.26	61.05	61.65	59.62	61.30	81.80	70.57	54.67	54.45	55.09	56.26	63.59
Hawaii	154.86	90.45	77.77	73.57	68.76	68.57	62.44	61.91	62.82	57.20	52.21	45.16	48.28	57.07	70.08
Idaho	51.79	44.42	47.69	58.48	52.77	46.66	42.09	47.37	41.47	36.76	36.17	37.74	42.99	45.52	45.14
Montana	77.39	75.03	74.84	80.70	82.36	77.17	78.66	78.32	69.76	65.96	64.78	63.03	63.75	53.16	71.78
Nevada	141.75	161.31	142.04	116.49	110.01	110.77	111.25	109.86	100.12	91.61	96.03	99.06	126.05	116.43	116.63
New Mexico	105.84	97.67	90.72	103.69	89.48	86.52	86.40	78.62	74.37	68.43	73.69	63.86	65.66	59.93	81.78
North Dakota	51.80	44.55	52.28	51.61	43.54	50.85	45.59	45.48	42.39	33.18	31.84	41.68	32.82	33.65	42.95
Oregon	73.96	67.06	71.39	69.84	72.88	66.23	67.75	71.00	72.27	65.18	67.65	59.22	56.45	60.48	67.24
South Dakota	63.35	60.75	62.46	58.75	61.68	60.92	64.36	52.13	52.90	53.11	52.54	42.59	42.80	43.65	55.14
Vermont	75.77	78.57	69.24	83.98	77.63	56.61	60.32	58.56	63.19	44.36	46.42	45.25	49.08	50.45	61.39
Wyoming	81.67	84.58	74.23	77.94	64.10	64.80	65.95	70.41	73.52	60.08	55.23	61.21	54.74	53.69	67.30

Table 4. Tort Filings Per 100,000 People

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
All U.S.D.C.	21.76	18.63	16.29	12.97	11.81	21.87	15.52	18.78	17.37	23.06	20.36	23.67	25.47	26.87	19.60
Alaska	26.61	18.56	20.98	20.71	15.78	13.55	12.04	9.86	8.84	9.92	9.71	10.50	11.23	11.00	14.24
Arizona	9.14	10.54	6.85	8.15	7.35	5.72	5.06	4.43	3.83	3.54	3.68	3.71	4.74	7.46	6.01
Hawaii	27.86	21.20	15.67	13.61	10.83	12.80	12.83	11.39	9.53	7.88	7.56	7.66	8.46	12.54	12.84
Idaho	8.01	7.96	11.82	18.24	9.69	6.48	6.45	7.19	6.31	4.99	3.74	2.29	2.46	4.17	7.13
Montana	21.17	23.42	23.89	25.79	21.31	14.84	16.36	14.37	12.41	8.03	10.24	9.71	6.06	6.73	15.31
Nevada	14.51	21.89	24.36	15.76	8.88	11.31	9.79	9.92	9.80	6.70	7.25	10.37	13.30	11.83	12.55
New Mexico	16.85	19.97	15.01	20.05	11.65	12.44	12.37	11.32	10.76	10.98	11.65	9.27	8.67	7.47	12.75
North Dakota	10.92	10.82	14.22	16.84	10.22	14.06	7.92	12.12	7.09	6.92	4.71	12.18	6.50	3.82	9.88
Oregon	9.71	9.23	10.23	8.98	8.70	7.11	5.69	5.54	4.89	5.79	4.45	4.47	5.05	5.19	6.79
South Dakota	16.14	26.82	10.36	13.10	10.67	11.95	9.66	9.18	8.60	9.78	8.67	7.22	7.89	8.66	11.34
Vermont	19.37	16.59	15.84	18.04	14.55	12.20	11.68	12.46	12.44	8.23	8.06	6.76	10.46	9.96	12.62
Wyoming	18.33	20.63	24.60	18.42	16.23	18.92	19.04	16.91	17.79	15.99	13.57	12.77	12.31	12.05	16.97

Table 5. Civil Trials Per 100,000 People

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
All U.S.D.C.	3.79	3.46	3.13	2.81	2.28	2.09	2.01	1.87	1.79	1.72	1.86	1.74	1.73	1.73	2.29
Alaska	2.46	4.36	2.10	1.75	3.16	2.49	2.01	1.97	1.20	0.74	1.18	1.31	0.72	0.56	1.86
Arizona	2.11	1.74	1.82	1.66	1.47	1.14	1.14	1.29	0.99	1.26	1.15	1.00	1.50	1.24	1.39
Hawaii	1.35	1.01	2.12	1.81	1.31	0.98	0.65	0.80	0.71	1.50	1.50	1.33	1.79	1.69	1.32
Idaho	1.65	3.17	2.80	2.69	1.44	1.57	1.03	0.93	1.05	0.96	0.87	0.92	0.65	1.03	1.48
Montana	1.37	1.71	1.47	1.11	0.77	1.98	1.64	1.94	1.50	1.16	1.36	1.55	1.64	1.84	1.50
Nevada	3.94	4.36	3.62	2.73	2.67	2.45	2.46	2.41	1.91	2.29	2.30	2.49	2.69	1.96	2.73
New Mexico	4.12	5.20	3.91	2.53	2.68	2.43	2.73	3.17	3.39	2.16	2.64	2.37	2.49	1.87	2.98
North Dakota	2.18	1.10	2.21	1.40	0.63	1.11	1.74	1.42	1.26	1.42	1.25	0.62	0.77	1.22	1.31
Oregon	2.22	1.34	1.39	1.46	1.33	1.17	1.27	1.74	1.94	0.98	1.26	1.30	0.99	1.35	1.41
South Dakota	3.69	3.28	4.09	5.43	3.16	3.41	3.39	2.98	2.31	2.16	2.01	1.12	1.97	1.95	2.93
Vermont	4.76	6.27	4.38	3.28	2.61	2.44	2.43	2.91	1.29	1.61	1.93	1.45	1.61	1.29	2.73
Wyoming	6.04	9.38	7.30	6.28	5.07	4.43	5.61	4.18	2.37	1.95	3.63	4.32	3.12	3.47	4.80

Table 6. Median Time Intervals From Filing to Disposition

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
All U.S. D.C.	8.00	8.00	9.00	8.20	8.70	8.70	9.30	8.50	9.50	8.30	8.60	8.10	8.90	7.60	8.53
Alaska	9.50	10.10	7.90	9.90	11.70	13.60	14.90	9.50	9.20	9.20	9.10	9.90	7.20	8.70	10.03
Arizona	9.40	10.60	11.30	10.70	10.80	10.70	10.00	10.40	10.20	11.80	9.90	9.00	8.10	7.20	10.01
Hawaii	6.70	8.70	12.10	11.30	11.00	9.60	12.00	9.60	10.90	9.30	10.30	11.40	9.10	8.90	10.06
Idaho	13.40	13.20	13.80	11.30	10.60	11.50	11.80	11.60	11.50	13.80	11.50	11.00	10.30	10.60	11.85
Montana	11.80	11.10	12.10	10.00	11.60	11.10	11.90	11.00	12.80	11.70	9.50	10.60	10.30	9.30	11.06
Nevada	7.00	7.50	9.20	8.10	10.60	8.60	8.10	7.70	8.90	9.10	9.60	9.50	7.00	8.00	8.49
New Mexico	9.00	10.00	10.20	10.70	10.00	10.00	10.00	11.10	10.30	10.70	9.30	9.00	9.60	8.90	9.91
North Dakota	9.20	9.90	9.40	9.00	8.70	9.70	9.80	7.70	7.30	11.80	10.60	7.50	10.10	8.90	9.26
Oregon	8.60	8.00	9.10	8.70	9.90	9.40	9.60	10.40	10.60	11.60	10.10	10.40	11.10	10.90	9.89
South Dakota	10.80	11.10	12.00	11.20	12.30	10.90	9.40	11.80	11.40	10.50	10.50	12.50	11.50	12.50	11.31
Vermont	10.60	9.30	9.40	7.90	7.50	9.00	7.50	8.00	7.30	8.80	8.00	8.40	7.20	8.70	8.40
Wyoming	7.80	9.50	9.00	10.20	9.00	8.40	9.30	9.40	9.80	9.40	12.40	7.80	10.80	9.20	9.43

Table 7. Percentage of Cases Pending Three Years or More

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
All U.S.D.C.	8.30	9.60	6.80	12.20	14.00	N/A	13.00	12.60	14.90	11.00	6.60	7.30	11.70	15.80	11.06
Alaska	7.50	19.20	0.30	8.60	13.70	N/A	7.40	6.10	5.80	9.40	7.30	10.70	6.90	9.30	8.63
Arizona	5.60	7.20	6.20	7.00	7.00	N/A	5.70	5.50	5.10	6.70	6.10	6.40	3.90	3.00	5.80
Hawaii	3.60	3.40	2.00	24.60	25.40	N/A	11.50	8.10	8.70	8.20	4.50	3.50	4.20	3.20	8.53
Idaho	4.10	3.30	3.70	3.10	3.90	N/A	6.50	7.70	8.10	7.10	6.60	6.90	6.50	5.40	5.61
Montana	10.00	11.20	7.00	6.90	6.40	N/A	4.00	0.50	5.00	10.60	9.10	10.30	10.60	8.70	7.72
Nevada	1.70	2.10	1.40	3.50	3.30	N/A	4.40	5.40	4.50	4.60	5.20	5.70	4.60	7.50	4.15
New Mexico	6.40	9.40	3.60	2.40	3.80	N/A	3.30	3.90	4.00	4.30	3.50	11.20	3.60	15.70	5.78
North Dakota	1.80	1.70	1.20	1.60	2.80	N/A	2.40	1.80	2.60	3.20	2.00	6.50	4.80	6.40	2.98
Oregon	2.00	2.60	2.10	2.90	3.00	N/A	2.40	2.80	3.10	3.40	3.60	5.00	4.50	4.60	3.23
South Dakota	2.40	2.20	1.90	3.60	3.80	N/A	5.70	5.60	7.80	7.20	3.30	4.10	4.80	8.60	4.69
Vermont	5.90	3.60	2.20	2.00	2.60	N/A	1.70	2.40	3.10	8.30	6.10	7.90	6.80	7.80	4.65
Wyoming	11.80	21.60	22.50	4.70	4.20	N/A	20.20	22.20	22.30	25.50	4.10	3.60	3.60	2.10	12.95