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# UNILATERAL ATTORNEY'S FEES CLAUSES: A PROPOSAL TO SHIFT TO THE GOLDEN RULE

Jeffrey C. Bright\*

## ABSTRACT

*The American rule is widely recited as the standard for whether attorney's fees are recoverable. Yet in contract terms, one-sided attorney's fees clauses often supersede the American rule. One-sided attorney's fees clauses state that one party recovers attorney's fees in the event of litigation; however, the other party—the disadvantaged party—is unable to recover attorney's fees.*

*In the event of a contract dispute, unilateral attorney's fees clauses significantly influence the course of litigation. The advantaged party aggressively pursues litigation due to its ability to recover attorney's fees. The disadvantaged party, on the other hand, is deterred from pursuing a claim or asserting a defense to the lawsuit.*

*Specifically, if it is a small-claim dispute, then the disadvantaged party will not pursue litigation because the costs exceed the potential award. Even if the amount in controversy is substantial, the disadvantaged party is still deterred from pursuing litigation—an adverse judgment and the opposing party's attorney's fees are simply too much risk for most litigants. Accordingly, many disadvantaged parties refrain from litigating a claim, even if such arguments have merit.*

*Unilateral attorney's fees clauses are widespread. They are common in standard forms such as leases, mortgages, promissory notes, retail installment contracts, and commercial contracts for the sale of goods. Although outside the scope of this Article, such contract terms are likely to continue to proliferate.*

*A minority of states have recognized the unfairness of unilateral attorney's fees clauses and their oppressive effects in litigation. This Article reviews the different statutes in existence and proposes a model statute. The proposed statute incorporates several state laws, and it is designed to retain the benefits of a “loser pays” system. Meanwhile, the proposed statute is designed to prohibit a party from using fee-shifting as a means to oppress weaker parties in litigation of valid claims.*

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\* Practicing attorney at Stock and Leader, LLP, York, Pennsylvania; A.B., Franklin and Marshall College; J.D., *summa cum laude*, Thomas Jefferson School of Law. Thank you to my wife, Elizabeth, for your support of all my pursuits.

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*It is common knowledge that parties with superior bargaining power, especially in "adhesion" type contracts, customarily include attorney fee clauses for their own benefit. This places the other contracting party at a distinct disadvantage. Should he lose in litigation, he must pay legal expenses of both sides and even if he wins, he must bear his own attorney's fees. One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims.*<sup>1</sup>

## I. INTRODUCTION

Clients ask three questions at the beginning of every lawsuit: Can I win this lawsuit? How much will this cost me? And, *can I recover attorney's fees?* Every lawyer knows the American rule: Each party pays for its own lawyer's fees.<sup>2</sup> The American rule is taught in law school without much scrutiny of its application in practice. A typical contracts textbook might devote two pages to the topic of attorney's fees.<sup>3</sup> A typical remedies textbook does not fare much better—devoting only nineteen pages to the subject of attorney's fees.<sup>4</sup> Accordingly, most lawyers cite the American rule as a reflex.

But the rule is not always controlling. Contracts often include clauses that supersede the American rule. And the attorney's fees clause may be used exclusively to the advantage of the stronger drafting party; meanwhile, it is oppressive to the weaker party. It might read similar to the following:

In event of litigation arising from this contract, [the weaker party] must pay for [the opposing party's] attorney's fees and costs of litigation.

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1. *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Ct. App. 1971) (emphasis added).

2. *See, e.g., Deacon's Dev., LLP v. Lamb*, 719 N.W.2d 379, 382 (N.D. 2006); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 720–21 (1995). A brief history of the American rule is available to the interested reader. *See, e.g., David A. Root*, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 584–85 (2005); *see also John F. Vargo, The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569–79 (1993).

3. *See, e.g., E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS* 21–22 (6th ed. 2001).

4. *See, e.g., DOUG RENDLEMAN, REMEDIES: CASES AND MATERIALS* 160–78 (7th ed. 2006).

This is a one-sided attorney's fees clause (or a unilateral attorney's fees clause). The weaker party will be unable to recover attorney's fees, regardless of whether it prevails in the lawsuit.<sup>5</sup> The opposing party, on the other hand, will receive attorney's fees if it is successful.<sup>6</sup> In some circumstances, the unilateral attorney's fees clause may provide attorney's fees for the stronger party regardless of whether that party prevails.<sup>7</sup>

One-sided attorney's fees clauses are ubiquitous in practice.<sup>8</sup> Public policy is not fond of this practice,<sup>9</sup> and for good reason—it is unfair. It is

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5. *Lamb*, 719 N.W.2d at 382.

6. *See id.*

7. Such attorney's fees clauses have been recognized as overreaching and have been held to be unconscionable in at least one jurisdiction. *See Deak Nat'l Bank v. Bond*, 390 N.Y.S.2d 771, 773 (Sup. Ct. 1976) ("The [contract term] does not even require that an action be commenced or that a default be declared before attorney's fees are 'immediately due.' As in *Weidman*, there could be a judicial determination that there had been no default and the attorney's fees would nonetheless be due. Such a result is unconscionable, and unenforceable, pursuant to the authority of that case.").

8. In my personal experience practicing law, it is standard for one-sided attorney's fees clauses to be included in mortgages, residential and commercial leases, and occasionally in sales of goods and services to small businesses. Statutory provisions and caselaw in California support my anecdotal experience: "[California] Civil Code, section 1717, is part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail." *Care Constr., Inc. v. Century Convalescent Ctrs., Inc.*, 126 Cal. Rptr. 761, 763 n.3 (Ct. App. 1976). For California to have enacted a statute with such a purpose, it is reasonable to infer that several types of standardized contracts use unilateral attorney's fees provisions. *See Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (indicating that one-sided terms in adhesion contracts often become standard and widespread). Widespread use of terms that favor the drafter are also common in landlord-tenant contracts. *See, e.g., Galligan v. Arovitch*, 219 A.2d 463, 465 (Pa. 1966) (discussing the nonnegotiable exculpatory clause in favor of landlords found in nearly all leases).

9. Two recent examples demonstrate the public's disdain for fee-shifting in general. First, there was a great deal of discussion in the 1990s regarding fee-shifting. The U.S. Congress had discussed adopting the British "loser pays" rule as part of its Contract with America. *See generally* Tobias, *supra* note 2, at 729–31. Such proposals were met with criticism and the fee-shifting rule was never enacted. *See generally* Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1866–69 (1998). Second, Florida enacted a fee-shifting statute at the behest of the medical malpractice defense lobby. The statute was soon repealed. *See* Matthew J. Wilson, *Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan*, 19 EMORY INT'L L. REV. 1457, 1480 (2005); *see also* Vargo, *supra* note 2, at 1620–22 (describing the repeal of the Florida statute); Sherman, *supra*, at 1866

intuitively unfair that one party receives attorney's fees if it is successful in the lawsuit, while the other party is without such a remedy. The unfairness of unilateral attorney's fees clauses implicitly demonstrates the uneven bargaining strength of the parties to the contract, as unilateral attorney's fees clauses are often used to oppress weaker parties in litigation. This is especially true when considering the types of contracts that most often contain unilateral attorney's fees clauses. Such clauses are common in several types of adhesion contracts, for example, landlord-tenant contracts,<sup>10</sup> certain types of commercial contracts, and mortgages.<sup>11</sup>

Some jurisdictions have recognized the inherent unfairness of these clauses and have addressed the problem through legislation.<sup>12</sup> The majority of jurisdictions, however, have done nothing, and one-sided attorney's fees clauses are routinely enforced.<sup>13</sup> This Article argues that a legislative

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(describing opposition from doctors who initially supported the law).

10. John J. Donohue III, Commentary, *Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1110 n.38 (1991) ("[I]n California leases it is not uncommon for the landlord to specify that, in the event that suit is brought against the tenant, the tenant must pay the legal fees of the landlord."). My own experience in Pennsylvania supports Mr. Donohue's anecdotal experience.

11. As with residential leases, my experience with commercial contracts and mortgages is anecdotal. However, once again, it is clear that such clauses are common. One state, New York, has enacted a statute specifically to address unilateral attorney's fees clauses in mortgages. N.Y. REAL PROP. LAW § 282 (McKinney 2006 & Supp. 2012).

12. Seven states have enacted reciprocal attorney's fees statutes. These statutes apply when the contract calls for attorney's fees for one party. The statute reforms the contract to mandate a reciprocal attorney's fees clause in favor of the prevailing party, whether named in the contract or not. CAL. CIV. CODE § 1717 (West 2009 & Supp. 2012); FLA. STAT. ANN. § 57.105(7) (West 2006 & Supp. 2012); HAW. REV. STAT. § 607-14 (1993 & Supp. 2007); MONT. CODE ANN. § 28-3-704 (2011); OR. REV. STAT. ANN. § 20.096 (West 2003 & Supp. 2012); UTAH CODE ANN. § 78B-5-826 (LexisNexis 2008 & Supp. 2011); WASH. REV. CODE ANN. § 4.84.330 (West 2006 & Supp. 2012).

13. Only seven states have reciprocal attorney's fees statutes. *See supra* note 12 and accompanying text. Six other states have limited reciprocal attorney's fees statutes. *See infra* note 143. Several states have some protections from one-sided attorney's fees provisions. *See infra* note 144. And thirty-one states have no protections from one-sided attorney's fees provisions. *See infra* notes 168–71. For an example of litigation in which a party advantaged by a unilateral attorney's fees clause sought to have the contract interpreted under New York law, which would enforce a unilateral attorney's fees provision, as opposed to California law, which includes a reciprocal fee-shifting statute, see *ABF Capital Corp. v. Grove Props. Co.*, 23 Cal. Rptr. 3d 803, 805–06 (Ct. App. 2005).

approach towards one-sided attorney's fees clauses should be adopted in every jurisdiction. Further, this Article proposes a model statute that reforms unilateral attorney's fees clauses to become reciprocal.

Part II of this Article discusses the inherent unfairness of one-sided attorney's fees clauses. Unfairness is present in the creation of the contract and the unduly harsh and oppressive effects of the clause in the event of litigation. Part III discusses the common law's failure to remedy this problem. And Part IV discusses the different types of legislative approaches in existence. Generally, legislatures address this issue in one of the following manners: through reciprocal attorney's fees statutes; through limited reciprocal attorney's fees statutes; by enacting other miscellaneous consumer protection statutes; and, in several states, enacting absolutely nothing to address the unfairness in one-sided attorney's fees clauses. Part V proposes a model statute for remedying the issue.

## II. THE INHERENT UNFAIRNESS OF UNILATERAL ATTORNEY'S FEES CLAUSES

Unilateral attorney's fees clauses are unfair and should be disfavored for three reasons. First, the clause is commonly inserted into contracts when the contracting parties are of unequal bargaining power, and the clause is always in favor of the stronger party. Second, the clause has a significant, oppressive effect against the disadvantaged party in the event of litigation. Third, it is against public policy to allow such clauses.

### A. *Unfairness in the Creation of the Contract: Unequal Bargaining Power and Inconspicuous One-Sided Attorney's Fees Clauses*

One-sided attorney's fees clauses are often included in contracts when the contracting parties are of uneven bargaining strength. Indeed, the contract is usually one of adhesion.<sup>14</sup> A contract of adhesion is generally defined as a standardized contract prepared by the party of superior bargaining power, and the contract is presented to the weaker party on nonnegotiable terms such as "take-it-or-leave-it."<sup>15</sup> It is a "nonconsensual

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14. *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Ct. App. 1971) ("It is common knowledge that parties with superior bargaining power, especially in 'adhesion' type contracts, customarily include attorney fee clauses for their own benefit.").

15. *See, e.g., Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981); *Reeves v. Chem. Indus. Co.*, 495 P.2d 729, 732 (Or. 1972).

agreement forced upon a party against his will,”<sup>16</sup> and the typical standardized contract is exclusively favorable to the drafting party.<sup>17</sup> This is because the stronger party is able to draft the contract to its advantage without fear of negotiation from the weaker party.<sup>18</sup> As stated by one commentator, “no companies willingly agree to one-way fee-shifting provisions against themselves.”<sup>19</sup>

Allowing powerful parties to oppressively bargain and form adhesion contracts subverts public policy.<sup>20</sup> Such oppressive bargaining creates “disproportionate exchanges of value which, in turn, undermine the freedom to contract and the proper functioning of the system.”<sup>21</sup> Adhesion contracts do not contain a key element of free contract—the ability to negotiate the terms of the contract on equal bargaining grounds.<sup>22</sup> As noted

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16. *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 39 (Mich. 2005) (quoting *Morris v. Metriyakool*, 344 N.W.2d 736, 756 (1984)) (internal quotation marks omitted).

17. *See Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 883 (Idaho 2003).

18. *See id.*; *Rory*, 703 N.W.2d at 39.

19. Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2043 (1993) (footnote omitted). This quote is in reference to statutory one-way fee-shifting; nevertheless, it is applicable to contractual fee-shifting.

20. *See Centric Corp. v. Morrison-Knudsen Co.*, 731 P.2d 411, 414 (Okla. 1986) (“[T]he minimum standards are not limited to precepts of rationality and self-interest—they include equitable notions of fairness and propriety which preclude the wrongful exploitation of business exigencies to obtain disproportionate exchanges of value . . .”). In *Centric*, the Oklahoma Supreme Court discussed economic duress; however, such principles are equally applicable to contracts of adhesion, as both doctrines are premised upon parties not bargaining at arm’s-length and being subject to oppressive, ham-handed tactics by a party of superior bargaining strength. *See id.*

The Oklahoma Supreme Court also noted that there is “an increasing recognition of the court’s role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power, and courts are becoming more skittish about enforcing agreements which were entered into under coercive circumstances.” *Id.*; *see also* *Milligan v. Chesterfield Vill. GP, LLC*, 239 S.W.3d 613, 629 (Mo. Ct. App. 2007) (“[T]here is a public interest in protecting the freedom to contract in a setting that provides for equal bargaining powers and the power to bargain for and protect [one’s] personal rights and interests.”). *But see* *Chepkovich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1197–98 (Pa. 2010) (Saylor, J., concurring) (refuting that adhesion contracts are contrary to principles of the free market).

21. *See Centric Corp.*, 731 P.2d at 414; *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 592 N.W.2d 201, 206 (Wis. 1999). Indeed, if a party has been unable to bargain at arm’s-length for the quid pro quo, it is questionable whether contract law should protect the expressed bargains made in the contract. *See Centric Corp.*, 731 P.2d at 414.

22. *See RB-3 Assocs. v. M.A. Bruder & Sons Inc.*, No. C-3-95-198, 1996 WL 1609231, at \*5 (S.D. Ohio Aug. 26, 1996); *Lovey*, 72 P.3d at 883; *Rory*, 703 N.W.2d at

by the Indiana Supreme Court, such hard bargaining undermines the concept of free-market enterprise:

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party, in need of the good or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.<sup>23</sup>

The mere fact that a contract is adhesive, however, does not invalidate the unilateral attorney's fees clause.<sup>24</sup> Thus, stronger bargaining parties continue to use standardized forms that include unilateral attorney's fees clauses.<sup>25</sup>

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39; *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 489–90 (Mont. 2009) (“A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formulation.” (quoting *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 7 (Mont. 2002)) (internal quotation marks omitted)).

Similar to contracts of adhesion, contracts of coercion contain the staple characteristic that “[t]he stronger party to a bargain, by simply offering the weaker party a value and without threatening to violate the weaker party's rights, can cause the weaker party's choice to enter the contract not to be free.” Sian E. Provost, Note, *A Defense of a Rights-Based Approach to Identifying Coercion in Contract Law*, 73 TEX. L. REV. 629, 633 (1995). Such a statement clarifies the core problem with nonnegotiable agreements; a weaker party is bound to terms that it could not negotiate, and these terms are often oppressive to the weaker party.

Although adhesion contracts are formed without negotiation, such contracts are deemed to satisfy the bargained-for-exchange requirement of a contract. In essence, valuable consideration is still being sought and exchanged. Merely, the weaker party is unable to negotiate the exchange. *See Boomer v. AT&T Corp.*, 309 F.3d 404, 416 (7th Cir. 2002) (noting that adhesion contracts are nonnegotiable, yet still satisfy the requirement of a bargain for exchange).

23. *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971).

24. *See* Teri J. Dobbins, *The Hidden Costs of Contracting: Barriers to Justice in the Law of Contracts*, 7 J.L. SOC'Y 116, 125–26 (2005) (“Although contracts of adhesion are treated differently under the law, they are presumptively enforceable.” (footnote omitted)).

25. *See Lovey*, 72 P.3d at 883 (“Adhesion contracts are a fact of modern life.”).



An additional sign of unfairness in creation of the contract is that disadvantaged parties are often unrepresented in the transaction.<sup>26</sup> This is true not only for individuals, but also for small businesses.<sup>27</sup> Many small

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26. *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996) (“Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change any of the contract’s terms.” (citation omitted)); *see also* Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 GEO. J. LEGAL ETHICS 989, 997–98 (1998) (opining that low-income and middle-class persons’ legal needs are not met because such persons are often unrepresented in transactions). It is also common for certain transactions, even if involving professionals such as real estate agents or financial advisors, to lack legal representation. *See Childs v. Smeltzer*, 171 A. 883, 886 (Pa. 1934).

27. It is common for small businesses to lack legal representation. For example, the North Texas Small Business Development Center provides a FAQ section on the subject of whether to hire an attorney. *See Legal and Tax FAQs*, N. TEX. SMALL BUS. DEV. CENTER NETWORK (2010), [http://www.ntsfdc.org/faq\\_tax.shtml](http://www.ntsfdc.org/faq_tax.shtml) (click on “Should I hire a lawyer?”). The Answer section will lead many small-business owners to conclude that a lawyer is unnecessary for all but the most important of transactions. The Small Business Development Center’s information questions the value of a lawyer in assisting a transaction, the competency of lawyers in providing advice that dovetails with business principles, the cost of hiring a lawyer, the knowledge of the lawyer in comparison to the small-business owner, and the complexity of contractual transactions:

*Should I hire a lawyer?*

As with any specialist, a lawyer is valuable if you need one and a waste of money if you don’t need one. *As a business owner, you will undoubtedly need the services of a lawyer now and then.* If you will need one frequently, it might be more cost efficient to hire one on a retainer. If, however, you will only need one infrequently, you might locate one and establish a relationship where you can get and pay for what you want when you need it.

In using lawyers, it is important to keep in mind that *lawyers work with the law*. They are usually not business people and often do not understand business issues. *They should not be used for business advice unless they have clear competence to offer that kind of advice.*

Since lawyers are expensive, especially for small businesses, they are usually hired with care and consideration to their expense compared with their benefit. If the business owner understands the law in certain areas, a lawyer is usually not needed. An example might be contracts. If the business owner is familiar with contracts and contract law, the expense of a lawyer to draft a

business owners believe that “[i]f the business owner understands the law in certain areas, a lawyer is usually not needed. An example might be contracts. If the business owner is familiar with contracts and contract law, the expense of a lawyer to draft a simple contract is probably not needed.”<sup>28</sup> Only when litigation is imminent do many small-business owners accept that they lack an understanding of contract law.

One of the reasons why the disadvantaged party is often without counsel is because of the party’s inferior financial status.<sup>29</sup> The advantaged party, on the other hand, is quite likely a merchant who is knowledgeable about industry contracts and has received attorney advice in drafting the agreement.<sup>30</sup>

Moreover, one-sided fees clauses are not explained to the disadvantaged party and are offered with inconspicuous writing.<sup>31</sup> Most parties to an agreement are unaware of the legal consequences, or even the existence, of one-sided attorney’s fees provisions.<sup>32</sup>

These circumstances demonstrate the unequal bargaining power that is present when a unilateral attorney’s fees clause is created. Because of the unequal bargaining power, it can hardly be said that the disadvantaged

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simple contract is probably not needed. On the other hand, if the business owner is uncertain, the review of the draft contract by a lawyer will be money well spent. Once a contract is signed by you, it is usually too late to fix problems. The law assumes that you have read and understand a contract before you sign it.

*Id.* This Author’s general experience in representing small businesses is that the mindset of this FAQ section is wholly embraced by small-business owners. It is very common for small-business owners to contract and conduct business without legal assistance. And the implied criticisms from this FAQ section—whether the lawyer will add value; whether the lawyer’s advice will account for business judgment; whether the lawyer knows more about contracts than the business owner himself; and whether the lawyer is too expensive for the project—are common concerns of small-business owners. *See id.* This Article does not take a stance on whether business owners should use a lawyer in contractual transactions. But, with such a mindset, it is understandable why many small-business owners attempt to contract without legal assistance. *See id.*

28. *Id.*

29. Dobbins, *supra* note 24, at 123–24.

30. *Id.* at 126–27.

31. *See* B&R Supply Co. v. Bringhurst, 503 P.2d 1216, 1217 (Utah 1972).

32. *See id.* at 1217–18 (discussing the enforceability of an attorney’s fees clause that was inconspicuously inserted into the contract); Dobbins, *supra* note 24, at 122–24; Andrew Scherer, Gideon’s Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings, 23 HARV. C.R.-C.L. L. REV. 557, 570–76 (1988) (explaining that tenants are rarely knowledgeable about their legal rights).

party to a one-sided attorney's fees clause conscientiously intended to enter an agreement with such a term.

*B. Unfairness in the Event of Litigation*

It is the effect of unilateral attorney's fees clauses in litigation, however, that is truly oppressive. The clause creates significant leverage for the advantaged party, resulting in abusive and oppressive litigation tactics. Unilateral attorney's fees clauses alter the cost-benefit analysis in favor of the advantaged party. They also deter a disadvantaged party from pursuing a case unless it is a slam dunk.<sup>33</sup> But rarely does a case present itself as an obvious "slam dunk."<sup>34</sup> And it is also rare for a case to be obviously frivolous.<sup>35</sup> Thus, the disadvantaged party is often deterred from pursuing and defending claims based upon viable grounds. The significant altering of the cost-benefit analysis and resultant risk-aversion of the disadvantaged party is distinctly shown in three common patterns: (1) aggressive litigation by the advantaged party; (2) risk-aversion by the disadvantaged party; and (3) capitulation by the disadvantaged party to settlement demands by the advantaged party.

1. *Unilateral Attorney's Fees Clauses Result in Aggressive Litigation by the Advantaged Party*

The outcome of litigation is often akin to gambling: at the outset of the lawsuit, parties will assess their likelihood of winning and the costs of a

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33. See *infra* Part III.B.2; see also Clinton F. Beckner III & Avery Katz, *The Incentive Effects of Litigation Fee Shifting When Legal Standards Are Uncertain*, 15 INT'L REV. L. & ECON. 205, 206 (1995) ("[T]he British rule deters risk-averse litigants and penalizes those who overestimate their chances of victory . . ."); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 650–52 (1974) ("Current practice tends to deter the prosecution of even clearly meritorious small claims by litigants who could at best recover less than the often high expenses of counsel . . . . And what is true for plaintiffs also holds for defendants . . . ."); Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REV. 199, 214 (1991) (reviewing WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991)) ("[F]ee shifting simply increases the burden on the plaintiff, who must cope with the prospect of having to pay the defendant's fees even in the event of a loss in a close case.").

34. Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371, 373 (1996); see Beckner & Katz, *supra* note 34, at 206–07.

35. See Bebchuk & Chang, *supra* note 34, at 373.

successful suit.<sup>36</sup> Generally, if attorney's fees and costs exceed the potential award, then there is a strong disincentive to pursue the suit.<sup>37</sup>

This problem is particularly acute in small claims litigation. Unilateral attorney's fees clauses provide an incentive for the advantaged party to pursue small claims litigation (or litigation in general), since fee-shifting results in no costs for a victorious suit, and the costs of suit will not exceed the amount at stake.<sup>38</sup> Accordingly, unilateral attorney's fees clauses are common in small claim contracts.<sup>39</sup> Unilateral attorney's fees clauses allow the advantaged party to pursue litigation, even when the amount in controversy is insignificant and, without the one-sided attorney's fees clause, it would be unreasonable to pursue the litigation.<sup>40</sup>

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36. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 348–49 (1991); Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 114 (1996); see generally Beckner & Katz, *supra* note 34 (noting that there are certain unpredictable aspects of administering legal standards).

37. See Bebhuk & Chang, *supra* note 34, at 373 (“Even if the plaintiff can count on the court to decide the case as the plaintiff predicts, the plaintiff will not sue if its litigation costs exceed the value of the relief that it expects the court to award.”); Comment, *supra* note 33, at 650–51; Jennifer M. Smith, *Credit Cards, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War*, 61 ME. L. REV. 171, 174 (2009); see also Summers v. Crestview Apartments, 236 P.3d 586, 592–93 (Mont. 2010) (discussing unilateral attorney's fees clauses in leases, whereby landlords deter tenant-litigants).

38. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263 (1975) (stating that statutes providing for fee-shifting are often intended to encourage private litigation). Although *Alyeska Pipeline* applies to statutory fee-shifting, the same reasoning is applicable in private contract fee-shifting clauses. See Krent, *supra* note 19, at 2040 (explaining that one-way fee-shifting creates an incentive to litigate as opposed to the American rule); Margaret H. Lemos, *Special Incentives to Sue*, 95 MINN. L. REV. 782, 782–84 (2011); James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 AM. J. COMP. L. 195, 201 (2010) (“[S]tatutory exceptions to the no-indemnity practice are designed to, and usually do, encourage lawsuits.”); Sherman, *supra* note 9, at 1866 (“The justification for [statutory] fee-shifting has been based on providing an incentive for parties to vindicate their rights under the particular statute . . . .”); Tobias, *supra* note 2, at 720 (explaining that most statutory fee-shifting is “to encourage the pursuit of certain forms of litigation which vindicate important social policies”).

39. See Donohue, *supra* note 10, at 1110 n.38 (noting it is common for landlords to include unilateral fee-shifting clauses in residential leases). My own experience in Pennsylvania supports Mr. Donohue's anecdotal experience. Indeed, it is standard for landlords to draft leases with one-sided attorney's fees clauses in favor of the landlord.

40. Bebhuk & Chang, *supra* note 34, at 373; Comment, *supra* note 33, at 650–51; Smith, *supra* note 37, at 174; see also Summers, 236 P.3d at 592–93.

When a unilateral attorney's fees clause is present, the disadvantaged party is placed in a difficult situation; its options are limited. First, the disadvantaged party could litigate the lawsuit and prevail. But the costs of litigating the lawsuit would exceed the amount in controversy; thus, the disadvantaged party would be at a net loss by having litigated the suit.<sup>41</sup> Even if the claim is more substantial than a small claim, the costs of litigation may still outweigh the potential benefit of the claim or defense.<sup>42</sup> Second, the disadvantaged party could litigate the suit and lose. By losing, the disadvantaged party would also pay a substantial amount to the opposing party for attorney's fees. Third, the disadvantaged party could immediately capitulate and settle the dispute.

All three options are loser options for the disadvantaged party. Success on the merits of the lawsuit is a financial loss; losing the lawsuit is a substantial financial loss; and capitulation is a loss as well. Since the lawsuit is ultimately a loss—regardless of the disadvantaged party's tactics—many disadvantaged parties will simply yield to the stronger party.<sup>43</sup> In effect, the disadvantaged party receives the worst aspects of both the American rule and the British rule: the disadvantaged party is required to pay its own fees, even in event of success (the American rule); and a loss is significantly harmful because the disadvantaged party must pay opposing counsel's fees (the British rule).<sup>44</sup>

Even if the disadvantaged party has a meritorious claim or defense, a cost-benefit analysis often mandates the party to immediately capitulate to

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41. Maxeiner, *supra* note 38, at 196 ("The practice of no-indemnity allows [the opposing party] to render the victories of their adversaries pyrrhic and the claims of their adversaries' clients worthless." (footnote omitted)); *id.* at 199 & n.10 ("[I]t is not uncommon for parties' combined legal bills to equal or exceed amounts in controversy." (footnote omitted)); *id.* at 212. In one anecdotal case, attorney's fees were almost \$30,000 after two years of litigation on a claim worth approximately \$1,800. *Tentinger v. McPheters*, 977 P.2d 234, 238 n.3 (Idaho Ct. App. 1999); *Smith*, *supra* note 37, at 175 ("[A]ttorney's fees are substantial and account for the majority of the cost of the litigation." (footnote omitted)); *see also* *Mountain View Condo. Ass'n v. Bomersbach*, 734 A.2d 468, 469 (Pa. Commw. Ct. 1999) (noting that an attorney's fees award of \$46,548.64 was granted on a claim originally valued at \$1,200).

42. *See* Maxeiner, *supra* note 38, at 219 ("But who wants to take a claim to court only to see the legal fees equal or exceed any possible recovery? That is a common result for claims under \$25,000 and not unusual for amounts of \$100,000 or even \$1 million.").

43. *See* Lemos, *supra* note 38, at 796–98.

44. *See* Bebachuk & Chang, *supra* note 34, at 373 (describing the drawbacks of the American rule and British rule regarding risk-aversion to pursuing a cause of action).

avoid further costs of litigation.<sup>45</sup> Thus, the advantaged party is able to steamroll the disadvantaged party, regardless of the merits of the suit. The stronger party is aware of this advantage in litigation, and it aggressively pursues claims or defenses, even if they are of dubious merit.<sup>46</sup>

2. *Disincentive for the Disadvantaged Party to Bring Meritorious Claim, Due to Fear of Greater Losses*

Because of the unilateral attorney's fees clause, a disadvantaged litigant must assess the risks of having to pay opposing counsel's fees in the event of a loss. This risk is quite daunting because fees can mount quickly and significantly in litigation.<sup>47</sup> Further, attorney's fees for an opposing lawyer can be difficult to predict, and a risk-averse litigant must consider a worst-case outcome.<sup>48</sup> For example, in one case, a Texas Court of Appeals accepted that "reasonable attorney's fees for this case would be between \$25,399.99 and \$90,000.00."<sup>49</sup> That is quite a range. A risk-averse litigant cannot ignore the possibility that opposing counsel's fees may be difficult to predict and could be quite large.<sup>50</sup>

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45. Comment, *supra* note 33, at 651 ("[T]he fear of a penalty upon loss of a small claim may induce premature or unjust settlement where the claimant is poor and the claim is less than open-and-shut.").

46. See *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Ct. App. 1971) ("One-sided attorney's fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims."); Dobbins, *supra* note 24, at 127 & n.64 ("A party who knows that the other party is unlikely or unable to sue for breach of contract (even if liability is clear) can breach the contract with impunity or compel modifications or concessions that would otherwise be refused.").

47. See Gross & Syverud, *supra* note 36, at 348–49; Erik S. Knutsen, *The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada*, 36 QUEEN'S L.J. 113, 115 (2010) ("The cost to litigate today can quickly eclipse the value of what is at stake in the dispute—for example, a summary judgment motion may now be more expensive than a family car."); Maxeiner, *supra* note 38, at 212, 219; see also *Mountain View Condo. Ass'n v. Bomersbach*, 734 A.2d 468, 469 (Pa. Commw. Ct. 1999) (affirming an award of tens of thousands of dollars in legal fees pertaining to a small claim matter).

48. Knutsen, *supra* note 47, at 132–38 (describing the unpredictability of assessing attorney's fees at the outset of litigation); Mark S. Stein, *The English Rule with Client-to-Lawyer Risk Shifting: A Speculative Appraisal*, 71 CHI.-KENT L. REV. 603, 605 (1995) ("[I]t is unrealistic to assume that individual litigants facing the threat of complete ruin will be risk neutral. As several commentators have observed, such litigants will more likely be highly risk averse.").

49. *EMC Mortg. Corp. v. Davis*, 167 S.W.3d 406, 419 (Tex. App. 2005).

50. *Sherman*, *supra* note 9, at 1871.

Potential liability for opposing counsel's fees exaggerates the risk of the lawsuit for the disadvantaged party.<sup>51</sup> It is not uncommon for attorney's fees to exceed the amount in controversy, even in disputes of moderate or substantial stakes.<sup>52</sup> No longer is the disadvantaged party choosing to defend or pursue a claim based on the suit's merits. The decision is based on whether the party is willing to risk an adverse judgment that includes opposing counsel's attorney's fees.<sup>53</sup>

Many disadvantaged parties have a meritorious claim; yet they fail to assert it because the consequences of losing the case are so great that they cannot afford to risk the loss.<sup>54</sup> Even if a suit is commenced, the disadvantaged party is likely to capitulate to an unfavorable settlement because of fear of opposing side's attorney's fees.<sup>55</sup> As noted by one commentator, "[c]onsumer contracts with 'loser pays' clauses . . . scare consumers and exacerbate the perception that a court system is too expensive and unpredictable."<sup>56</sup> The Supreme Court has also noted that fee-shifting acts as a punishment to bring suit and results in a strong deterrent for bringing or defending a lawsuit:

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51. See Maxeiner, *supra* note 38, at 198 ("Indemnifying prevailing parties would discourage plaintiffs with plausible, but not clearly winning lawsuits, from suing. Worse, they might bring a lawsuit, be heavily outspent by the better off adversary, and find themselves compelled upon defeat to indemnify their adversaries for attorney's fees." (footnote omitted)).

52. See Knutsen, *supra* note 47, at 115; Maxeiner, *supra* note 38, at 212, 219; Smith, *supra* note 37, at 175; Vargo, *supra* note 2, at 1624–26.

53. See *Int'l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 543 (Ct. App. 2000) ("The California Supreme Court has recognized the policy indicating the mere threat of an attorney fees award alters the dynamics of litigation." (citing *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 85 (Cal. 1979))).

54. *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Ct. App. 1971); Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorney's Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 79–80 (1996); Mastro, *supra* note 33, at 215 ("Under fee-shifting, the well-heeled party—more often than not the defendant—could better afford to take litigation risks. The financially strapped party, in contrast, could ill afford defeat and would therefore have to capitulate on terms favorable to the defendant or, worse yet, refrain altogether from bringing suit, no matter how meritorious the claim."); Maxeiner, *supra* note 38, at 212.

55. *Coast Bank*, 97 Cal. Rptr. at 39; Comment, *supra* note 33, at 650–51 ("[T]he fear of a penalty upon loss of a small claim may induce premature or unjust settlement where the claimant is poor and the claim is less than open-and-shut."); Di Pietro & Carns, *supra* note 54, at 79–80; Wilson, *supra* note 9, at 1468 ("Parties may forego viable claims due to increased costs and financial risk, particularly when facing stronger or repeat litigants.").

56. Wilson, *supra* note 9, at 1468.

The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. . . . 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.<sup>57</sup>

Unilateral attorney's fees clauses affect more than the poor, however. The deterrent effect of unilateral attorney's fees clauses is particularly notorious for middle-class litigants.<sup>58</sup> Middle-class litigants have the necessary wealth to pursue a lawsuit; however, the expense is a heavy burden on their finances.<sup>59</sup> Thus, an adverse judgment coupled with payment of an opposing party's attorney's fees is a devastating risk. Fear of the unilateral attorney's fees clause skews the cost-benefit analysis towards risk-aversion and refusal to pursue litigation.<sup>60</sup> As one commentator stated, "to bring a claim . . . with a loser pays provision, a civil litigant must either be almost absolutely sure of his claim or have more money than he knows what to do with."<sup>61</sup>

The separate ends of the economic spectrum—wealthy litigants and

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57. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–18 (1967) (citations omitted).

58. Di Pietro & Carns, *supra* note 54, at 79; Root, *supra* note 2, at 608; Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 740–41 (2010); Thomas D. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 318, 329 (1998); Vargo, *supra* note 2, at 1616–17.

59. See Rosen-Zvi, *supra* note 58, at 740–41. The costs of litigation have become a significant focus of litigation, often overshadowing the analysis of the merits of the dispute. See, e.g., *Jaquette v. Black Hawk Cnty.*, Iowa, 710 F.2d 455, 462–63 (8th Cir. 1983) (questioning if the "excessive cost" of litigation is denying reasonable access to courts and improperly deciding litigation). In Canada, where fee-shifting is modeled after the British system, unpredictability of the costs of litigation is a strong deterrent for middle-income persons in pursuing valid claims. Knutsen, *supra* note 47, at 115 ("In the minds of litigants and lawyers, concerns about unpredictable legal costs often replace issues of substance at the heart of a dispute. For a middle-income Canadian who loses even a fairly standard contract or personal injury case, such costs can be unbearable." (footnote omitted)). This problem extends far beyond the Canadian legal system. See Dobbins, *supra* note 24, at 116 & n.2; Mastro, *supra* note 33, at 215.

60. Rosen-Zvi, *supra* note 58, at 740–41; Sherman, *supra* note 9, at 1871–72.

61. Wilson, *supra* note 9, at 1474. This quote is technically discussing statutes with loser-pay provisions; however, this quote is equally applicable to loser-pay provisions in private contracts because of the similar effects on litigation.



poor litigants—are less affected by one-sided attorney's fees clauses.<sup>62</sup> Wealthy litigants are undeterred from the risk of paying opposing counsel's fees because such litigants have substantial financial resources.<sup>63</sup> Poor litigants are undeterred from pursuing litigation because they are, in effect, judgment proof.<sup>64</sup> A judgment against an indigent is often worthless because they have no assets to pursue in post-judgment collection efforts.<sup>65</sup> The resulting effect is that middle-class litigants are extremely cautious in pursuing litigation, even meritorious litigation, if a one-sided attorney's fees clause is present.<sup>66</sup> “While affluent companies and individuals can afford increased litigation costs and spread their risks, the average citizen might avoid litigation based on the fear of high risks and uncertain outcomes.”<sup>67</sup>

For example, suppose a sole proprietor contracts to purchase \$25,000 worth of unique widgets from a large commercial vendor. Also, suppose the contract is a standard form prepared by the large commercial widget vendor, and the contract includes a one-sided attorney's fees clause in favor of the commercial vendor. Lastly, suppose there is a dispute regarding whether the vendor properly fulfilled its obligation, and the sole proprietor has refused to make payment on the goods. The amount in controversy is \$25,000. From the sole proprietor's point of view, here is the cost-benefit analysis:

- The amount in controversy is \$25,000, and under the best circumstances, the sole proprietor will be awarded a judgment for that amount.
- To litigate this dispute, the sole proprietor will have to pay legal

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62. Di Pietro & Carns, *supra* note 54, at 79; Dobbins, *supra* note 24, at 142 (“Insolvent parties or parties with no non-exempt assets have nothing to lose, so litigating claims is relatively risk-free. But for moderate-income parties or parties with only a few assets, the risk of litigating may be too high. Fee shifting may discourage such parties from litigating all but the most airtight cases.” (footnotes omitted)); Stein, *supra* note 48, at 604–07 (discussing pros and cons of the British rule, including the different effects on the different classes of litigants).

63. See Di Pietro & Carns, *supra* note 54, at 79.

64. Sherman, *supra* note 9, at 1872. This was also shown in Florida's experiment with fee-shifting. Rowe, *supra* note 58, at 329.

65. Sherman, *supra* note 9, at 1872.

66. See Knutsen, *supra* note 47, at 130–31 (explaining that fee-shifting is most pronounced for the middle-class litigant as opposed to an indigent litigant or corporation); Wilson, *supra* note 9, at 1471.

67. Wilson, *supra* note 9, at 1468.

fees and expenses of several thousands of dollars. Depending on whether the lawsuit settles, the sole proprietor can expect to pay legal fees of approximately \$5,000 to upwards of \$25,000. And, if the case settles, the sole proprietor will not receive the full \$25,000 from the commercial widget vendor. Thus, the net value of the lawsuit is questionable for the sole proprietor: a settlement will limit the recovery to an amount below \$25,000 and litigation through trial will result in legal fees that will likely eclipse the \$25,000 in dispute.

- If the sole proprietor loses the case, then it will have expended tens of thousands of dollars on litigation fees and expenses, and the sole proprietor will also have to pay tens of thousands of dollars for the opposing party's attorney's fees. Including the party's own fees, the adverse judgment, and the payment of opposing counsel's fees, the net loss is approximately \$75,000.

Thus, the sole proprietor's range of financial outcomes is quite dismal: a 50% chance of success, with the potential benefit being a maximum of approximately \$10,000 (perhaps less depending on the attorney's fees for litigation). On the other hand, it has a 50% chance of failure, with the potential loss being approximately \$75,000. In gambling terms, the sole proprietor is risking \$75,000 for a payoff of \$10,000. For most litigants, the risk is simply not worth the potential benefit.

Meanwhile, for the advantaged party, the commercial vendor, who already has an established relationship with its legal counsel, the cost-benefit analysis looks like this:

- A win will result in a judgment against the opposing party for approximately \$50,000, which will compensate the widget vendor for the contract and its attorney's fees.
- A loss will result in an adverse judgment for \$25,000 and the advantaged party will still have to pay its own attorney's fees, amounting to a net loss of approximately \$50,000.

Thus, for the commercial vendor, the range of financial outcomes looks much different: a 50% chance of success, with the net value being approximately \$25,000. On the other hand, there is a 50% chance of failure, with the potential loss being \$50,000. For this gambler, he is risking \$50,000 for a payoff of \$25,000.

The cost-benefit analysis is much more favorable for the commercial vendor compared to the sole proprietor. Although the merits of the dispute

and the amount in controversy are identical for both parties, the commercial vendor has a payout that is two and one-half times greater than the sole proprietor, and the commercial vendor's risk exposure is one-third less than the sole proprietor's. For the sole proprietor, the attorney's fees clause makes litigating this lawsuit a losing battle—a Pyrrhic victory at best. Yet, it is a worthy cause for the commercial vendor.

It is very risky for the disadvantaged party to pursue such litigation.<sup>68</sup> Most risk-averse litigants will either refrain from filing suit, or if they happen to be the defendant, they will seek to quickly resolve the lawsuit—even on terms unfavorable to the litigant—fearing opposing counsel's attorney's fees.<sup>69</sup>

3. *Oppressive Negotiations: The Advantaged Party Begins Negotiations at the Amount in Controversy Plus Attorney's Fees*

Unilateral attorney's fees clauses also allow for excessive leveraging on behalf of the advantaged party.<sup>70</sup> Generally, a litigant should settle when the settlement is of greater benefit than the expected benefit of the litigation.<sup>71</sup> The same cost-benefit analysis that deters pursuit of litigation also causes settlements that are heavily advantaged towards the party with the favorable attorney's fees clause.<sup>72</sup>

When negotiating a settlement, the disadvantaged party's valuing of the lawsuit is based on the merits of the suit with an accounting for the costs to litigate and the potential adverse award, which could include

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68. See Rachlinski, *supra* note 36, at 160–62.

69. Litigants weigh the expected benefits of litigation as compared to the potential costs when determining whether to bring suit. See Lemos, *supra* note 38, at 796–98. Accordingly, unilateral attorney's fees clauses alter the calculation of potential risk versus the potential gain of a lawsuit. See Sherman, *supra* note 9, at 1871.

70. This Article does not address the effects of one-sided fee-shifting on the psyche of litigants nor does this Article provide statistical analysis as to real-life data on the effects of one-sided fee-shifting. For a greater discussion on the psyche of litigants and whether a case settles, see generally Gross & Syverud, *supra* note 36. This Article addresses an undisputable fact of one-sided fee-shifting—that one party to the lawsuit is exposed to greater risk than the other party, and whether it is a benefit to society to allow for economically stronger parties to have such advantages and one-sided clauses in their contracts.

71. Rachlinski, *supra* note 36, at 117.

72. See, e.g., *Marek v. Chesny*, 473 U.S. 1, 8–11 (1985) (discussing potential effects on settlement when attorney's fees may be awarded to a prevailing party, and finding it may change a plaintiff's incentive to proceed to trial).

opposing counsel's attorney's fees.<sup>73</sup> The advantaged party, however, negotiates with a different cost-benefit analysis: it values the litigation as including an award for attorney's fees in its favor, thus increasing the amount at stake.<sup>74</sup> Further, the advantaged party does not include the opposing party's attorney's fees in its calculation of risk.<sup>75</sup> Thus, the valuation of the case that drives the ultimate settlement amount is not based solely on the true merits of the case; rather, it is based on the disadvantaged party's fear of paying opposing counsel's fees.<sup>76</sup>

The immediate effect of such disparate valuations is a starting point for negotiations that favors the advantaged party. Referring back to the previously discussed sole proprietor and commercial vendor, at the beginning of negotiations, the sole proprietor's initial demand is \$25,000, which is the amount in controversy.<sup>77</sup> Yet, the commercial widget vendor's demand is \$30,000 because it includes \$5,000 for attorney's fees. The midpoint for settlement is already skewed in favor of the commercial vendor. The midpoint for negotiation is very important because settlements generally occur within the middle range of the parties' initial demands.<sup>78</sup> Further complicating the negotiations, the commercial vendor's attorney initially warned the sole proprietor: The more time we spend

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73. See generally *Evans v. Jeff D.*, 475 U.S. 717 (1986) (discussing the propriety of allowing defendants to seek a waiver of attorney's fees in settlement due to the disadvantageous position fee-shifting places defendants in).

74. See, e.g., *Marek*, 473 U.S. at 11 (stating that potential fee-shifting should cause plaintiffs to weigh risks and potential gains before deciding to proceed with a trial).

75. Di Pietro & Carns, *supra* note 54, at 58, 80 (noting that loser-pays rules discourage settlement of close cases because the rising attorney's fees during the dispute drive the parties' settlement numbers further apart); see also Krent, *supra* note 19, at 2040 n.8.

76. See *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39-40 (Ct. App. 1971); Comment, *supra* note 33, at 651 ("[T]he fear of a penalty upon loss of a small claim may induce premature or unjust settlement where the claimant is poor and the claim is less than open-and-shut." (footnote omitted)); Di Pietro & Carns, *supra* note 54, at 82 ("[E]xposure [to fee-shifting] caused a client with some assets and a good claim to settle for less than the case was worth." (internal quotation marks omitted)); Mastro, *supra* note 33, at 215; Rachlinski, *supra* note 36, at 161 ("[P]oorer, risk-averse defendants will be willing to sacrifice more to settle a case under a loser-pays system than under a conventional system."); Wilson, *supra* note 9, at 1468 ("Parties may forego viable claims due to increased costs and financial risk, particularly when facing stronger or repeat litigants.").

77. See *supra* pp. 101-03.

78. See generally Gross & Syverud, *supra* note 36 (describing the negotiation process and how mistakes in the process often lead to a trial).

negotiating settlement numbers, the larger my settlement demand becomes.<sup>79</sup>

Escalating demands by the advantaged party act as an incentive for the disadvantaged party to settle sooner, rather than later.<sup>80</sup> This can often lead to early capitulation by the disadvantaged party.<sup>81</sup>

If the sole proprietor is risk-averse—particularly considering that a victorious judgment may not cover his own attorney's fees—the sole proprietor's only option is to settle. But the sole proprietor cannot negotiate a settlement in the normal fashion. Generally, both parties begin negotiations at their full demand value, which, as noted earlier, is \$25,000 for the sole proprietor and \$30,000 for the commercial widget vendor. Then, both parties hope to reach a settlement amount somewhere in the middle of these demands.<sup>82</sup>

But here, after the sole proprietor rebukes the commercial vendor's offer for \$30,000 and counters with a “walk-away”<sup>83</sup> in hopes of reaching a quick resolution, it becomes even more difficult to reach a fair settlement.<sup>84</sup> The commercial vendor will reject the sole proprietor's offer. Further, the

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79. Although the general range of viable settlement may not have changed, the jockeying of the parties for the negotiating high ground has already commenced. Such jockeying may result in failure to reach a settlement. *See* Knutsen, *supra* note 47, at 139 (opining that lawyers often advise clients to settle quickly to avoid an escalation in fees).

80. Vargo, *supra* note 2, at 1610 (explaining the great pressure on litigants to settle quickly under the British rule due to exposure to increased costs and exposure if a party is to lose the suit).

81. *See* Coast Bank v. Holmes, 97 Cal. Rptr. 30, 39 (Ct. App. 1971); Comment, *supra* note 33, at 651; Di Pietro & Carns, *supra* note 54, at 82; Mastro, *supra* note 33, at 215; Rachlinski, *supra* note 36, at 161; Wilson, *supra* note 9, at 1468.

82. *See* Gross & Syverud, *supra* note 36, at 327–30.

83. A “walk-away” is a settlement in which neither party receives money. Each party agrees to settle the dispute by simply walking away from the issue with no monetary settlement.

84. For a small claim negotiation similar to the anecdote described in this Article, *see* Perez v. Trust Ins. Co., No. 9637, 2000 WL 420619, at \*1 (Mass. Dist. Ct. Apr. 11, 2000) (noting how haggling over settlement amount, due to attorney's fees, caused the settlement amount to escalate over the course of three years). *See also* Mountain View Condo. Ass'n v. Bomersbach, 734 A.2d 468, 469 (Pa. Commw. Ct. 1999). In *Bomersbach*, negotiations were \$500 apart regarding a potential settlement of the defendant's \$1,200 delinquency. *Id.* Eventually, the defendant received an adverse judgment of \$46,548.64 due to attorney's fees against it. *Id.* at 471. In practice, I have also experienced escalating demands when negotiating small claim commercial disputes.

commercial vendor's ultimate demand is now \$35,000. It has increased \$5,000 due to attorney time spent negotiating and preparing a pleading.

As a general rule of negotiations, it is almost impossible to reach a settlement when the opposing side's demand is perpetually escalating.<sup>85</sup> The sole proprietor quickly realizes that full capitulation will settle the dispute, and any other course of negotiation may result in the feared trial and a large exposure to liability, much of which constitutes opposing counsel's attorney's fees.<sup>86</sup>

The sole proprietor may decide to immediately offer a settlement number that is close to full capitulation.<sup>87</sup> The sole proprietor cannot risk a loss of \$75,000 when the potential net benefit is only \$10,000.<sup>88</sup> And the harder the sole proprietor negotiates to reach a settlement that is fair and based upon the merits of the case, the more the commercial widget vendor increases the stakes of the settlement.<sup>89</sup> This places the risk-averse sole proprietor in a difficult situation—either litigate a claim that has potentially large exposure for the amount at stake, or yield to complete capitulation. Most risk-averse parties choose the latter, immediately settling to avoid exposure to a judgment that includes opposing counsel's fees.<sup>90</sup> Sometimes this occurs by a written settlement; other times, the opposing side may simply allow a default judgment after it has been unable to find an attorney willing to represent it.<sup>91</sup>

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85. There was a brief time period in Florida when a fee-shifting statute existed. During this time period, the number of settlements actually decreased. Both parties fought harder because of their perception of larger amounts at stake, and thus, greater discrepancies occurred in settlement offers. Wilson, *supra* note 9, at 1480.

86. See Gross & Syverud, *supra* note 36, at 328–29.

87. See Comment, *supra* note 33, at 650–51; Di Pietro & Carns, *supra* note 54, at 80–82; Mastro, *supra* note 33, at 215; Rachlinski, *supra* note 36, at 161; Wilson, *supra* note 9, at 1468.

88. See Gross & Syverud, *supra* note 36, at 328–29.

89. See Di Pietro & Carns, *supra* note 54, at 82 (stating that fee-shifting has “discouraged settlement in a few [cases] by driving the parties’ offers farther apart”); see also Root, *supra* note 2, at 609 (discussing the difficulties of settlement with fee-shifting when both parties believe that their claim is strong).

90. See *Coast Bank v. Holmes*, 97 Cal. Rptr. 30, 39 (Ct. App. 1971); Comment, *supra* note 33, at 651; Di Pietro & Carns, *supra* note 54, at 80–82; Mastro, *supra* note 33, at 215; Rachlinski, *supra* note 36, at 161; Wilson, *supra* note 9, at 1468.

91. See *Damian v. Tamondong*, 77 Cal. Rptr. 2d 262, 265 (Ct. App. 1998) (“Such one-sided attorney fees provisions, coupled with other oppressive litigation tactics by dealers, has made it difficult or impossible for consumers with good defenses to find attorneys willing to represent them in prosecuting or defending litigation arising from automobile purchases.”).

As shown by this hypothetical scenario, unilateral attorney's fees clauses cause oppressive negotiations, and the actual settlement amount is unrelated to the merits of the lawsuit. The negotiation is simply a steamrolling by the stronger party over the weaker victim. If not for the attorney's fees provision, settlement would range near the walk-away amount of zero, as opposed to a capitulation of several thousands of dollars (or even tens of thousands of dollars). Under the American rule, the commercial widget vendor would have to assess the benefits of litigating a claim that might cost as much to litigate as the claim is worth.<sup>92</sup> This would place both parties on equal footing in the settlement negotiations.

It is important to acknowledge that much scholarship has discussed the effects of the American rule and the British rule (or loser-pays system) on settlement negotiations and whether such rules increase or decrease litigation.<sup>93</sup> Because settlement negotiations, litigation, and the parties that engage in the legal system are so varied and dynamic, there is not a clear consensus among the academics, scholars, judges, practitioners, and critics as to the effects of the American and British rules.<sup>94</sup> But much of the literature is in accord on a few points and logical inferences:

1. *One-way* fee-shifting is an incentive to pursue litigation.<sup>95</sup> And debate exists as to the effect of *two-way* fee-shifting.<sup>96</sup>
2. A risk-averse litigant, when faced with adverse fee-shifting, is likely to be deterred from pursuing litigation.<sup>97</sup> This is particularly true if the claim is of uncertain success (e.g., not a slam dunk);<sup>98</sup> if the litigant is of middle-class status;<sup>99</sup> or if a unilateral attorney's fees clause is adverse to the litigant, and the costs of litigation will

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92. See *Deacon's Dev., LLP v. Lamb*, 719 N.W.2d 379, 382 (N.D. 2006) (explaining the American rule).

93. See, e.g., *Bebchuk & Chang*, *supra* note 34; *Beckner & Katz*, *supra* note 33; *Di Pietro & Carns*, *supra* note 54; *Donohue*, *supra* note 10; *Gross & Syverud*, *supra* note 36; *Root*, *supra* note 2; *Sherman*, *supra* note 9, at 1869–72; *Stein*, *supra* note 48.

94. See *Sherman*, *supra* note 9, at 1869–74; *Donohue*, *supra* note 10, at 1093–94.

95. See, e.g., *Maxeiner*, *supra* note 38, at 200–01.

96. Compare *Sherman*, *supra* note 9, at 1869, with *Donohue*, *supra* note 10, at 1099.

97. See, e.g., *Beckner & Katz*, *supra* note 33, at 206; *Gross & Syverud*, *supra* note 36, at 348–49; *Sherman*, *supra* note 9, at 1871.

98. See, e.g., *Mastro*, *supra* note 33, at 214; *Wilson*, *supra* note 9, at 1474.

99. See, e.g., *Di Pietro & Carns*, *supra* note 54, at 79; *Root*, *supra* note 2, at 608.

exceed the potential award.<sup>100</sup>

3. In *some* circumstances, two-way fee-shifting may make settlement more difficult because the parties value the claims at higher amounts.<sup>101</sup>

Applying these three authoritative conclusions demonstrates that one-way fee-shifting provides the least preferable system. It incentivizes litigation for the advantaged party, yet the negative effects of deterrence are solely placed upon the disadvantaged party. Further, unless the disadvantaged party desires to fully capitulate its claim, settlement is often more difficult and expensive. In summary, the disadvantaged party has *no incentive* to pursue the case and, at the same time, it is also *deterred* from litigating. As noted by the California Court of Appeal, “One-sided attorney’s fees clauses can thus be used as instruments of oppression to force settlements of dubious or unmeritorious claims.”<sup>102</sup>

### C. Public Policy Favors a Prohibition of One-Sided Attorney’s Fees Clauses

Contracts of adhesion have long been disfavored by public policy.<sup>103</sup> Such contracts are contrary to the concept of free bargaining because parties are unable to freely negotiate the terms of the contract at arm’s-length.<sup>104</sup> The inability to negotiate terms of a contract at arm’s-length counters principles of a free-market economy.<sup>105</sup> One-sided attorney’s fees clauses are a prime example of oppressive tactics used by a more powerful party.

Inconspicuous contractual language in favor of the drafting party is also frowned upon.<sup>106</sup> Inconspicuous language is contrary to the concept of

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100. See, e.g., Bebchuk & Chang, *supra* note 34, at 373; Comment, *supra* note 33, at 650–51.

101. See Gross & Syverud, *supra* note 36, at 327–30.

102. Coast Bank v. Holmes, 97 Cal. Rptr. 30, 39 (Ct. App. 1971).

103. See, e.g., Provost, *supra* note 22, at 632 (explaining a court’s authority to rewrite or void these contracts). *But see* Chepkevich v. Hidden Valley Resort, L.P., 2 A.3d 1174, 1197–98 (Pa. 2010) (Saylor, J., concurring).

104. See Provost, *supra* note 22, at 632–33 (providing a general discussion of the courts’ disapproval of adhesion contracts and other contracts that are the result of disparate bargaining power).

105. See *supra* note 20.

106. See Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 459–50 (D.C. Cir. 1965) (“The manner in which the contract was entered is also relevant,” including determining whether “the important terms [were] hidden in a maze of fine print and minimized by deceptive sales practices.”).



free bargaining because parties are unable to freely negotiate the terms of the contract when they are unaware of the ultimate effects of the contract's clauses.<sup>107</sup> One-sided attorney's fees clauses are often slipped into contracts to the disadvantage of unsophisticated parties. This is not free bargaining—it is a stronger party imposing one-sided fee-shifting on the weaker party.<sup>108</sup>

Due to the widespread use of unilateral attorney's fees clauses, a systematic oppression of the weaker party's rights occurs.<sup>109</sup> Essentially, in a large swath of transactions, the weaker party faces insurmountable barriers in litigating and negotiating disputes.<sup>110</sup> Claims are not pursued, and the defense of meritorious claims is nonexistent. The more powerful party is able to run roughshod over the weaker party. This is merely legal bullying; it resolves disputes based upon the parties' bargaining strengths and wealth, as opposed to the merits of the dispute.

Interestingly, there are six rationales often cited in support of fee-shifting:

1. Making the victorious litigant financially whole for all harm suffered;<sup>111</sup>
2. punishing losing litigants;<sup>112</sup>
3. incentivizing specific litigation for the public good;<sup>113</sup>

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107. Cf. *McCorkle v. Hall*, 782 P.2d 574, 576–77 (Wash. Ct. App. 1989) (expressing the view that clear and unambiguous language gives the reader a reasonable opportunity to discern its meaning).

108. See *Orix Fin. Servs., Inc. v. Thunder Ridge Energy, Inc.*, No. 01 Civ. 4788 RJH/HBP, 2006 WL 587483, at \*11 (S.D.N.Y. Mar. 8, 2006) (“Typical contracts of adhesion are standard-form contracts offered by large, economically powerful corporations to unrepresented, uneducated, and needy individuals on a take-it-or-leave-it basis, with no opportunity to change any of the contract's terms.”).

109. Because superior bargaining parties often include unilateral attorney's fees clauses in their contracts, economically inferior parties have a systematic disadvantage in nearly all potential lawsuits. Mastro, *supra* note 33, at 215. And once a clause of such advantage is known by superior bargaining parties, it proliferates to nearly all standard forms. Cf. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987).

110. See *supra* Part II.B; see also *Damian v. Tamondong*, 77 Cal. Rptr. 2d 262, 265 (Ct. App. 1998). *Damien* demonstrates how attorneys will not represent parties that are disadvantaged by unilateral attorney's fees clauses because the ability to litigate or negotiate the dispute is undermined. *Id.*

111. Thomas D. Rowe, Jr., *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 Duke L.J. 651, 657.

112. *Id.* at 660.

4. leveling the litigation playing field, particularly in suits where a weaker economic party is litigating against a major entity (e.g., litigation against the government);<sup>114</sup>
5. economic analysis suggesting that fee-shifting leads to increased settlements and more efficient disposition of cases;<sup>115</sup> and
6. fairness.<sup>116</sup>

None of these rationales are served by the insertion of unilateral attorney's fees clauses in favor of a stronger bargaining party. First, the clause does not make the *victorious* litigant financially whole; it only allows for the advantaged party to be made whole. To make the victorious litigant whole, fee-shifting must be reciprocal.

Second, the punitive element is excessively served to the point where it is no longer a desirable goal. A unilateral attorney's fees clause amounts to strict liability for losing lawsuits. This prohibits litigants from using the legal process to seek redress or protection from abuse.<sup>117</sup> It also deters the pursuit of viable claims and defenses in litigation. Further, if the disadvantaged litigant is successful on the merits, then the losing litigant (the advantaged party) is *not* punished. Thus, one-sided attorney's fees clauses are not tailored to suit a punitive goal; they are only tailored to punish one party—the weaker party. A true method for punishing losing litigants would be a reciprocal attorney's fees clause.

Third, the goal to incentivize useful litigation is not met by one-sided attorney's fees clauses. Certainly, one-sided attorney's fees clauses encourage litigation. But generally, one-sided attorney's fees clauses are used to incentivize useful litigation.<sup>118</sup> When statutes allow one-sided fee-shifting, the intent is to level the playing field between a large, financially stronger litigant and a weaker adversary.<sup>119</sup> A stronger party's use of oppressive litigation tactics to force a weaker party into capitulation is not useful litigation. In fact, it directly subverts the public policy that creates the numerous one-sided fee-shifting statutes.

There is no valid reason to incentivize *oppressive litigation* against a

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113. Sherman, *supra* note 9, at 1865–66.

114. Rowe, *supra* note 111, at 663–64.

115. *Id.* at 665–66.

116. *Id.* at 653.

117. Rowe, *supra* note 58, at 318.

118. See Rowe, *supra* note 111, at 665–66.

119. Cf. Rosen-Zvi, *supra* note 58, at 732–34.

weaker party. If the goal is to allow parties to pursue claims and defenses against litigants and to be made whole at the end, then a reciprocal clause is just as useful. If the claim or defense is a slam dunk, then the stronger party can bring claims and defenses without hesitation, as they will be confident in victory. It is beneficial for society for the litigant to determine whether the suit is likely to succeed, as opposed to litigating the suit with full knowledge that it will force the opposing side into capitulation because of the unilateral attorney's fees clause. Thus, a reciprocal clause incentivizes useful litigation as much as a unilateral clause.

Fourth, unilateral attorney's fees clauses are not in accordance with the goal for increased settlement of lawsuits. Even if more settlements result from unilateral attorney's fees clauses, it is likely that the settlements are not based on the suits' merits. Instead, such results are merely based on the weaker party capitulating to the stronger party in order to avoid a potentially large judgment due to the inclusion of attorney's fees. This is not a settlement on the merits; it is an abusive tactic used to oppress weaker parties in litigation. Surely this is not a desirable goal.

Fifth, unilateral attorney's fees clauses do not level the playing field for weaker, disadvantaged parties. To the contrary, it is used by the stronger party to force the weaker party into capitulation.

Lastly, unilateral attorney's fees clauses are inherently unfair in difficult, novel, or close cases. A litigant should not be burdened with opposing counsel's attorney's fees for pursuing a meritorious, yet ultimately unsuccessful claim. There is a fine line between winning and losing lawsuits—the credibility of a witness, the determination of how a reasonable party should have acted, and a judge's interpretation and application of law are all unpredictable and may result in an adverse judgment.<sup>120</sup> It is unfair to place attorney's fees on the losing litigant for such close cases.<sup>121</sup>

### III. THE COMMON LAW'S FAILURE TO PROTECT WEAKER PARTIES FROM ONE-SIDED ATTORNEY'S FEES CLAUSES

#### *A. Adhesion Contracts*

Generally, an adhesion contract is defined as a "standardized contract, which, imposed and drafted by the party of superior bargaining

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120. See Gross & Syverud, *supra* note 36, at 323–30.

121. Rowe, *supra* note 111, at 670–71.

strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it.”<sup>122</sup> Such contracts receive judicial scrutiny because the parties are not bargaining at arm’s-length, which is the classic model of free-market contracting.<sup>123</sup>

In many instances of unilateral attorney’s fees clauses—for instance, residential leases and mortgages—the contracts are adhesive.<sup>124</sup> Yet, courts are reluctant to hold attorney’s fees clauses invalid under the doctrine of adhesion.<sup>125</sup> Generally, the contract must either fail to meet “the reasonable expectations of the weaker or adhering party,” or it must be “unduly oppressive or unconscionable.”<sup>126</sup> As summarized by the Supreme Court of Michigan, “an adhesion contract is simply a type of contract *and* is to be enforced according to its plain terms just as any other contract.”<sup>127</sup> Rarely are adhesion contracts deemed oppressive to the point that they are unenforceable, and, accordingly, attorney’s fees provisions in contracts of adhesion are rarely invalidated.<sup>128</sup>

### B. Unconscionability

Many courts divide unconscionability into two specific types: procedural unconscionability and substantive unconscionability.<sup>129</sup> Procedural unconscionability arises from the formation of the agreement, while substantive unconscionability focuses on the specific content of the agreement.<sup>130</sup>

Generally, unconscionability will be found if (1) the weaker party does not have a choice negotiating the contract terms, and the terms are

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122. *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 171 (Cal. 1981) (quoting *Neal v. State Farm Ins. Cos.*, 10 Cal. Rptr. 781, 784 (Ct. App. 1961)) (internal quotation marks omitted).

123. *See id.*

124. *See Galligan v. Arovitch*, 219 A.2d 463, 465 (Pa. 1966); *In re Parker*, 269 B.R. 522, 530 (Bankr. D. Vt. 2001); *see also Graham*, 623 P.2d at 172–73.

125. *Lovey v. Regence BlueShield of Idaho*, 72 P.3d 877, 883 (Idaho 2003) (“Adhesion contracts are a fact of modern life. They are not against public policy.”).

126. *Graham*, 623 P.2d at 172–73 (citations omitted) (internal quotation marks omitted).

127. *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 41 (Mich. 2005).

128. *See Dobbins*, *supra* note 24, at 125–26; *Mastro*, *supra* note 33, at 211–12; *see also MGM Desert Inn, Inc. v. Shack*, 809 F. Supp. 783, 786–87 (D. Nev. 1993); *Movsovit & Sons of Fla., Inc. v. Axel Gonzalez, Inc.*, 367 F. Supp. 2d 207, 215–16 (D. P.R. 2005).

129. *Sosa v. Paulos*, 924 P.2d 357, 360 (Utah 1996).

130. *Id.*

unreasonably favorable to the other party; or (2) there is a gross disparity in the terms of the contract.<sup>131</sup> Although unconscionability is often an issue when the contracting parties are of different bargaining strength or sophistication,<sup>132</sup> it may also apply in commercial contracts.<sup>133</sup>

Regardless, it is rare for a court to find that a contract contains either type of unconscionability.<sup>134</sup> Further, unconscionability is a heavy burden to prove, and it is unpredictable whether a court will deem a contract unconscionable.<sup>135</sup> It would be very risky for a litigant to choose to pursue a case to trial on the sole defense of unconscionability.<sup>136</sup> Most litigants are

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131. *Id.* at 361; *see also* Maxwell v. Fidelity Fin. Servs., Inc., 907 P.2d 51, 58 (Ariz. 1995) (noting that courts are split as to whether both procedural and substantive unconscionability must be shown—and the degree of unconscionability—to prove a claim of unconscionability).

132. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449–50 (D.C. Cir. 1965); Pinnacle Computer Servs., Inc. v. Ameritech Publ'g, Inc., 642 N.E.2d 1011, 1017 (Ind. Ct. App. 1994).

133. A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Ct. App. 1982); Nw. Acceptance Corp. v. Almont Gravel, Inc., 412 N.W.2d 719, 722–23 (Mich. Ct. App. 1987). *But see* WXON-TV, Inc. v. A.C. Nielsen Co., 740 F. Supp. 1261, 1264 (E.D. Mich. 1990) (“Unconscionability will rarely be found in a commercial contract.” (citing U.S. Fibres v. Proctor & Schwartz, Inc., 509 F.2d 1043, 1048 (6th Cir. 1975))).

134. King v. Ron's Mobile Homes Sales, Inc., No. 00-12-027, 2009 WL 2243967, at \*3 (Del. Com. Pl. July 23, 2009) (indicating that a unilateral attorney's fees clause would be unconscionable); Weidman v. Tomaselli, 365 N.Y.S.2d 681, 692 (Rockland Cnty. Ct. 1975) (holding that an attorney's fees clause in a residential lease was unconscionable); Dobbins, *supra* note 24, at 125–26; Maxeiner, *supra* note 38, at 202 (“The generally weak level of American control of unconscionable contract terms . . . means control of such terms is exceptional.”).

135. *See, e.g.,* Miller v. Corinthian Colls., Inc., 769 F. Supp. 2d 1336, 1344 (D. Utah 2011) (noting that unconscionability bears a heavy burden of proof and procedural unconscionability, alone, rarely renders a contract unconscionable); Adams v. John Deere Co., 774 P.2d 355, 359 (Kan. Ct. App. 1989) (“[U]nconscionability . . . is left to the sound discretion of the trial court to be determined under the peculiar circumstances of each case.”); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 75–76 (2006).

A practicing attorney is likely uncertain as to the predictability of whether the defense of unconscionability will prevail. Not only do scholarly articles discuss the unpredictability of the doctrine, but a practicing attorney will often be concerned by the fact that an appellate court in his or her particular jurisdiction may not have ruled on the issue. Further, the issue may be conclusively litigated in a pretrial motion. Many local courts rotate judges to hear pretrial motions, thus, a practitioner may feel uncertain about the likelihood of success.

136. *Compare* BKB Props., LLC v. Suntrust Bank, No. 3:08-cv-00529, 2010 WL 200750, at \*3–5 (M.D. Tenn. Jan. 13, 2010) (finding a unilateral attorney's fees clause enforceable), *with* King, 2009 WL 2243967, at \*3 (indicating that a unilateral

risk-averse and err towards caution.<sup>137</sup> Accordingly, they assume that unconscionability will be unsuccessful as a defense against a unilateral attorney's fees clause from the contract.<sup>138</sup> As noted by the California Court of Appeal, "parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney's fees if they win, and whether they will have to pay their opponent's fees if they lose.... The in terrorem effect of uncertainty should not be underestimated."<sup>139</sup>

#### IV. DIFFERENT LEGISLATIVE APPROACHES TO ONE-SIDED ATTORNEY'S FEES CLAUSES

Seven states provide reciprocal attorney fee's statutes.<sup>140</sup> These statutes reform unilateral attorney's fees clauses to apply reciprocally towards both parties.<sup>141</sup> Six other states provide limited reciprocal attorney's fees statutes that apply to specific types of contracts: consumer contracts, installment contracts, and residential leases.<sup>142</sup> Six states and the District of Columbia provide various protections from unilateral attorney's fees clauses; however, the statutes do not mandate a reciprocal remedy.<sup>143</sup> But a majority of the nation (thirty-one states) provides no restraint on

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attorney's fees clause would be unconscionable).

137. Gross & Syverud, *supra* note 36, at 349; Stein, *supra* note 48, at 605; *see also supra* Part II.B.2.

138. *See* Schmitz, *supra* note 135, at 75. This Article does not address statutory attorney's fees for vexatious or frivolous litigation, which would not be present in a close dispute. The standard for attorney's fees as a sanction requires a higher threshold than the strict liability imposed by contractual fee-shifting, which merely requires a successful litigant. *See* Sherman, *supra* note 9, at 1865-66.

139. *Int'l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 541 (Ct. App. 2000). *International Billing Services* was discussing whether the California reciprocal attorney's fees statute applied to the contract dispute; however, its reasoning is equally applicable to a defense based on unconscionability. The fear of the doctrine of unconscionability not prevailing at trial is a strong deterrent.

140. *Supra* note 12.

141. *See supra* note 12.

142. CONN. GEN. STAT. ANN. § 42-150bb (West 2012); DEL. CODE ANN. tit. 6, §§ 4344, 7613 (2005); MASS. GEN. LAWS. ANN. ch. 186, § 20 (West 2003 & Supp. 2012); N.H. REV. STAT. ANN. § 361-C:2 (LexisNexis 2008); N.M. STAT. ANN. § 47-8-48 (LexisNexis 2011); N.Y. REAL PROP. LAW § 234 (McKinney 2006 & Supp. 2012).

143. ALA. CODE § 35-9A-163(a)(3) (LexisNexis Supp. 2011); ARK. CODE ANN. § 4-56-101 (2011); D.C. CODE § 28-3806 (LexisNexis 2010); KAN. STAT. ANN. § 58-2547(a)(3) (2005); KY. REV. STAT. ANN. § 411.195 (LexisNexis 2005 & Supp. 2011); ME. REV. STAT. ANN. tit. 14, § 6030(2)(B) (2003 & Supp. 2011); OHIO REV. CODE ANN. § 1319.02 (LexisNexis 2009 & Supp. 2012).

unilateral attorney's fees clauses. These states may provide unique fee-shifting statutes; however, they do not protect an inferior bargaining party from unilateral attorney's fees clauses.

*A. Seven States Provide Reciprocal Attorney's Fees Statutes that Address Unilateral Attorney's Fees Clauses*

Seven states provide reciprocal attorney's fees statutes.<sup>144</sup> These statutes are designed to prohibit unilateral attorney's fees provisions and apply to nearly all types of contracts.<sup>145</sup> These statutes are triggered when a contract has a unilateral attorney's fees clause, and the effect is that the attorney's fees clause becomes reciprocal.<sup>146</sup>

The public policy behind the reciprocal attorney's fees statutes is generally the sense of unfairness discussed in Part II of this Article. Some courts have noted that the purpose is to "even the playing field" between a consumer and a commercial entity.<sup>147</sup> Oregon has described the public policy purpose in similar words: to "equalize the rights of disfavored parties to adhesion contracts who lacked bargaining power."<sup>148</sup> And others have noted that it is unfair to have an unequal allocation of risk and exposure to liability in litigating the merits of a contractual dispute.<sup>149</sup>

It has also been stated that the public policy purpose is not solely to protect weaker individuals, but also to prevent oppressive negotiation of contracts, oppressive negotiation of disputes, and oppressive litigation tactics.<sup>150</sup> As stated by the California Court of Appeal:

Civil Code section 1717 is not designed exclusively for the benefit of

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144. See *supra* note 12 and accompanying text.

In categorizing these statutes as ones that apply to nearly all contracts and act as a reciprocal reformation of unilateral attorney's fees clauses, not only do the statutes themselves state this on their face, but several cases also support such a reading of these statutes. See *Reynolds Metals Co. v. Alperson*, 599 P.2d 83, 85 (Cal. 1979); *Fla. Hurricane Prot. & Awning, Inc. v. Pastina*, 43 So. 3d 893, 895–96 (Fla. Dist. Ct. App. 2010); *Eastman v. McGowan*, 946 P.2d 1317, 1326–27 (Haw. 1997); *Jones v. Riche*, 216 P.3d 357, 359–60 (Utah Ct. App. 2009).

145. See *supra* note 12 and accompanying text.

146. See *supra* note 12.

147. *Fla. Hurricane Prot. & Awning*, 43 So. 3d at 895–96; see *McMillan v. Golden*, 497 P.2d 1166, 1168 (Or. 1972).

148. *N. Pac. Lumber Co. v. Oliver*, 596 P.2d 931, 946 (Or. 1979).

149. See *Jones*, 216 P.3d at 359–60 & n.4.

150. *ABF Capital Corp. v. Grove Props. Co.*, 23 Cal. Rptr. 3d 803, 812–13 (Ct. App. 2005).

individuals or unsophisticated, weaker parties to a contract. Rather, it reflects a general policy to prevent one-sided attorney fee provisions. Thus, it promotes certainty, and prevents overreaching both in the negotiation of a contract and in the use of the courts during litigation. “One-sided attorney’s fees clauses can . . . be used as instruments of oppression to force settlements of dubious or unmeritorious claims.” This litigation concern applies, whether the parties are of different or equal bargaining strength in the negotiation of the contract.<sup>151</sup>

Unilateral attorney’s fees provisions are oppressive in *all* types of contracts, not just small claims contracts or contracts with individuals. Often, a small business owner is just as inferior in bargaining strength as an individual when entering commercial contracts. Further, the unilateral attorney’s fees clause creates the same oppressive litigation tactics, regardless of the types of parties that formed the contract.

*B. Six States Provide Limited Reciprocal Attorney’s Fees Statutes that Address Unilateral Attorney’s Fees Clauses in Specific Contracts*

Six states have limited reciprocal attorney’s fees statutes.<sup>152</sup> These statutes reform unilateral attorney’s fees clauses into reciprocal clauses; however, they only apply to limited types of contracts. Three states apply reciprocal statutes specifically to residential leases.<sup>153</sup> New York is one of the states with a reciprocal attorney’s fees statute pertaining to residential leases, and it also includes a similar statute for residential mortgages.<sup>154</sup> Delaware’s statute provides reciprocal attorney’s fees pertaining to commercial lease–purchase transactions.<sup>155</sup> Two states provide reciprocal statutes pertaining to retail installment contracts.<sup>156</sup> Connecticut provides a broad, general reciprocal attorney’s fees statute that applies to commercial contracts with consumers.<sup>157</sup>

The public policy behind these limited statutes is nearly identical to

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151. *Id.* at 812 (quoting *Int’l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 540 (Ct. App. 2000) (alteration in original)).

152. *See supra* note 142 and accompanying text.

153. MASS. GEN. LAWS ANN. ch. 186, § 20 (West 2003 & Supp. 2012); N.M. STAT. ANN. § 47-8-48 (LexisNexis 2011); N.Y. REAL PROP. LAW § 234 (McKinney 2006 & Supp. 2012).

154. N.Y. REAL PROP. LAW § 282 (McKinney Supp. 2012).

155. DEL. CODE ANN. tit. 6, § 7613 (2005).

156. DEL. CODE ANN. tit. 6, § 4344 (2005); N.H. REV. STAT. ANN. § 361-C:2 (LexisNexis 2008).

157. CONN. GEN. STAT. ANN. § 42-150bb (West 2012).



the public policy behind reciprocal attorney's fees statutes.<sup>158</sup>

What this does is give some equity to the situation. At the present time, many form contracts include attorney's fees provisions for the commercial party, and even though . . . that party may be wrong and a consumer successfully defends an action against him, or her, they would not be entitled to receive attorney's fees in defending that action. This will put some equity in the situation to the same extent that any commercial party will receive.<sup>159</sup>

Thus, these states provide a remedy to unilateral attorney's fees clauses, but only for contracts of a certain type. As previously noted, unilateral attorney's fees are oppressive in *all* types of contracts, not just standardized form adhesion contracts.<sup>160</sup>

*C. Six States Provide Some Protections from Unilateral Attorney's Fees Clauses, Yet They Do Not Provide a Reciprocal Attorney's Fees Statute*

Some states provide protection from unilateral attorney's fees clauses; however, they do not provide reciprocal attorney's fees statutes.<sup>161</sup> Three states prohibit collection of attorney's fees by a landlord against a tenant when enforcing a residential lease.<sup>162</sup> Other jurisdictions limit the amount of attorney's fees that may be collected when enforcing certain instruments, particularly promissory notes and installment contracts.<sup>163</sup> The public policy behind such protections is, as one would expect, the same as that noted by reciprocal attorney's fees statutes:

"[W]hen a stipulation is incorporated into an ordinary contract, lease, note or other debt instrument, it is ordinarily included by the creditor or a similar party to whom the debt is owed and is in the sole interest of such party." Ohio courts assume that "[i]n those circumstances, the

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158. See *Retained Realty, Inc. v. Spitzer*, 643 F. Supp. 2d 228, 232 (D. Conn. 2009) (explaining that a reciprocal attorney's fees statute seeks to level the playing field between the consumer and the commercial entity); *Colonial Estates Assocs. v. Montagna*, 469 N.E.2d 1301, 1302-03 (Mass. App. Ct. 1984) (noting that the statute's objective is to equalize the burden of litigation).

159. H.R. 22, 1979 Leg., at 7489-90 (Conn. 1979).

160. See *supra* Part IV.A.

161. See *supra* note 12 and accompanying text.

162. ALA. CODE § 35-9A-163 (LexisNexis Supp. 2011); KAN. STAT. ANN. § 58-2547(a)(3) (2005); ME. REV. STAT. ANN. tit. 14, § 6030 (2)(B) (2003 & Supp. 2011).

163. ARK. CODE ANN. § 4-56-101 (2011); D.C. CODE § 28-3806 (LexisNexis 2010); KY. REV. STAT. ANN. § 411.195 (LexisNexis 2005 & Supp. 2011); OHIO REV. CODE ANN. § 1319.02 (LexisNexis 2009 & Supp. 2012).

promise to pay counsel fees is not arrived at through free understanding and negotiation.”<sup>164</sup>

Such statutes, however, do not remedy unilateral attorney’s fees clauses as well as a comprehensive reciprocal statute. Similar to the limited reciprocal attorney’s fees statutes, these types of statutes are too limited in scope. Prevention of unilateral attorney’s fees clauses should apply to all types of contracts.

Additionally, such statutes are inadvisable because they negate the benefit of proper, acceptable fee-shifting. For small claims contracts, the only way that a non-breaching party can truly be made whole is to allow fee-shifting. Otherwise, the non-breaching party will be deterred from pursuing the suit due to the expense of fees exceeding the value of the suit.<sup>165</sup> By outright prohibiting the collection of attorney’s fees, it prevents many litigants from pursuing satisfaction from a party’s breach of contract. A more mindful statute would recognize that attorney fee-shifting is valuable to incentivize some suits and defenses. It is the unilateral aspect of the clause that is truly oppressive, not the fact that the prevailing party is made whole.

A more comprehensive approach to the issue is to reform the contract as a mutual right to attorney’s fees. Thus, the benefit of fee-shifting—an incentive to pursue righteous litigation—is maintained.

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164. *In re Tudor*, 342 B.R. 540, 561 (Bankr. S.D. Ohio 2005) (second alteration in original) (quoting *Worth v. Aetna Cas. & Sur. Co.*, 513 N.E.2d 253, 257–58 (Ohio 1987)).

165. Bebhuk & Chang, *supra* note 34, at 373 (“Even if the plaintiff can count on the court to decide the case as the plaintiff predicts, the plaintiff will not sue if its litigation costs exceed the value of the relief that it expects the court to award.”); Comment, *supra* note 33, at 650–51 (“Current practice tends to deter the prosecution of even clearly meritorious small claims by litigants who could at best recover less than the often high expenses of counsel . . . . And what is true for plaintiffs also holds for defendants . . . .”); Smith, *supra* note 37, at 174 (litigation is cost prohibitive on small claims such as credit card disputes); Maxeiner, *supra* note 38, at 196 (“The practice of no indemnity allows [opposing parties] to render the victories of their adversaries pyrrhic and the claims of their adversaries’ clients worthless.”); Maxeiner, *supra* note 38, at 199 & n.10 (“[I]t is not uncommon for parties’ combined legal bills to equal or exceed amounts in controversy.”); Maxeiner, *supra* note 38, at 212. For an example of a small claim (\$420) with attorney’s fees that far eclipse the amount in controversy (\$6,873.75), see *Tentinger v. McPheters*, 977 P.2d 234, 238 n.3 (Idaho Ct. App. 1999). See also *Mountain View Condo. Ass’n v. Bomersbach*, 734 A.2d 468, 469 (Pa. Commw. Ct. 1999) (considering the reasonableness of \$46,549 attorney’s fees award on a claim that was originally valued at \$1,200).

*D. Thirty-One States Do Not Provide Any Protection from Unilateral Attorney's Fees Clauses*

Thirty-one states do not protect weaker parties from one-sided attorney's fees clauses.<sup>166</sup> Such states may provide unique statutes regarding fee-shifting;<sup>167</sup> however, they do not protect weaker parties from unilateral attorney's fees clauses.

For example, Alaska follows a version of the British rule and provides that the losing party must pay the winning party's attorney's fees.<sup>168</sup> Additionally, Texas and Arizona have similar loser-pays rules.<sup>169</sup> Idaho requires an offer for settlement prior to filing suit, and \$25,000 or less in pleaded damages triggers a British rule fee-shifting system.<sup>170</sup>

Such statutes, although creative and useful in their own ways, do not restrict unilateral attorney's fees clauses. And the majority of jurisdictions do not contain any statutes of the type noted in the previous paragraph.<sup>171</sup>

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166. See *infra* notes 169–71.

167. Several states provide specific statutes for vexatious or frivolous litigation as well as statutes for insurance contracts. This Article does not discuss insurance contracts or malicious prosecution because those topics are of a different substance.

168. ALASKA R. CIV. P. 82; see generally Di Pietro & Carns, *supra* note 54.

169. ARIZ. REV. STAT. ANN. § 12-341.01 (2003 & Supp. 2011); TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2008 & Supp. 2012). *But see* Intercontinental Grp. P'ship v. KB Home Lone Star L.P., 295 S.W.3d 650, 653 (Tex. 2009) (indicating that parties can contract around the statute to create unilateral attorney's fees clauses); Mohican Oil & Gas, LLC v. Scorpion Exploration & Prod., Inc., 337 S.W.3d 310, 321 (Tex. Ct. App. 2011) (“[T]he terms of the contract, not statute, control the outcome of this issue.”).

As shown by the cited cases in this footnote, merely because a statute allows for reciprocal attorney's fees does not mean it will reform a contract that includes a unilateral attorney's fees clause. There is a significant difference between a statute that follows the British rule and a statute that prohibits unilateral attorney's fees clauses and reforms such clauses to follow the British rule.

Some states expressly permit attorney's fees awards in specific causes of action or with specified dollar amounts in the pleadings. NEV. REV. STAT. § 18.010 (2011) (allowing attorney's fees when judgment is \$20,000 or less); OKLA. STAT. ANN. tit. 12 § 939 (West 2000 & Supp. 2012) (allowing attorney's fees in actions for breach of express warranty); OKLA. STAT. ANN. tit. 12 § 936 (permitting attorney's fees on specific types of contracts). These are not reciprocal attorney's fees statutes because they do not override unilateral attorney's fees clauses written in contracts; therefore, any attorney's fees provisions in the contract supersede the statute. See *Rowland v. Lepire*, 662 P.2d 1332, 1336–37 (Nev. 1983); *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., L.L.C.*, 164 P.3d 1063, 1069–70 (Okla. 2007).

170. IDAHO CODE ANN. § 12-120 (2010 & Supp. 2012).

171. These states do not have any reciprocal attorney's fees statutes within the

### V. A MODEL RECIPROCAL ATTORNEY'S FEES STATUTE

Unilateral attorney's fees clauses are often used to oppress weaker parties in litigation.<sup>172</sup> These clauses force the weaker party to either capitulate on a claim, or deter the weaker party from pursuing a claim or defense.<sup>173</sup> Such widespread hard bargaining undermines the ability of parties to enforce contracts and defend against claims. The common law has been unable to remedy this situation.<sup>174</sup> The two doctrines most applicable to this issue are the doctrines of adhesion contracts and unconscionability. Generally, courts will not find a contract unenforceable merely because it is a contract of adhesion.<sup>175</sup>

Unconscionability, on the other hand, has been applied to sever and restrict unilateral attorney's fees clauses.<sup>176</sup> Unconscionability is a flexible but unpredictable doctrine that is applied at the court's discretion, depending on the totality of facts at hand. Most litigants are risk-averse and are unwilling to base their entire legal defense on such an unpredictable doctrine. Cutting and splicing different states' statutes provides a model reciprocal attorney's fees statute to address unilateral attorney's fees clauses. The following model statute is proposed:

#### *Contracts with Clauses for Attorney's Fees*

(a) In any written contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.<sup>177</sup>

(b) For claims under \$25,000.00 (exclusive of costs and attorney's fees)

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scope of this Article: Colorado, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming.

172. See *supra* Part II.

173. See *supra* Part II.

174. See *supra* Part III.

175. See *supra* Part III.B.

176. See, e.g., *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 690-92 (Rockland Cnty. Ct. 1975).

177. Language patterned after the California statute. See CAL. CIV. CODE § 1717 (West 2009 & Supp. 2012).

arising from a contract that includes a provision for attorney's fees, regardless of whether the attorney's fees clause is a unilateral attorney's fees clause within the scope of the previous subpart (a), or whether the attorney's fees clause is reciprocal and allows attorney's fees to be awarded to the prevailing party, the plaintiff must make a demand fifteen (15) days prior to commencing litigation. The demand must be for a definitive sum that itemizes the amount demanded for damages, the amount demanded for attorney's fees, and any amount demanded for costs. The itemized amount of attorney's fees may be no more than ten percent (10%) of the itemized amount of damages. The sum of all such identified amounts is the "total amount demanded."<sup>178</sup>

(1) If the plaintiff fails to make a demand fifteen (15) days before the filing of a lawsuit, then the plaintiff cannot recover attorney's fees.<sup>179</sup>

(2) If the defendant agrees to pay the total amount demanded within thirty (30) days of the demand, or offers to tender eighty-five percent (85%) of the total amount demanded, payable prior to the fifteen (15) day deadline in subpart (b)(1), then the plaintiff is unable to receive attorney's fees if it commences the action. If the defendant agrees to either pay the full amount within thirty (30) days, or offers to tender eighty-five percent (85%) of the total amount demanded within the required time period, and the defendant fails to pay as required, then the defendant is prohibited from recovering attorney's fees in the event that it is the prevailing party under paragraph (a).<sup>180</sup>

(3) If the defendant rejects the plaintiff's demand and does not

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178. The demand for money prior to filing of suit in a small claim, and its effect on attorney's fees, is patterned after the Idaho statute. *See* IDAHO CODE ANN. § 12-120 (2010 & Supp. 2012). By requiring an itemization of attorney's fees, damages, and costs, the defendant can determine whether the suit should be defended. A good faith demand by the plaintiff is implied. Theoretically, costs will be a rare itemized amount because the demand is made prior to filing. However, there could be instances where an investigator was hired to locate the defendant.

179. The requirement of a demand is a catalyst for a settlement.

180. This subpart emphasizes an immediate payment to the plaintiff; thus, claims are not delayed on the basis of shallow negotiations. Further, by applying in conjunction with paragraph (b), the attorney's fees are limited to 10% of the amount in controversy; therefore, a plaintiff cannot request attorney's fees as a starting point of negotiation that are excessive to the amount in dispute. It is also implied that a defendant's offer to pay or tender the required amount will not be made in bad faith. Bad faith gaming of the system should expose the defendant and the defendant's attorney to punitive damages or sanctions.

agree to pay or tender an offer as noted in subpart (b)(2) above, and the suit commences to trial, then, if the plaintiff receives a judgment award less than seventy-five percent (75%) of its original demand for damages, that amount  $[(0.75 \times \text{original demand for damages}) - (\text{actual award})]$  is credited to the amount due from the defendant for attorney's fees.<sup>181</sup>

(c) The prevailing party must submit a postjudgment motion for entry of attorney's fees.<sup>182</sup> A hearing may be held on the matter at the court's discretion.

(1) In the postjudgment motion for attorney's fees, the demand for attorney's fees must be in a definitive amount, and the attorney's billing sheets must be attached as an exhibit.<sup>183</sup>

(2) If the losing party offers eighty-five percent (85%) of the demanded attorney's fees, then the originally prevailing party may continue to litigate for the full amount of attorney's fees requested; however, the original prevailing party cannot receive attorney's fees for such derivative, postjudgment litigation. If no such offer is made by the losing party, subsequent to the postjudgment motion for attorney's fees, the original prevailing party may also include attorney's fees in its motion for the time spent preparing the postjudgment motion and litigating the issue of attorney's fees.<sup>184</sup>

(3) Subject to the preceding two subparts, if the original prevailing party also prevails on its litigation for attorney's fees, then, under the court's discretion, the prevailing party may also collect the fees related to litigation of the attorney's fees issue.

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181. This method is called the "benefit-of-the-judgment approach." Sherman, *supra* note 9, at 1883. The purpose of this approach is to ensure the plaintiff's demand is reasonable and that a plaintiff is not considered an absolute victor when the defendant is able to secure a judgment for much less than the amount demanded.

182. ALASKA R. CIV. P. 82.

183. Requiring a definitive amount shown for attorney's fees allows the opposing party to assess the reasonableness of the attorney's fees demanded.

184. Litigation over postjudgment attorney's fees can become an expensive litigation matter in itself. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967); Maxeiner, *supra* note 38, at 199 n.13; Wilson, *supra* note 9, at 1474-75. The purpose of this section is to incentivize a losing party's agreement as to the amount of attorney's fees that are due for the litigation. Also, practice may develop, as is the case in Alaska, that appeals of the substantive suit are dropped in consideration for a stipulation on attorney's fees. Di Pietro & Carns, *supra* note 54, at 73-74.

(d) The court must provide reasonable attorney's fees,<sup>185</sup> and such fees must not exceed the following:

(1) Fifty percent (50%) of the judgment amount for judgments equal or less than \$25,000.

(2) For judgments in excess of \$25,000, the attorney's fees are \$12,500 for the first \$25,000 of the judgment, then twenty-five percent (25%) of the judgment amount in excess of \$25,000.

(3) If the prevailing party is successful due to a default judgment, then reasonable attorney's fees are fifteen percent (15%) of the judgment amount, with maximum attorney's fees of \$10,000.

(e) If the defendant is the prevailing party, then the court is required to provide attorney's fees, and such fees must not exceed the following:

(1) Fifty percent (50%) of the amount claimed by the plaintiff in its pleading for claims up to \$25,000.

(2) For claims in excess of \$25,000, the attorney's fees are \$12,500 for the first \$25,000 of the claim, and twenty-five percent (25%) for the amount claimed by the plaintiff in excess of \$25,000.<sup>186</sup>

(f) This statute cannot be waived by the contracting parties.

(g) If a defendant prevails on a defense that the contract does not exist, then the defendant is still awarded attorney's fees, with an exception: If the defendant proves the contract does not exist, but the plaintiff is still victorious on a claim for unjust enrichment, then neither party is awarded attorney's fees. Further, if a plaintiff is able to prove a contract exists because of promissory estoppel used as a substitute for consideration, then such a judgment is within the scope of this statute.<sup>187</sup>

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185. If the court is not required to provide attorney's fees, then the discretionary, unpredictable manner of judges will result in unpredictability as to whether attorney's fees will actually be awarded. *See Di Pietro & Carns, supra* note 54, at 43–46.

186. By limiting attorney's fees in correlation to the claimed amount, parties can negotiate without fear of runaway attorney's fees in the event of a loss.

187. *See Hooban v. Unicity Int'l, Inc.*, 220 P.3d 485, 487–88 (Utah Ct. App. 2009); *Smith, supra* note 37, at 192–94; *see also Paul v. Schoellkopf*, 26 Cal. Rptr. 3d 766, 769–70 (Ct. App. 2005); *Int'l Billing Servs., Inc. v. Emigh*, 101 Cal. Rptr. 2d 532, 542 (Ct. App. 2000) (demonstrating that even if a contract is adjudicated to be nonexistent, a defendant is still able to recover attorney's fees).

This proposed model statute meets the six purposes of fee-shifting, and it also avoids the severe negative aspects of one-sided fee-shifting. First, the prevailing party—whether a plaintiff or defendant—is made whole. Second, there are reasonable punitive elements to the statute: if a plaintiff does not first provide a demand for settlement on a small claim, then they are not entitled to attorney’s fees. The purpose of this clause is to penalize a plaintiff that insists on litigating a dispute that could be settled at the outset. Also, it penalizes a plaintiff who makes a recklessly high demand—if the plaintiff’s demand is rejected, and the ultimate award is not within 25% of the demand, then the defendant can discount the attorney’s fees it must pay. And, as is always true with fee-shifting, the losing party is penalized by having to pay the opposing party’s attorney’s fees.

Third, there is much dispute as to whether fee-shifting incentivizes litigation or settlements.<sup>188</sup> Regardless, unilateral attorney’s fees clauses cause aggressive litigation against weaker parties and capitulation, not settlement on the merits. This proposed statute removes unilateral fee-shifting from the cost-benefit analysis. Settlement is still encouraged for slam dunk cases because a party is aware that it will have to pay attorney’s fees if it loses.<sup>189</sup> Further, if it is a small claim, there is the ability to settle at the beginning of the lawsuit.

Fourth, this statute reforms the contract to a reciprocal attorney’s fees clause, thus leveling the playing field. In other words, “what is sauce for the goose is sauce for the gander.”<sup>190</sup> The stronger party cannot proceed to litigation under the strategy of oppressing the weaker party into submission. Each case must be litigated with the merits of the suit as the priority, and attorney’s fees as a secondary focus.

The proposed statute also levels the playing field for small claims negotiations because a plaintiff cannot use escalating settlement demands at the outset of litigation. Further, the statute encourages settlement of decisive claims by allowing the defendant to immediately tender 85% of

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188. See *supra* Part III.

189. Di Pietro & Carns, *supra* note 54, at 80 (noting that loser-pays rules encourage settlement if the advantaged party clearly has a stronger case than the disadvantaged party); see also Smith, *supra* note 37, at 197–98 (opining that reciprocal fee-shifting statutes are an equitable remedy that curbs aggressive, abusive practices of credit card companies in litigating small claims); Wilson, *supra* note 9, at 1469; Wilson, *supra* note 9, at 1484 (explaining that statutory fee-shifting is designed to promote access to justice, general fairness, and socially beneficial litigation).

190. Valley Bible Ctr. v. W. Title Ins. Co., 188 Cal. Rptr. 335, 336 (Ct. App. 1983); see also *Int’l Billing Servs.*, 101 Cal. Rptr. 2d at 541.



the anticipated liability. In essence, the statute acts as a catalyst for a fair settlement of decisive suits. At the same time, suits that are not slam dunks allow for a negotiation based on the merits of the dispute.

Another important aspect is the statute's limitation on court-awarded attorney's fees. Even with reciprocal fee-shifting, parties may be risk-averse due to the fear of opposing counsel's fees in the event of a loss. This is particularly true for middle-class litigants. By limiting the attorney's fees award to an amount related to the substantive amount in controversy, parties can better assess the potential amount of opposing counsel's attorney's fees that would be recoverable. Thus, a party can better analyze whether the suit should be litigated.<sup>191</sup>

Lastly, the statute cannot be waived. It applies to all written contracts with unilateral attorney's fees clauses. This is appropriate because a waiver of the statute would become common in standardized forms,<sup>192</sup> and unilateral attorney's fees clauses are oppressive in all contracts, not just specific contracts of adhesion.

## VI. CONCLUSION

Unilateral attorney's fees clauses are inherently unfair. The clauses are in favor of the stronger bargaining party at the time the contract is created, and such clauses are often the result of the weaker party being unable to negotiate the terms of the contract. The full oppressive nature of the clause, however, only reveals itself once litigation has commenced. Unilateral attorney's fees clauses are significantly influential once a lawsuit is commenced, and they become a "tail that wags the dog." The weaker party is often deterred from pursuing a claim or defense because of fear of the unilateral attorney's fees clause. Further, the clause often results in capitulation by the disadvantaged party to the stronger party's settlement demands.

To confront this oppressive litigation, a minority of states have enacted reciprocal attorney's fees statutes. These clauses address the

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191. See *Int'l Billing Servs.*, 101 Cal. Rptr. 2d at 541 ("For [the reciprocal attorney's fees statute] to function as intended, parties need reasonable prospective assurance of whether they will or will not be able to recover their attorney's fees if they win, and whether they will have to pay their opponent's fees if they lose." (quoting the prevailing party's brief) (internal quotation marks omitted)).

192. Cf. *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349, 355 (Tex. 1987) (once disclaimers are permitted, standard forms always tend to include them, and the consumer is unable to negotiate the terms).

problem and should be adopted in all jurisdictions. This approach is more beneficial than relying upon the common law, in which unconscionability is the only doctrine that has prevailed on the issue. Unfortunately, unconscionability is very unpredictable and does not provide a stable guidepost for parties litigating a contract with a unilateral attorney's fees clause.

The model statute proposed in this Article reforms unilateral attorney's fees clauses to become reciprocal. The model statute also incorporates a limitation on the award of attorney's fees, as well as a requirement for settlement offers on small claims disputes. The purpose of the model statute is to protect weaker parties from the oppressive nature of unilateral attorney's fees clauses, while at the same time affording the benefits of fee-shifting. There is no place in a free-market economy for contractual provisions in which the sole purpose is to oppress a weaker party once a dispute arises. Thus, a unilateral attorney's fees clause should be uniformly prohibited, and, in its place, the golden rule—premised on reciprocity—should supersede the unilateral attorney's fees clause.