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The Litigation Explosion, Proposed Reforms, and their Consequences

A recent study found that America “spends five times as much as its major industrial competitors on personal-injury wrangling . . . [and] that over the last two generations the cost of injury litigation rose fourteenfold after inflation, while the size of the real U.S. economy rose threefold.”¹ Another survey reported, “American tort claims [run] at least ten times higher [than Britain’s], malpractice claims [are] thirty to forty times higher, and product claims [are] nearly a hundred times higher, in each case per capita.”² These reports, and other studies of a similar nature, represent substantial evidence of a “litigation explosion” that is consuming the productivity, profits, and general effectiveness of many American industries.³ Pointing to such information, a broad coalition of lawmakers, politicians, scholars, business leaders, and citizens now petition for substantial reformation of the judicial system.⁴ This Article introduces the reforms proposed to reduce litigation.⁵ Each of the proposals must be carefully considered, as serious constitutional and practical problems accompany the benefits associated with each of them.

Section I summarizes evidence establishing the existence of a litigation explosion and introduces the concept in general terms. Section II examines the proposal of fee shifting. Section III considers the merits and consequences of statutorily-imposed caps on damages. Section IV evaluates the proposal of stricter limitations on the methods and manner whereby lawyers solicit clients and reviews the legal principles that already restrict the nature and scope of permissible lawyer advertising. Section V reviews allegations that frivolous lawsuits impose a substantial burden on the legal system that can be neatly eliminated by the imposition of certification of merit requirements. Section VI concludes

1. WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 7 (Truman Talley Books 1991).

2. *Id.* (citing Patrick S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1012).

3. *But see* DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS*, 735 (Aspen 2002) (“As with all other issues in the fight over tort law, the seriousness of the problem is hotly disputed.”).

4. *See infra* note 6, and accompanying text.

5. While this paper does not purport to address all of the proposals for reform, it does attempt to identify and explore those proposals that are most frequently levied.

by noting that serious constitutional and practical consequences plague all of the proposals.

I. THE LITIGATION EXPLOSION

The term “litigation explosion” describes the contemporary perception that litigation is increasingly prevalent in the United States and burdensome to society. The existence of the litigation explosion and the significance of its consequences continue to be debated points. Nevertheless, the litigation explosion has become a battle cry for a broad array of lawmakers, politicians, scholars, business leaders, and citizens.⁶ These individuals contend that something must be done to reduce litigation, which they view as “costly and inefficient.”⁷ Professor Miller aptly sets forth their position:

Increased litigation is said to result in substantial costs and delay. One study of the expenditures in asbestos litigation in the federal court system found that only thirty-seven cents of each dollar expended by defendants and insurers went to the victim, with legal fees and other transaction costs consuming the remainder. Accompanying this rise in costs seems to be an increase in the length of time that it takes to adjudicate or otherwise dispose of a dispute. Other problems associated with the “litigation explosion” are the harassment of innocent defendants, people not entering the medical profession or leaving because of the high cost of insurance or the fear of litigation, and, paradoxically, the denial of effective relief to deserving claimants.⁸

The debate about the litigation explosion may be tainted, to some degree, by exaggerations and overstatements.⁹ However, examining the issue is important because evidence of its existence is accumulating and because the litigation explosion debate has attained a level of substantial prominence.¹⁰ One scholar commented that a substantial body of

6. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 985–86 (2003) (noting that various sectors have expressed concern about increasing amounts of litigation and the effects that it is having on our society and systems).

7. *Id.*

8. *Id.* at 986–87.

9. The author does not attempt to estimate the effect that the filing of numerous claims might have on various American industries, but acknowledges that the topic is one that is, at times, subject to bias, overstatement, and exaggeration.

10. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 62 (1985) (“[T]he past decade of high anxiety over the burdens placed on our judicial system . . . has fairly been termed a litigation explosion . . .”).

evidence supports the notion of a litigation explosion. Specifically, he stated, “[l]itigation and its threat have begun to metastasize to virtually every sector of the economy.”¹¹ Evidence tending to establish the existence of the litigation explosion and its consequences can be found in (A) the employment context, (B) the healthcare industry, and (C) in many other professional contexts.

A. Employment, the American Workplace, and the Litigation Explosion

According to one report, a surge of more than 100,000 employee suits is overwhelming California courts.¹² These suits accuse employers of various offenses, including: “wrongful firing, wrongful failure to promote, and departure from policies spelled out in company employment booklets.”¹³ The increasing number of claimants in the system has forced many petitioning employees to wait years before having their employment matters finally adjudicated.¹⁴ This backlog affects the administration of justice in a variety of ways.¹⁵ One scholar even questioned the wisdom of a legislative proposal he felt was substantively justifiable because implementation of the proposal would aggravate “the litigation explosion already present in the field of employment discrimination.”¹⁶ That scholar believed that adoption of the proposal was exceptionally dangerous because “employment discrimination is one of the fastest growing areas of civil litigation, with courts reporting that they are being swamped by these claims.”¹⁷ Despite the fact that the law may have protected important employee rights, the scholar questioned the practical implications of opening another avenue for the presentation of employee claims. In summary, a significant body of evidence indicates that increasing litigation imposes a substantial burden on American workers, employers, and consumers.

11. OLSON, *supra* note 1, at 7.

12. *Id.* at 18.

13. *Id.* at 8.

14. Richard A. Bales, *Compulsory Arbitration of Employment Claims: A Practical Guide to Designing and Implementing Enforceable Agreements*, 47 BAYLOR L. REV. 591, 593 (1995) (“Judges see the employment litigation explosion adding to the backlog that forces litigants to wait for years before getting to trial . . .”). In addition to overwhelming both judges and judicial staff, the backlog frustrates litigants whose conflicts are extended by the judicial system’s inability to get these matters speedily resolved.

15. Legislative enactments that might alleviate problems that exist in the workplace are sometimes refused and vetoed because of their potential to contribute to the litigation explosion.

16. Peter J. Longo, *The Human Genome Project’s Threat to the Human Constitution: Protections from Nebraska Constitutionalism*, 33 CREIGHTON L. REV. 3, 17 (1999).

17. *Id.* (citing Karen A. Haase, *Mixed Metaphors: Model Civil Jury Instructions for Title VII Disparate Treatment Claims*, 76 NEB L. REV. 900, 901 (1997)) (emphasis added).

B. Healthcare, the Insurance Industry, and the Litigation Explosion

Increasing claims plague the health care industry too. “For many [physicians], a labor of love has become an agonizing search for insurance to ensure continued practice in an industry for which they trained eight, fifteen, or even twenty years.”¹⁸ The increasing cost of malpractice insurance is, at least partially, the result of more claims and expanding jury verdicts.¹⁹ Increasing costs impact all levels of the healthcare hierarchy, including physicians, health care providers, and the very individuals seeking medical treatment. Various statistics, reports, and articles reveal the significance of the problem.²⁰ Nationwide, insurance premiums have increased by 50 percent since 1975.²¹ A Wall Street analyst estimated that healthcare costs grew “seven to eight times faster than revenue” for one California healthcare provider.²² Some argue that these cost increases are attributable to implementation of cutting edge treatments. But, medical research was introducing new treatment options in previous years too. Thus, recent increases in cost of healthcare are not solely a result of new treatment options.

The increasing cost of healthcare puts a pinch on employers desirous to provide such security for employees. For example, the sizeable General Electric Company reported that its earnings “went up seven percent [in 2002], but [its] healthcare costs went up fourteen percent.”²³ Further explaining the depth and breadth of current trends in the healthcare industry, one author noted:

Health care costs [now] consume more than fourteen percent of the United States gross domestic product. Medicare spending alone totaled approximately \$162 billion and \$198 billion for fiscal years 1995 and 1996 respectively . . . *the problem of rising healthcare costs [is] well known.*²⁴

18. Bryan A. Liang & LiLan Ren, *Medical Liability Insurance and Damage Caps: Getting Beyond Band-Aids to Substantive Systems Treatment to Improve Quality and Safety in Healthcare*, 30 AM. J.L. & MED. 501, 502 (2004).

19. Increased jury verdicts and an increased number of claims both impose a costly burden on insurers who must find money to pay the bills whether those verdicts are increasingly frequent or increasingly large.

20. Many of these reports and studies are explained in the remaining portions of this Section.

21. Liang & Ren, *supra* note 18, at 505.

22. Reed Abelson, *Already Battered, Tenet Reduces Earnings Forecast for Rest of Year*, N.Y. TIMES, June 24, 2003, at C1.

23. Steven Greenhouse, *Stirring Words, Realist Tactics*, N.Y. TIMES, Jan. 19, 2003, at BU2.

24. Judith Parker, *Corporate Practice of Medicine: Last Stand or Final Downfall*, 29 AHA J. HEALTH LAW 160 (1996).

Malpractice insurance is increasingly expensive, and healthcare costs are rising as a result. Pinpointing the cause of rising malpractice insurance is difficult because numerous factors simultaneously contribute to the cost increases. Potentially relevant factors include fluctuating interest rates,²⁵ greed (in both the insurance companies and medical professionals),²⁶ a more dangerous living environment,²⁷ and the extension of life expectancy,²⁸ to name a few. Recognizing the potential impact of these alternative factors, adherents to the litigation explosion theory maintain that increasing lawsuits are the principal culprits. Their claim is supported by several statistical studies. One such study emerged as the tort reform debate raged in Florida. At that time, the Florida Hospital Association hired Milliman USA, Inc. ("Milliman") to evaluate the cause of rising insurance premiums. Among other things, the Milliman Report revealed that the total amount of paid claims in Florida for the year 2000 was more than 150 percent higher than the amount paid in 1991.²⁹ The study also found that the frequency of medical malpractice claims in Florida increased significantly between 1991 and 2000. In 1991, 4.82 claims were filed per 100,000 residents; in 2000, 7.56 claims were filed per 100,000 residents.³⁰ Accordingly, the

25. See LAYLOCK, *supra* note 3, at 171. Laycock explained the effect that fluctuating interest rates can have on the price of insurance: In the early 1980's, when insurance rates were very high, the insurance industry set rates below the expected level of losses to attract immediate business. Premium dollars could be immediately invested: claims would be paid years later. Investment earnings more than offset the underwriting losses. When interest rates declined insurers lost money, but the plaintiff's bar said that was the natural consequence of the insurance market's relation to interest rates. On this view of the facts, big premium increases were also the result of declining interest rates. Insureds got an unusually large return from their insurers' investment when rates were high; now that the interest rates are low, their premiums have to cover the nearly the full value of their expected claims.

Id.

26. Avoiding meaningful analysis by labeling insurance providers as "greedy," while popular in current political rhetoric, disregards the fact that while greed is inherent in capitalism, the emotion also serves as a check upon itself. If an insurance company charges exorbitant rates for the sole purpose of accentuating already healthy profits, other start-up insurers (also "greedy" for a profit) will, in time, provide those services at a reduced rate.

27. In our industrialized and automated society, accidents and injuries are more likely than ever to occur. Additionally, recreational activities such as skiing, rock climbing, and other such activities, increasingly put the insured in harm's way.

28. An aging population requires more medical services, and more medical services increase the likelihood of malpractice and injury as well as the likelihood of tort litigation. Additionally, an aging population indicates that more medical procedures are being performed on the elderly; such operations are inherently more unpredictable and dangerous than similar operations performed on younger individuals. See e.g., *The U.S. Death Rate Drops; Life Expectancy Rises*, BOSTON GLOBE, Apr. 19, 2006, A1 ("The government also said yesterday that the US life expectancy had inched up again to a record high of 77.9 years.").

29. See LAYLOCK, *supra* note 3, at 136.

30. *Id.*

Milliman report seems to indicate that insurance rates have increased because of a significant spike in the number of legal claims filed and because of the consequential increase in expenditures to defend and satisfy those claims.³¹

C. Impact of the Litigation Explosion: Beyond the Employment and Healthcare Context

Increased litigation affects a broad range of people and industries. Studies reveal that professionals in various sectors worry about shielding themselves from the burden of lawsuits and litigation. For example, one study noted that, “[malpractice insurance] is a crushing expense for many accountants, nurses, amateur sports umpires, and local charity volunteers.”³² While these industries are not as effected by the litigation explosion as participants in other industries are, the effect of increasing litigiousness is broadly felt. Individuals pressing for reform of the judicial system contend that the propensity of Americans to litigate when problems arise is driving up costs and imposing a burden on various industrial sectors, groups, and individuals.³³ They contend that the litigation explosion “has given the legal profession a more and more prominent role in the running of the business and medical worlds, academia and public service, entertainment and sports—virtually every walk of American life.”³⁴

A substantial and accumulating body of evidence lends support to the existence of a litigation explosion. While the evidence does not conclusively establish its existence,³⁵ or define its parameters and implications, the litigation explosion has become a topic at the forefront

31. *But see The de-Haven Smith Report.* It should be noted that other studies tend to produce alternative results. The Florida Academy of Trial Lawyers commissioned a similar study. The Academy reported its finding in the de-Haven Smith Report (“Smith Report”). That report found that the total number of malpractice claims peaked in 1996, then dropped in the ensuing years, before resuming a temporary upward trend again in 1999. The report also concluded that the number of claims involving extraordinary amounts had not increased in frequency during the past decade. Contrary to the Milliman Report, the Smith Report seems to indicate that the number of claims filed has not increased, and implies that increasing insurance premiums must be attributable to other factors.

32. OLSON, *supra* note 1, at 8.

33. *See* Civil Justice Reform Amendments of 1995, Pub. L. No. 89-7 at 59 (statement of Rep. Biggins) (stating that the Girl Scouts in Southern Illinois must sell 53,000 boxes of cookies a year to cover their liability expenses).

34. OLSON, *supra* note 1, at 9.

35. *See e.g.,* Miller, *supra* note 6, at 996 (“The foregoing shows that the supposed litigation crisis is the product of assumption; that reliable empirical data is in short supply; and that data exist that support any proposition. Thus, *one should be cautious and refrain from trumpeting conclusions on the subject* lest it distract us from serious inquiry.”) (emphasis added).

of current political, legal, and social debate.³⁶ It has already “engaged the attention of all three branches of the federal government as well as many state legislatures.”³⁷ Further, “an avalanche of literature, both professional and popular, has addressed the problem and advanced numerous overlapping solutions.”³⁸ Accumulating evidence and commentary supports the notion that a litigation explosion is occurring within the United States judicial system even if questions as to the cause and desirability of the explosion remain unexplained.

The time has come for the legal profession to quickly and thoroughly examine the numerous proposals that have been advanced to deal with the litigation explosion. These reform proposals include: an absolute cap on non-economic damages, the total abolishment of joint and several liability, shortening the time wherein suits may be filed in accordance with the applicable statute of limitations, a proposed limitation on the rates that can be charged in contingency fee arrangements, and a fee-shifting system analogous to the British approach.³⁹ This Article does not review all of the proposed reforms. Instead, it considers the effect that fee shifting, damage caps, tighter restrictions on attorney advertising, and more rigid measures to preclude frivolous lawsuits, will have on the American judicial system if they are generally adopted.

II. FEE SHIFTING TO REDUCE LITIGATION

Proponents of reform contend that adopting the British fee-shifting model represents a viable alternative to decrease the number of claims filed and eliminate the consequences of the litigation explosion.⁴⁰ Specifically, these persons allege that the current approach, whereby each party bears its own legal fees and expenses, provides no incentive for a plaintiff to assess personally the merits of his or her case before

36. *Id.* at 985. (“The contemporary perception of a crisis in the judicial system first became prominent in the 1970s For example, former Vice President Dan Quayle, speaking as the head of the President’s Council on Competitiveness, maintained that federal civil litigation had almost tripled between 1960 and 1990, and that in 1989 alone eighteen million new lawsuits were filed—almost one lawsuit for every ten American adults. *The recent outcry in this country over the social costs of civil litigation is unprecedented in its decibel level and sense of urgency*, bringing together a coalition of politicians, lawmakers, business people, and scholars that often bridges traditional lines between conservative and liberal ideologies.”) (emphasis added).

37. *Id.* at 986.

38. *Id.*

39. See e.g., LAYCOCK, *supra* note 3, at 170–71 (describing many proposals to rectify the litigation explosion, the healthcare crisis, and the increasing legal expenditures and costs that some believe are plaguing American industries).

40. Jonathan Fischbach & Michael Fischbach, *Rethinking Optimality in Tort Litigation: The Promise of Reverse Cost Fee Shifting*, 19 B.Y.U. J. PUB. L. 317, 317 (2005).

filing suit.⁴¹ They seek to replace the current American approach⁴² with a rule that requires the losing party to bear the legal costs associated with litigating the particular matter. This, they contend, would squeeze many lawsuits out of the system by discouraging substantively “weaker” lawsuits.⁴³

To understand the significance of this proposed reform, a brief review of the British Rule and American Rule is helpful.

A. *The British (“Loser Pays”) Rule*

The English legal system employs the “loser pays” rule, to provide remedies after adjudication.⁴⁴ In its purest form, the “loser pays” rule requires the defeated party to pay all of the prevailing party’s attorney fees.⁴⁵ Accordingly, liability for legal expenses automatically flows from a defendant to the prevailing plaintiff, or from a plaintiff to the prevailing defendant upon judicial resolution of their dispute.⁴⁶ This shifting of fees occurs automatically and the party adjudged to have lost the case is liable for the legal expenses that he or she imposed on the prevailing party. The British Rule does not consider the margin of victory in determining the losing parties liability to reimburse legal fees.⁴⁷ Nor does it evaluate the substantive basis of the losing parties claims.

Proponents argue that the British Rule promotes fundamental principles underlying the law of remedies by restoring the prevailing party more fully to its rightful position⁴⁸—the position that he or she

41. The combination of plaintiffs whose resources are protected by a contingency fee structure and counsel who may invest a minimal amount of time attempting to settle these cases fails to encourage even cursory analysis of the merits before a claim is filed.

42. Which has been deemed the “American Rule.”

43. Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59, 79 (Winter, 1997) (The approach would “encourage stronger lawsuits, and discourage weaker ones by rewarding victorious claims and imposing a penalty for those that lose.”); see also Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 143 (1984). While the effect of fee-shifting might have a particularly strong effect in contingency cases, imposing a potential penalty on the plaintiff for losing would cause self-analysis prior to filing in all cases.

44. John F. Vargo, *The American Rule on Attorney Fee Allocations: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993).

45. This is known as two-sided fee shifting. A prevailing party is entitled to legal fees from its opponent regardless of whether the prevailing party is the plaintiff or the defendant.

46. See Fischbach & Fischbach, *supra* note 40, at 320.

47. See Thomas D. Rowe, *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 321–22 (1998) (arguing that a responsible system should consider the margin of victory as well as the substantive grounds upon which a defeated party’s case was based before requiring that party to compensate the prevailing party for its legal expenses).

48. See e.g., LAYLOCK, *supra* note 3, at 15 (“The fundamental principle of [remedies] is to restore the injured party as nearly as possible to the position that he would have been in but for the

would have occupied had the wrong never occurred.⁴⁹ To fully restore a prevailing plaintiff to its “rightful position,” the law must provide damages for the particular injury that she sustained and for the legal expenses that plaintiff incurred in protecting pertinent rights. Conversely, a defendant who establishes that she was not liable for the complained-of damages is entitled to compensation for the fees and costs required to establish her innocence.

Advocates of the British Rule contend that it provides a substantial incentive for parties to settle their differences out of court.⁵⁰ In close cases,⁵¹ parties might settle to avoid the risk of being liable for legal expenses.⁵² Such settlements, proponents of the British Rule argue, would further reduce the amount of litigation crowding the judicial system.

B. The Current Approach or American Rule

Shortly after gaining its independence in 1796, the United States departed from the British fee-shifting rule.⁵³ The United States Supreme Court explained the reason for abolishing the British Rule in the case of *Arcambel v. Wiseman*.⁵⁴ In that case, the Court held that attorney fees were not recoverable unless specifically authorized by legislation. After striking down the award of attorney fees at issue in the case, the Court stated, “We do not think that this charge [of attorney fees from the losing party] ought to be allowed. The general practice of the United States is in opposition to it”⁵⁵ American judges and legislators deeply desired open access to courtrooms. One justice underscored the importance of such access, explaining:

The right to sue and defend in the courts is the alternative of force. In

wrong.”).

49. The author acknowledges that some juries might already adjust the damage award to effectuate a more full recovery, but simultaneously notes that the British Rule, standing by its expressed terms, more fully comports with this principle of the law of remedies than the American Rule does when limited to its expressed terms.

50. Fischbach & Fischbach, *supra* note 40, at 331.

51. The term “close cases” refers to cases that are likely to require a significant amount of time and money before they are resolved.

52. Uncertainty that leads to settlement is more likely when the consequences of litigation are raised. Accordingly, parties to litigation will be more likely to settle when additional liabilities are imposed upon them.

53. In essence, the new approach treated legal fees as an ancillary matter. As an independent and separate matter, it was contemplated and awarded without reference to the underlying cause of action.

54. 3 U.S. 306 (1796).

55. *Id.*

an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all⁵⁶

To ensure the access it valued, the Court adopted the “American Rule.” The rule imposes upon each litigant the responsibility to bear his or her own legal expenses.⁵⁷ The American Rule construes legal fees “as an ancillary matter, separate from the merits,” of a case and provides that a prevailing litigant will not recover such expenditures unless “specifically authorized by a particular rule or statute.”⁵⁸

C. Implications of Replacing the American Rule with the British Rule

Replacing the American Rule with the British Rule would reduce litigation. After all, “[i]t is self-evident that parties make litigation and settlement decisions based on the procedural setting, and not just on the merits, of a given case.”⁵⁹ By imposing an obligation on parties to pay the legal costs of a prevailing opponent, the law would create a stiff procedural deterrent to litigation.⁶⁰ As a general matter, only plaintiffs who are substantially confident about the merits of their case would file claims. By increasing the potential costs of litigation, adopting the British Rule would reduce the filing of claims.⁶¹ However, replacing the American Rule with the British Rule is not without consequences.

1. Adoption of the British Rule would reduce access to courts.

“Citizens in the United States place a high premium on the option to go to court, and the deterrent effect of the British Rule undoubtedly closes the courthouse doors to many low-income parties.”⁶² Aware that

56. *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148 (1907).

57. *See e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 247 (1975) (superceded by statute as stated in *Perez v. Rodriguez Bou*, 575 F.2d 21 (1st Cir. 1978)).

58. LAYCOCK, *supra* note 3, at 912–15.

59. Molot, *supra* note 43, at 60 (“In particular, lawyers and clients alike understand that the cost of litigation may affect outcomes.”). The potential cost of litigation may also affect the client’s willingness to pursue a legal remedy and incur legal costs. *See infra* note 172 and accompanying text.

60. Thus, in this context the question becomes whether the deterrent provided is too substantial and arduous.

61. As explained in part II C 1., proponents of the British Rule are correct when they assert that its adoption would reduce the number of claims presented to American tribunals. Judicial systems that adhere to the British approach experience less litigation per capita than courts in the United States do. *See e.g., Atiyah, supra* note 2.

62. Fischbach & Fischbach, *supra* note 40, at 331.

limiting access to such an extensive degree is generally unacceptable, some reform advocates have tempered their demands by lobbying for proportional fee shifting.⁶³ Under this approach a plaintiff is only responsible for a portion of a particular defendant's legal fees.⁶⁴ While proportional fee shifting might impede access to courts less than traditional fee shifting would,⁶⁵ any risk of out-of-pocket expenses is a substantial deterrent to poor plaintiffs.⁶⁶

Wealthy individuals in possession of monetarily insignificant claims might also hesitate before introducing their claims into the court system. This is because the potential benefit of prevailing on a minor claim frequently fails to outweigh the costs associated with protecting that right, especially when the added risk of being liable for the prevailing parties legal fees is included in the analysis.

If the British Rule is adopted, it is safe to assume that litigation will decrease. However, access to the judicial system will be severely limited.⁶⁷

2. *By adopting the British Rule, the judicial system would unduly favor parties with disposable resources and perhaps violate the Due Process Clause.*

Though it is intertwined with the previous point, that adoption of the "British Rule" would reduce access to courts, it is worth noting separately that implementation of the British Rule may render the rights of the wealthy more secure than the rights of the poverty stricken or underprivileged.⁶⁸ Adopting the British Rule is "particularly troubling

63. *Id.* This is also known as fee shifting by percentage.

64. *See id.*

65. For a poor plaintiff, the potential of being liable for \$5500 may not be much more daunting than the potential of being liable for \$11,000. Both amounts represent a substantial danger.

66. While a poor plaintiff may not have much money to lose, the risk of losing even a small amount is likely to be poignantly felt in most cases.

67. *See Chambers v. Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all . . .").

68. *See e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), *superceded by statute as stated by United Phosphorus v. Midland Fumigant*, 21 F. Supp. 1255 (D. Kan. 1998), and *Decorations For Generations, Inc. v. Home Depot USA, Inc.*, 2003 U.S. Dist. LEXIS 26608 (E.D. Cal. Sept. 19, 2003).

In support of the American Rule, it has been argued 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*. Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial

because it imposes this chilling effect disproportionately on private litigants opposing individually wealthy or commercial defendants who rapidly accumulate legal expenses.”⁶⁹ Two hypothetical, but realistic, examples sufficiently demonstrate the inequality that fee shifting imposes.

In both cases, suppose that an uninsured plaintiff suffers a minor injury (perhaps a broken arm) as a result of a low-speed car crash with an uninsured driver. Upon examination of the case, the plaintiff’s attorney informs his client that the likelihood of establishing liability is approximately 60 percent, this being a “good case.” Hypothetical Plaintiff “A” falls into the middle socio-economic class, making approximately \$115,000 per year. Plaintiff “A” has very little debt and some disposable income. Conversely Plaintiff “B” falls into a lower socio-economic class, making approximately \$25,000 per year. Plaintiff “B” has little disposable money.

Plaintiff “B” may hesitate to file a legal action because the threat of being responsible for the legal fees of the adverse party is very daunting and troubling in light of his financial situation. Conversely, a semi-prosperous plaintiff such as Plaintiff “A” would worry less (to some degree) about incurring liability for the prevailing parties fees.⁷⁰ This fact holds true even if a proportional approach⁷¹ to fee shifting is adopted instead of the traditional British Rule. In most instances an individual or entity with disposable income is more willing to assume financial risk than an individual with less income. The disparate treatment that a fee shifting system imposes on individuals is even more substantial when the financial status of the parties is more exaggerated. Thus, a multi-millionaire or a large corporation would possess a far greater capacity to protect their legal rights than a similarly injured person with less income and assets.⁷²

Fundamental principles of the American judicial system forbid treating litigants differently on the basis of their economic status.⁷³ “Over the past two decades one of the most important trends in both judicial

administration. (Emphasis added).

69. Fischbach & Fischbach, *supra* note 40, at 331.

70. Though incurring liability is still a substantial consideration for Plaintiff A.

71. Under a proportional fee shifting approach, the losing party would be responsible for only a limited portion of the victorious party’s legal expenditures. While the potential amount of the party’s liability would decrease, a poor person still feels the loss of a set amount of money in a way that a wealthier person does not.

72. While this may already be the case, implementation of the British Rule in place of the American Rule would expand the disparity.

73. *Mason v. Henderson*, 35 F.Supp. 35, 37–38 (E.D. La. 1972) (“Due Process requires . . . that all persons, rich or poor, young or old, be accorded equal treatment.”).

and legislative decisions has been the enormous thrust to equalize the treatment of rich and poor in the courts.”⁷⁴ Yet, fee shifting unequally deters poor people from filing claims. For this reason, fee-shifting systems contradict fundamental principles of equality and fairness that are imbedded in the American judicial system.

In addition to treating participants differently depending on their financial status, adoption of the British Rule might provide additional incentive for wealthy parties to extend litigation and run up legal costs as an intimidation strategy.⁷⁵ By such tactics, a wealthy defendant could gain a superior bargaining position. Additionally, such conduct would crowd the judicial system by keeping cases on court dockets for longer periods of time, and forcing judges to review more preliminary motions.

3. *Exceptions to the American rule substantially limit its scope already.*

Many exceptions to the American Rule exist, though critics of the rule frequently fail to acknowledge them. “Cumulatively, these exceptions take a huge bite out of the American Rule.”⁷⁶ In many instances, the rule that the prevailing party cannot recover attorney’s fees is subject to an exception already.⁷⁷ The existence of these exceptions makes adoption of the British Rule seem less necessary.

Adopting the British Rule will significantly affect the ability of citizens to petition courts for a redress of their grievances. Additionally, adoption of the British approach renders the rights of rich parties better protected than the rights of poor persons. Because these two consequences are significant, the judicial system should be particularly concerned about proposals that automatically shift fees to prevailing parties.

74. *Lee v. Habib*, 424 F.2d 891, 898 (D.C. Cir. 1970); see also *Tate v. United States*, 359 F.2d 245, 252 (D.C. Cir. 1966) (noting that “equal treatment for rich and poor” is a vital component of the judicial system); *McCord v. Polozola*, 555 F.Supp. 996, 997 (N.D. La. 1983) (“Beyond a doubt one of the most important functions of a federal court is to steadfastly guard the rights and privileges secured by the Constitution . . . [and] a court’s obligation in this regard is *owed equally to the rich and poor.*”) (emphasis added).

75. Consider a case where a poor plaintiff brings suit against a wealthy corporate defendant. The defendant could obtain unequal bargaining power by extending and delaying the legal process to expand its legal bill. As that figure increases, the Plaintiffs willingness to settle the case in accordance with the terms of the defendant would also increase. While this strategy is employed in the current American system, adoption of the British system would provide additional incentive for its implementation.

76. LAYCOCK, *supra* note 3, at 913.

77. David W. Robertson, *Court-Awarded Attorneys’ Fees in Maritime Cases: The “American Rule” in Admiralty*, 27 J. MAR. L & COM. 507 (1996). Robertson identifies various exceptions including: statutory exceptions, the bad faith litigation exception, contract exceptions, a family law exception, the collateral litigation exception, and the contempt-of-court exception.

III. DAMAGE CAPS TO CURB THE LITIGATION EXPLOSION

Damage caps are another proposed response to the litigation explosion.⁷⁸ These caps aim to reduce the number of claims filed by removing the incentive to file a claim that accompanies the potential of an extraordinary verdict.⁷⁹ Damage caps also minimize the impact of the litigation explosion by alleviating the legal expenses and financial vulnerability that numerous claims impose on defendants.⁸⁰ Despite these potential benefits, damage cap statutes are constitutionally controversial and blatantly unfair when applied in some instances.⁸¹

A. Constitutional Implications

The enactment of damage caps raises significant constitutional concerns.⁸² Judicial consideration of these caps generally focuses on whether caps unconstitutionally modify the right to a *jury* trial, and on whether they represent undue usurpation of judicial power. Indeed, “[t]he constitutionality of damage caps has been one of the most controversial aspects of . . . reform in many states”⁸³ Courts have reached inconsistent conclusions when called upon to determine whether damage caps comport with constitutional doctrines. The Virginia Supreme Court considered the constitutionality of a damage cap⁸⁴ in the case of

78. Matthew W. Stevens, *Strictly No Strict Liability: The 1995 Amendments to Chapter 99B, the Products Liability Act*, 74 N.C. L. REV. 2240, 2240 (1996) (“From the movements beginnings in the mid-1980s, states have attempted to contain the apparent litigation explosion of the last decade with a wide array of legislation, including damage caps and other changes”) (emphasis added).

79. Because the sky seems to be the limit, plaintiffs frequently overestimate the value of their cases. Such overestimation provides an incentive to litigate.

80. According to this theoretical advantage, damage caps do not significantly reduce litigation. Instead, they alleviate the financial burden that numerous claims impose on parties who frequently find themselves the targets of these lawsuits. Damage caps aim to ensure that that liability is predictable and manageable for defendants who might otherwise be overwhelmed by numerous claims.

81. Many states have already enacted statutory provisions to limit damage recoveries. Accordingly, cases, commentary, and information regarding the consequences of damage caps are developing.

82. See Alfreda A. Sellers Diamond, *Constitutional Comparisons and Converging Histories: Historical Developments in Equal Educational Opportunity Under the Fourteenth Amendment of the United States Constitution and the New South African Constitution*, 26 HASTINGS CONST. L.Q. 853 (1999) (Author notes that adoption of a constitution represents adoption of a foundation for the citizens and society.). As constitutional precepts are the foundational precepts upon which society is built, a proposed restraint that raises constitutional questions should be carefully considered as the proposal has substantial potential to shift society in unanticipated ways.).

83. Chad E. Stewart, *Damage Caps in Alabama's Civil Justice System: An Uncivil War within the State*, 29 CUMB. L. REV. 201, 203 (1999).

84. VA. CODE ANN. § 8.01–581.15 (1989) (limiting the amount of damages recoverable in a

Etheridge v. Medical Center Hospitals.⁸⁵ In that case, the plaintiff suffered severe and permanent injuries. The trial court attributed the injuries to the negligence of an attending physician. The court reduced the jury verdict of \$2.75 million to \$750,000 pursuant to a statute capping damages.⁸⁶ Plaintiff appealed to the Virginia Supreme Court, which held that the damage cap was constitutionally permissible and appropriately applied.⁸⁷

The Florida Supreme Court reached the opposite result upon consideration of a similar damage cap. In the case of *Smith v. Department of Insurance*, that Court held that “the cap on noneconomic damages is contrary to Article I, § 21⁸⁸ of the Florida Constitution.”⁸⁹ Specifically, the court stated:

A plaintiff who receives a jury verdict for, [] \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right.⁹⁰

The inconsistencies expressed in the *Smith* case and the *Etheridge* case aptly demonstrate the “deep split among state supreme courts over the constitutionality of damage caps.”⁹¹ While there is no consensus,⁹² “the majority of courts reviewing challenges under the constitutions of their respective states have invalidated limitations on damages.”⁹³ In addition to Alabama and Florida, the Illinois Supreme Court recently held that a damage cap provision violated the Illinois constitution.⁹⁴ Specifically, the Illinois Court held that the statutory cap violated the separation of powers doctrine as the cap unduly hindered the judicial branch’s power and obligation to prevent excessive verdicts through the

medical malpractice action).

85. 376 S.E.2d 525 (Va. 1989).

86. *Id.* at 526 (The statutory damage cap provided that compensatory damage awards in medical malpractice could not exceed \$750,000 per occurrence.).

87. *Id.* at 526–27.

88. FLA. CONST. ART. I, § 21 (1987) (“The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay.”).

89. *Smith v. Dep’t of Ins.*, 507 So.2d 1080 (Fla. 1987).

90. *Id.* at 1088–89 (emphasis added).

91. LAYCOCK, *supra* note 3, at 173.

92. *Id.* at 174 (“There is no serious claim that damage caps on state-law claims violate the federal constitution.”).

93. *Moore v. Mobile Infirmary Ass’n.*, 592 So.2d 156, 158 (Ala. 1991).

94. *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997).

remittitur power.⁹⁵

Regardless of the case law that the individual reader finds most persuasive, these cases introduce constitutional considerations that must accompany responsible review of the merits and consequences of damage caps. Specifically, the reader should consider the effect of damage caps on (1) the right to a jury trial, and (2) the separation of powers doctrine before advocating the adoption of damage caps.

1. The right to a jury trial.

The right to a jury trial is a constitutionally protected one.⁹⁶ Yet, damage caps intrude on that right.⁹⁷ While jurors retain discretion in the realm of liability, the ability of jurors to award the damages they deem proper is substantially limited when the legislature enacts a damage cap.⁹⁸ Stripping this power from jurors is a monumental change. After all, “[a]ssessment of the quantum of damages as a function of the jury in actions at law [is] deeply entrenched” in our legal system.⁹⁹

The adoption of statutory damage caps may, or may not, be constitutional.¹⁰⁰ Regardless, implementation of these caps significantly limits the discretion and responsibility of jurors. In so doing, damage caps change traditional concepts about what happens in a jury trial.

Damage caps reduce the litigant’s constitutional entitlement from one commanding that a jury reach a unanimous verdict on both the questions of liability and damages, to one requiring that a jury reach a unanimous verdict on the question of liability alone. Under this scheme, the jury reaches the question of damages only if not pre-empted by legislative fiat from doing so.¹⁰¹

95. *Id.* Whether they violate the right to a jury trial or not, the enactment of damage caps are inconsistent with the right to a jury trial as traditionally understood. *See generally Smith*, 507 So.2d 1080.

96. *See e.g.*, U.S. CONST. art. VII (2006) (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.”).

97. *See e.g.*, *Smith* 507 So.2d at 1088–89 (wherein the Court felt like the intrusion was sufficient to render the damage cap provision unconstitutional).

98. By adopting a damage cap, the legislature inserts its determination in place of the juries with regard to liability and damages.

99. Paul Weiss, *Reforming Tort Reform: Is There Substance to the Seventh Amendment*, 38 CATH. U. L. REV. 737, 746 (1989) (“The common law required a jury to assess a plaintiff’s damages whenever the amount sued for was an unliquidated or uncertain sum.” *Id.* Until the perceived litigation explosion of recent times “no one has seriously suggested that assessment of the amount of a plaintiff’s damages in a common law of action is anything but a question for the jury.” *Id.*

100. *Smith* and *Etheridge* reached different determinations on this point.

101. Weiss, *supra* note 99, at 765.

The implementation of damage caps would, at a minimum, modify the constitutional right to a jury trial and the nature of judicial proceedings. Recognition of this impact, and further consideration of its significance, should precede formal adoption of damage cap provisions.

2. *Damage Caps Narrow, Perhaps Unconstitutionally, the Separation between Powers*¹⁰²

The legal doctrine of remittitur provides a “procedure by which trial and appellate judges reduce jury verdicts” that they deem excessive.¹⁰³ By the remittitur doctrine courts may reduce the jury verdict to the highest amount that the court deems reasonable in the circumstances.¹⁰⁴ Accordingly, courts already possess the power to review jury verdicts for reasonableness. Legislatures usurp this judicial power when they preemptively review the reasonableness of verdicts by adopting statutory damage caps.¹⁰⁵

The doctrine of remittitur represents a more effective mechanism to review the reasonableness of awards¹⁰⁶ than statutorily imposed damage caps do. Courts apply the remittitur concept upon examining the facts of the case. Legislative bodies, on the other hand, enact damage caps before the cases that the statute will govern even exist. Accordingly, damage caps frequently fail to properly address the presented situation.¹⁰⁷ Remittitur, on the other hand, is less arbitrary and more informed. Courts review the verdict in light of the facts to determine whether the amount awarded is reasonable. If the award is unreasonable, the presiding judge reduces it.¹⁰⁸

Acknowledging the existence of remittitur tarnishes the appeal of damage caps, and upon deeper consideration even makes these caps appear entirely unnecessary. Perhaps using the doctrine of remittitur more frequently is a better way of responding to extraordinary verdicts than damage caps are. At a minimum, the legislature intrudes on the

102. This argument persuaded the Illinois Supreme Court to declare that a damage cap enacted by the state’s legislature was unconstitutional. *See Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1064 (Ill. 1997).

103. LAYCOCK, *supra* note 3, at 189.

104. *Id.*

105. *See e.g.*, Stewart, *supra* note 83, at 225.

106. *See e.g.*, Levka v. City of Chicago, 748 F.2d 421 (1984) (jury returned a verdict of \$50,000 in favor of the plaintiff). On appeal the court noted, “[T]he award of \$50,000 in this case is grossly excessive and must be reduced.” *Id.* By the process of remittitur the court reduced the award to \$25,000, which it believed was reasonable. *Id.*

107. The next section sets forth in detail the injustices that result from the statutory imposition of damage caps.

108. *See generally Levka*, 748 F.2d 421.

authority of the judicial branch, as provided by the remittitur doctrine, when it enacts damage caps.

B. Arbitrary Damage Caps Frequently Impose Harsh and Unfair Results

Because legislators paint with broad strokes when they craft statutory law, damage cap provisions frequently impose harsh and unjust results in individual cases.¹⁰⁹ The case of *State v. DeFoor*¹¹⁰ is illustrative. That case involved a damage cap that limited recovery against the state for traffic accidents to \$400,000 per occurrence.¹¹¹ In 1992, a state employee dislodged a boulder. It rolled down a mountain and struck a bus.¹¹² Nine people were killed and approximately twenty-five injured.¹¹³ Application of the pertinent damage cap provision left each of the victims with the prospect of recovering a maximum of \$11,000.¹¹⁴ Such absurd results inevitably attend legislative remedies that are enacted prior to the factual record that they govern.¹¹⁵ President Clinton noted his concern for harsh results that were unavoidable as he vetoed a federal damage cap proposal.¹¹⁶ Perhaps in so doing, he recognized the problem inherent in damage caps. There will always be extraordinary cases wherein application of definitive rules is improper.

While damage caps alleviate the consequences of the litigation explosion, strict application of these caps also effectuates unjust results in individual cases. Lawmakers should contemplate and account for the potential for unjust results prior to enacting such caps. Similarly, legislators should consider the constitutional implications associated with damage caps.

109. The breadth of cases to which a statute is intended to apply frequently renders the statute unresponsive to individual cases.

110. *State v. DeFoor*, 824 P.2d 783 (Colo. 1992).

111. COLO. REV. STAT. § 24-10-114(1) (2006) (the per occurrence amount provided for in the statute is now \$600,000 total and limited to no more than \$150,000 per individual claimant).

112. *DeFoor*, 824 P.2d at 785.

113. *Id.*

114. *Id.* at 802.

115. *See infra* note 129.

116. *See infra* note 133.

IV. LAWYER ADVERTISING: EXAMINING STRICTER CONSTRAINTS ON LAWYER SOLICITATION OF CLIENTS

Persons who lobby for reform of the judicial system argue that the aggressive advertising practices of lawyers contribute significantly to increasing litigation in the United States.¹¹⁷ They contend that lawyer advertisements encourage litigation among parties who might not otherwise engage the process.¹¹⁸ In this way, advertising by lawyers directly results in more claims being filed.¹¹⁹ To reduce the filing of claims, they propose more rigid prohibitions on advertising by attorneys. While a reduction in advertising would reduce the number of claims filed, proponents of these measures fail to acknowledge that the bar already imposes significant limitations on lawyer advertising. Additional limitations on lawyer communications would interfere with constitutional rights and increase the cost of legal fees.

A. The Bar Imposes Limitations on the Nature and Scope of Lawyer Advertising

Concerned that advertising might negatively affect the public's perception¹²⁰ of lawyers, the Model Rules of Professional Conduct limit the nature and scope of lawyer advertising. As a general rule, advertising is permitted.¹²¹ However, various rules impose limits on the nature of permissible communications. First, "[a] lawyer shall not make a false or

117. The claim that lawyer advertising is responsible for fueling the litigation explosion has been made for a long time. Those concerned about the advertising practices of lawyers became increasingly concerned subsequent to *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), which eliminated many of the States most stringent restrictions on the permissible scope of advertising by lawyers.

118. See e.g., Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 693 (2001).

119. This proposition is not novel. Advertising encourages persons to engage in certain conduct (such as filing a lawsuit) though they might not otherwise be interested in doing so. See William Hornsby, *Clashes of Class and Cash: Battles from the 150 Years War to Govern Client Development*, 37 ARIZ. ST. L.J. 255, 291 (2005) ("The battles among lawyers [about advertising] are fueled by the fact that advertising is effective. Simply put, it works. This is not to suggest that every lawyer who advertises gets a positive return on investment, but constant increases in the overall expenditures for yellow pages and television ads suggest that the public is responsive to ads to a degree that justifies the movement.").

120. See e.g., Tonia Goolsby, *Does Ambulance Chasing in Florida Justify Advertising Reform in Arkansas*, 49 ARK. L. REV. 795, 809 (1997) ("a two-year study on lawyer advertising [indicated that people] have negative feelings about those attorneys who use direct mail advertising.").

121. ABA MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. (2006) ("To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising . . . the public's need to know about legal services can be fulfilled in part through advertising.").

misleading communication about the lawyer or the lawyer's services."¹²² Beyond being honest, lawyers must not make any statements that *might* mislead. Second, "[a] lawyer shall not by in-person or live telephone contact solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for . . . doing so is the lawyer's pecuniary gain."¹²³ Third, lawyers shall not engage in any advertising that "involves coercion, duress or harassment."¹²⁴ These model rules, which are widely adopted among the states with only slight variations, demonstrate that state bar associations already significantly restrict the nature and scope of permissible advertising.¹²⁵

Though persons critical of the judicial system claim otherwise, these rules are frequently enforced. In the case of *Davis v. Alabama State Bar*, the Alabama Supreme Court upheld a 60-day suspension for lawyers whose "advertisements were misleading."¹²⁶ In the case of *In re Morse*, the California Supreme Court increased sanctions against attorneys who had engaged in misleading advertising to deter similar wrongdoing by other attorneys.¹²⁷ New York upheld a disciplinary order when an attorney solicited work from real estate brokers in violation of the pertinent ethical guidelines, which precluded any advertisement that might mislead the audience.¹²⁸ The cited instances are not exhaustive.

122. ABA MODEL RULES OF PROF'L CONDUCT R. 7.1 (misleading statements include statements that would give the client unjustified expectations).

123. ABA MODEL RULES OF PROF'L CONDUCT R. 7.3.

124. *Id.*

125. Proponents of more rigid restrictions claim that the existing rules do not do enough to restrict attorney advertising. In the next section, this Article explains that additional restrictions might violate freedom of speech, which is a foundational right in American society.

126. *Davis v. Ala. State Bar*, 676 So.2d 306, 309 (Ala. 1996). Among other things:

The Alabama State Bar Disciplinary Board found William Dowsing Davis III and Dan Arthur Goldberg to be violating Rule 1.1, Alabama Rules of Professional Conduct (failure to provide competent representation); Rule 1.4(a) and (b) (failure to keep clients reasonably informed and failure to reasonably explain a matter so as to permit a client to make an informed decision); Rule 5.1 (failure to make reasonable efforts to ensure that the lawyers in their firm conformed to the Rules of Professional Conduct); Rule 5.3(b) (failure to ensure that the activities of a nonlawyer under an attorney's supervision are compatible with professional standards); Rule 5.5(b) (providing assistance to a person engaging in the unauthorized practice of law); Rule 8.4(a) (violation of the Rules of Professional Conduct through the acts of another); Rule 8.4(d) (engaging in conduct prejudicial to the administration of justice); and Rule 8.4(g) (engaging in conduct that adversely reflects on a lawyer's fitness to practice law). Both of the attorneys were suspended from the practice of law for 60 days.

127. *In re Morse*, 900 P.2d 1170 (Cal. 1995).

128. *In re Green*, 429 N.E.2d 390, 392 (N.Y. 1981) (indicating the violative mailer provided that "By recommending the services of [lawyer], you, the realtor, will save your clients time and money—one of the main reasons that they called on you.").

State courts have frequently punished advertisements by lawyers when their communications fail to comply with adopted regulations.¹²⁹

As substantial restrictions already exist, the choice presented is not one between no regulation on lawyer advertising and some regulation. Instead, the question is whether more rigid restrictions should be adopted.

B. Important Rights Will Be Infringed If More Significant Restrictions on Lawyer Advertising are Implemented

Advocates of reform to curb the litigation explosion assert that the provisions contained in the Model Rules are not sufficient for one reason¹³⁰ or another.¹³¹ While a complete or more substantial ban on advertising would reduce the amount of litigation, additional limitations would also raise important constitutional questions.

In the case of *Florida Bar v. Went For It, Inc.*, the Supreme Court acknowledged that “[c]onstitutional protection for attorney advertising, and for commercial speech generally, is of recent vintage.”¹³² Until the 1970’s, the Court did not extend the protections of the First Amendment to protect the advertising communications of lawyers.¹³³ However, the 1977 case of *Bates v. State Bar of Arizona*¹³⁴ expanded the protections of the First Amendment to “invalidate a state rule prohibiting lawyers from advertising in newspapers and other media.”¹³⁵ Nearly two decades of cases have built upon the foundation laid in the *Bates* case. Now, it is “well established that lawyer advertising is commercial speech and, as such, is accorded a measure of First Amendment protection.”¹³⁶ While the Court recognized that some restrictions on lawyer advertising, such as those provided by the Model Rules of Professional Conduct, were permissible, it held that an absolute prohibition was not.¹³⁷ Most European legal systems have reached the same conclusion. They

129. See e.g., Richard Martel, *Regulation of Advertising in the Legal Profession: Still Hazy after All these Years*, 1997 DET. C.L. REV. 123 (1997).

130. Some claim that the Model Rules themselves do not go far enough to prevent the ills associated with lawyers who advertise. In essence, they contend that lawyers should be precluded from advertising altogether.

131. Others take a more moderate approach. They contend that the Rules should be made more rigid, and also that they should be enforced with more frequency and with more substantial penalties.

132. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622 (1995).

133. *Id.*

134. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

135. *Id.*

136. *Fla. Bar*, 515 U.S. at 622–23 (emphasis added).

137. *Id.* at 632.

recognize the fundamental right that lawyers possess to communicate and advertise.¹³⁸

Prohibiting lawyers from advertising might reduce the number of claims filed, but would also prohibit that class of individuals from exercising rights granted unto them by the Constitution. Any proposal that effectuates a denial or modification of constitutional rights should be cautiously considered.

C. Advertising by Lawyers Encourages Competition, which Results in Lower Prices.

Since the Supreme Court's decision in the *Bates* case,¹³⁹ numerous studies¹⁴⁰ have been conducted to estimate the effects of the expanded First Amendment protection. Each of these studies arrived at the same conclusion: "*Competition among lawyers, in the form of commercial advertising, has resulted in lower prices to consumers.*"¹⁴¹ Advertising contributes to a perfect market,¹⁴² wherein consumers are able to compare the hourly rates of attorneys and the service that they render. Without the unfettered presentation of such information, price and value comparisons are infinitely more difficult to conduct. Permitting and protecting advertising has granted citizens an increased ability to compare the price and quality of legal services.¹⁴³

138. See e.g., Louise L. Hill, *Publicity Rules of the Legal Profession within the United Kingdom*, 20 ARIZ. J. INT'L & COMP. L. 323 (2003) ("Historically, the legal professions in European countries frowned upon or prohibited advertising by lawyers. . . . [A]s a result, many EU Member states abandoned their traditional rules prohibiting lawyer advertising in favor of permitting some form of advertising by lawyers. The jurisdictions of the United Kingdom (UK) were no exception.") (emphasis added).

139. See *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (wherein the United States Supreme acknowledged that the First Amendment protected the right of lawyers to advertise).

140. Van O'Steen, *Bates v. State Bar of Arizona: The Personal Account of a Party and the Consumer Benefits of Lawyer Advertising*, 37 ARIZ. ST. L.J. 245, 250 (Summer, 2005) ("Since *Bates*, at least four studies have been conducted—including two through grants from the National Science Foundation and one by the Federal Trade Commission—intended to measure the effect of advertising on the pricing of legal services.").

141. *Id.* at 251. The author further states, "I know of no research that has concluded otherwise, and the debate on this question appears settled." *Id.*

142. A perfect market is one wherein both the buyer and seller of goods or services possess an adequate amount of information. Such information allows them to negotiate effectively with one another and attribute the proper value to the services to be provided.

143. In a sense, the price charged by lawyer "A" serves as a check on the price that lawyer "B" is able to obtain for services of a similar nature. When parties are unable to ascertain what the general prices are, there is less of a check and price disparities are more likely to result. The legal community in Las Vegas has recently experienced price wars attributed to advertising. One personal injury attorney recently began advertising a contingency fee of 22 percent. Others followed suit.

V. FRIVOLOUS LAWSUITS ARE SUFFICIENTLY CONSTRAINED BY CURRENT LEGAL DOCTRINES

Legislative disdain for frivolous and vexatious lawsuits is clearly manifest in prominent places. “Rule 11 of the Federal Rules of *Civil Procedure*,¹⁴⁴ Rule 3.1 of the *Model Rules of Professional Conduct*,¹⁴⁵ and § 170 of the *Restatement of Law Governing Lawyers*,¹⁴⁶ all seek to balance efforts to curb frivolous suits with an understanding that prohibitions against such suits should be tempered to avoid over-enforcement.”¹⁴⁷ Yet, some continue to argue that frivolous lawsuits contribute to the litigation explosion in an especially egregious manner.¹⁴⁸ In the presidential debates of 1996, the candidates mentioned the problem of frivolous lawsuits three times.¹⁴⁹ Like politicians, some scholars have also participated in the debate over meritless civil lawsuits.”¹⁵⁰

Judge Posner noted that courts are unable to neatly distinguish valid

144. By presenting to the court a pleading, written motion, or other paper, an attorney or unrepresentative party is certifying that to the best of the person’s knowledge, information, and belief, formed after a reasonable inquiry under the circumstances . . . *the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument.*

FED. R. CIV. P. 11 (2006) (Emphasis added).

145. *A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous*, which includes a good faith argument for an extension, modification or reversal of existing law.

MODEL RULES OF PROF’L CONDUCT R. 3.1 (2005) (Emphasis added).

146. *A lawyer may not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous*, which includes a good-faith argument for an extension, modification, or reversal of existing law.

RESTATEMENT OF LAW GOVERNING LAWYERS, § 110 (2000) (Emphasis added).

147. Erin Shiller & Jeffrey Wertkin, *Frivolous Filings and Vexatious Litigation*, 14 GEO. J. LEGAL ETHICS 909 (2001).

148. Robert Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L.J. 805, 806 (2004) (“Frivolous lawsuits are endemic to the entire legal system . . .”).

149. Jeffrey Parness & Amy Leonetti, *Expert Opinion Pleading: Any Merit to Special Certificates of Merit?*, 1997 BYU L. REV. 537, 538 (1997), quotes a statement from those debates wherein Bill Clinton stated:

In the case of the product liability bill which they passed and I vetoed—I think that’s what he’s talking about—I actually wanted to sign that bill, and I told the people exactly what—the Congress exactly what kind of bill I would sign. Now a lot of the trial lawyers didn’t want me to sign any bill at all, but I thought we ought to do what we could to cut frivolous lawsuits, but they wouldn’t make some changes that I thought should be made. Now let me just give you an example. I had a person in the Oval Office who lost a child in a school bus accident where a drunk driver caused the accident directly, but there were problems with the school bus. The drunk driver had no money. Under the new bill, if I had signed it, a person like that could never have had any recovery. I thought that was wrong.

150. *See id.*

cases “from the utterly frivolous ones.”¹⁵¹ The distinction between frivolous cases and meritorious ones is messy because the determination depends on subjective application of an ambiguous definition. In the legal context, the term “frivolous” is defined as “given to triflings, not worth notice,” and “of little weight or importance, not worth notice of slight.”¹⁵² Accordingly, the subjective perspective of the person called upon to evaluate a claim determines whether it is frivolous or meritorious. For this reason, *some* frivolous cases inevitably find their way into the system,¹⁵³ despite the ethical guidelines that prohibit lawyers from entertaining them.

To further deter the filing of frivolous suits, some individuals contend that “certificates of merit” issued by designated experts or panels should be required before certain cases are permitted to proceed.¹⁵⁴ These special certificates impose a more significant burden than already exists under Federal Rule of Civil Procedure Rule 11¹⁵⁵ by requiring the claimant to obtain a written expert opinion certifying that the merits of the particular case are valid. “The major goal typically [justifying the imposition of certification requirements] is a reduction in the number of frivolous claims.”¹⁵⁶ Many states have already enacted these measures to reduce litigation in certain contexts. Among these, Illinois requires that a certificate of merit, issued by an expert, accompany the filing of a product liability claim.¹⁵⁷ Illinois requires a similar certificate when one files an action for medical malpractice.¹⁵⁸ In Florida, a medical negligence claimant must submit a “verified written medical expert opinion,” certifying that there are reasonable grounds for the claim before notice of the lawsuit is mailed.¹⁵⁹ Similarly, a Georgia provision requires a certificate of merit in all civil actions for medical malpractice.¹⁶⁰ California,¹⁶¹ Nevada,¹⁶² and the Virgin Islands¹⁶³ have all

151. *Crowley Cutlery Co. v. U.S.*, 849 F.2d 273, 278 (7th Cir. 1988).

152. *See* CORPUS JURIS SECUNDUM, p. 1832 (1986).

153. A case that one judge may deem “frivolous” may be designated “meritorious” by other judges or legal commentators. Similarly, those cases deemed meritorious by a particular judge may be criticized as frivolous or baseless by some legal commentators.

154. *Id.* (“State lawmakers have recently sought to deter certain types of frivolous claims by requiring special certificates of merit involving the use of an expert opinion.”).

155. *See* FED. R. CIV. P. 11 (2006) (implying that an attorney certifies that a claim is meritorious upon permitting it to be filed for the consideration of the tribunal.).

156. Parness & Leonetti, *supra* note 149, at 541.

157. 735 ILL. COMP. STAT. ANN., Title 735 § 52-622 (requiring affidavit and written report of an expert before a product liability action can be filed).

158. *See* 735 ILL. COMP. STAT. ANN., Title 735, §5/2-622(a). The Illinois law requiring an expert affidavit for medical malpractice was sustained despite constitutional attack. *See* DeLuna v. St. Elizabeth’s Hosp., 588 N.E.2d 1139 (Ill. 1992).

159. FLA. STAT. ANN. § 766.203(2)(b) (2006).

160. GA. CODE ANN. § 9-11-9.1(a) (2005) (requiring an expert certification after a complaint

enacted similar requirements. The United States Congress even proposed such a requirement at the federal level, though President Clinton ultimately vetoed the measure.¹⁶⁴

These measures effectively preclude a number of suits. A reduction in the number of claims filed comes as no surprise; adding another procedural impediment makes filing a claim more expensive, more difficult, and less likely. In addition to the procedural impediments, a certification panel or expert is likely to prevent the introduction of many cases, and thereby reduce litigation.

A. Substantial Measures Already Exist to Deter Frivolous Suits from the System

Various measures already exist to deter frivolous suits from entering the system. First, various procedural rules prohibit lawyers from introducing frivolous claims or defenses into the system.¹⁶⁵ Among these prohibitions, Rule 11 of the *Federal Rules of Civil Procedure* provides that a lawyer may be subject to sanctions for pursuing a frivolous claim or relying on a frivolous defense. These provisions are frequently enforced. And “[c]oncern by the courts, particularly the federal courts, about abuse of judicial process has increased in recent years and has been manifest by a greater judicial willingness to impose sanctions [pursuant to Rule 11].”¹⁶⁶ In addition to sanctions, lawyers may be punished for violating codes of professional conduct if they present frivolous claims or defenses for adjudication.¹⁶⁷ Second, the economic realities of modern legal practice strongly encourage attorneys to refrain from bringing cases

and answer are filed “[in] any action for damages for personal injuries, wrongful death, or property damage resulting from an alleged act of malpractice or negligence by a licensed person.”).

161. CAL CIV. PROC. CODE 340.1(h)(1) and (2) (2005) (requires that a plaintiff seeking to recover damages stemming from sexual abuse as a child must first obtain certification from (1) his attorney and (2) from a licensed mental health practitioner.); *see also* 340.1(h)(2) (the licensed mental health provider cannot be a party to the litigation and must certify that there is a “reasonable” basis for the action).

162. Nevada employed a medical malpractice-screening panel to review these cases, though the procedural requirement that a plaintiff receive such certification has been abandoned.

163. Parness & Leonetti, *supra* note 149, at 561 (“In the Virgin Islands there is a Medical Malpractice Action Review Committee that, within the Office of the Commissioner of Health, arranges for the review of all prospective malpractice claims by experts before civil actions may be commenced.”).

164. *See* H.R. 956, 104th Cong. (1996).

165. *See supra* notes 144–46 for a summary of the ethical rules that constrain lawyers not to entertain or introduce frivolous matters.

166. MURRAY SCHWARTZ, *LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS*, 118 (Michie Publishers 1985).

167. *See supra* notes 144–46.

that are frivolous or “not worth notice.” Plaintiff attorneys retained on a contingency fee arrangement receive compensation only if they achieve certain results for their clients.¹⁶⁸ Because their compensation is directly tied to success, these attorneys will not file claims unworthy of notice.¹⁶⁹ Additionally, lawyers charging an hourly rate are generally concerned about their reputation. In this way, the engagement of a lawyer on a case is an existing check on frivolous suits. In light of existing deterrents, it is valid to wonder whether frivolous suits present the significant problem that some persons contend they do.

1. The certification requirement may reduce more than frivolous litigation.

As stated earlier, imposing a certification of merit requirement will reduce litigation,¹⁷⁰ by imposing another procedural hurdle that must be cleared before claims can be filed. However, certification requirements affect a broader range of claims than many proponents of the measures acknowledge.

Adopting these certification requirements will preclude meritorious suits as well as frivolous ones. As “parties make litigation [] decisions based on the procedural setting, and not just on the merits, of a given case,”¹⁷¹ imposing additional procedural prerequisites to filing claims will inhibit all litigants from bringing their claims. The significant possibility that this requirement will intrude on the ability and tendency of individuals with meritorious claims to assert their rights is something that should be carefully considered before states rush to adopt the certification of merits requirements.¹⁷²

168. Many plaintiff attorneys are compensated on a contingency fee basis, meaning they are compensated only if they achieve certain results for their clients. If the case is “not worth notice,” it does not present a viable opportunity for victory or success. Lawyers are not likely to accept such representation or take such cases to court because they are unlikely to be paid for their efforts. For a discussion on the risks associated with contingency fee arrangements see e.g., *Edell & Assocs. P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424 (4th Cir. 2001).

169. If the attorney believes that the claim is not worth notice, and the matter is contingent upon certain results, he or she will not invest time in that matter.

170. See *Molot*, *supra* note 43, at 60 (“In particular, lawyers and clients alike understand that the cost of litigation may affect outcomes.”).

171. *Id.*

172. See e.g., *Parness & Leonetti*, *supra* note 149, at 578. (“Reform efforts must aim to deter frivolous claims without denying justice for claims with merit.”).

2. *The certification requirements raise poignant Constitutional questions.*

Certification requirements have already been challenged on various constitutional grounds. These challenges have been framed in terms of separation of powers, equal protection, and the right to apply to courts for a redress of grievances.¹⁷³

By imposing certification requirements on litigants, the legislature assumes the power of the judiciary, which, according to constitutional principles, has authority over “practice and procedure” before its tribunals.¹⁷⁴ Because a special certificate requirement usurped the constitutional right of the court to set its own pleading rules, the Ohio Supreme Court held a certification requirement to be invalid.¹⁷⁵ Upon review of a similar statute, the Illinois Supreme Court reached the same result, invalidating the legislatively imposed certification requirement.¹⁷⁶ These precedents demonstrate the judiciary’s concern that certificate of merit requirements step beyond the scope of legislative authority and into the realm of judicial operations.¹⁷⁷

Certification requirements are also challenged as inconsistent with the principle of equal protection “since certificate of merit standards treat differently malpractice, product liability, or other specified claimants from all other claimants.”¹⁷⁸ Certification requirements may implicate equal protection concerns by providing protections to certain defendants (i.e. negligent doctors) that are not provided to the public at large (i.e.

173. See e.g., ILL. CONST. art. I, § 5. The right for a redress of grievances is also known as the right of a litigant to access courts.

174. See e.g., OHIO CONST. art. IV, § 5(B) (2006).

175. See *Hiatt v. S. Health Facilities*, 626 N.E.2d 71 (Ohio 1994) (The pertinent certificate requirement was found to be inconsistent with a pleading rule set by the Ohio Supreme Court whereby pleadings “need not be verified or accompanied by affidavit except when otherwise specified by the rules promulgated by the Supreme Court.”).

176. See *DeLuna v. St. Elizabeth’s Hosp.*, 588 N.E.2d 1139, 1147 (Ill. 1992) (In addition to finding that the statutory provision unconstitutionally infringed on the judicial branches right to determine pleadings rules, there was some concern that experts were being forced to perform a judicial function—assessing the merits of a particular claim—though not trained to do so. The majority disregarded that contention finding that the expert was not asked to render views concerning the outcome of the suit, which apparently would have been unconstitutional. Though it has been rejected, that contention is also one for consideration.).

177. It should also be noted that certification requirements have withstood similar constitutional assaults in other states. See e.g., *Royle v. Fla. Hosp.-E. Orlando*, 679 So.2d 1209 (Fla. Dist. Ct. App. 1996) (held that a certification requirement did not violate state constitutional right of access to courts); *Mahoney v. Doerhoff Surgical Servs.*, 807 S.W.2d 503, 509 (Mo. 1991) (holding that the certification requirement did not violate jury trial or access to court challenges.).

178. *Parness & Leonetii*, *supra* note 149, at 581–82. Consistent with these requirements, a medical malpractice claimant may be forced to comply with a procedural requirement that an ordinary tort claimant does not have to worry about.

negligent drivers). This concern about unequal treatment is best illustrated by a hypothetical example.

In both instances, assume that the claims arose in the State of Florida where an applicable statute requires persons claiming damages for medical malpractice to obtain a written expert opinion certifying that the cause of action is meritorious.¹⁷⁹ Plaintiff A suffers nonpermanent injuries, valued at \$100,000, due to a doctor's malpractice. Conversely, Plaintiff B suffers nonpermanent injuries, valued at \$100,000 when involved in an accident with a negligent driver. Further suppose that in both cases the relative defendants are 100 percent liable for the injuries. For all intents and purposes, the injuries sustained by Plaintiff A and by Plaintiff B are the same. Yet, the law imposes an additional burden and expense on Plaintiff A, who due to the certification statute must allocate time and money¹⁸⁰ to obtain an expert certification before bringing the claim.

VI. CONCLUSION

As this Article demonstrates, proposals to reduce litigation and alleviate the consequences of increasing litigation abound. Many of these proposals would reduce litigation. But, none of them can be implemented without substantial consequences. Application of the British fee-shifting model could reduce litigation, but not without limiting access to courts and rendering the rights of wealthy persons and entities better protected than those of persons and entities without such resources. Damage caps could reduce the ills associated with increasing litigation, but not without usurping judicial power and imposing unjust results in individual cases. Rigid restrictions on lawyer advertising cannot reduce litigation without intruding on the First Amendment.

Thus, the judicial system finds itself stuck in a quagmire. On one hand there appears to be a growing interest in reducing litigation to protect American industries.¹⁸¹ On the other hand, the judicial system remains interested in protecting the rights of individuals and promoting access to courts. Serious consequences accompany each reform proposal. So what does all of this mean?

179. In fact, Florida does have such a provision.

180. See e.g., Michael Higgins, *Running for Coverage: Hearing "No" for an Answer Does not Have to be the Final Word when an Insurance Company Denies a Client's Claim*, A.B.A. J., Oct. 1997, at 62. (noting that "expert fees may run from \$150 to \$400 an hour."). It should also be noted that doctors in some states are able to charge upwards of \$2000 an hour for expert fees. Accordingly, the costs of reviewing a case and then issuing a certification of merit can be significantly costly.

181. Pressure to reduce litigation and control the litigation explosion is building in many social circles.

America's unique judicial system stresses the importance of individual liberty and freedom. Yet a system that provides such freedom depends on a moral, and self-governing populace. Lawyers, as representatives of the judicial branch, have a unique responsibility to counsel their clients and administer the law with adequate regard for broad societal consequences. The best way to prevent litigation from unduly overwhelming society is to impress upon the minds of lawyers their positions as representatives of the judicial branch and representatives of the society served they serve.

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