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## Contract and Property Law—Fee-Shifting Statutes and Landlord-Tenant Law—A Call for the Repeal of the English Rule "Loser Pays" System Regarding Contract Disputes and Its Effect on Low-Income Arkansas Tenants

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CONTRACT AND PROPERTY LAW—FEE-SHIFTING STATUTES AND  
LANDLORD-TENANT LAW—A CALL FOR THE REPEAL OF THE ENGLISH  
RULE “LOSER PAYS” SYSTEM REGARDING CONTRACT DISPUTES AND ITS  
EFFECT ON LOW-INCOME ARKANSAS TENANTS

I. INTRODUCTION

In October of 2012, Petrice Howard noticed water leaking in her daughter’s bedroom.<sup>1</sup> This leak would be followed by an infestation of black mold that spanned the surfaces of the bedroom before spreading to the rest of the house.<sup>2</sup> Her landlord refused to do anything to fix the problem, and when Petrice reported the issue to code enforcement, the landlord claimed that she had breached her contract and proceeded to evict her.<sup>3</sup> Though this situation is bad enough on its own, in Arkansas, if Petrice chose to fight her landlord’s claim of breach of contract, she might face the additional burden of having to pay for her landlord’s attorney’s fees due to Arkansas’s adoption of an English Rule statute for breach of contract cases.

The “American Rule,” which requires the parties involved to independently bear the cost of their individual attorney’s fees regardless of the outcome of the case, has reigned supreme in American jurisprudence since its founding, despite many attempts to replace it with the cost-shifting “English Rule” that awards attorney costs to a prevailing party.<sup>4</sup> In the face of these attempts to overthrow the American Rule, the Supreme Court of the United States has routinely held that individuals should pay their own attorney’s fees, with few exceptions, for three major policy reasons: (1) to keep courts accessible to all persons, including low-income individuals; (2) to reduce the burden on courts in having to determine awards of attorney’s fees; and (3) to prevent penalization of individuals for asserting claims or defenses in court, because the outcome of litigation cannot be known in advance.<sup>5</sup>

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1. Cheree Franco, *No Rights for Tenants in Arkansas: Study Panel Wants Landlords to Fix Properties, End Retaliatory Eviction*, ARK. TIMES (Feb. 14, 2013), <http://www.arktimes.com/arkansas/no-rights-for-tenants-inarkansas/Content?oid=2681818>.

2. *Id.*

3. *Id.*

4. *See, e.g.*, *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015); *Arccambel v. Wiseman*, 3 U.S. 306, 306 (1796).

5. David Schoen, *Attorney Fees—United States is Not Liable for Attorney Fees under the Equal Access to Justice Act by Analogy to Section 1983*, 8 U. ARK. LITTLE ROCK L. REV. 61, 64 (1985) (citing *Fleischmann Distilling Corp. v. Maier*, 386 U.S. 714, 718 (1967)).

This note explores how adoption of the English Rule's "loser pays" statute makes enforcing contracts more difficult for Arkansas tenants seeking to dispute their lease agreements, and calls for the adoption of either the American Rule or a hybrid rule that will help protect low-income tenants' access to the judicial system. Part II briefly explores the historical background of the English and American Rules. Part III explains the current position of tenant rights in Arkansas under the Arkansas Residential Landlord-Tenant Act of 2007 and explains how this Act places several hurdles in the path of tenants, particularly low-income tenants, in seeking the aid of the judicial system. Part IV illustrates that the English Rule creates another unnecessary hurdle for low-income individuals, specifically low-income Arkansas tenants, seeking to enforce their lease agreements. Part V explores how the English Rule creates an unnecessary burden on the judicial system in determining who constitutes a prevailing party and the amount of reasonable attorney fees he or she deserves. Part VI calls for repeal of Arkansas Code Annotated section 16-22-308, and for the legislature to adopt a limited fee-shifting statute favoring prevailing plaintiffs. Finally, Part VII concludes this note.

## II. BACKGROUND

### A. The History of the English Rule and the American Rule in the United States

When a case concludes, courts will either apply the English Rule, which states that the prevailing party should be awarded reasonable attorney fees by the court, or the American Rule in which each party pays their own attorney fees.<sup>6</sup> The English "loser pays" rule dates back as early as the Roman era.<sup>7</sup> After two decades of American jurisprudence, the federal court system adopted and maintained a steadfast adherence to the American Rule.<sup>8</sup> Courts have maintained a strict observance of the American Rule, recognizing departures from this standard only in cases involving explicit statutory exceptions, cases involving common funds, or cases involving bad faith.<sup>9</sup>

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6. Jacob Singer, *Bad Faith Fee-Shifting in Federal Courts: What Conduct Qualifies?*, 84 ST. JOHN'S L. REV. 693, 695 (2010).

7. *Id.*; Buffy D. Lord, *Dispute Resolution on the High Seas: Aspects of Maritime Arbitration*, 8 OCEAN & COASTAL L.J. 71, 86 n.109 (2002) ("The tradition of awarding attorney's fees and costs can be traced to Roman law in which the losing party was required to pay the prevailing party's costs.").

8. *Arcambel*, 3 U.S. at 306 (holding that the "general practice of the United States is in opposition to [adopting the English Rule]").

9. *See, e.g.,* Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 65 (1993); *Tr. of the Internal Improvement Fund of Florida v. Greenough*, 105 U.S. 527, 536 (1881); *see also* Schoen, *supra* note 5, at 65; M. Brinkley Morse, *Attorney's Fees* –

Generally, any attempt to convert to an English Rule system received little support.<sup>10</sup> The real threat came in 1994 when Newt Gingrich brought forth the Republican “Contract With America.”<sup>11</sup> Part of this contract was the “Common Sense Legal Reform Act,” which switched from the American Rule to the English Rule for all actions arising under state law but brought in federal courts under diversity jurisdiction.<sup>12</sup> After significant backlash to the adoption of the English Rule, the legislature backtracked and limited the scope of the English Rule in the Attorney Accountability Act of 1995.<sup>13</sup>

## B. The History of the English Rule and the American Rule in Arkansas

While Arkansas generally follows the American Rule, during the Republican “Contract With America,” Arkansas adopted the English Rule for civil lawsuits concerning contract disputes in Arkansas Code Annotated section 16-22-308. The statute reads:

In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney’s fee to be assessed by the court and collected as costs.<sup>14</sup>

The statute has remained essentially the same over the last twenty-four years and covers any lawsuit in which a contractual dispute is in question.<sup>15</sup>

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*Nemeroff v. Abelson and the Bad Faith Exception to the American Rule*, 58 TUL. L. REV. 1519, 1522 (1984). Additionally, in June 2015, the Supreme Court of the United States renewed its dedication to the American Rule, holding that “[w]e . . . will not deviate from the American Rule ‘absent explicit statutory authority.’” *Baker Botts L.L.P.*, 135 S. Ct. at 2164.

10. See 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 (1998); Morse, *supra* note 9, at 1522–23.

11. NEWT GINGRICH ET AL., CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION 145–46 (1994).

12. *Id.*

13. Attorney Accountability Act of 1995, H.R. 988, 104th Cong. (1995). The Attorney Accountability Act of 1995 limits the awarding of attorney’s fees to two situations: (1) an injured party may recover reasonable attorney’s fees when there has been a violation of Rule 11(b) of the Federal Rules of Civil Procedure; and (2) an offeror of a rejected settlement agreement may recover reasonable attorney’s fees from the time of the rejection of the offer if the outcome of the case is not more favorable to the offeree than the settlement offer. *Id.* §§ 2, 4.

14. ARK. CODE ANN. § 16-22-308 (Repl. 1999).

15. *See id.*

Arkansas courts have held that the statute applies to basic business contractual disputes for the sale of land and bankruptcy claims.<sup>16</sup> However, in cases that include multiple claims, where only one or some of the claims are actionable claims under the statute, the actionable claim must be primarily based in contract.<sup>17</sup> Additionally, when a party seeks specific performance, the statute does not apply.<sup>18</sup>

### C. The Legal Services Corporation Helps Cover the Cost of Litigation for Low-Income Individuals

Despite providing a more balanced and consistent experience for the parties, the American Rule does not entirely solve the problem of limited access to the courts for low-income individuals due to a lack of money. While some argue that the American Rule relieves some of the burden that the English Rule places on courts, it does not alleviate the barriers placed in the way of low-income individuals seeking access to courts.<sup>19</sup>

In response to this issue, Congress created the Legal Services Corporation (LSC) in 1974 to provide subsidies to cover the costs of court for eligible low-income individuals.<sup>20</sup> LSC does not attempt to promote “socially useful litigation,” but rather seeks to “achieve equal access to the system of justice for the poor.”<sup>21</sup> LSC continues to fund a significant portion of the legal aid offered around the country.<sup>22</sup> However, the LSC is underfunded and unable to help many people in need, despite its attempts to remove the barriers between low-income individuals and courts.<sup>23</sup> Because of this, many low-income individuals still lack access to the court system that holds the potential justice they desire.

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16. See *Beck v. Inter City Transp., Inc.*, 2012 Ark. App. 370, at 8, 417 S.W.3d 740, 745; *Curry v. Thornsberry*, 81 Ark. App. 112, 121, 98 S.W.3d 477, 483 (2003).

17. *Barringer v. Hall*, 89 Ark. App. 293, 305, 202 S.W.3d 568, 575 (2005).

18. *Ouachita Trek & Dev. Co. v. Rowe*, 341 Ark. 456, 466, 17 S.W.3d 491, 497 (2000).

19. See generally Calvin A. Kuenzel, *Attorneys' Fees in a Responsible Society*, 14 STETSON L. REV. 283 (1985); Phyllis A. Monroe, Comment, *Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access*, 46 ALB. L. REV. 148 (1981); Philip J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969); James H. Creek III, Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216 (1967); Albert A. Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792 (1966).

20. See Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat 378 (1974) (codified as amended at 42 U.S.C. § 2996 (1982)).

21. Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1232 (1988).

22. See *How We Work*, LEGAL SERS. CORP., <http://www.lsc.gov/what-legal-aid/how-we-work> (last visited Jan. 17, 2017).

23. Note, *supra* note 21, at 1232.

### III. THE ARKANSAS RESIDENTIAL LANDLORD-TENANT ACT OF 2007

The Arkansas legislature drafted the Arkansas Residential Landlord-Tenant Act of 2007 (hereafter abbreviated as “the Act”) based on the Uniform Residential Landlord and Tenant Act (URLTA).<sup>24</sup> When Arkansas adopted the URLTA it removed every provision favorable to tenants.<sup>25</sup> In 2009, the Arkansas General Assembly put forth a series of amendments; however, these amendments did little to correct the lack of protections and remedies for tenants, because the changes made were “essentially corrective rather than substantive.”<sup>26</sup>

#### A. The Arkansas Residential Landlord-Tenant Act of 2007 Does Not Provide a Remedy for Tenants

As the Act stands today, remedies for frivolous claims remain one-sided, providing relief for landlords, but not for tenants.<sup>27</sup> In fact, the Act dedicates an entire subchapter to remedies specifically for landlords, and fails to provide remedies for tenants at all.<sup>28</sup> Specifically, Arkansas Code Annotated sections 18-17-701 and 18-17-702 grant the landlord access to remedies when the tenant does not comply with the rental agreement.<sup>29</sup> There is no protection in place for tenants, outside of contract law, if the landlord does not comply with the rental agreement.

Likewise, Arkansas Code Annotated section 18-17-705, titled “Landlord *and* tenant remedies for abuse of access,” does not actually provide for *any* tenant remedies, once again limiting the tenant to breach of contract claims.<sup>30</sup> Similarly, under the Act’s subchapter for Landlord Obligations, there is only one statute, which solely covers security deposits.<sup>31</sup> Conversely, the Tenant Obligations under the Act include “maintaining the dwelling unit,” providing access to the landlord, and delineating the ways in which a tenant may use or occupy the property.<sup>32</sup> Therefore, the Act makes the possibility of tenant noncompliance significantly higher than it does for landlords.

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24. See Marshall Prettyman, *The Landlord Protection Act, Arkansas Code § 18-17-101 Et Seq.*, 2008 ARK. L. NOTES 71, 72 (2008).

25. See *id.*

26. Marshall Prettyman, *Landlord Protection Law Revisited: The Amendments to the Arkansas Residential Landlord-Tenant Act of 2007*, *Ark. Code Ann. §§ 18-17-101 Et Seq.*, 35 U. ARK. LITTLE ROCK L. REV. 1031, 1039 (2013).

27. See ARK. CODE ANN. §§ 18-17-101 to -913 (Repl. 2015).

28. See *id.* §§ 18-17-701 to -707.

29. *Id.* §§ 18-17-701, -702.

30. *Id.* § 18-17-705 (emphasis added).

31. *Id.* § 18-17-501.

32. See *id.* §§ 18-17-601 to -603.

B. Under Current Arkansas Property Law, Residential Tenants Remain Less Protected than Commercial Tenants

The Arkansas Residential Landlord-Tenant Act of 2007 applies almost exclusively to residential leases, as the name suggests. Only a single provision in the Act looks at commercial leases.<sup>33</sup> Notably, in the statute regarding commercial leases, the court can set the amount of rent due if the landlord and the tenant disagree on the amount.<sup>34</sup> Yet, in the mirror statute applying only to residential leases, the court does not have this authority, and the tenant must pay “all rent allegedly owed” while the dispute remains ongoing.<sup>35</sup>

C. The Arkansas Residential Landlord-Tenant Act of 2007, Combined with the Lack of an Implied Warranty of Habitability in Arkansas, Fails to Provide Tenants with any Relief or Remedies to Enforce Their Lease Agreements

Not only does Arkansas fail to explicitly protect tenants, it fails to protect tenants implicitly as well. Arkansas is the only state in the country that has not adopted an implied warranty of habitability or an equivalent duty to repair for landlords.<sup>36</sup> In fact, Arkansas protects landlords from having to maintain the dwellings that they rent out.<sup>37</sup> Every other state requires, at a minimum, that the landlord ensure that the leased premises are habitable for the duration of the lease.<sup>38</sup>

In 1969, the Supreme Court of Hawai'i became the first state to adopt the implied warranty of habitability, overturning the policy of *caveat emptor*

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33. ARK. CODE ANN. § 18-17-912 (Repl. 2015).

34. *Id.* § 18-17-912(b).

35. *Id.* § 18-17-706(2) (Repl. 2015).

36. *See* NON-LEGISLATIVE COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS, REPORT TO GOVERNOR MIKE BEEBE 19 (2012).

37. ARK. CODE ANN. § 18-16-110 (Repl. 2015) (“No landlord or agent or employee of a landlord shall be liable to a tenant or a tenant’s licensee or invitee for death, personal injury, or property damages proximately caused by any defect or disrepair on the premises absent the landlord’s: (1) Agreement supported by consideration or assumption by conduct of a duty to undertake an obligation to maintain or repair the leased premises; and (2) Failure to perform the agreement or assumed duty in a reasonable manner.”).

38. *See* NON-LEGISLATIVE COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS, *supra* note 36; *Lemle v. Breeden*, 462 P.2d 470, 473 (Ha. 1969); *Mease v. Fox*, 200 N.W.2d 791, 796 (Iowa 1972); *Marini v. Ireland*, 265 A.2d 526, 533–34 (N.J. 1970); *see also*, Jamie M. Powers, *Oklahoma Landlords Beware: Miller v. David Grace, Inc. Abandons Caveat Emptor in Residential Leases*, 63 OKLA. L. REV. 361, 365 (2011); Michael J. Davis & Phillip E. DeLaTorre, *A Fresh Look at Premises Liability as Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141, 155–57 (1984).

and holding that leased premises needed to be safe for “human habitation.”<sup>39</sup> In 1972, the Supreme Court of Iowa took this implied warranty a step further, requiring landlords to warrant that “there are no latent defects in facilities and utilities vital to the use of the premises for residential purposes and these essential features shall remain during the entire term in such condition to maintain the habitability of the dwelling.”<sup>40</sup> Despite the rapid adoption of this implied warranty of habitability that began in the 1960s, Arkansas remains the sole state to not apply this warranty or an equivalent duty to landlords.<sup>41</sup>

With the lack of either an implied warranty of habitability or statutory protections for tenants, many common remedies are not available to tenants in a dispute against their landlord in Arkansas.<sup>42</sup> In fact, if a tenant in Arkansas attempts to withhold rent, or uses their rent money to fix instead the condition that is rendering the leased premises uninhabitable, then that tenant runs the risk of being criminally prosecuted under Arkansas’s failure to vacate statute.<sup>43</sup> Essentially, while being the only state to not provide some level of protection for tenants under the implied warranty of habitability, Arkansas is also the only state to criminalize the non-payment of rent.<sup>44</sup>

#### D. Arkansas Offers No Statutory Protections to Tenants, Forcing Them to Enforce the Lease Agreement Under Contract Law

Arkansas tenants are not provided any relief or remedies to enforce their lease agreements under either the implied warranty of habitability or the Arkansas Residential Landlord-Tenant Act of 2007. Moreover, as illustrated above, Arkansas tenants are particularly vulnerable as they are offered none of the statutory protections afforded to tenants in most other states.

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39. *Lemle*, 462 P.2d at 474.

40. *Mease*, 200 N.W.2d at 796.

41. See NON-LEGISLATIVE COMMISSION ON THE STUDY OF LANDLORD-TENANT LAWS, *supra* note 36.

42. See Thomas E. Martin, Jr., *Common Law Residential Rent Withholding—A Call for Legislative Action*, 79 PA. B. ASS’N Q. 72, 74–76 (2008) (exploring the ability of tenants to withhold rent when the landlord violates the implied warranty of habitability); Michael G. Walsh, *Advising Your Client on the Tenant’s “Repair and Deduct” Remedy when the Repair and Deduct Remedy Is Available, It Can Be a Powerful Form of Self-Help for the Tenant.*, PRAC. REAL EST. LAW., Sept. 2005, at 11 (looking at tenants’ ability to repair the property themselves and then deduct the cost of repair from their rent payments); Richard M. Frome et. al., *Tenant Remedies: An Oxymoron*, PROB. & PROP., Jan.–Feb. 1998, at 39, 39–40 (provides an overview of the various remedies available to tenants when the landlord breaches the lease agreement).

43. ARK. CODE ANN. § 18-16-101 (Repl. 2015).

44. Lynn Foster, *The Hands of the State: The Failure to Vacate Statute and Residential Tenants’ Rights in Arkansas*, 36 U. ARK. LITTLE ROCK L. REV. 1, 2 (2013).



Therefore, a tenant's remaining option is to enforce the lease agreement under contract law.

#### IV. THE ENGLISH RULE CONSTRUCTIVELY BARS LOW-INCOME TENANTS' ACCESS TO COURTS

Access to courts is an imperative right of every individual.<sup>45</sup> This access allows a litigant to present his or her case and to seek justice, "provid[ing] the essential confirmation that our legal rights are real, meaningful, and enduring."<sup>46</sup> Constructively prohibiting access to courts renders these legal rights meaningless to those who are unable to afford it. Access to the legal system is often more imperative for low-income individuals because they use the legal system to obtain the basic necessities of life including "food, clothing, or shelter."<sup>47</sup> Additionally, low-income individuals often wield little political clout, and therefore, must rely on courts to "address their needs."<sup>48</sup>

Under Arkansas law, a court's award of reasonable attorney's fees to the prevailing party is both permissive and discretionary, making litigation even more uncertain.<sup>49</sup> As previously stated, the amount awarded to prevailing parties is left to the discretion of the presiding court, meaning that any party bringing forth or defending a claim does so in an extremely precarious position.<sup>50</sup> For low-income individuals seeking to enforce their agreements, this level of uncertainty can serve as a strong deterrent against bringing claims to court.

The danger of barring low-income individual's access to courts influenced the Supreme Court of the United States's decision to adopt, and its continued use of, the American Rule.<sup>51</sup> In *Farmer v. Arabian American Oil Co.*, Justice Goldberg stated that "[i]t has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to

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45. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

46. Note, *supra* note 21, at 1236.

47. Note, *supra* note 21, at 1236; Hiram E. Smith and Fred Marr, *Poor People Without Lawyers Have No Enforceable Legal Rights: The Future of Legal Services*, 13 LINCOLN L. REV. 39, 65 (1982).

48. Note, *supra* note 21, at 1237.

49. See *Worley v. City of Jonesboro*, 2011 Ark. App. 594, at 18, 385 S.W.3d 908, 919.

50. See *River Valley Land, Inc. v. Hudson*, 2009 Ark. App. 600, at 4–5, 347 S.W.3d 40, 43–44.

51. See *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring), *disapproved of on other grounds by Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987).

courts be not effectively denied those of moderate means.”<sup>52</sup> In this way, the Court anticipated the potential of the English Rule to constructively bar access to the judicial system.

Low-income tenants in Arkansas are particularly situated to be harmed by the application of an English Rule statute. As previously explained, tenants in Arkansas do not possess any remedies under the Arkansas Residential Landlord-Tenant Act of 2007, nor do they have the protection of an implied warranty of habitability. Therefore, the only remaining channel for tenants is bringing a breach of contract claim under the provisions of their leases. Currently, there are very few cases in Arkansas state courts where either a tenant or a landowner brought forth a claim that falls under Arkansas Code Annotated section 16-22-308.<sup>53</sup> Notably, the few published cases involving a claim by a landlord or a tenant under this statute involve parties that are not low-income individuals.<sup>54</sup> The lack of case law demonstrates that this form of relief is insufficient because low-income individuals are unlikely to bring their claims to court under an English Rule statute.

Arkansas courts have recognized that disputes arising under contracts for the sale of land are breach of contract claims for the purpose of Arkansas Code Annotated section 16-22-308.<sup>55</sup> Likewise, the Arkansas courts have recognized a lease agreement dispute as a breach of contract case under the statute.<sup>56</sup> Under the current law and interpretation of the statute, Arkansas courts would place a lease dispute under Arkansas Code Annotated section 16-22-308, which subjects the “losing” party to paying the attorney’s fees for the winning party.<sup>57</sup>

The inherent uncertainty of litigation, combined with the vast discrepancies in what constitutes “reasonable” attorney fees, creates a perfect environment to scare away low-income tenants from bringing valid complaints to court. According to the 2015 Census report, 43.1 million people in America were living in poverty.<sup>58</sup> There is a significant percentage of the population that remains constructively barred from courts, and the justice these courts represent, due to the poverty they live in.

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52. *Id.*

53. *See* Notes of Decisions to ARK. CODE ANN. 16-22-308 (Westlaw through Act 4 of the 2017 Reg. Sess.).

54. *See id.*

55. *See, e.g.,* Armstrong Remodeling & Constr., LLC v. Cardenas, 2012 Ark. App. 387, at 13–14, 417 S.W.3d 748, 757.

56. *See, e.g.,* River Valley Land, Inc. v. Hudson, 2009 Ark. App. 600, at 9–10, 347 S.W.3d 40, 45.

57. *See id.*

58. United States Census Bureau, *Income and Poverty in the United States: 2015*, <http://www.census.gov/library/publications/2016/demo/p60-256.html> (last visited Jan 17, 2017).

## V. THE ENGLISH RULE BURDENS COURTS

The adoption of the English Rule in breach of contract cases creates additional work for an already burdened judicial system.<sup>59</sup> To award attorney's fees, courts must determine (a) when a claim has been adjudicated, (b) who the prevailing party is, and (c) what constitutes "reasonable fees."<sup>60</sup> Each of these questions requires significant litigation on its own and is incredibly fact-intensive.<sup>61</sup>

A. Both the Supreme Court of the United States and the Supreme Court of Arkansas Have Held that, to Determine Who the Prevailing Party Is, There Must Be Adjudication on the Merits of Issues Central to the Litigation

The Supreme Court of Arkansas has held that in order to even begin to determine the prevailing party, there must be "an adjudication on the merits of issues central to the litigation."<sup>62</sup> Courts frequently disagree as to what constitutes adjudication on the merits. The Supreme Court of the United States has held that adjudication on the merits occurs where litigation results in a "material alteration of the legal relationship of the parties."<sup>63</sup> In determining what constitutes a "material alteration," the Court has held that circumstances such as enforced settlement agreements, consent decrees, and full trials complete with a jury decision are "material alterations," as they represent "court-ordered change[s] in the legal relationship between the plaintiff and the defendant."<sup>64</sup>

The Court recognizes a separate "catalyst theory," which awards attorney's fees even if there has been "no judicially sanctioned change in the legal relationship of the parties."<sup>65</sup> Specifically, the catalyst theory allows for a party to be named the prevailing party for the purposes of determining the award of attorney's fees if they were the "catalyst" that triggered a fa-

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59. Jacob K. DeYoung, Comment, *Rule 4.7 of the Arkansas Rules of Criminal Procedure: A Squandered Opportunity or a Step in the Right Direction?*, 67 ARK. L. REV. 147, 147 (2014).

60. See *BKD, LLP v. Yates*, 367 Ark. 391, 394–95, 240 S.W.3d 588, 591–92 (2006).

61. See *Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717–18 (1967).

62. *BKD, LLP*, 367 Ark. at 395, 240 S.W.3d at 592.

63. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quoting *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)).

64. *Id.* (quoting *Tex. State Teachers Ass'n*, 489 U.S. at 792).

65. *Id.* at 605.

avorable outcome.”<sup>66</sup> The Court has remained hesitant to use the catalyst theory, however, because this theory would allow for recovery of attorney’s fees, even if a plaintiff merely “established that the complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted.”<sup>67</sup> Despite this, the court has yet to repudiate the catalyst theory, and has in fact gone so far as to name a plaintiff that has received only nominal damages the prevailing party in a claim.<sup>68</sup>

Arkansas courts have adopted the Supreme Court’s stance requiring a material change in the legal relationship between the parties. In *Perry v. Baptist Health*, the Supreme Court of Arkansas held that in order to determine who is the prevailing party, the court must determine “which party, if any, prevailed on the merits of the case as a whole.”<sup>69</sup> While the Supreme Court of the United States was willing to recognize a settlement as adjudication on the merits<sup>70</sup>, the Arkansas Court of Appeals has held that adjudication on the merits does not, in fact, include summary judgments.<sup>71</sup>

Consequently, courts must go through a rigorous and fact-intensive analysis of each individual case to determine which claims involved, if any, were adjudicated on the merits.<sup>72</sup> Without this process, there is no way that the court could possibly determine who the prevailing party is. In order to determine who pays, the courts must take pains to determine who the prevailing party is. Therefore, this first step in determining who pays, and how they much that party pays, places a large burden on courts that would be relieved by the adoption of the American Rule in breach of contract cases.

B. Both the Supreme Court of the United States and the Supreme Court of Arkansas Broadly Interpret Who the Prevailing Party Is in Regards to Awarding Attorney’s Fees

The Supreme Court of the United States has broadly interpreted “prevailing party” in regards to awarding attorney’s fees. In *Farrar v. Hobby*, the Court held that, for the purposes of awarding attorney’s fees under fee-shifting statutes, a prevailing party is one that “succeed[s] on any significant issue in litigation which achieves some of the benefit [that party] sought in

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66. See *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 194–195 (2000).

67. *Buckhannon*, 532 U.S. at 605.

68. *Friends of the Earth*, 528 U.S. at 194.

69. 368 Ark. 114, 120–21, 243 S.W.3d 310, 316 (2006).

70. *Maher v. Gagne*, 448 U.S. 122, 123 (1980).

71. *Beckworth v. Diamante, a Private Membership Golf Club, LLC*, 2010 Ark. App. 814, at 14–15, 379 S.W.3d 752, 762.

72. See *BKD, LLP v. Yates*, 367 Ark. 391, 393–94, 240 S.W.3d 588, 590–91 (2006).

bringing suit.”<sup>73</sup> Likewise, in *Buckhannon Board & Care Home, Inc. v. Virginia Department of Health & Human Resources*, the Court held that a “‘prevailing party’ is one who has been awarded some relief by the court.”<sup>74</sup>

Arkansas has adopted a similarly broad interpretation of “prevailing party” when determining the award of attorney’s fees. The Supreme Court of Arkansas requires that courts explore the case as a whole and “analyz[e] each cause of action and its subsequent outcome” to determine whether there was a prevailing party.<sup>75</sup>

Additionally, courts have held that Arkansas Code Annotated section 16-22-308 applies mainly to breach of contract and other contractual dispute cases; therefore, in order to be the prevailing party in a case that includes a miscellaneous claim and a breach of contract claim, the party only needs to prevail on the contract claim.<sup>76</sup> The Arkansas Court of Appeals has held that “[w]here both contract and tort claims are advanced, an attorney fee award is proper only when the action is primarily based in contract.”<sup>77</sup>

For example, in *Baptist Health v. Smith*, a physician who lost on his claim for indemnity against a vascular surgery center and its president, but prevailed on his counterclaim for breach of contract, was found to be the prevailing party simply because he prevailed on the contract claim.<sup>78</sup> Likewise, in *Spann v. Lovett & Co., Ltd.*, the Supreme Court of Arkansas held that a buyer who lost on his claims of fraud, reimbursement, and tortious interference, but prevailed on his breach of contract claim, was the prevailing party for the purpose of awarding attorney’s fees.<sup>79</sup>

Likewise, the Supreme Court of Arkansas has held that the amounts won by each party are not indicative of whether or not the party prevailed in the end.<sup>80</sup> Rather, it held that the prevailing party is “determined by who comes out ‘on top’ at the end of the case.”<sup>81</sup> In *Larco Inc. v. Strebeck*, the court held that not receiving all of the damages an employee originally sought in his suit was not enough to say that he did not prevail.<sup>82</sup>

Therefore, what constitutes a “prevailing party” for the sake of determining attorney’s fees does not necessarily mean that the party truly prevailed in terms of the full impact of the claims brought forth. This relaxed view of which party prevailed for the sake of attorney’s fees means that par-

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73. 506 U.S. 103, 109 (1992) (citations omitted).

74. 532 U.S. 598, 603 (2001).

75. *BKD, LLP*, 367 Ark. at 394, 240 S.W.3d at 591.

76. *See Baptist Health v. Smith*, 536 F.3d 869, 873 (8th Cir. 2008).

77. *Barringer v. Hall*, 89 Ark. App. 293, 305, 202 S.W.3d 568, 576 (2005).

78. 536 F.3d at 873.

79. 2012 Ark. App. 107, at 23–24, 389 S.W.3d 77, 94–95.

80. *Marcum v. Wengart*, 344 Ark. 153, 162, 40 S.W.3d 230, 236 (2001).

81. *Id.*

82. *Larco, Inc. v. Strebeck*, 2010 Ark. App. 263, at 8, 379 S.W.3d 16, 22.

ties may actually end up being rewarded for poor behavior. Moreover, even if a party were to prevail on all aspects of a case, this is not indicative of the party deserving attorney's fees. As Judge Gibson once said: "it is a fallacy to suppose that every successful plaintiff has a right to be made whole by a verdict which is, at best, only an approximation [of] perfect justice."<sup>83</sup>

C. Arkansas Courts Use Seven Factors to Determine What Constitutes Reasonable Attorney's Fees, but These Factors Are Merely a Guide, Rather than a Fixed Test

Arkansas state courts have routinely held that there is no "fixed" test to determine what constitutes reasonable attorney's fees.<sup>84</sup> Instead courts will be guided by the following seven factors in making their decision:

(1) the experience and ability of the attorney; (2) the time and labor required to perform the service properly; (3) the amount in controversy and the result obtained in the case; (3) the novelty and difficulty of the issues involved; (4) the fee customarily charged for similar services in the local area; (5) whether the fee is fixed or contingent; (6) the time limitations imposed upon the client in the circumstances; and (7) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney.<sup>85</sup>

In using these factors to "guide" their decision, courts are not required to look at each factor, or even discuss the various factors, when they report the fees that the losing party is required to pay.<sup>86</sup> This lack of transparency can create even more confusion for litigants bringing suits, as they are left in the dark about how much the other party's attorney's fees are going to be, should they not prevail.

Determining what constitutes the reasonableness of fees often induces a significant burden on courts.<sup>87</sup> As the Supreme Court of the United States stated: "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration."<sup>88</sup> This has certainly been true, and this confusion is not aided by the fact that Arkansas state courts and the fed-

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83. *Good v. Mylin*, 8 Pa. 51, 56 (Pa. 1848).

84. *See, e.g., Newcourt Fin., Inc. v. Canal Ins. Co.*, 341 Ark. 452, 454–55, 17 S.W.3d 83, 84–85 (2000) (per curiam); *Chrisco v. Sun Indus., Inc.*, 304 Ark. 227, 229, 800 S.W.2d 717, 718–19 (1990).

85. *Phi Kappa Tau Hous. Corp. v. Wengert*, 350 Ark. 335, 341, 86 S.W.3d 856, 860 (2002).

86. *See, e.g., Millwood-RAB Mktg., Inc. v. Blackburn*, 95 Ark. App. 253, 261–62, 236 S.W.3d 551, 557–58 (2006).

87. *See Fleishmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967).

88. *Id.* at 718.

eral courts look at different factors to assess whether a fee is reasonable or not.<sup>89</sup>

Moreover, despite this factor test, the decision of what constitutes “reasonable attorney fees” remains highly subjective. Arkansas courts have held that even the determination of the “amount of award” to be granted to the prevailing party is an entirely discretionary determination that will only be reversed on appeal if there was an abuse of discretion.<sup>90</sup> The Arkansas Court of Appeals went on to confirm the discretionary nature of the amount of the fees awarded in a later case, reiterating that “[t]he decision to award attorney’s fees and the amount of the award are discretionary.”<sup>91</sup> So while there is a “reasonable” requirement to the awards of fees, courts have full discretion on how they define “reasonable.”<sup>92</sup>

In contrast to Arkansas’s seven factor guidelines, federal courts generally use one of two methods of determining attorney’s fees: the twelve factor test or the “lodestar” method.<sup>93</sup> The twelve factors that federal courts look at are similar in nature to Arkansas’s seven factors; however, the federal courts also look at the experience of the attorney, the desirability of the case in question, the nature and length of the relationship between the client and the attorney, and awards granted in similar cases.<sup>94</sup>

Overall, the lodestar method has become the more popular method of determining reasonable fees and requires only that “[t]he initial estimate of a reasonable attorney’s fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.”<sup>95</sup> While seemingly more objective, the lodestar method continues to place burdens on courts because the “initial estimate” is increased or decreased depending on the twelve *Johnson* factors.<sup>96</sup>

In the end, the reasonableness of the attorney fees awarded creates an additional burden on courts because the courts must make the discretionary decision on what amount is reasonable in a given case. To determine the reasonable amount of the award, courts undergo a fact-intensive analysis of the time spent on the case and the regular rates of other attorneys.<sup>97</sup> This analysis only occurs after the court has already determined which claims the

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89. *In re Fowler*, 395 B.R. 647, 650 (Bankr. W.D. Ark. 2008), *aff’d sub nom.* First State Bank of Crossett v. Fowler, 427 B.R. 1 (Bankr. W.D. Ark. 2010).

90. *Worley v. City of Jonesboro*, 2011 Ark. App. 594, at 18–21, 385 S.W.3d 908, 919–20.

91. *River Valley Land, Inc. v. Hudson*, 2009 Ark. App. 600, at 8–9, 347 S.W.3d 40, 44.

92. *See id.*

93. Note, *supra* note 21, at 1243.

94. *Johnson v. Ga. Highway Exp., Inc.*, 488 F.2d 714, 718–19 (5th Cir. 1974), *abrogated by* *Blanchard v. Bergeron*, 489 U.S. 87, 90 (1989).

95. *Blum v. Stenson*, 465 U.S. 886, 888 (1984).

96. *Id.*

97. *Hensley v. Eckerhart*, 461 U.S. 424, 429–31 (1983).

court adjudicated and which party prevailed, illustrating the amount of work the English Rule adds to the court system. No wonder England has created an entire court system—the taxing court—that is solely responsible for determining these reasonable fees.<sup>98</sup>

## VI. REPEALING THE ENGLISH RULE AND INSTITUTING A NEW AMERICAN RULE

For the reasons listed thus far, repealing the English Rule would not only lessen the burden on courts, but would also help provide a more consistent legal experience for plaintiffs and defendants, while simultaneously providing the equal access to courts that American jurisprudence requires. Under the American Rule, parties would pay for their individual attorney fees.<sup>99</sup> Therefore, any party bringing forth or defending a claim would go into the case fully aware of the cost of litigation; parties would be able to make far more informed decisions as the case continues than they are currently able to under the more discretionary English Rule.

The Supreme Court of the United States has explicitly stated that unless “specific and explicit provisions for the allowance of attorneys’ fees [are found] under [a] selected statute,” the American Rule is to be applied to any cause of action.<sup>100</sup> Similarly, the Supreme Court of Arkansas has ruled that “[t]his court follows the American Rule . . . absent statutory authority or a contractual agreement between the parties.”<sup>101</sup> Therefore, for Arkansas to adopt the American Rule, all that is necessary is for the Arkansas legislature to repeal the statutory language authorizing the award of attorney’s fees to the prevailing party. No additional statute need be created to apply the American Rule for breach of contract cases.

### A. Federal Courts Throughout the United States Have Built in Several Common Law Exceptions to the American Rule

Understanding the problematic nature of frivolous claims, federal courts throughout the centuries have built in several common law exceptions to the American Rule. First, courts can award attorney’s fees to the party whose lawsuit benefits others as well as themselves under the “common fund” exception.<sup>102</sup> Second, courts may award attorney’s fees to the party

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98. Solicitor’s Act, 1957, 5&6 Eliz. 2, c. 3.

99. *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2164 (2015).

100. *Alyksa Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 260 (1975).

101. *Carter v. Cline*, 2013 Ark. 398, at 4, 430 S.W.3d 22, 26.

102. *See* *Trs. v. Greenough*, 105 U.S. 527, 529 (1881); *see also* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person’s Access to Justice*, 42 AM. U. L. REV. 1568, 1579 (1993) (“The ‘common fund’ doctrine is a commonly used equitable excep-



who willfully disobeys the court's orders.<sup>103</sup> Third, courts may award attorney's fees to a party when a suit is brought forth in bad faith.<sup>104</sup> Fourth, courts may award attorney's fees if there is explicit statutory language or a contractual agreement that authorizes it.<sup>105</sup>

While originally created to protect plaintiffs, the English Rule has been used to protect defendants as well.<sup>106</sup> Similar to the application of the English Rule, a party may gain attorney's fees under the bad faith exception only if they are the prevailing party.<sup>107</sup> If a party is found to be the prevailing party, particularly the defendant, they then must prove that the other party acted in bad faith.<sup>108</sup>

The United States Court of Appeals for the Second Circuit provided the definition of bad faith often used in fee-shifting cases: "An action is brought in bad faith when the claim is entirely without color and has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons."<sup>109</sup> In order to proceed, courts must determine (a) whether there was a reasonable basis for the claim, and then determine (b) whether the party brought forth the claim with the subjective state of mind required.<sup>110</sup> Therefore, the common law exception for bad faith protects parties that would otherwise be brought into litigation for frivolous and harmful reasons.

#### B. The Arkansas Residential Landlord-Tenant Act of 2007 Already Fully Protects Landlords from Frivolous Claims

Arkansas landlords are already fully protected by a number of statutory exclusions built into the Arkansas Residential Landlord-Tenant Act of 2007 that protect the landlord and awards attorney's fees for willful actions.<sup>111</sup> In Arkansas Code Annotated section 18-17-701(c)(2), the Act provides that landlords may recover reasonable attorney's fees if the tenant's "noncompliance [with the eviction for failure to pay rent] is willful" so long as the landlord is represented by an attorney.<sup>112</sup> Moreover, the Arkansas Code allows

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tion to the American Rule. Both federal and state courts employ this exception to compensate parties who create or preserve a common fund for the benefit of others.").

103. Schoen, *supra* note 5, at 65.

104. See Morse, *supra* note 9, at 1521.

105. Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2164 (2015).

106. Morse, *supra* note 9, at 1524 n.36.

107. *Id.* at 1523.

108. *Id.* at 1524–25.

109. Browning Debenture Holders' Comm. v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir. 1977).

110. Comment, Nemeroff v. Abelson, *Bad Faith, and Awards of Attorneys' Fees*, 128 U. PA. L. REV. 468, 476 (1979).

111. See ARK. CODE ANN. §§ 18-17-701 to -706 (Repl. 2015).

112. *Id.* § 18-17-701(c)(2).

for the landlord to collect reasonable attorney's fees in addition to actual damages, if the tenant breaches the lease agreement.<sup>113</sup> Similarly, if a tenant remains in possession of the leased property in bad faith, then the landlord can recover any reasonable attorney's fees in addition to damages.<sup>114</sup> Arkansas Code Annotated section 18-17-705 allows a landlord to collect attorney's fees if a tenant refuses to allow the landlord lawful access, regardless of whether the landlord simply terminates the rental agreement or actually obtains injunctive relief in Arkansas district court.<sup>115</sup>

As a result, not only do these statutes and several others allow for attorney's fees in nearly every case for landlords, but the Act completely omits the right of tenants to obtain any attorney's fees should they prevail on a cause.<sup>116</sup> In the one statute, which allows for a judgment in favor of a tenant, there is no mention of attorney's fees whatsoever.<sup>117</sup>

Landlords remain fully protected in regards to the potential expenses of having to litigate their cases under the Act without the English Rule. With these protections already in hand, the need for an English Rule to protect the landlords from frivolous or bad faith claims that may result in expensive attorney costs remains unnecessary.

C. Arkansas Should Recognize a New Exception to the American Rule Where Low-Income Individuals Are Immune from Paying Any Attorney's Fee Awards, as Long as the Action Brought Is Brought in Good Faith

In order to provide the greatest possible access to the court system to low-income tenants, Arkansas should institute a new exception to the American Rule that would protect low-income individuals. There have been other attempts at creating exceptions that would help weaken the barriers standing between low-income individuals and the court system, but these exceptions often create new, unresolved issues.<sup>118</sup>

Quite frankly, the best way to protect low-income individuals' access to the court system, while simultaneously relieving the burden on courts under the American Rule, would be to contact the state legislatures and ask for legal aid to receive better funding. LSC is already in place to help remove the monetary barrier between low-income individuals and the judicial

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113. *Id.* § 18-17-703.

114. *Id.* § 18-17-704(c).

115. *Id.* § 18-17-705.

116. *See id.* § 18-17-706.

117. ARK. CODE ANN. § 18-17-706 (Repl. 2015).

118. Note, *supra* note 21, at 1231–32.

system, and, with proper funding, it has the possibility of removing this barrier entirely.<sup>119</sup>

Additionally, courts could recognize a new qualified exception for those cases in which the American Rule does not apply by allowing low-income individuals to be immune from having to pay attorney's fee awards barring bad-faith exceptions. Litigants seeking to utilize the exception would only need to illustrate that, based on income and family size, they would normally qualify for aid from LSC. This does not solve the entire problem, but certainly adds more security to the process and allows for better access to courts by those of "moderate means."<sup>120</sup>

In the unsigned note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, the author puts forth the idea that instead of the losing party paying the winning party's attorney fees, the losing attorney should pay the assigned attorney's fees in those instances that the litigant meets certain low-income requirements.<sup>121</sup>

This idea, however, does not solve the problem of low-income litigants' access to courts, but merely shifts the barrier instead. While the implementation of this idea would theoretically remove the issue of how low-income individuals could pay for their attorney, it fails to recognize that attorneys themselves would be far more unlikely to take on low-income clients if they ran the risk of being personally responsible for the other party's attorney's fees, despite the fact attorneys "must take risks regularly and should be better able and more willing than plaintiffs to assume risk."<sup>122</sup> All this solution does is redirect the problem that low-income litigants have in finding adequate legal presentation to the attorneys themselves, and ultimately fails to solve the problem. This proposed solution allows for the litigants to go to court, but does not allow for the litigants to find a lawyer that will go with them.

## VII. CONCLUSION

For the policy reasons stated above, adoption of the American Rule would result in more equitable litigation and actual contract enforcement, while simultaneously limiting the burden on an already burdened court system and allowing more equal access to courts for the state's most needy. The Arkansas Residential Landlord-Tenant Act of 2007 leaves tenants with no real remedies for disputes with landlords outside of contract enforcement.

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119. See Note, *supra* note 21, at 1232.

120. See *Farmer v. Arabian Am. Oil Co.*, 379 U.S. 227, 237 (1964) (Goldberg, J., concurring), *disapproved of on other grounds by* *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987).

121. Note, *supra* note 21, at 1233.

122. Note, *supra* note 21, at 1249.

Arkansas's adoption of the English Rule for contractual disputes, however, constructively denies low-income tenants access to the courts, while simultaneously burdening the courts by making them go through fact-intensive analyses of whether claims were adjudicated on the merits, who the prevailing parties were, and what constitutes reasonable fees.

As is evident from the lack of tenants seeking to enforce their lease agreements through contract law, there is a segment of the population deterred by Arkansas's adoption of the English Rule. By switching to the American Rule, and instituting the new exception, Arkansas would follow the rest of the country, and open the doors of the judicial system to every citizen, regardless of their means. With the American Rule and this limited exception, low-income individuals like Petrice would be able to fight the breach of contract claim with more certainty and less fear about later drowning in court costs.

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