BUSINESSES BEWARE: THE CHANGING FACE OF ATTORNEY-FEE AWARDS IN U.S. COURTS

AARON BARTHOLOMEW*

SHARON YAMEN**

The American Rule, creating a presumption against attorney-fee awards, is axiomatic in litigation in United States' courts. Established by the very early U.S. Supreme Court case of Arcambel v. Wiseman in 1796, the rule rejected the British tradition of a "loser-pays" system, in which the losing party pays all parties' attorney fees and litigation costs. While the Court's reasoning for the rules creation is murky, later decisions have justified it on various grounds. Critics of the American Rule argue that the rule encourages the assertion of unmeritorious claims and defenses and fails to sufficiently encourage the settlement of those that are meritorious. The rationale notwithstanding, several long-established exceptions to the American Rule are generally accepted: attorney fees are generally awarded when allocated by contract or when expressly authorized by statute or common law.

In the last few decades, however, states and administrative agencies have made additional modifications to the American Rule, sometimes expanding its scope and other times limiting it. Several of these modifications are of particular note for businesses. This article examines the legacy and creation of the American Rule, as well as its established historical exceptions, and then examines and critiques recent innovations affecting the American Rule in modern litigation.

---

* Aaron Bartholomew is an Associate Professor in the Woodbury School of Business at Utah Valley University and enjoys his multi-jurisdictional civil litigation practice from his home in Utah County, Utah. J.D., J. Rueben Clark School of Law, Brigham Young University; B.A., with honors, Brigham Young University.

** Sharon Yamen is an Assistant Professor, Legal Studies Division of the Collins College of Professional Studies at St. John's University; J.D., Hofstra University School of Law; B.A., cum laude, SUNY Buffalo.

First, governmental agencies are empowering private litigants and attorneys to enforce regulations against businesses by using the lure of attorney fees to shift the legal costs to the private sector. Second, contractual provisions notwithstanding, states are limiting the scope of attorney-fee awards. Third, many courts have liberalized the award of "actual" attorney fees in lieu of requiring a showing of "reasonableness."

The endless tinkering with the American Rule evidences a broad dissatisfaction with the rule itself, the policies it promotes and its capricious results. The questions asked about the rule should be welcome, but the recent deviations from the rule affecting businesses may result in imbalances that must be rectified.

I. INTRODUCTION

It seems that everywhere you look, people are suing for the craziest things: Whopper customers are suing Burger King for "portraying burgers with ingredients that 'overflow over the bun,' making it appear the burgers are 35% larger and contain more than double the meat than the chain

serves."[1] A New York man is suing Taco Bell because he was not happy that "the Mexican Pizza he purchased for $5.49 only contains half as much beef and bean filling as the photo in the chain's advertising."[2] "A Florida woman is suing Kraft for $5 million, saying Velveeta microwave mac and cheese takes longer to microwave than advertised,"[3] or the lawsuit against the pasta making company Barilla, alleging that they engage in false

1. Jonathan Stempel, *Burger King Must Face Lawsuit Claiming its Whoppers are Too Small*, REUTERS (Aug. 29, 2023, 5:29 PM), https://www.reuters.com/legal/burger-king-must-face-lawsuit-claiming-its-whoppers-are-too-small-2023-08-29/; *see also* Class Action Complaint & Demand for Jury Trial at 2, Coleman v. Burger King Corp., No. 22-cv-20925 (S.D. Fla. Aug. 23, 2023).

2. Jonathan Stempel, *Taco Bell is Sued for False Advertising of Cruchwrap, Mexican Pizzas*, REUTERS (July 31, 2023, 2:28 PM), https://www.reuters.com/legal/taco-bell-is-sued-false-advertising-crunchwraps-mexican-pizzas-2023-07-31/; *see also* Class Action Complaint & Demand for Jury Trial, Siragusa v. Taco Bell Corp., No. 23-05748 (E.D.N.Y. July 31, 2023).

3. Melissa Alonso & Zoe Sottile, *A Florida Woman Is Suing Kraft for $5 Million, Saying Velveeta Microwave Mac and Cheese Takes Longer To Make Than Advertised*, CNN BUS., https://www.cnn.com/2022/11/28/business/florida-kraft-velveeta-mac-and-cheese-lawsuit/index.html#:~:text=Kraft%20Heinz%20Foods%20Company%20dismissedCompany%20spokesperson%20told%20CNN%20Monday (Nov. 30, 2022, 4:53 AM); *see also A Lawsuit Over Mac and Cheese and 400+ Other Food Lawsuits Filed by a NY Attorney*, TJ GRIMALDI (Dec. 6, 2022), https://www.tjgrimaldi.com/mac-and-cheese-lawsuit/ [hereinafter *400+ Food Lawsuits*] ("Amanda Ramirez claims she purchased a package of instant Velveeta Shells & Cheese. According to the packaging, the product should be ready in 3 ½ minutes. When Ramirez cooked the food, she realized it took longer than the advertised time. After stirring in the water and waiting for the cheese to thicken, it took more than 3 ½ minutes for the food to be ready to eat."); Corrado Rizzi, *1250 Thread Count for Sealy Sheets Is Way Off, Class Action Alleges*, CLASSACTION.ORG (June 6, 2022), https://www.classaction.org/news/1250-thread-count-for-sealy-sheets-is-way-off-class-action-alleges (describing a lawsuit that "American Textile Company has significantly misrepresented the thread count of its Sealy-brand 1250 thread count bed sheets"); Emily Ashcraft, *Blue Diamond Reaches Settlement with Plaintiffs in Vanilla Flavoring Lawsuit*, LAWSTREET (Apr. 21, 2021), https://lawstreetmedia.com/news/agriculture/blue-diamond-reaches-settlement-with-plaintiffs-in-vanilla-flavoring-lawsuit/ (reporting on a lawsuit "alleging that Blue Diamond Growers' almond milk and almond milk yogurt products falsely claimed to be flavored with vanilla, when the flavor did not actually come primarily from vanilla," and noting that this lawsuit ultimately reached a settlement); Melvin S. Drozen et al., *Litigation to Proceed Over Strawberry Content in Kashi Cereal Bars*, NAT'L L. REV. (Sept. 12, 2022), https://www.natlawreview.com/article/litigation-to-proceed-over-strawberry-content-kashi-cereal-bars (discussing a lawsuit over the strawberry content of Kashi's "Ripe Strawberry" Soft Baked Breakfast Bars, which is subject to various plausible interpretations, but a judge in the U.S. District Court for the Southern District of Illinois ruled on September 8, 2022 that Kashi's packaging furthers the plaintiff's reasonable interpretation by identifying several design elements on the packaging, including an ingredient callout that solely lists strawberries and whole grains, strawberry-only images, and images of the filling, which the plaintiff claims is colored red using substances other than strawberries).

advertising by featuring the slogan "Italy's #1 Brand of Pasta" on pasta boxes, even though the pasta is not made in Italy.[4] As far back as one can remember, there have been lawsuits over misrepresentation in food packaging and advertising. What about the case in which a man sued Anheuser-Busch for false and misleading advertising because their commercials featured "scenic tropical settings [and] beautiful women and men engaged in endless and unrestricted merriment."[5] What the plaintiff said was "untrue" was that image is not what you got from drinking their beer.[6] It makes you ask the question — why? What is the driving force behind these lawsuits, especially if the American Rule applies? Why would anyone want to bear the cost of litigating such nonsense?

This article provides a comprehensive examination of the American Rule by tracing its historical roots and exploring its past, present, and future. Section II will discuss various exceptions that have been carved out over time. These legacy exceptions predate modern legal developments and have been recognized for specific circumstances where it is fair or just to deviate from the general principle of each party bearing their own costs. Section III will go beyond the legacy exceptions and explore more recent developments and contemporary exceptions to the American Rule. Over time, as legal and societal landscapes have evolved, courts have recognized additional circumstances where it might be appropriate to shift attorney fees and costs. Finally, Section IV will reflect on the implications of all the exceptions to the American Rule and raise questions about whether it is still appropriate to call it the "American Rule" considering the numerous exceptions that have been recognized over time. This section will address the evolving nature of legal systems and societal norms that have influenced the development of these exceptions and will consider the extent to which the American Rule has been eroded and whether the underlying principles it once represented remain intact. Questioning the ongoing balance between fairness, access to justice, and the potential consequences of fee-shifting on the litigation landscape, what is the future of this fundamental legal principle?

4. *400+ Food Lawsuits*, *supra* note 3 ("Barilla moved to dismiss the case in August, but the judge denied the request. The case is still currently moving through the legal system.").

5. Id.

6. *Id.* ("The beer commercials depicted a fantasy that wasn't what you got when you consumed the product.").

II. THE AMERICAN RULE

It is difficult to conceive of a legal rule as unique and axiomatic to civil practice in the United States as the American Rule. Of all the many legal rules in American law, this is the one that took on the name and identity of a nation — the general rule against attorney-fee awards.

The rule has applied in nearly every civil case brought before the bar of American courts for 230 years, and yet it has humble beginnings in a colonial America that rejected the pomp and ceremony of contemporary English legal practice and was captured as a fifty-three-word, almost-afterthought in one of the earliest decisions of the U.S. Supreme Court (1796):

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the court, till it is changed, or modified, by statute.[7]

That language memorializes what we now know as the American Rule and was the then-institutionalized custom of the colonial and early-American courts: "[T]he cost of retaining counsel could not be included as part of a damage award,"[8] and a prevailing litigant could not recover an attorney fee from the losing litigant except to the extent prescribed by the legislature.[9] "With very few exceptions, the principle that each side must bear its own legal expenses has been followed consistently since the Court first announced it in 1796, and, over time, it has come to be accepted as the 'American Rule.'"[10] The history of the American Rule is long and complicated and predates the seminal case of *Marbury v. Madison*.[11] To refresh your American legal history, the American Rule's origins date to well before the doctrine of judicial review[12] and to just a few years after the final ratification of the United States Constitution.

---

7. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796). Scholars have sometimes used "Arcambal" as an alternate spelling of *Archambel*, *see* THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 750 n.1 (Maeva Marcus et al. eds., 2003) [hereinafter DOCUMENTARY HISTORY]. This article uses the U.S. Reporter's spelling.

8. DOCUMENTARY HISTORY, *supra* note 7, at 750.

9. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS., Winter 1984, at 9.

10. DOCUMENT HISTORY, *supra* note 7, at 754.

11. 5 U.S. (1 Cranch) 137 (1803).

12. Judicial review is defined as "[a] court's power to review the actions of other branches or levels of government; esp., the courts' power to invalidate legislative and executive actions as being unconstitutional," *Judicial Review*, BLACK'S LAW DICTIONARY 349 (Pocket ed. 1996).

How did we get this rule? Why do we still have successful litigants bearing most of the expenses of vindicating themselves? Considering that we find our legal roots in the common law, why is this practice such a departure from our English counterparts? It all stems from that two-sentence ruling given as an ancillary footnote in a lawsuit about privateering, *Arcambel v. Wiseman*.[13] The lasting significance of this case established an important precedent that we still use today.

The facts from *Arcambel* are less widely known and understood than its legacy would imply; outside of legal academia, it is a case that no one knows, but it is a keystone to the way we practice law in America.

A. Arcambel and the Origins of the American Rule

The Spanish merchant vessel *Nuestra Señora del Carmen* arrived in Newport, Rhode Island, on August 19, 1795, as a vessel and cargo that was captured at sea by force during the war between France and Spain by the *Brutus*, a French privateer ship, commanded by Jean Antoine Gariscan, and it was therefore liable to be condemned or appropriated as enemy property.[14] The French viewed their "prize" as the spoils of war and set out to sell the ship and its cargo at auction. However, the Spanish did not exactly see eye-to-eye with the French on this issue. The agent of the ship, Spanish vice-consul Joseph Wisemen, libeled, or instituted a suit in admiralty court, regarding the *Nuestra Señora* in the federal district court of Rhode Island on August 25, 1795.[15]

The claim asserted that the *Brutus* had violated the Neutrality Act of 1794 because "the *Brutus* had been outfitted in Charleston for the purpose of committing hostilities against a nation with whom the United States was at peace."[16] Additionally, "the capture was contrary to the law of nations because no one on board the *Brutus* held a valid commission to privateer," and thus, "Wiseman asked that the court attach the *Nuestra Señora* and cargo pending its decree to posted a $4,000 bond (later increased to $12,000) to cover costs and damages if his libel failed," which was a move to prevent the auction from going through.[17] The district court judge allowed the libel and promptly seized the ship and its cargo.[18]

---

13. 3 U.S. (3 Dall.) 306, 306 (1796).

14. DOCUMENTARY HISTORY, *supra* note 7, at 750; *Prize*, BLACK'S LAW DICTIONARY, *supra* note 12, at 502.

15. *See Libel*, BLACK'S LAW DICTIONARY, *supra* note 12, at 378.

16. DOCUMENTARY HISTORY, *supra* note 7, at 750.

17. *Id.*

18. *Id.* at 750–51.

While awaiting trial, two claims to the *Nuestra Señora* were interposed, the first of which was by Louis Arcambel, the attorney acting on behalf of the French vice-consul.[19] He sought restoration of the "prize" to Gariscan, and then later asked for leave to amend and have the "prize" restored directly to him, as to not hold France liable for damages should his claim fail.[20] The second claim was made by chancellor John Jutau, "acting solely as agent for Gariscan and the crew of the *Brutus*."[21] Both "demanded that the libel be dismissed because the *Brutus* was a properly outfitted and commissioned privateer that had made its capture on the high seas at a time" when France and Spain were at war.[22] The court allowed both claims to be heard at trial.

Finally, the trial commenced on May 4, 1796, in which the judge ruled that there was insufficient evidence "to support the libel and ordered it dismissed."[23] However, "the *Nuestra Señora* and her extensive cargo had been sold at a court-ordered auction the previous January," and the judge awarded net proceeds of $72,000 to Arcambel and Gariscan jointly.[24] The court also "ordered Wiseman to pay the claimants $8,000 in damages as well as 'such Costs of the Court as shall be taxed by Law,' an amount assessed at $22.75."[25] Wiseman immediately appealed to the circuit court. Arcambel, not satisfied with sharing the proceeds with Gariscan, filed a cross-appeal.

The two appeals were argued on the same day before the same judge in federal circuit court. The circuit court affirmed the dismissal of libel and increased the total damages Wiseman owed to $9,328.82.[26] Arcambel also had to give his share of the net proceeds from the auction to Gariscan.[27] These damages had been itemized and attached to the court's decree.

Wiseman and Arcambel promptly sought review by the U.S. Supreme Court on separate writs of error. Wiseman appealed the affirmance of his original libel, and Arcambel appealed the circuit court's ruling to award all the net proceeds to Gariscan.[28]

---

19. *Id.* at 751.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 752.
24. *Id.*
25. *Id.*
26. *Id.* at 753.
27. *Id.*
28. *Id.*

"The main question in Wiseman's claim, the validity of the capture by the *Brutus*, was quickly disposed of,"[29] as evidence in another case confirmed the legitimacy of the French privateer. Arcambel's claim fell short as well.

After decisions had been made on the core of the competing claims, a question regarding two items on the list of damages arose on the circuit court's decree. "[T]he list also included an allowance of $400 apiece for two [attorneys] in the district court and two [attorneys] in the circuit court, for a total of $1,600."[30]

In 1793, Congress passed legislation that set attorney fees for practicing in federal district courts. Admiralty was set at three dollars per service and fees for attorneys in circuit courts "should be tied to the rates allowed in the respective state supreme courts."[31] The sums claimed in this case "were well in excess of any possible combination of the modest fees specified by law."[32] Counsel arguing on behalf of Wiseman objected to the costs, while counsel representing Gariscan claimed that "it might fairly be included under the idea of damages."[33] The Court's ruling was concise and definitive:

> We do not think that this charge ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to respect of the Court, till it is changed or modified, by statute.[34]

Thus, the American Rule was memorialized, officially replacing the English Rule.

B. The English Rule or "Loser Pays"

Under the English Rule, the prevailing party has their attorney fees and costs paid for by the losing party in every case.[35] Proponents of the English Rule argue that the rule has the potential to deter frivolous or unmeritorious lawsuits because, if facing such a lawsuit, a defendant has every incentive to litigate the case knowing she will almost certainly be able to recover her costs and fees from the opposing party, thereby discouraging a potential

29. *Id.*
30. *Id.* at 754.
31. *Id.*
32. *Id.*
33. *Id.* (quoting Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796)).
34. *Arcambel*, 3 U.S. (3 Dall.) at 306.
35. *English Rule*, BLACK'S LAW DICTIONARY, *supra* note 12, at 224.

plaintiff from bringing frivolous litigation in the first place.[36] Conversely, it is thought that "the American Rule encourages frivolous suits because the rule does not create an incentive to discontinue a lawsuit: the plaintiff does not have to pay anything except his or her own fees and costs in the event of a loss."[37] It would seem that the English Rule promotes good public policy, deterring wasteful litigation and a drain on increasingly scarce judicial resources.

Additionally, some argue that the English Rule reduces a party's incentive to drive up the opposing party's costs, particularly in the oft-abused discovery processes and motions practice, because the litigant faces the possibility of paying those costs in the event of a loss.[38] The greater risk that a party bears under the English Rule — particularly if that party's claims or defenses are weak — may be an effective and greater inducement to settle.[39]

Finally, the English Rule appears to truly "make whole" a successful litigant, restoring the party to the financial status prior to or "but for" the conduct of the malfeasance of the opposing party; whereas the American Rule penalizes the lawsuit's winner, despite his or her claim or defense being proven.[40] This argument is an appealing justification for the English Rule, particularly in tort law, where it has been asked "on what principle of justice can a plaintiff wrongfully run down on a public highway recover his doctor's bill but not his lawyer's bill?"[41] To many a prevailing party, victory in court has rung very hollow when their attorney's final bill arrives.

Critics of the English Rule, including early American Colonists, argued that the English Rule "was seen as stacking the deck against a poor plaintiff, who might have a good enough case, but might not be willing to gamble on a courtroom victory."[42] This poses a problem unique to this

---

36. *See* D. Rosenberg & S. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 5 (1985).

37. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1591 (1993).

38. *See id*.

39. Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 336 (2013).

40. Vargo, *supra* note 37, at 1591–92.

41. *Id.* at 1592 (quoting *First Report of the Judicial Council of Massachusetts*, 11 MASS. L.Q. 7, 64 (1925)).

42. Dale Marshall, *What Is The American Rule?*, WISEGEEK, https://www.wise-geek.com/what-is-the-american-rule.htm (Oct. 31, 2023).

rule: "If a plaintiff is afraid to bring suit because of limited resources that would be destroyed in the event of a loss, then justice has effectively been denied."[43] The English Rule thus appears to increase the risk to litigate by eliminating the buffer that, even if a litigant loses the case, at least she will not have to pay the winner's fees.

Some believe the American Rule has survived this long not because of an interest in justice, but ever since attorneys had "freed themselves from fee regulation and gained the right to charge clients what the market would bear[,] . . . the right to recover attorney fees from an opposing party became an unimportant vestige."[44]

In what would become a typical pattern throughout U.S. jurisdictions, California codified the American Rule in 1872 when it enacted Code of Civil Procedure Section 1021, which states in pertinent part that "[e]xcept as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties . . . ."[45] Since that time, the California legislature has enacted several statutory exceptions to the American Rule, and courts have relied on their "inherent equitable authority" to develop additional exceptions.[46]

C. Policy of the American Rule

The 1796 *Arcambel* decision did nothing to justify or explain the reasoning behind the American Rule, but courts have been "quite active in stating or inventing reasons for the rule that attorney fees could not be recovered as *damages*."[47] In the nineteenth century, several justifications for the rule were adopted: the objective value of legal services is difficult to determine;[48] a party's legal expenses are, to a certain extent, reflections of his or her own decisions regarding the litigation, for which the other party should not bear liability;[49] an opposing party's legal fees are too

43. *Id.*

44. Leubsdorf, *supra* note 9, at 9.

45. CAL. CIV. PROC. CODE § 1021 (West 2022); *see, e.g.*, Bruno v. Bell, 91 Cal. App. 3d 776, 781 (1979) ("The general American Rule, codified by California's Code of Civil Procedure section 1021 . . . .").

46. *See* Gray v. Don Miller & Assocs., 35 Cal. 3d 498, 505 (1984); Consumers Lobby Against Monopolies v. Pub. Utils. Comm'n, 25 Cal. 3d 891, 906 (1979); Serrano v. Priest, 20 Cal. 3d 25, 34 (1977). *See generally* RICHARD M. PEARL, CALIFORNIA ATTORNEY FEE AWARDS ch. 7 (Christopher D. Dworin ed., 2d ed. 1994).

47. Leubsdorf, *supra* note 9, at 23.

48. Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 230–31 (1872).

49. St. Peter's Church v. Beach, 26 Conn. 355, 365–67 (1857).

unforeseeable to be recovered.[50]

More recently, the U.S. Supreme Court has opined that "since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that 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."[51]

Whatever the opaque motive behind its adoption, there is no denying the relative permanence of the American Rule and the robust defense to its ongoing status as a fixture in American jurisprudence.

D. Lasting Legacy

In the decades and centuries since *Arcambel*, legislatures and the courts have carved out numerous exceptions to the American Rule, which will be the subject of the next section. Like the evidentiary rules against hearsay, there are so many exceptions to the American Rule that one wonders about the effectiveness of the rule in the first instance. Still, in most general civil cases and in nearly all tort litigation, the American Rule strictly applies.

III. LEGACY EXCEPTIONS TO THE AMERICAN RULE

It is an extremely common threat in civil litigation — a motion or request for an award of attorney fees upon prevailing in the case, often added almost as an afterthought to the end of a complaint in nearly every type of case — tort, business disputes and dissolutions, family law, and even estate disputes. In reality, an actual attorney-fee award at the end of successful litigation is uncommon, if not rare, in many types of cases. So much so that when attorneys see a request for attorney fees in the prayer for relief by an opposing party, much of the time, we consider it an empty threat and a remote risk.

The American Rule, however, is not without its limits, and there are cases where awards of attorney fees are not uncommon but are the default. This section focuses on the time-tested exceptions to the rule across jurisdictions.

While generally adhering to the American Rule, U.S. courts have long since recognized its flexibility and exceptions. Indeed, many attempts have been made over the years to either broaden its exceptions or abolish it altogether when legislators believed there were instances where fee-shifting

50. Stewart v. Sonneborn, 98 U.S. 187, 197 (1878).

51. Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967); *see also* Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964).

is appropriate to both encourage meritorious suits and defenses and discourage unmeritorious or frivolous claims and defenses. In a notable example spanning decades, federal legislation has been proposed to codify the abolition of the American Rule in specific tort litigation. For example, in "The Common Sense Product Liability and Legal Reform Act of 1995," the "loser pays" rule was included in the proposed federal tort reform legislation in order to discourage unmeritorious claims and defenses in product liability cases and encourage speedy resolution of those that are meritorious.[52] That legislation has failed to pass.

Therefore, until recently, the only enduring and general exceptions to the American Rule resulted from one of three circumstances in a case: "[a]s a general rule, attorney fees may be awarded only when they are authorized by statute or contract,"[53] and the courts recognize limited common-law exceptions to the American Rule. These three historical exceptions are discussed in this section.

A. Contracts

Contemporary contracts of all kinds provide that the defaulting party in a contract would be required to pay the reasonable attorney fees associated with the enforcement of the contract. Courts routinely and regularly enforce these provisions as written.

In this regard, the law in Utah is typical of many U.S. jurisdictions. "If the legal right to attorney fees is established by contract, Utah law clearly requires the court to apply the contractual attorney fee provision and to do so strictly in accordance with the contract's terms."[54] When applying contractual attorney-fee provisions, a court does not have and cannot act with the same equitable discretion to deny attorney-fee awards as it can when considering equitable remedies or statutory rights.[55]

If the attorney-fee clause in the contract does not provide for bilateral, mutually enforceable terms, but rather unilateral, one-sided terms, the Utah Code provides a remedy to ameliorate the situation for the party on the other side of that provision.[56] Utah Code Annotated Section 78B-5-826 permits an award of "costs and attorney fees to either party that prevails in

52. H.R. 1075, 104th Cong. (1995).

53. Fericks v. Lucy Ann Soffe Trust, 2004 UT 85, ¶ 23, 100 P.3d 1200.

54. Jonas v. Riche, 2009 UT App 196, ¶ 2, 216 P.3d 357.

55. *Id.*; *see also* Giusti v. Sterling Wentworth Corp., 2009 UT 2, 201 P.3d 966, 980 (noting that contractual attorney fees are awarded in "strict accordance with the terms of the contract").

56. UTAH CODE ANN. § 78B-5-826 (West 2023).

a civil action based upon any promissory note, written contract, or other writing executed after April 28, 1986, when the provisions of the promissory note, written contract, or other writing allow at least one party to recover attorney fees."[57]

Even when the underlying contract is found to be unenforceable, a successful litigant may recover attorney fees if that contract contained an attorney-fee provision.[58]

B. Historical Statutory Schemes

The *Arcambel* decision itself contemplates statutory deviations from the American Rule in its final phrase: "till it is changed or modified, by statute."[59]

Federal and state laws provide roughly two hundred historical statutory exceptions to the American Rule to encourage specific private litigation to implement and enforce public policy. A primary purpose of these statutes is to "equalize contests between private individual plaintiffs and corporate or governmental defendants."[60] It is impossible in this forum to have a meaningful exposition of all of these numerous historical statutory exceptions to the American Rule. Rather, we will focus on several that are of broader interest and significance.

Although these statutory exceptions are very common across jurisdictions, the authors reside and work in the Intermountain West and the Northeast. Thus, the statutory references here will focus on those regions of the United States.

Family Law: The Utah Code provides that in a divorce or "any action to establish an order of custody, parent-time, child support, alimony, or division of property in a domestic case, the court may order a party to pay the costs, attorney fees, and witness fees, including expert witness fees," for the opposing party "to prosecute or defend the action," and "[t]he order may include provision for costs of the action."[61] Additionally, the same statute provides for attorney-fee awards in enforcement actions and temporary support proceedings.[62]

According to New York Domestic Relations Law, a judge can order

57. *Id.*

58. Bilanzich v. Lonetti, 2007 UT 26, ¶ 16, 160 P.3d 1042.

59. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796).

60. HENRY COHEN, CONG. RSCH. SERV., 94-970, AWARDS OF ATTORNEYS' FEES BY FEDERAL COURTS AND FEDERAL AGENCIES summ. (2008).

61. UTAH CODE ANN. § 30-3-3(1) (West 2023).

62. *Id.*§ 30-3-3(3).

either spouse to pay the other spouse's legal fees as well as expert fees in order for them to be able to pursue and defend the divorce action.[63] The court must consider the facts of the case and the circumstances of the parties when allocating such fees in order to ensure that each spouse is adequately represented. An award of attorney fees is discretionary and not required.[64]

Note that the award of attorney fees is not contingent upon "prevailing" in the domestic relations litigation, which is typical of these statutes across jurisdictions. For example, Texas law likewise allows a court to allocate one party's reasonable legal fees for prosecuting or defending a divorce action to the other party, irrespective of the final disposition of the case.[65]

Consumer Protection (Marketing): States have broadly enacted statutes to protect consumers from specific prohibited practices — mostly in marketing and advertising — and those statutes routinely incorporate attorney-fee provisions for a successful consumer-litigant.[66] The Utah Consumer Sales Practices Act (UCSPA) prohibits all kinds of unconscionable and deceptive practices in commerce (false or misleading advertising, bait-and-switch sales practices, *inter alia*), with the explicit authorization of class actions to enforce the provisions of the Act.[67] The UCSPA stipulates that any "judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation."[68] Similarly, in New York, the Consumer Protection Law Section 20-700 provides: "[n]o person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental, or loan or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts" and provides those successful litigants with an award of attorney fees and costs.[69]

Federally Protected Rights: In litigation concerning all kinds of rights protected under federal law, the U.S. Code permits attorney-fee awards to

63. N.Y. DOM. REL. LAW § 237 (McKinney 2023).

64. *See Attorney's Fees*, N.Y.C. BAR, https://www.nycbar.org/get-legal-help/article/family-law/divorce/attorneys-fees-and-expert-fees/ (last visited Mar. 19, 2024).

65. TEX. FAM. CODE ANN. § 6.708 (West 2023).

66. *See, e.g.*, UTAH CODE ANN. § 13-11-1 (West 2023).

67. UTAH CODE ANN. § 13-11-1 *et seq.* (West 2023).

68. UTAH CODE ANN. § 13-11-17.5 (West 2023).

69. N.Y.C. ADMIN. CODE § 20-700.

the prevailing party, often including suits against governmental entities that generally enjoy sovereign immunity.[70] Notably, the Civil Rights Act of 1964 roundly grants courts discretion to award attorney fees to the prevailing party in litigation regarding Public Accommodations and Facilities,[71] Equal Employment Opportunities,[72] Fair Housing,[73] Fair Labor Standards,[74] Age Discrimination,[75] Equal Credit Opportunity,[76] Voting Rights,[77] Americans with Disabilities,[78] Civil Rights,[79] and a myriad of others. Broadly, the Equal Access to Justice Act passed in 1980 waives some sovereign immunity and permits attorney-fee awards in specific agency adjudications and all civil actions (except in tort and tax cases) brought by or against the United States.[80] While there is no theoretical maximum attorney-fee award under the applicable statutes, the awards are calculated on an hourly basis at the rate of $125 per hour.[81]

Parenthetically, the Internal Revenue Code in 26 U.S.C. § 7430 permits the IRS and federal courts to grant an award of attorney fees in cases in which the government fails to establish that its case was substantially justified up to a statutory hourly amount ($125 per hour).[82]

Situational Statutory Provisions: States routinely codify oddly specific and situational statutory provisions for attorney fees based upon public policies that legislatures are attempting to advance. For example, Utah law provides several industry-specific attorney-fee statutes.[83] If a contractor fails to pay for work performed by subcontractors or suppliers, "reasonable costs of any collection and attorney's fees" incurred in the collection of such sums are also due to the subcontractor.[84] Attorney fees and costs are

70. *See* 42 U.S.C. § 2000a-3(b).

71. 42 U.S.C. §§ 2000a-3(b), 2000b-1; *see also* Barbara Stark, *Pennies From Heaven: An Expanded Theory of Entitlement for State Court Claimants Under the Civil Rights Fee-Shifting Statutes*, 30 SANTA CLARA L. REV. 505, 505 n.2 (1990).

72. 42 U.S.C. § 2000e-5(k).

73. 42 U.S.C. § 3613(c)(2); *see also* Stark, *supra* note 71, at 505 n.2.

74. 29 U.S.C. § 216(b).

75. 29 U.S.C. § 626(b).

76. 15 U.S.C. § 1691e(d).

77. 52 U.S.C. § 20105(c); *see also* Stark, *supra* note 71, at 505 n.2.

78. 42 U.S.C. § 12205.

79. 42 U.S.C. § 1988.

80. 28 U.S.C. § 2412(b), (d); 5 U.S.C. § 504.

81. 28 U.S.C. § 2412(d)(2)(A)(ii); 5 U.S.C. § 504(b)(1)(A).

82. *See* 26 U.S.C. § 7430.

83. *See* UTAH CODE ANN. § 78B-5-825 (West 2023).

84. UTAH CODE ANN. § 58-55-603(2) (West 2023).

also available in actions to abate or enjoin nuisances, like known drug, gambling, or prostitution houses.[85] One of the most prolific sources of attorney-fee law in New York is landlord-tenant litigation. A select few statutes grant attorney fees in specific circumstances: a successful tenant in a landlord-tenant case may recover attorney fees if the lease would otherwise allow the landlord to do so if successful;[86] successful claimants are awarded attorney fees in cases of housing discrimination against victims of domestic violence;[87] prevailing victims are also granted attorney fees in cases of discrimination against children in housing;[88] and prevailing tenants are awarded attorney fees when a landlord has unreasonably withheld consent to a residential subletting.[89] There are hundreds of these specific situational attorney-fee provisions riddled throughout state laws in the United States.

On the federal side, Congress has passed laws over the years to protect certain industries and penalize litigants who, despite those protections, sue manufacturers and suppliers anyway. Recently, and in light of several mass shootings, the Protection of Lawful Commerce in Arms Act (PLCAA) has received considerable headlines.[90] The law is intended to protect firearm manufacturers and dealers from liability when crimes are committed with their products.[91] In *Phillips v. Lucky Gunner, LLC*,[92] a federal district court ruled that federal and state immunity statutes prohibit the claims of liability of a retailer on the sale of ammunition.[93] The lawsuit was brought on behalf of the decedent Jessica Ghawi by her parents against several web-based businesses (two web-based ammunition vendors, Lucky Gunner, LLC, and The Sportsman's Guide, as well as suppliers of various tactical gear) from whom James Holmes purchased materials. In 2015, Holmes was convicted for the mass murder committed in a movie theater in Aurora, Colorado, during the showing of the movie *The Dark Night,* which resulted in the death of Jessica and eleven other victims.[94] Brady Center lawyers representing the family members alleged that the internet business

85. UTAH CODE ANN. § 78B-6-1114 (West 2023).
86. N.Y. REAL PROP. LAW § 234 (McKinney 2023).
87. N.Y. REAL PROP. LAW § 227-d (McKinney 2023).
88. N.Y. REAL PROP. LAW § 237-a (McKinney 2023).
89. N.Y. REAL PROP. LAW § 226-b (McKinney 2023).
90. Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901–03.
91. 15 U.S.C. § 7901(b).
92. 84 F. Supp. 3d 1216 (D. Colo. 2015).
93. *Id.* at 1228.
94. *Id.* at 1220.

practices of the Federal Firearm Licensees did not include "reasonable safeguards" to prevent persons such as Holmes from purchasing their products.[95] The judge dismissed the case because web-based businesses have special immunity from the general duty to use reasonable care under the PLCAA, which generally prohibits claims against firearm and ammunition manufacturers, distributors, dealers, and importers for damages and injunctive relief arising from the criminal or unlawful misuse of firearms and ammunition, unless the suit falls within one of six enumerated exceptions.[96] Plaintiffs attacked the constitutionality of the PLCAA and failed as "every federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional."[97] The judge ordered that plaintiffs' claims as to all defendants and the civil action be dismissed. Pursuant to separate state-law protections, Colorado Revised Statutes Section 13-21-504.5, the defendants Lucky Gunner, LLC, and The Sportsman's Guide were entitled to an award of reasonable attorney fees of over $200,000.00.[98]

Bad faith litigation: Many states have enacted seemingly potent statutes designed to limit and actively discourage bad-faith litigation. This provision from the Utah Code is a representative example:

> (1) In civil actions, the court shall award reasonable attorney fees to a prevailing party if the court determines that the action or defense to the action was without merit and not brought or asserted in good faith, except under Subsection (2).
>
> (2) The court, in its discretion, may award no fees or limited fees against a party under Subsection (1), but only if the court:
>
> (a) finds the party has filed an affidavit of indigency . . . in the action before the court; or
>
> (b) the court enters in the record the reason for not awarding fees under the provisions of Subsection (1).[99]

The applicable burden of proof is high. "Good faith is defined as having '(1) [a]n honest belief in the propriety of the activities in question; (2) no

95. *Id.*

96. *Id.* at 1223–24, 1227–28.

97. *Id.* at 1222; *see also* Ileto v. Glock, Inc., 565 F.3d 1126, 1138–42 (9th Cir. 2009); City of New York v. Beretta U.S.A. Corp., 524 F.3d 384, 392–98 (2d Cir. 2008); Estate of Kim *ex rel.* Alexander v. Coxe, 295 P.3d 380, 388–92 (Alaska 2013); District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163, 172–82 (D.C. 2008); Adames v. Sheahan, 909 N.E.2d 742, 764–65 (Ill. 2009).

98. *See* COLO. REV. STAT. § 13-21-504 (2022), *repealed by* S.B. 23-168, 73d Gen. Assemb., Reg. Sess. (Colo. 2023); *see also* Phillips v. Lucky Gunner, LLC, 84 F. Supp. 3d 1216 (D. Colo. 2015).

99. UTAH CODE ANN. § 78B-5-825 (West 2023).

intent to take unconscionable advantage of others; and (3) no intent to, or knowledge of the fact that the activities in question will hinder, delay, or defraud others.'"[100] "To prevail in a 'bad faith' claim, "a party must prove that one or more of these factors is lacking."[101] There are surprisingly few published cases in the last thirty years wherein this statute (or its predecessor before the code revision, Utah Code Annotated Section 78-27-56) is applied and an award of attorney fees is upheld; most of the time, any award of attorney fees under this statute is either disallowed or reversed, leaving us to conclude that attorney-fee awards under this statute are disfavored and rare.

Similarly, the New York Code sanctions similar conduct, framing the prohibition as against "frivolous" litigation instead of bad faith. Without defining "frivolous litigation," a court "may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct."[102] Further, "the court, in its discretion may impose financial sanctions upon any party or attorney [or both] in a civil action or proceeding who engages in frivolous conduct."[103]

Many states have likewise enacted a variety of "Vexatious Litigant" rules designed to discourage litigants that repeatedly file unmeritorious lawsuits. The rules typically allow a court to require that the plaintiff post a bond or security to cover the attorney fees and costs of the defendant *upon* or *soon after* the case is filed with the Court.[104] The actual awards of attorney fees in these cases are not presumptive, but the rule specifically permits a defendant to request by motion the release and payment of attorney fees and costs as part of the relief requested.

C. Common-Law Exceptions

Courts recognize two major exceptions to the American Rule based in the common law, or in other words, instances when courts may award attorney fees without statutory authorization. Those exceptions are the common-benefit doctrine and the bad-faith doctrine.[105] The Utah Supreme

100. *In re* Discipline of Sonnenreich, 2004 UT 3, 86 P.3d 712, 726 (citation omitted).

101. *Id.* (citation omitted).

102. N.Y. COMP. CODES R. & REGS. tit. 22, § 130-1.1(a) (2023).

103. *Id.*

104. CAL. CIV. PROC. CODE § 391.7 (West 2023).

105. *See* UTAH CODE ANN. § 78B-5-825 (West 2023).

Court, for instance, has held that "in the absence of a statutory or contractual authorization, a court has inherent equitable power to award reasonable attorney fees when it deems it appropriate in the interest of justice and equity."[106] In *Stewart*, the Utah Supreme Court outlined the unique circumstances where a court might exercise this inherent equitable power, including when a party acts in bad faith, vexatiously or for oppressive reasons, when a nonparty class is benefitted from the results of the successful litigants that brought the action, and "private attorney general" cases when the "vindication of a strong or societally important public policy" occurs and the costs of so doing transcend the plaintiff's own interests.[107] The Court found that the plaintiffs had conferred substantial benefits on utility ratepayers that they did not represent and awarded the plaintiffs a reasonable attorney fee, despite the lack of statutory or contractual provision for such an award. The application of these exceptions is based in the inherent regulatory powers of the courts over themselves but are, admittedly, rare and confined to certain types of cases where broader societal interests are at issue.

IV. EXPERIMENTS IN TINKERING WITH THE AMERICAN RULE

Notably, a few states have attempted to cast off the American Rule and adopt some version of the loser-pays rule.

Texas law establishes that motions to dismiss may be filed in civil actions and adopts a loser-pays rule for these motions.[108] The prevailing party, whether a motion to dismiss is granted or denied in part or in full, is entitled to "costs and reasonable and necessary attorney's fees."[109] The original version of the law differs to that of the version in effect today. The original version contained a true loser-pays provision that would have allowed prevailing parties in lawsuits to recover costs and attorney fees from losing parties, but in committee, this practice was modified to the narrow application of only motions to dismiss.[110] According to Walker Friedman, chairman of the State Bar of Texas Litigation Section, "The way the bill was initially written was a different matter. But the way that

106. Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 782 (Utah 1994).

107. *Id.* at 782–83 (quoting Serrano v. Priest, 20 Cal. 3d 25, 45 (1977)).

108. *See* H.B. 274, 82nd Leg. (Tx. 2011).

109. *Id.*; *see also* Robert L. Willmore, *Is the US Looking Across the Pond?; Texas Enacts Tort Reform Law with "Loser Pays" Provision*, CASETEXT (July 20, 2011), https://casetext.com/analysis/is-the-us-looking-across-the-pond-texas-enacts-tort-reform-law-with-loser-pays-provision.

110. Willmore, *supra* note 109.

ultimately the issues were resolved — I don't think there's going to be a tremendous, overwhelming effect on lawyers."[111]

Florida adopted a loser-pays law in 1980, but by 1985, it was completely repealed.[112] In 1980, to rectify what was seen as abusive litigation against medical professionals, the Florida state legislature adopted a loser-pays rule solely for medical-malpractice lawsuits with the intention to combat the rise in medical-malpractice insurance rates.[113] Their hope was to reduce the rates of this type of litigation and, in turn, lower the insurance premiums paid by the doctors and hospitals in defending against such claims. Quickly, however, issues arose with this new system.[114] Consider for a moment that an averagely situated plaintiff brings a lawsuit against a doctor for malpractice and the plaintiff loses, and the plaintiff is ordered under this law to pay all the defendant's attorney fees (perhaps tens to hundreds of thousands of dollars). Could the plaintiff pay them? On the other hand, could the doctor or his insurer pay a successful plaintiff's attorney fees in addition to a damage award? Unfortunately, the frequency of the inability to pay for either side was too common and too great, and all sides lobbied for repeal of the loser-pays law. By 1985, this experiment was nothing but a blip on the radar and a cautionary tale to all those who were seeking to do the same.[115]

Alaska has long been considered the only state in the U.S. that has followed a broader "loser pays" rule, "but it actually follows a limited version of the system that permits only modest recovery of fees and is riddled with exceptions."[116] Depending on a variety of factors, a prevailing party is limited to seek recovery ranging from one percent to thirty percent, a relatively small portion to the overall expenditures.[117] A judge has discretion to invoke any one of ten exceptions on a case-by-case basis in order not to award fees; however, the final and most impactful statutory exception to the loser-pays rule is a "catch-all" provision that permits the court to reduce or to not award attorney fees due to "other equitable factors

111. *Id.*

112. Marie Gryphon, *Other Contingencies: Reconsidering "Loser Pays,"* MO. MED., Jan.–Feb. 2010, at 10, 13.

113. *See id.*; *see also* FLA. STAT. § 768.56 (1981).

114. Gryphon, *supra* note 112, at 13.

115. *Id.*

116. Victor Schwartz & Cary Silverman, *Who Pays When the "Loser Pays"? Considering Practical Issues, Misperceptions and Options*, ALEC (Apr. 22, 2012), https://www.alec.org/article/who-pays-when-the-loser-pays-considering-practical-issues-misperceptions-and-options/.

117. *Id.*

deemed relevant."[118] Even though touted as the only state that follows the loser-pays system, an empirical study of the law conducted by the Alaska Judicial Council concluded that a loser-pays law "seldom plays a significant role in civil litigation."[119]

Although some states have tried to adopt variations of the loser-pays rule mostly within narrow constraints, the United States Supreme Court confirms the American Rule "remains the norm, unless a statutory or contractual exception applies."[120] In December 2019, the U.S. Supreme Court decided three cases[121] based on the Patent Act: 35 U.S.C. §§ 145 and 285, each solidifying that the "American Rule still rules the day" and that "appellate courts will continue to ensure that awards of fees properly fall within a statutory exception to the presumption against fee awards, . . . and will be upheld when warranted by the totality of the circumstances."[122]

On the chance that a case merits an award of attorney fees through any of the noted exceptions, the formalities of the applicable and varied rules of civil procedure must still be observed and additional thorny issues must be addressed, including the necessity of the work described, adequacy of such descriptions, privilege and potential for waiver, and the effect of contingency agreements, among others.[123] If a party is awarded attorney fees by statute, contract, or other common-law exception that provides for such an award, litigants are still on your journey and not at your destination.

---

118. *Id.* (quoting State v. Native Vill. of Nunapitchuk, 156 P.3d 389, 405 (Alaska 2007)).

119. *Id.* (quoting DI PIETRO ET AL., ALASKA JUDICIAL COUNCIL, ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES (1995)).

120. Robert L. Maier, *Recent Takes from the Supreme Court and Federal Circuit on Attorney Fees Awards in Patent Cases*, LAW.COM (Jan. 21, 2020, 10:37 AM), www.law.com/newyorklawjournal/2020/01/21/recent-takes-from-the-supreme-court-and-federal-circuit-on-attorney-fees-awards-in-patent-cases/?slreturn=20200312130227.

121. *See generally* Peter v. NantKwest, Inc., 140 S. Ct. 365 (2019); Blackbird Tech LLC v. Health In Motion LLC, 944 F.3d 910 (Fed. Cir. 2019); Intell. Ventures I LLC v. Trend Micro Inc., 944 F.3d 1380 (Fed. Cir. 2019).

122. Maier, *supra* note 120 (citing the Supreme Court's recent take on the law in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 554 (2014), in which the Court repeated that an exceptional case "is simply one that stands out from others with respect to the substantive strength of a party's litigating position . . . or the unreasonable manner in which the case was litigated").

123. *See, e.g.*, FED. R. CIV. P. 54; UTAH R. CIV. P. 73; *see also* Andre Regard & Ivey Workman, *Collecting Attorney Fees*, ABA (July 31, 2019), https://www.https://www.americanbar.org/groups/litigation/resources/newsletters/consumer/collecting-attorney-fees/.

V. CONTEMPORARY DISTORTIONS OF THE AMERICAN RULE

A. Cost-Shifting Government Regulation

There are more than 200 federal and over 2,000 state statutes that permit the shifting of fees, making this exception to the "American Rule" perhaps the most significant.[124] "Fee shifting statutes can be divided into four main categories: 1) civil rights suits; 2) consumer protection suits; 3) employment suits; and 4) environmental protection suits."[125] Many of these categories we have discussed above. One commentator has suggested that "Congress has allowed these categories of statutes because they compel a higher public purpose, and therefore, successful lobbying litigants should not shoulder the cost of advancing American public policy, particularly when their victory may not result in a monetary reward."[126]

Although a few statutes allow for a two-way shift (basically the "loser pays" rule), where the losing party, whether the plaintiff or the defendant, is required to pay the opponent's legal fees, most legislation uses a one-way shift, where only the successful plaintiff is entitled to recover attorney fees through statute.[127] The mere fact that one-way or two-way fee-shifting laws exist suggests that the "American Rule" is being questioned and is crumbling, but it does not necessarily imply a speedy move to the "loser pays" rule. This is true whether one-way or two-way fee-shifting laws are or are not enforced.[128]

To advance policy and at the same time lighten the burden of enforcing compliance, legislatures and governmental agencies are empowering private litigants and attorneys to enforce regulations against businesses by using the lure of attorney fees to shift the legal costs for compliance and regulatory enforcement to the private sector.

i. Private Attorneys General Act

The Private Attorneys General Act (PAGA) is legislation unique to California that enables employees to sue their employers for violations of state labor laws with the goal of enforcing labor standards and preventing

124. David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule*," 15 IND. INT'L & COMP. L. REV. 583, 588 (2005).

125. *Id.* (footnotes omitted).

126. *Id.* (footnote omitted).

127. *Id.*

128. *Id.* at 588–89.

unlawful employment practices.[129] It enables employees to file claims on the California Attorney General's behalf for labor violations against a current or former employer. The litigant-employees and their legal counsel function as "private attorneys general" and have the same civil enforcement powers as a governmental agency.[130]

Prior to PAGA, the bulk of wage and hour violations could only be enforced by the California Division of Labor Standards Enforcement (DLSE), acting on behalf of the wronged workers.[131] In response to longstanding dissatisfaction with the DLSE's administrative process, which was slow and ineffective due to ongoing and worsening shortages of funding and staff, the legislature created the PAGA statutory scheme to permit employees to sue their employer without having to rely on agency action to settle their claims.[132]

Enacted in 2004 as an amendment to California's Labor Code, the law came as a result of state agencies' perceived inability to ensure employer compliance with California's labor laws (predominately wage and hour enforcement).[133] Before PAGA, California's Labor Code gave the California Labor Commissioner exclusive authority to enforce labor laws, including the power to assess and collect civil penalties for violations. PAGA expanded this authority by allowing employees to sue their employers for labor code violations and collect civil penalties on behalf of themselves, other employees, and the state.[134]

A unique feature of PAGA is its one-way attorney-fee provision: a successful litigant-employee is guaranteed an award of attorney fees against their employer. If an employee prevails in a lawsuit against their employer, they can recover their reasonable attorney fees and costs. In addition to the damages and penalties that are applicable to each employee, an employee who wins a PAGA claim may also be entitled to attorney fees and expenses.[135] However, if the employee does not prevail, they are not

129. Kim v. Reins Int'l Cal., Inc., 459 P.3d 1123, 1127, 1130–31 (Cal. 2020).

130. *Private Attorney General Act — PAGA Claims in California*, SHOUSE CAL. L. GRP. [hereinafter *PAGA Claims in California*], https://www.shouselaw.com/ca/labor/paga-claims/ (last visited Mar. 20, 2024).

131. BAKER & WELSH, LLC, CALIFORNIA PRIVATE ATTORNEYS GENERAL ACT OF 2004: OUTCOMES AND RECOMMENDATIONS 2 (Mar. 2021), https://www.cabia.org/app/uploads/CABIA-PAGA-Study-Final.pdf.

132. *Id.*

133. *PAGA Claims in California*, *supra* note 130; *see* CAL. LAB. CODE § 2699(a) (West 2023).

134. CAL. LAB. CODE § 2699(a) (West 2023).

135. *Private Attorney General Act of 2004 (PAGA)*, L. OFFS. SCOTT ERNEST WHEELER, https://www.scottwheelerlawfirm.com/employment-law/private-attorney-

responsible for the employer's attorney fees. This provision was included in PAGA to ensure that employees had access to legal representation in enforcing labor laws and to incentivize private attorneys to take on PAGA cases.[136] The policy behind this one-way provision is leveling the playing field between employers and employees by reducing the financial risk of bringing a PAGA claim.[137]

Since its enactment in 2004, PAGA has been a powerful tool for employees to enforce labor laws and recover civil penalties for labor code violations. PAGA has been used to address a wide range of labor code violations, including failure to pay minimum wage, failure to provide meal and rest breaks, and failure to provide accurate wage statements.[138]

An employer's exposure to PAGA claims is relatively significant.[139] According to a 2017 study, over 20,000 lawsuits against employers were filed under PAGA over the course of the previous five years, with the average cost to the employer being over $1.1 million.[140] By enabling employees to pursue offenses that the state enforcement agencies are unable to take on themselves due to a lack of resources, PAGA appears to improve the enforcement of the California Labor Code. Although it is arguable whether it achieves that goal, it is undeniably a significant source of income for employee-side employment attorneys, who receive fees that account for thirty-three percent or more of the workers' overall recovery, or on average more than $372,000 [141] or $405,000 per case,[142] depending on who is doing the counting. PAGA presents an occasionally insurmountable barrier for employers who are frequently compelled into settlements because the cost of defending the claims is so high.[143] Further, PAGA is exempt from both class certification requirements and arbitration agreements.[144]

---

general-act-of-2004-paga-/ (last visited Mar. 20, 2024).

136. Arias v. Superior Ct., 209 P.3d 923, 929–30 (Cal. 2009).

137. CAL. LAB. CODE § 2699(g)(1) (West 2016).

138. *See Arias*, 209 P.3d at 929–30; *see also* Kim v. Reins Int'l Cal., Inc., 459 P.3d 1123, 1127, 1130–31 (Cal. 2020).

139. *Private Attorney General Act of 2004 (PAGA)*, *supra* note 135.

140. Marissa Alguire et al., *A Look Back at 2021 for Califonria's Private Attorneys General Act, and What to Expect in 2022*, AKERMAN: HR DEF. BLOG (Feb. 1, 2022), https://www.hrdefenseblog.com/2022/02/a-look-back-at-2021-for-californias-private-attorneys-general-act-and-what-to-expect-in-2022/.

141. *Id.*

142. BAKER & WELSH, LLC, *supra* note 131, at 8.

143. Alguire et al., *supra* note 140.

144. *Id.*

As long as the employee encountered at least one of the Labor Code infractions mentioned, "regardless of whether the employee experienced other alleged violations in the same complaint," PAGA permits a current or former employee to bring legal action on behalf of other "aggrieved employees."[145] Because PAGA is exempt from class certification requirements, there has not been a "gatekeeper" position to ensure that these representative claims can be decided based on the representative employee's claims without having to get into a variety of specific concerns.[146] This has had the practical result of subjecting businesses defending against PAGA claims to astronomical discovery costs early on in the case, even before it has been established whether the claims can be tried in a fair and efficient way.[147]

The huge gap in award amounts between agency-decided cases and PAGA court cases is greatly exacerbated by the fact that attorney fees are not granted in cases decided by the California Labor and Workforce Development Agency (LWDA).[148]

Employees may still seek redress through agency action, but PAGA introduced a new set of fines that were split into two accounts: twenty-five percent would go to employees, and the remaining seventy-five percent would go to the state.[149] The prospect for a larger recovery encouraged employees and their attorneys to pick the court alternative, and it is possible that increased state revenue was a key factor in the legislature's and governor's adoption of PAGA.[150] The LWDA receives seventy-five percent of any civil penalty recovered in a PAGA case with the aggrieved employees typically keeping twenty-five percent.[151] The offended employee may also file separate lawsuits for penalties that are legally recoverable.[152]

At present, PAGA remains an important tool for employees to seek redress for their employers' labor-related violations, and it is likely to continue to be used in California and other states with similar laws. It is worth noting that the U.S. Supreme Court's recent conservative shift may lead to future challenges to PAGA's constitutionality or application.

145. *Id.*
146. *Id.*
147. *Id.*
148. *See* BAKER & WELSH, LLC, *supra* note 131, at 8.
149. *Id.* at 2.
150. *Id.*
151. *Private Attorney General Act of 2004 (PAGA)*, *supra* note 135.
152. *Id.*

PAGA's critics deride the business environment it created: despite having the best of intentions, PAGA has turned into a toxic legal practice, which has led to plaintiffs' lawyers extorting money from companies of all sizes, sometimes amounting to hundreds of millions of dollars, much of which is attorney fees. Because PAGA did not require plaintiffs to demonstrate how their claims were shared by other employees, which is required by the mechanism for class actions, or even that they suffered the same violations as other employees, there were almost no legal safeguards that could have prevented such abuse.[153] In particular, some critics of PAGA argue that it grants plaintiffs as "private attorney generals" overly broad powers to pursue claims on behalf of the state, and that it undermines federalism by allowing state law to override federal arbitration agreements.

ii. Food for Thought: Product Liability and Deceptive Trade Practices

An attorney fee award for a successful consumer plaintiff was typically not permitted under the American Rule because those actions traditionally were grounded in tort liability theories. Because of this, even successful plaintiffs were required to bear their own legal costs, which often decreased their net recovery to an amount below their actual losses.[154] Opportunities to level the playing field in litigation were likewise limited. In the states that allowed for them, punitive damages judgments were completely discretionary under the common law, and the rules controlling them were not uniform and doled out on case-by-case basis. As a result, judgments and award amounts were not guaranteed. Therefore, the threat of such a judgment was unavailable to induce settlement or prevent dishonest behavior in those states that did not recognize common law punitive

153. David L. Cheng, *California Employers Receive a Big Win with SCOTUS PAGA Decision*, FORD HARRISON (June 16, 2022), https://www.fordharrison.com/california-employers-receive-a-big-win-with-scotus-paga-decision ("In 2014, the state supreme court held that employers could not avoid being sued under PAGA by seeking arbitration agreements with representative action waivers from their employees."). In an 8-1 decision the United States Supreme Court on June 15, 2022, held that a state court ruling, which had previously prevented California employers from compelling individual arbitration of an employee's claims under PAGA was preempted by the Federal Arbitration Act, *id*. "That state court ruling, *Iskanian v. CLS Transportation*, remained the law until the U.S. Supreme Court intervened," *id.* (citing 327 P.3d 129 (Cal. 2014)).

154. Michael C. Gilleran, *The Rise of Unfair and Deceptive Trade Practice Act Claims*, ABA (Oct. 17, 2011), https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/articles/2011/rise-unfair-deceptive-trade-practice-act-claims/.

damages.[155] Before the introduction of contemporary consumer protection laws, deceptive trade practice regulations were historically adopted as a statutory reaction to aid in balancing the unfair advantage that merchants and manufacturers typically enjoyed at the expense of consumers.[156] *Caveat emptor*, or "let the buyer beware," was the accepted maxim in trade until the 1960s, when the government's role in private commerce was reevaluated.[157] Some form of "Unfair and Deceptive Practice Laws" (UDPL) was enacted in most states to rectify this perceived imbalance of power and to replace *caveat emptor* as the prevailing status of the law.[158] UDPLs typically mandate full disclosure of all relevant facts, allowing consumers to evaluate transactions realistically, make educated decisions, and recoup attorney fees in successful litigation to enforce the law.[159] As described at the beginning of this article, plaintiff-side litigation against businesses of all sizes under UDPL statutes has become a burgeoning practice in its own right.

As a substantive matter, a UDPL eliminates the "intent" element, a key factor in proving a fraud case, thereby lowering the standard of proof, and making it easier for a plaintiff to receive a favorable judgment.[160] To incentivize meritorious litigation, UDPLs "provide for a mandatory or discretionary award of attorney fees to a prevailing plaintiff."[161] As a result, a victorious plaintiff would at least receive a net recovery equivalent to its actual damages.[162] In addition, there is no threat to the plaintiff making these claims should they lose, as they do not have to pay the defendant's legal fees. Only the defendant must pay the other side's attorney fees should the plaintiff prevail.

Since the inception of these laws, there has been a consistent rise in consumer protection litigation, and data show that consumers reported losing more than $5.8 billion to fraud in 2021, an increase of more than

155. *Id.*

156. Andrew E. Sattler & Jeffrey D. Sattler, *A Business Consumer's Advantage: The DTPA's Role in Small Business Litigation*, J. CONS. & COM. L., Fall 2021, at 43, 43.

157. *Id.*

158. *See* Carolyn Carter, *Maps: How Well Do States Protect Consumers?*, NCLC (Mar. 1, 2018), https://www.nclc.org/resources/maps-how-well-do-states-protect-consumers/ (showing a map that identifies states that broadly prohibits deceptive trade practices).

159. *See* Sattler & Sattler, *supra* note 156, at 43; *see also id.*

160. Gilleran, *supra* note 154.

161. *Id.*

162. *Id.*

seventy percent over the previous year.[163] This trend most likely can be attributed, at least in part, to the fact that most consumer protection statutes allow for the recovery of attorney fees by the prevailing party.[164]

Unsurprisingly, many recent cases involving UDPLs target claims made in the food and health industries. A duo of California cases focused on false and misleading claims, one about the health benefits of YoPlus yogurt,[165] and the other involving GNC engaging in deceptive trade practices by selling vitamin C supplements that contained less vitamin C than advertised.[166] The baby food company, Gerber, was sued in federal court for making false and misleading claims about the health benefits of its food products.[167] Claims were also brought against General Mills for engaging in deceptive trade practices by falsely advertising that its Nature Valley granola bars were "100% natural" when they contained highly processed and genetically modified ingredients,[168] and FritoLay contested claims made in New York that it engaged in deceptive trade practices by falsely advertising that its Tostitos and SunChips were made with "All Natural" ingredients when they contained genetically modified corn and vegetable oils.[169] The snack food giant, Mondelēz International, which owns Nabisco, Oreo, Ritz, and a multitude of legacy brands, was sued in the Southern District of California for engaging in deceptive trade practices by falsely advertising that its belVita breakfast biscuits were a "nutritious"

163. Press Release, FTC, New Data Shows FTC Received 2.8 Million Fraud Reports from Consumers in 2021 (Feb. 22, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/02/new-data-shows-ftc-received-28-million-fraud-reports-consumers-2021-0 (stating that since there is no centralized database or reporting system for instances involving deceptive trade practices and attorney fee awards, it is difficult to offer precise numbers).

164. Gilleran, *supra* note 4 ("Some states also require that attorney fees be awarded to a party who has successfully sought injunctive relief for a violation of a [Unfair and Deceptiove Trade Practice Act]."); *see, e.g.*, Thorsen v. Durkin Dev., LLC, 20 A.3d 707 (Conn. App. Ct. 2011); Airflo A/C & Heating v. Pagan, 929 So. 2d 739 (Fla. Dist. Ct. App. 2006).

165. The lawsuit alleged that General Mills engaged in deceptive trade practices by claiming that the yogurt could boost immunity and regulate digestive health, Johnson v. Gen. Mills, Inc., 275 F.R.D. 282, 285 (C.D. Cal. 2011). The case eventually settled for 8.5 million, *see* Johnson v. Gen. Mills, Inc., No. SACV 10-00061-CJC(ANx), 2013 WL 3213832, at *1 (C.D. Cal. June 17, 2013).

166. Arora v. GNC Holdings, Inc., No. 19-cv-02414-LB, 2019 WL 6050750, at *1 (N.D. Cal. Nov. 15, 2019).

167. Williams v. Gerber Prods. Co., 552 F.3d 934, 936 (9th Cir. 2008).

168. Bohac v. Gen. Mills, Inc., No. 12-cv-05280-WHO, 2014 WL 1266848, at *1 (N.D. Cal. Mar. 26, 2014).

169. *In re* Frito-Lay N. Am., Inc. All Nat. Litig., No. 12-MD-2413(RRM)(RLM), 2013 WL 4647512, at *1 (E.D.N.Y. Aug. 29, 2013).

and "sustained energy" food when they contained high levels of added sugar.[170] Every kids' favorite, Nutella, was targeted when its maker, Ferrero Company, was sued for deceptive trade practices by claiming that Nutella was a healthy food.[171] America's addiction to coffee has also yielded at least two UDPL suits: Nestle USA for misleading consumers on the trans-fat content of Coffee-mate brand creamers,[172] and Starbucks for engaging in deceptive trade practices by underfilling its lattes and mochas.[173]

In each of these cases, the plaintiffs were successful in proving that the defendant engaged in deceptive trade practices, and the court awarded attorney fees and costs to the prevailing party. The awards served to incentivize attorneys to take on these cases and to ensure that consumers have access to legal representation in cases of deceptive trade practices.

B. Mandatory Caps on Attorney Fees

Attorney-fee awards play a crucial role in the legal landscape, ensuring access to justice and incentivizing legal representation for individuals with limited financial means.[174] In the same instant, some courts and legislatures have created substantive caps on attorney-fee awards, even when permitted by contract, statute, or common law. Ostensibly, this represents a delicate balancing act between fairly compensating attorneys for their services, preventing excessive fee awards, and protecting the interests of litigants.

California employs a case-by-case approach, imposing a cap on attorney fees in class action lawsuits but relying on reasonableness in other cases. They allow for discretionary awards of attorney fees based on public interest litigation, where the prevailing party acts as a private attorney general. While California does not impose specific caps on fee awards in these cases, the court has the authority to consider reasonableness and

170. McMorrow v. Mondelēz Int'l, Inc., No. 17-cv-2327-BAS-JLB, 2021 WL 859137, at *4 (S.D. Cal. Mar. 8, 2021).

171. *In re* Ferrero Litig., 278 F.R.D. 552, 562 (S.D. Cal. 2011).

172. Consumers of Coffee-mate brought a putative class action lawsuit against Nestle and a group of retail stores alleging that some flavors of Coffee-mate contained partially hydrogenated oil (PHO), an artificial form of trans fat, even though defendant's labels included nutrient claims, such as "0g Trans Fat," Beasley v. Lucky Stores, Inc., 379 F. Supp. 3d 1039, 1040–41 (N.D. Cal. 2019).

173. Strumlauf v. Starbucks Corp., 192 F. Supp. 3d 1025, 1028 (N.D. Cal. 2016).

174. Sattler & Sattler, *supra* note 156, at 52 (discussing how the component of attorney fees of the DTPA is a valuable asset to consumers).

proportionality when awarding fees.[175]

However, in class action lawsuits, California follows a different approach. In such cases, California Civil Procedure Code Section 1021.5(b) imposes a cap on attorney fees. It restricts the maximum fee award to twenty-five percent of the "common fund" recovered, ensuring that a significant portion of the settlement benefits the class members.[176]

Virginia generally follows the American Rule, including the exceptions, that attorney fees are available to the prevailing party when permitted by contract or statute, with some interesting permutations.[177] In the case of *Lambert v. Sea Oats Condominium Ass'n*,[178] even when the requested attorney fees and costs were more than sixteen times the amount of damages received, the amount of damages recovered did not necessarily set a cap on the total amount of attorney fees and costs that may be awarded because determining the reasonableness of attorney fees involves consideration of multiple factors, not just the results obtained.[179] In *Winding Brook Owner's Ass'n v. Thomlyn, LLC*,[180] application of a multi-factor reasonableness test was demonstrated by the court examining the complexity and duration of a case to grant attorney fees that were more than ten times the value of the damages recovered.[181] Following *Graham v. Community Management Corp.*,[182] sometimes prevailing parties cannot recover attorney fees if they do not follow the notice pleading requirements of Virginia Supreme Court Rule 3:25 and fail to ask for attorney fees in

175. CAL. CODE REGS. tit. 11, § 3201 (2023); CAL. CIV. PROC. CODE § 1021.5 (West 2023).

176. CAL. CODE REGS. tit. 11, § 3201 (2023); CAL. CIV. PROC. CODE § 1021.5 (West 2023).

177. Root, *supra* note 124, at 588 (discussing the exception of fee-shifting and how close to 2,000 state statutes permit it).

178. 798 S.E.2d 177 (Va. 2017).

179. *Id.* at 185. In *Lambert*, the Virginia Supreme Court ruled that the Circuit Court of Virginia Beach erred by artificially limiting the amount of attorney fees granted to less than the amount of damages recovered by the plaintiff, *id.* at 186. Ms. Lambert received a judgment of $500 in her suit against a condo association, *id.* at 180. However, she wanted more than $9,500 in attorney fees, but the circuit court judge restricted the award of attorney fees due to the modest amount in controversy and thus granted only $375 in attorney expenses, *id.*

180. 96 Va. Cir. 173 (2017).

181. *Id.* at 175. During closing arguments, the plaintiff requested $11,610.88 in damages, which was ultimately awarded by the jury, *id.* at 173. The plaintiff then sought attorney fees and costs in the amount of $121,160, *id.* A determination by the circuit court stated that the amount sought was appropriate in light of the case's complexity and the steps required as a result of the defendant's activities, *id.* at 175.

182. 805 S.E.2d 240 (Va. 2017).

their pleadings.[183] In *McIntosh v. Flint Hill School*,[184] a one-sided "challenger pays" attorney-fee provision was not enforced and indicated that very large awards of attorney fees in arbitration will likely be upheld by courts in Virginia, absent extraordinary circumstances.[185]

In North Carolina, the longstanding rule is that, unless a statute provides otherwise, the parties to litigation are responsible for their own attorney fees. "[I]t is well established that the non-allowance of counsel fees has prevailed as the policy of this state at least since 1879."[186] At the same time, North Carolina law creates a presumption of attorney fees in all contract litigation and caps recovery at an award equal to 15% of the "outstanding balance" owed.[187]

Many states have adopted a process similar to that of New York, which takes a wholly different approach when it comes to caps on attorney-fee

183. *Id.* at 245. The plaintiff Community Management Corporation sued defendant Ms. Graham for breaching her employment contract and sought attorney fees under a contractual provision, which awarded fees to the prevailing party when suing over a breach of the employment contract, *id.* at 241. Although Plaintiff requested attorney fees in its lawsuit, the defendant failed to request attorney fees in any of her responsive pleadings: two demurrers, three pleas in bar, and an answer, *id.* A verdict for the defense was ultimately obtained, and Ms. Graham then launched a second suit against the Community Management Corporation to recoup her attorney fees from the first litigation, *id.* The Supreme Court determined that the plain wording of Virginia Supreme Court Rule 3:25 bars Ms. Graham from getting attorney fees because she had failed to request them in any of her pleadings in the original suit and thus waived her right to attorney fees, *id.* at 245; *see* VA. SUP. CT. R. 3:25(B) ("Demand. A party seeking to recover attorney fees must demand them in the complaint filed pursuant to Rule 3:2, in a counterclaim filed pursuant to Rule 3:9, in a cross-claim filed pursuant to Rule 3:10, in a third-party pleading filed pursuant to Rule 3:13, or in a responsive pleading filed pursuant to Rule 3:8. The demand must identify the basis upon which the party relies in requesting attorney's fees."); VA. SUP. CT. R. 3:25(C) ("Waiver. The failure of a party to file a demand as required by this rule constitutes a waiver by the party of the claim for attorney fees, unless leave to file an amended pleading seeking attorney fees is granted under Rule 1:8.").

184. No. CL-2018-1929, 2018 WL 9393020 (Va. Cir. Ct. Sept. 17, 2018).

185. *Id.* at *5–6; McIntosh v. Flint Hill Sch., No. CL-2018-1929, 2018 WL 11367517, at *1 (Va. Cir. Ct. Oct. 9, 2018). Ms. McIntosh filed a declaratory relief lawsuit in Circuit Court, seeking to nullify the one-sided attorney-fee provision in the Enrollment Contract between her and her child's school. The contract stated: "We (I) agree to pay all attorneys' fees and costs incurred by Flint Hill School in any action arising out of or relating to this Enrollment Contract," *McIntosh*, 2018 WL 9393020, at *1. The Court held that this attorney-fee provision was substantively unreasonable since it subjected the parents to attorney fees regardless of whether they prevailed in action against the school or not and regardless of whether the fees sought were fair or not, *id.* at *6; *McIntosh*, 2018 WL 11367517, at *1.

186. Stillwell Enters v. Interstate Equip. Co., 266 S.E.2d 812, 814 (N.C. 1980).

187. *See, e.g.*, N.C. GEN. STAT. § 6-21.2(2) (2023).

awards. New York will award only *reasonable* attorney fees in an actively managed, highly discretionary process.[188] While New York does not impose statutory caps, the courts actively determine the reasonableness of attorney-fee awards based on factors such as the complexity of the case, the time and labor involved, and the skill and experience of the attorneys.[189] This empowers the courts to ensure that attorney fees are fair and reasonable in relation to the services rendered.[190]

In certain cases, New York courts have employed a lodestar method to calculate attorney-fee awards.[191] This method involves multiplying the reasonable hours worked by a reasonable hourly rate. However, the courts may also apply a multiplier to the lodestar figure if certain factors, such as the risk involved or exceptional results achieved, warrant an upward adjustment.[192] New York, while lacking statutory caps *per se*, relies on the courts' discretion to determine the reasonableness of attorney-fee awards.

C. Actual vs. Reasonable Attorney Fees: A Shifting Debate

When a party is entitled to attorney fees resulting from an agreement between the parties (contract), a statute, or a specific court rule, the court may grant that party a judgment for those costs.[193] Exactly what constitutes attorney fees, however, and how much of the legal costs incurred should be shifted to the other party are matters of debate.

Parties to a contract are free to incorporate clauses that provide the recovery of legal expenses.[194] Today, a growing number of contracts have what is known as a "shifting attorney fee" provision, which allows the

188. *See* N.Y. PUB. OFF. LAW § 19(2)(b) (McKinney 2023).

189. Cont'l Bldg. Co. v. Town of North Salem, 211 A.D.2d 88, 95–96 (N.Y. App. Div. 1995) (holding that a court may not reduce an award of counsel fees to a prevailing party in order to "err[] on the side of conservatism and avoid[] contribution toward the overpricing of litigation" if the court specifically finds that the amount of time spent was reasonable indeed, the time was appropriately documented, and the rate charged was reasonable).

190. N.Y. JUD. LAW § 474 (McKinney 2023).

191. *See, e.g.*, Arbor Hill Concerned Citizens Neighborhood Ass'n v. Cnty. of Albany, 522 F.3d 182, 183 (2d Cir. 2008) (discussing the "lodestar" as the "presumptively reasonable fee").

192. Morgan & Finnegan v. Howe Chem. Co., 210 A.D.2d 62, 63 (N.Y. App. Div. 1994); Ross v. Congregation B'Nai Abraham Mordechai, 12 Misc. 3d 559, 566 (N.Y. Civ. Ct. 2006).

193. Greenfield v. Philles Recs., Inc., 98 N.Y.2d 562, 569 (2002).

194. Richard Stim, *Attorneys' Fees Provisions in Contracts*, NOLO, https://www.nolo.com/legal-encyclopedia/attorneys-fees-provisions-contracts-32645.html (last visited Mar. 21, 2024).

winning party to recover its own legal expenses as additional damages if the contract is broken.[195] However, how much of the legal expenses that are recoverable depends on the precise text of the contract. The majority of "shifting attorney fee" laws state that the victor is only entitled to recover "reasonable" legal fees, not "actual" legal fees.[196] This difference might result in expenses in the tens of thousands, or even hundreds of thousands, of dollars.[197]

Usually, courts award "reasonable" attorney fees, and the meaning of the word "reasonable" is at the core of this determination. The word "reasonable" is frequently used to refer to a variety of obligations and duties. However, the term "reasonable" is frequently used in vague and unclear ways, which causes misunderstanding and disagreements between the parties.

To determine whether an attorney fee is "reasonable," courts undertake a complex and time-consuming evaluative evidentiary process to determine a "reasonable" attorney fee.[198] The court would determine a "reasonable" fee by weighing a variety of factors: the hourly rate for the geographical area; the reasonableness of the hours billed; the complexity of the case;[199] the time and effort expended; the skill required; the typical fee for similar work; the experience or ability of the attorney; the novelty and difficulty of the legal questions; the sufficiency of the representation; the difficulty of the problems faced by the attorney, particularly any unusual challenges; the type of case; and the outcome.[200] The court does not "rubber stamp" invoices, but it might take into account the "actual" attorney fees charged.[201] Additionally, the awarded attorney fee would typically be less than what was actually charged.[202] Ironically, this process by itself may

195. Daniel J. McCarthy, *It's Time to Revise Your Contracts and Agreements for "Actual" Attorneys' Fees and Costs*, BUTZEL ATT'YS & COUNS. (May 26, 2021), https://www.butzel.com/alert-Its-Time-to-Revise-Your-Contracts-and-Agreements-for-Actual-Attorneys-Fees-and-Costs.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* Jim Gale, *Awarding Attorneys' Fees In North Carolina*, 2018 SUPER. CT. JUDGES' SUMMER CONF. (June 21, 2018), https://www.sog.unc.edu/sites/default/files/course_materials/09%20Attorneys%27%20Fees%20Awards%20in%20NC_Gale.pdf; *see also* United Labs., Inc. v. Kuykendall, 437 S.E.2d 374, 381–82 (N.C. 1993); N.C. REV. R. PRO. CONDUCT 1.5.

201. McCarthy, *supra* note 195.

202. *Id.* (stating that rarely, but on occasion, courts will also award attorney fees that are larger than those that were actually charged).

substantially increase any attorney-fee award.

To overcome this problem, when interpreting contractual provisions related to attorney fees, some contracts have begun to use the word "actual" to refer to the particular fees that were paid by the winning party, in lieu of using "reasonable" to refer to the amounts that would be reasonable given the circumstances.[203] Although subject to interpretation, it is believed that "actual" is clearer and less confusing than "reasonable."

While this evaluative process to determine a "reasonable" attorney fee is still generally favored instead of simply awarding "actual" attorney fees, recent court decisions call into question the reasoning and rationale behind this process — to ostensibly arrive at a "fairer" result.[204]

A growing number of contracts seek to avoid this time-consuming process by adjusting contract language to entitle the prevailing party to an award of "actual" attorney fees and by avoiding "reasonable" language altogether.[205] Proponents of this view raise these questions and issues: Why should a court impose its own ideas on what the fees should be if a contract stipulates that the victorious party is entitled to recover "actual" attorney fees? One would assume that the winning side could just present the invoice to the judge and get paid.[206] It is established law that a written document must be enforced in accordance with the plain meaning of its contents if it is complete, clear, and unambiguous on its face.[207] When "the contract language plainly and unambiguously provides for the recovery of 'actual attorneys fees' we must simply enforce the contract language as written."[208]

In a recent ruling, the court stated that the strict "reasonableness" approach does not apply where a contract grants the victorious party "actual attorney fees."[209] In that case, the commercial lease agreement between the parties stated that the winning party in this case would be entitled to "actual attorneys' fees."[210] Therefore, as part of its damages

203. Stonehill Cap. Mgmt., LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016) (discussing how courts look to the express words of a contract when assessing a party's intent).

204. Juarez v. N.Y. State Off. of Victim Servs., 36 N.Y.3d 485, 493 (2021) (discussing the ambiguity in identifying what are "reasonable fees").

205. McCarthy, *supra* note 195.

206. *See id.*; *see, e.g.*, Northridge Livonia, LLC v. Burn Fitness-3, LLC, No. 2020-181630-CB (Mich. Bus. Ct. Apr. 15, 2021).

207. Greenfield v. Philles Recs., Inc., 98 N.Y.2d 562, 569 (N.Y. 2002).

208. McCarthy, *supra* note 195 (quoting *Northridge*, No. 2020-181630-CB).

209. *Id.*

210. *Id.*

claim, the victorious party submitted the invoices for its legal fees, and the judge "considered the invoice as part of the prevailing party's damage claim and added the amount accordingly."[211] The court found that there was absolutely no need to conduct a time-consuming "reasonableness" investigation to ascertain the proper level of legal fees.[212] The justification was simple: Parties are free to contract with one another, and as a result, parties are allowed to contract for the recovery of "actual" legal fees. The court held that it would be improperly rewriting the parties' contract if it enforced a "reasonableness" analysis.[213] Therefore, if an agreement is reasonably certain on its face, "a court is not free to alter the contract to reflect its personal notions of fairness and equity."[214] It is reversible error to reduce a fee in order to "err[] on the side of conservatism and avoid[] contribution toward the overpricing of litigation" where the attorney fees are sufficiently and appropriately documented.[215]

Whether this recent case law is an anomaly or a trend is yet to be determined. Nevertheless, a strict reading of this holding encourages drafters to include contract clauses stating that a prevailing party is entitled to "actual" legal costs, which would ostensibly always be higher than a "reasonableness" inquiry would allow. If substantiated by actual authenticated invoices, an "actual" attorney-fee provision should obviate the requirement for a hearing to contest spending.[216] Although a court retains the right to decide what constitutes "reasonable," if that is what the parties agreed to, litigants should be able to assert their rights to "actual" expenses as the prevailing party unless the court finds them to be excessive, in which case they would be in violation of most state rules of professional conduct.[217]

---

211. *Id.*

212. *Id.*

213. *Id.*

214. Greenfield v. Philles Recs., Inc., 98 N.Y.2d 562, 569–70 (N.Y. 2002).

215. Cont'l Bldg. Co. v. Town of North Salem, 211 A.D.2d 88, 95 (N.Y. App. Div. 1995).

216. *"Actual" Versus "Reasonable" Attorneys' Fees*, SDK HEIBERGER LLP, https://www.sdkhlaw.com/blog/safeharbor-gw9xw-ft92p-ltelg-xwlsl-d9lm4-9w5j5-p7edn-axgnj-tg2ha-r7cx7-9c2nt-6k54n-c54tg-nrmxt-9zbbg-4xr79-tjgch-2ewsw-xerwk-brg4p-e5tfj (last visited Mar. 26, 2024).

217. Logan Knitting Mills, Inc. v. Matrix Grp. Ltd., No. 04 C 7596, 2007 WL 1594482, at *1 (N.D. Ill. June 1, 2007). This suit arose out of the breach of a contract (hereinafter, "the contract") governing the sale of Logan's mail order Wrestling Express merchandise division to Matrix, *id.* The contract contained the following provision:

> In the event any party shall be required to commence any action

Notably, the Seventh Circuit has read a "reasonableness" requirement into all contractual fee-shifting provisions.[218] Using a "commercial reasonableness" standard to evaluate the potential attorney-fee awards is designed to ensure that fees do not rise to "pie-in-the-sky numbers that one litigant seeks to collect from a stranger but would never dream of paying itself."[219]

The usage of the words "actual" and "reasonable" in relation to attorney fees in contracts continues to be a complicated matter that necessitates careful evaluation of the precise contract language and pertinent governing case law.

VI. CONCLUSION

We see from the origins, development, evolution, and endless tinkering with laws concerning the American Rule that we are not wholly satisfied with it as it is. It took fifty-three words to change the face of American litigation, and over 225 years later, we are still not satisfied with what has been created. Contemporary civil practice has been roundly called the Age of Litigation,[220] and it would be irresponsible to not continue to consider

---

> or proceeding against the other party by reason of any breach or claimed breach of any provision of this Agreement, to commence any action or proceeding in any way connected with this Agreement, or to seek a judicial declaration of rights under this Agreement, the party prevailing in such action or proceeding shall be entitled to recover from the other party, or to be reimbursed, the prevailing party's actual attorney's fees and costs including, but not limited to, expert witness fees, witness fees, and any and all other fees and costs, whether or not the proceeding or action proceeds to judgment.

Id. Matrix argues that it is entitled to its "actual" attorney's fees ($281,383.39) as specified by Paragraph 9.3, *id.* at *2. Logan argues that this Court should interpolate a reasonableness requirement into the contract, *id.*

218. *See id.*; Medcom Holding Co. v. Baxter Travenol Labs., Inc., 200 F.3d 518, 521 (7th Cir. 1999); Balcor Real Est. Holdings, Inc. v. Walentas-Phoenix Corp., 73 F.3d 150, 153 (7th Cir. 1996); Bock v. Comput. Assocs. Intern., Inc., No. 99 C 5967, 2002 WL 511560, at *3 (N.D. Ill. Apr. 3, 2002); Zeidler v. A&W Rests., Inc., No. 99 C 2591, 2001 WL 561367, at *2 (N.D. Ill. May 21, 2001).

219. *Logan Knitting Mills, Inc.*, 2007 WL 1594482, at *2; *see also Medcom Holding Co.*, 200 F.3d at 520.

220. *See, e.g.*, Kenneth W. Starr, *Law and Lawyers: The Road to Reform*, 63 FORDHAM L. REV. 959, 966 (1995); Chilenye Nwapi, *From Responsibility to Cost-Effectiveness to Litigation: The Evolution of Climate Change Regulation and the Emergence of Climate Justice Litigation*, *in* CLIMATE JUSTICE: CASE STUDIES IN GLOBAL AND REGIONAL GOVERNANCE CHALLENGES 517, 519–20 (Randall S. Abate ed., 2016).

the questions about the American Rule and its ongoing application in our court systems: What is the policy promoted by the American Rule? Is it effective? Does it actually "do" what we think it does? Are the costs of the American Rule to successful "white hat" litigants justified? Is it fair? Is the loser-pays system any fairer? Is there something better that can discourage non-meritorious litigation, make successful parties truly whole by awarding fees as part of a damages award, and still encourage those wronged to vindicate their rights despite the uncertainty of litigation? Would "importing" the English Rule remedy any perceived ills, or just give us different ones? We have so many carve-outs of and exceptions to the American Rule — why do we have it at all? Is the law around the American Rule as good as it is going to get?

In carving out the many exceptions to the American Rule detailed above, one can decide whether and how the American legal system is answering these important questions.

The adequacy, effectiveness, and purpose of the American Rule continues to be the subject of continued debate and discussion by legislatures, the Bar, and the Judiciary; this is a debate we should welcome. Among the litany of more recent carve-outs to the American Rule that legislatures have enacted are several that are of particular concern to businesses and have wholly changed the risk profile for businesses affected by them. Concerning contracts, the courts and legislatures meddle in freely negotiated agreements and add provisions and limitations that do not appear in the four corners of the documents. Further, many laws now allow — and even encourage — awards of attorney fees in tort litigation (product liability) and for a whole host of non-contractual business claims, with a fair number of carve-outs that create one-way legal cost liability. We are far past a "loser pays" system in some jurisdictions: We have a "only-certain-losers-pay" system for much of employment and business litigation, and employers and businesses bear the greater risk of litigation costs.

No reasonable review of the myriad of exceptions to and carve-outs from the American Rule can result in a clean bill of health for the rule, particularly as it concerns businesses and employers. More study needs to be done on this apparent permanent procedural imbalance and the real costs of the scales of justice being uncalibrated and weighed against them.