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Contract Law—Arkansas's Un-American Approach to Attorney's Fees for Breach of Contract

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CONTRACT LAW — ARKANSAS'S UN-AMERICAN APPROACH TO ATTORNEY'S FEES FOR BREACH OF CONTRACT

I. INTRODUCTION

The Arkansas prevailing-party statute, found in section 16-22-308 of the Arkansas Code, is both overbroad and under-inclusive on its face and should be repealed or, at least, limited to cases where public policy in some way favors shifting fees.[1] The law (hereinafter generally referred to as "the prevailing-party statute") provides that:

> 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.[2]

As written, this statute allows a court, in its discretion, to award attorney's fees to the prevailing party in almost any collection action or breach of contract case, unless a contract clause or conflicting statute prevents such allowance.[3]

The statute's effect at the outset of litigation is both an impetus to pursue claims and a limitation on parties of limited means. A party may consider the statute a bonus to their recovery on a surefire suit for breach, but a differently-situated party, not able to absorb the loss if they do not prevail, may view the statute as a risk too great to bear and choose to forego their suit. This dampening effect of the statute unnecessarily restrains unsophisticated parties' ability to enforce contracts in the state by its simple, unguided discretionary language.[4] This is likely most impactful to unsophisticated parties because the statute is implied in contracts that lack any express pro-

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1. *See infra* Part III, Section A.
2. ARK. CODE ANN. § 16-22-308 (Repl. 1999).
3. *Id.* ("[U]nless 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 . . . ."); *see also* Gafford v. Allstate Ins., 2015 Ark. 110, at 6, 459 S.W.3d 277, 280 (holding that ARK. CODE ANN. § 23-79-208 (Repl. 2014) is a conflicting statute that must be relied on in place of ARK. CODE ANN. § 16-22-308 (Repl. 1999) where applicable).
4. *See infra* Part III, Section C.

vision regarding fee-shifting, thus exposing unsophisticated parties to costs they did not know to exclude from the agreement.[5]

A remedy for this unusual situation could come in one of four forms. First, the statute could be repealed, with the result that the common law and pre-existing statutes would govern recovery of attorney's fees. Second, the Supreme Court of Arkansas could adopt judicial standards that would provide some guidance for both the trial courts administering the law and for the appellate courts reviewing awards of fees. This option would be comparable to the Court's guidance regarding sanctions for misconduct under the rules of civil procedure.[6] Third, the statute could be limited by legislative action to cases involving some wrongdoing beyond simple breach of contract. This option would be a plain addition to the text similar to the addition made in 1989.[7] Fourth, the statute could be replaced with the intention that the replacement include an explanation of the scope of the law in terms of affected parties and a maximum amount of fees to be recovered. The replacement would also include a statement of the policy behind the law that the Supreme Court of Arkansas could then consider in their adoption of judicial standards for review of the law. This option would bring the statute in line with the other fee-shifting statutes of limited application, such as section 23-79-208 of the Arkansas Code (hereinafter generally referred to as "the loss claims statute")[8] that is limited to suits involving defendant insurance companies.[9]

With these potential remedies as a backdrop, this note first analyzes the various approaches to attorney's fees in contract disputes and their effects and effectiveness.[10] Next, this note explains the scope and application of the prevailing-party statute and provides some examples of fee-shifting rules that include the type of standards and guidance needed in section 16-22-308.[11] Part III argues that the current "English Rule" style law that Arkansas uses is, by a lack of limiting language and in the absence of standards or guidelines, a law with no clear purpose and unpredictable results.[12] Last, Part III Sections B–D discusses other fee-shifting rules and how those may be used as examples to change Arkansas's.[13]

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5. *See infra* Part II, Section E.
6. *See infra* Part III, Section B.
7. *See infra* Part III, Section C.
8. Referred to as such because it is titled "Damages and attorney's fees on loss claims" in the Arkansas Code Annotated.
9. *See infra* Part III, Section D.
10. *See infra* Part II, Section A.
11. *See infra* Part II, Sections B–E.
12. *See infra* Part III.
13. *See infra* Part III, Sections B–D.

II. BACKGROUND

There are generally two approaches to the question of "who pays the attorneys" at the end of a case. In common parlance among legal circles, the two possibilities are known as the English Rule and the American Rule.[14] While, in modern practice, the dichotomy between the American and the English Rules is "sufficiently blurred" to render the distinction a mere useful fiction,[15] historically, the English Rule provides that the loser pays[16] and the American Rule provides that each party pays their own attorneys.[17] Despite the nomenclature, the American Rule finds both supporters and detractors throughout American legal scholarship.[18] In one camp, opponents of the rule argue that a party should not need to resort to the professional assistance of an attorney and the prolonged and expensive procedures of filing suit for enforcement of their rights. And when they do need to resort to legal action, they should be permitted to shift the cost to the wrongdoer. In the other camp, proponents argue that a party should not be scared away from enforcing obligations by the prospect of paying the other party's fees if things go awry. The solution is somewhere in the middle, and courts have been working inward from either side for centuries, choosing one "rule" or the other and carving out exceptions.[19]

A. English Rule

In England, the fees paid to the barrister and many of the other expenses paid during a lawsuit are referred to collectively as "costs."[20] There was

14. John R. Schleppenbach, *Winning the Battle but Losing the War: Towards A More Consistent Approach to Prevailing Party Fee Shifting in the Contractual Context*, 12 FLA. A & M U. L. REV. 185, 188 (2017).

15. Theodore Eisenberg et al., *Attorneys' Fees in a Loser-Pays System*, 162 U. PA. L. REV. 1619, 1622, n.4 (2014) (citing Theodore Eisenberg et al., *When Courts Determine Fees in a System with a Loser Pays Norm: Fee Award Denials to Winning Plaintiffs and Defendants*, 60 UCLA L. REV. 1452, 1455 (2013)).

16. EIU Grp., Inc. v. Citibank Del., Inc., 429 F. Supp. 2d 367, 369 (D. Mass. 2006) (asserting that the "'British Rule'—loser pays— . . . has been employed in England since the Statute of Gloucester in 1278 . . . .").

17. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

18. *See, e.g.*, Nathan Nash, Solange Hilfinger-Pardo & James Mandilk, *The Tarnished Golden Rule: The Corrosive Effect of Federal Prevailing-Party Standards on State Reciprocal-Fee Statutes*, 127 YALE L.J. 1068 (2018) (generally advocating for a broad "prevailing party" fee-shifting rule); *see also* Michael Moore, *Legal Malpractice and the Bad Faith Exception to the American Rule: A Suggested Approach for Addressing Intentional Lawyer Misconduct*, 48 WASH. & LEE L. REV. 1141, 1151 (1991) (arguing in support of the American Rule that a party should not "suffer a penalty for exercising his basic right to access the judicial system").

19. *See* Part II, Section B.

20. Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 856 (1929).

no allowance for costs at common law.[21] However, before the development of modern law, English statutory law began to provide means to collect costs for prevailing parties.[22] Recovery of costs was authorized by statute as early as 1278 for plaintiffs[23] and 1607 for defendants.[24] The English rule has become more and more narrowly prescribed, but is still the expectation and remains in the discretion of the court.[25] Special judges were, and still are, used in English courts to determine the amount of reasonable costs and fees.[26] The rules for recovery of costs have grown so complicated in England, and in all the other countries following the English rule, that Mathias Reimann calls it "hopelessly simplistic as well as virtually useless" to define the English rule as "loser pays."[27] Some countries following this rule shift fees in an attempt to make the winner completely whole, covering his or her costs almost entirely and including costs of representation, fact investigation, and court fees.[28] Yet, even countries in this category may limit the amount of attorney's fees to what the court considers reasonable.[29] Other English-rule countries, including England, generally do not shift the whole cost, but maintain the general rule of *some* shifting from the winner to the loser.[30]

B. American Rule

By contrast, the rule in America generally provides that "the prevailing party may not recover attorney's fees as costs or otherwise."[31] This rule is nearly as old as the United States federal court system.[32] In 1793, Congress allowed prevailing parties to be compensated for their costs and fees, but this statute was only renewed for a few years and expired in 1798.[33] An

21. *Id.* at 851–52.

22. *Id.* at 851 (Goodhart tells us that "[t]he common-law rule as to costs is based entirely on statute," referring to the Statute of Gloucester, before which there was no specific provision for claiming attorney's fees).

23. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 n.18 (1975).

24. John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1571 (1993).

25. *Id.* at 1571.

26. *Id.*

27. Mathias Reimann, *Cost and Fee Allocation in Civil Procedure: A Synthesis*, *in* COST AND FEE ALLOCATION IN CIVIL PROCEDURE: A COMPARATIVE STUDY 3, 9 (Mathias Reimann, ed., 2011) (ebook).

28. *Id.* at 10.

29. *Id.* at 11.

30. *Id.* at 13.

31. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

32. *See, e.g.*, Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) ("The general practice of the United States is in oposition [*sic*] to it . . . .").

33. *Alyeska*, 421 U.S. at 248 n.19.

1842 act of Congress gave the Supreme Court of the United States authority to regulate the payment of costs and to prescribe the costs that are taxable to parties.[34] In 1853, Congress prescribed the costs allowable for attorneys and numerous other persons who have business in litigation (printers, process servers, clerks, witnesses) and specifically prohibited other compensation (such as payment of fees by the opposing party).[35] Arkansas followed the same trend, enforcing the American rule for over a century before starting to carve out exceptions.[36]

There are many exceptions to the American rules of attorney's fees at both state and federal levels.[37] One commentator found six categories of exceptions to the American rule in America: (1) contract provisions that provide for fee-shifting, (2) common fund doctrine, (3) substantial benefit doctrine, (4) contempt, (5) bad faith, and (6) statutes and rules of procedure.[38] Most of these exceptions are the product of various legislative enactments that reflect the policy and perspectives of their respective states.[39] These include the statute that is the subject of this note as well as a litany of federal and state statutes too numerous to list here.[40] That litany includes a few prominent federal statutes, applicable to narrow areas of the law, that require the award of attorney's fees under certain circumstances: Antitrust,[41]

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34. *Id.* at 250 n.23.

35. *Id.* at 253–254.

36. *See* Jacobson v. Poindexter, 42 Ark. 97, 100 (1883) ("The law makes no allowance to the successful suitor for his time, indirect loss, annoyance or counsel fees."). The first statutory exception in Arkansas was not made until 1951 with the passage of section 4-56-101 of the Arkansas Code, *infra* note 122.

37. *See* Alyeska, 421 U.S. at 254–63 (providing a frequently cited list of exceptions).

38. Vargo, *supra* note 24, at 1578–89.

39. *See* Jeffrey C. Bright, *Unilateral Attorney's Fees Clauses: A Proposal to Shift to the Golden Rule*, 61 DRAKE L. REV. 85, 114–117 (2012) ("Seven states provide reciprocal attorney fee's statutes. These statutes reform unilateral attorney's fees clauses to apply reciprocally towards both parties. Six other states provide limited reciprocal attorney's fees statutes that apply to specific types of contracts: consumer contracts, installment contracts, and residential leases."); *see also* Nash, *supra* note 18, at 1104 n.150 (providing a list of state statutes that allow for recovery of attorney's fees in particular types of cases).

40. Vargo, *supra* note 24, at 1588 (finding that "there are over 200 federal and almost 2,000 state" statutory exceptions).

41. *See* 15 U.S.C.A. § 4304(a) (West 2018) ("[I]n any claim under the antitrust laws . . . the court shall, . . . (1) award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee, or (2) award to a substantially prevailing party defending against any such claim the cost of suit attributable to such claim, including a reasonable attorney's fee, if the claim, or the claimant's conduct . . . was frivolous, unreasonable, without foundation, or in bad faith."); *see also* 15 U.S.C.A. § 15 (West 2018) ("[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee").

Fair Labor Standards Act,[42] Lanham Act,[43] Truth in Lending,[44] Merchant Marine Act[45], and Title II Civil Rights Act.[46]

Aside from the statutory exceptions, courts have added exceptions based on their inherent powers and in the interest of "orderly and expeditious disposition of cases,"[47] generally fitting into the bad faith and common fund exceptions. Courts have widely recognized the bad faith exception where a party has acted "vexatiously, wantonly, or for oppressive reasons."[48] The common fund exception, which spreads the cost of litigation among those benefitting from it, has been upheld by the Supreme Court.[49] In exceedingly rare cases, a party may claim what has been termed the "private attorney general" exception, similar to the common fund doctrine.[50] Last, an exception cited almost as frequently as the bad-faith exception is the exception for contempt or willful disobedience of a court order.[51]

These numerous examples of federal statutory and common law exceptions reflect a trend observable in Arkansas as well. The General Assembly of the state began chipping away at the rule during the twentieth century and, piece by piece, put together sets of laws that both reflected and deviated from the federal procedures and statutes in meaningful ways. The prevail-

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42. 29 U.S.C.A. § 216(b) (West 2018) ("The court . . . shall . . . allow a reasonable attorney's fee to be paid by the defendant . . . .").

43. 15 U.S.C.A. § 1117(a) (West 2018) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party.").

44. 15 U.S.C.A. § 1640(a) (West 2018) ("[A]ny creditor who fails to comply with any requirement imposed under this part . . . is liable to such person . . . to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court").

45. 46 U.S.C.A. § 31304(b) (West 2018) ("If the plaintiff prevails, the court shall award costs and attorney fees to the plaintiff.").

46. 42 U.S.C.A. § 2000a-3(b) (West 2018) ("[T]he court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .").

47. EIU Grp., Inc. v. Citibank Del., Inc., 429 F. Supp. 2d 367, 372–73 (D. Mass. 2006) (quoting Link v. Wabash R.R., 370 U.S. 626, 630–31, (1962)), *aff'd in part*, *rev'd and remanded in part*, 489 F.3d 405 (1st Cir. 2007).

48. F. D. Rich Co. v. U.S. for the Use of Indus. Lumber Co., 417 U.S. 116, 129–30 (1974); *see also* Guardian Trust Co. v. Kansas City S. Ry., 28 F.2d 233, 241 (8th Cir. 1928) (providing a list of causes of action and classes of parties where bad faith may be found), *rev'd*, 281 U.S. 1 (1930).

49. *See* Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970) (acknowledging the possibility of recovery under the doctrine).

50. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 266 (1975) (recognizing this as an extremely limited exception, explaining that the function of a party acting as a private attorney general is to "call public officials to account and to insist that they enforce the law.").

51. *See* Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399, 428 (1923) ("[I]t was not an abuse of discretion in this case to impose as a penalty, compensation for the expenses incurred by the successful party to the decree in defending its rights in the Ohio court."). *See also infra* notes 90–105 and accompanying text.

ing-party statute is just one example of these exceptions but, as set out below, it is an exception that needs to be revisited.

C. The Prevailing-Party Statute Today

The state and federal courts and legislatures, in creating the exceptions discussed above, chipped away at the American Rule. At the same time, they generally included explanations, limitations, or clear standards for the reversal of the norm.[52] This section explains how the prevailing-party statute works and shows that it lacks the explanation, limitations, and standards needed to make it effective and reasonable. The following sections then discuss the rules and statutes that should be considered models for making exceptions to the American rule.[53]

1. How Section 16-22-308 Works

The statute itself does not require much parsing or extrapolation; it is remarkably simple, containing only one sentence and no sections or organizational aids. Section 16-22-308 provides that:

> 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.[54]

The party should follow the procedure provided in Arkansas Rule of Civil Procedure 54, and, if the party follows the procedure, it is left to the discretion of the trial court whether to award fees and in what amount.[55] Other than the determination of reasonableness of fees,[56] there is no guidance for the parties or the trial court in determining whether to allow the fees. The statute is simple and vague; however, a review of the case law reveals enough successful and unsuccessful attempts to recover to demonstrate the impressive scope of the prevailing-party statute.

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52. *Infra* Part II, Sections D–E.

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

55. *Id.* (providing that a party "*may* be allowed a *reasonable* attorney's fee.") (emphasis added). For an example of the need for strict compliance with Rule 54, see *Roop v. Cook*, 2009 Ark. App. 540, at 10–16 334 S.W.3d 412, 415–17, wherein the prevailing party lost its chance to recover fees due to a formulaic error in their pleading.

56. *See* Chrisco v. Sun Industries, Inc., 304 Ark. 227, 229, 800 S.W.2d 717, 718 (1990) (providing factors for determining reasonableness); *see also infra* Section II, C.

2. To What Does Section 16-22-308 Apply?

The statute, as written, is specific as to what types of agreements it affects, and it originally only covered actions for recovery on the types of agreements explicitly listed.[57] The language of the statute was expanded in 1989 by Act 800 to include breach of contract generally.[58] The first formulation of the statute excluded actions for recovery on breach of contract, seemingly limiting the original statute to fee-shifting only in cases where the recovery sought was based on a liquidated or readily-ascertainable sum owed under the agreement as opposed to losses that were difficult to measure, such as claims for consequential damages.[59]

The addition of breach of contract removed that minor limitation, and over a dozen types of agreements have been added by judicial interpretation to the list of agreements to which the prevailing-party statute is applicable. One preeminent scholar of contracts and damages provides the following list of contracts to which this provision has been applied:

legal services, insurance coverage, construction and surveying services, real property leases and sales agreements, oil and gas leases, covenants in warranty deeds, foreclosure actions, sales agency agreements, the sale of a business, partnership agreements, trust agreements, covenants not to compete, wrongful termination claims, employment contracts for public school teachers, and other employment contracts. [60]

An important effect of the non-limiting language of the statute is that a party prevailing on any action that is based predominantly on a contract claim, but includes other claims or counterclaims, can recover attorney's fees for the pursuit or defense of all claims.[61] For instance, in a claim based on strict tort liability, breach of implied and express warranties, and breach of contract, the court affirmed an award of attorney's fees under the prevailing-party statute.[62]

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57. First Nat'l Bank of Crossett v. Griffin, 310 Ark. 164, 174, 832 S.W.2d 816, 821 (1992).

58. *Id.* ("The classes of civil action to which Act 519 applies were expanded by amendment by 1989 Ark. Acts 800 which added actions for breach of contract.").

59. This includes the labor or services clause, being that the cost of the labor or services would have been a readily ascertainable if not an express sum in the contract.

60. HOWARD BRILL, ARKANSAS PRACTICE SERIES: LAW OF DAMAGES § 11:4, Westlaw (2018) (footnotes omitted).

61. Kinkead v. Union Nat'l Bank, 51 Ark. App. 4, 18, 907 S.W.2d 154, 162 (1995) ("Here, although appellants made unsubstantiated allegations of tort in their counterclaim, the trial was basically an action for foreclosure.").

62. Nissan N. Am., Inc. v. Harlan, 2017 Ark. App. 203, at 14, 518 S.W.3d 89, 98.

3. Who Is the Prevailing Party?

Though a complex lawsuit may result in favorable verdicts in each direction, for the purposes of section 16-22-308, the prevailing party is the party who received a monetary judgment in their favor.[63] In a case where the defendant successfully moved for dismissal on six of the seven claims against it, the defendant was still not considered the prevailing party under section 16-22-308 because, in the end, the plaintiff still won monetary judgment against the defendant and could therefore be awarded reasonable attorney's fees.[64]

4. What Is a Reasonable Fee?

Many cases and many courts have dealt with the question of what constitutes a reasonable fee. No court has, or likely can, develop a definite formula for calculating reasonable attorney's fees.[65] Arkansas courts use their own knowledge and a combination of the following eight factors set out in *Chrisco v. Sun Industries, Inc.*:

> 1) the experience and ability of the attorney, 2) the time and labor required to perform the legal service properly, 3) the amount involved in the case and the results obtained, 4) the novelty and difficulty of the issues involved, 5) the fee customarily charged in the locality for similar legal services, 6) whether the fee is fixed or contingent, 7) the time limitations imposed upon the client or by the circumstances, and 8) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. [66]

The decision of what amounts to a reasonable fee is within the discretion of the trial court and will only be upset by a higher court after a showing of abuse of discretion.[67] Additionally, courts disfavor the possibility of

63. Cumberland Fin. Grp., Ltd. v. Brown Chem. Co., 34 Ark. App. 269, 273, 810 S.W.2d 49, 51 (1991) ("the party in whose favor the verdict compels a judgment is considered to be the prevailing party").

64. ERC Mortg. Grp., Inc. v. Luper, 32 Ark. App. 19, 23–24, 795 S.W.2d 362, 365 (1990) ("The basis of the argument is that six of the seven counts contained in [appellee's] complaint were dismissed on the appellant's motion at the close of [appellee's] case-in-chief. . . . We agree with the view of the trial court here that the appellee was the 'prevailing party' under ARK. CODE ANN. § 16-22-308.").

65. *See* S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, 356, 138 S.W.3d 102, 107–08 (2003) (the court provides six cases that it had decided in the last twenty years, each with different factors for determining a reasonable fee); *see also* Hensley v. Eckhart, 461 U.S. 424, 436 (1983) (Referring to calculation of a reasonable fee amount: "There is no precise formula for making these determinations.").

66. Chrisco v. Sun Indus., Inc., 304 Ark. 227, 229, 800 S.W.2d 717, 718–19 (1990).

67. *Id.* at 230, 800 S.W.2d at 719.

another prolonged proceeding to determine attorney's fees[68] and so are not likely to entertain appeals or substantial discussion of hours and expenses.

5. When Is Section 16-22-308 Not Applicable?

The prevailing-party rule is not applicable in any situation where there is an otherwise applicable law, a prime example being actions against an insurance company, though the claim is based on contract.[69] Because "unjust enrichment is a quasi-contract claim" and based on a legal fiction, not an actual contract, a party may not recover under section 16-22-308 when prevailing on an unjust enrichment claim. [70] Last, the law is not applicable when the contract that is the subject of the action provides otherwise.[71] Specifically contracting otherwise offers the only protection from exposure to paying the prevailing/adverse party's attorney's fees. On the other hand, the statute is applicable in federal courts sitting in diversity,[72] and it is only applicable to attorney's fees on appeal if it is first raised at the trial level.[73]

D. Chipping Away at the American Rule (Procedurally)

As discussed above, the twentieth century has seen the development of several methods for collecting attorney's fees from an opposing party.[74] These include procedures relating to the misconduct of parties during both trial and pre-trial proceedings,[75] as well as procedures for a court to award attorney's fees under whatever substantive laws the legislature sees fit to provide.[76] Arkansas Rules of Civil Procedure 11,[77] 30,[78] 33,[79] 37,[80] and 56[81]

68. *See Hensley*, 461 U.S. at 437 (1983) ("A request for attorney's fees should not result in a second major litigation.").

69. Gafford v. Allstate Ins., 2015 Ark. 110, at 6–7, 459 S.W.3d 277, 280 ("[S]ection 23-79-208 provides for an insured's exclusive means of recovering attorneys' fees in an action to recover for a loss under an insurance policy.").

70. Stokes v. Stokes, 2016 Ark. 182, at 11, 491 S.W.3d 113, 121 ("Because Mason asserted an unjust-enrichment claim, he is not entitled to attorney's fees. Therefore, we conclude that in this case attorney's fees are not authorized by section 16-22-308.").

71. "[U]nless otherwise provided . . . by the contract which is the subject matter of the action" ARK. CODE ANN. § 16-22-308 (Repl. 1999).

72. Hortica-Florists' Mut. Ins. v. Pittman Nursery Corp., 729 F.3d 846, 852 (8th Cir. 2013), *as corrected* (Sept. 9, 2013) ("In a diversity case such as this one, *see* 28 U.S.C. § 1332, we employ state substantive law. State law governing attorneys' fees is generally 'substantive.'") (citations omitted).

73. Precision Steel Warehouse, Inc. v. Anderson-Martin Mach. Co., 313 Ark. 258, 272, 854 S.W.2d 321, 328 (1993) ("[W]e have held that Ark. Code Ann. § 16-22-308 (Supp. 1991) is not applicable to attorney's fees and costs on appeal.").

74. *See supra* notes 33–47 and accompanying text.

75. *See* FED. R. CIV. P. 11; ARK. R. CIV. P. 11.

76. ARK. R. CIV. P. 54(e).

provide for the recovery of attorney's fees as a result of various types of attorney misconduct, and Rule 54 provides the procedure for recovery.[82] Rules 30, 33, and 37 apply only to discovery proceedings, Rule 56 applies only to motions for summary judgment,[83] and Rule 11 applies to any "pleading, motion, or other paper" submitted to the court.[84] While Arkansas Rule of Civil Procedure 54 provides the procedure for requesting attorney's fees and taxing court costs, it does not actually establish any substantive right to request attorney's fees.[85] Instead, as a procedural rule, it is used in combination with section 16-22-308 to recover attorney's fees.[86]

The broadest provision allowing for the recovery of attorney's fees in both the state and federal court system is Rule of Civil Procedure 11. This rule is wielded as a bullwhip, a sword, and a shield by parties according to their present need. It can encourage an opposing party to follow through,[87]

77. ARK. R. CIV. P. 11(c)(2) ("Sanctions that may be imposed for violations of this rule include, but are not limited to . . . (D) an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee").

78. ARK. R. CIV. P. 30(d)(3) ("If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorneys' fees incurred by any parties as a result thereof.").

79. ARK. R. CIV. P. 33 (b)(5) ("The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.") ARK. R. CIV. P. 37(a)(4) (providing for "payment of reasonable expenses incurred" and the reasonable expenses include attorney's fees).

80. ARK. R. CIV. P. 37 (providing in five places that a party who is compelled to act by the court or who otherwise fails to act as he or she should may be ordered to pay the other party's "reasonable expenses" incurred by moving for the court order or "caused by the failure.").

81. ARK. R. CIV. P. 56(g) ("*Affidavits Made in Bad Faith*. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.").

82. *See* State Auto Prop. & Cas. Ins. v. Swaim, 338 Ark. 49, at 60–61, 991 S.W.2d 555, 562 (1999).

83. ARK. R. CIV. P. 56 (titled "*Summary judgment*").

84. ARK. R. CIV. P. 11(c).

85. Roop v. Cook, 2009 Ark. App. 540, at 10–16 334 S.W.3d 412, 415–17 ("The Roops admit that they did not comply with Rule 54(e) in that they did not specifically mention in their motion the statute entitling them to the award. ARK. CODE ANN. § 16-22-308.") (prevailing parties were denied recovery of attorney's fees on the basis of failure to adhere to Rule 54 despite ARK. CODE ANN. § 16-22-308 permitting recovery).

86. ARK. R. CIV. P. 54(e).

87. *See* ARK. R. CIV. P. 11(c)(2) (allowing the frightening prospect of official sanction).

punish them for failing to provide necessary information,[88] or protect a party from needless and trivial claims.[89] It is the last purpose of Rule 11 that, at first blush, appears to be the purpose behind the prevailing-party statute, and, if that is so, what is the purpose of a duplicate remedy? The purpose of the prevailing-party statute is not redundant and may be clearly distinguished from the federal and state Rule 11.

1. Federal Rule of Civil Procedure 11

Federal Rule of Civil Procedure 11 provides that a court may, upon appropriate motion, order a party to pay another party's attorney's fees and other expenses resulting from the violation of Rule 11(b).[90] Rule 11 attorney's fees are always the result of misconduct of parties, and the Rule narrowly directs monetary sanctions in such a way that they are only available when requested.[91] The court may not issue monetary sanctions for violations which the court addresses *sua sponte*.[92] If a claim, defense, or legal contention is found to be unwarranted or frivolous, the court may not order a monetary sanction unless the court has issued a "show cause" order.[93] Rule 11 sanctions do not apply to discovery, [94] and because the monetary sanctions only apply as far as the direct results of sanctioned behavior,[95] Rule 11 sanctions will not result in payment for discovery expenses. The purpose of Rule 11 is to deter misconduct rather than to compensate parties. This purpose is gleaned from sections on the applicability of the Rule, the Rule's recommended sanctions, and explicitly from the advisory committee's notes.[96] The

88. ARK. R. CIV. P. 11 (b)(2) (requiring "the factual contentions have evidentiary support").

89. ARK. R. CIV. P. 11(b)(2) (requiring "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law").

90. FED. R. CIV. P. 11(c)(4) ("[T]he sanction may include . . . an order directing payment to the movant of part or all of the reasonable attorney's fees.").

91. FED. R. CIV. P. 11(c)(2).

92. FED. R. CIV. P. 11(c)(4) ("[I]f imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."); *see also* Methode Elecs., Inc. v. Adam Techs., Inc., 371 F.3d 923, 926 (7th Cir. 2004) ("[I]f the sanction is imposed on the court's own motion, attorney fees cannot be awarded.").

93. FED. R. CIV. P. 11(c)(5)(B).

94. FED. R. CIV. P. 11(d).

95. FED. R. CIV. P. 11(c)(4).

96. FED. R. CIV. P. 11 advisory committee's note to 1993 amendments ("[T]he purpose of Rule 11 sanctions is to deter rather than to compensate."); *see also* FED. R. CIV. P. 11(c)(4) ("*Nature of a Sanction.* A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include . . . an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation. (5) *Limita-*

explanation of purpose and limitation on applicability make the federal Rule 11 reasonable and mitigate any dampening effect. Arkansas's Rule 11 can be described in much the same way; it is explained, limited, and reasonable in a way that the prevailing-party statute is not.

2. Arkansas Rule of Civil Procedure 11

The relevant part of Arkansas's Rule 11 is facially similar to the federal version, but the reporter's notes indicate that they are "significantly different."[97] The principal differences, as relate to attorney's fees, are notable and not mere procedural differences, but the "primary purpose" of the sanctions in deterring misconduct is largely the same.[98] Arkansas's Rule 11 differs in that it requires a sanctioning court to "explain the basis for the sanction" and explain "how a monetary sanction was determined," if any.[99] The requirement that a trial court explain the basis for the monetary sanction was adopted by the Supreme Court of Arkansas in 1995.[100] The Court admitted that because of the lack of judicial standards for determining an appropriate sanction, neither the trial court nor the parties had a basis for arguing in favor of or against a particular sanction amount.[101] To correct this situation, the Court adopted the federal standard of review for Rule 11 sanctions based on the purpose of deterring "future litigation abuse."[102] The federal standard comes from *In re Kunstler*[103] and was adopted in whole by the Supreme Court of Arkansas.[104] This adoption of a judicial standard to be used by the trial court, reviewing court, and the parties moving for the sanction is precisely the type of standard that could be created to improve the prevailing-party statute.[105]

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tions on Monetary Sanctions. The court must not impose a monetary sanction . . . on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.").

97. ARK. R. CIV. P. 11 addition to reporter's notes, 2015 amendment ("Other changes are based on FED. R. CIV. P. 11, but overall this rule differs significantly from its federal counterpart.").

98. *See* Crockett & Brown, P.A. v. Wilson, 321 Ark. 150, at 159, 901 S.W.2d 826, 830 (1995).

99. ARK. R. CIV. P. 11(c)(3).

100. *Crockett*, 321 Ark. at 159, 901 S.W.2d at 830–31.

101. *Id.* at 159, 901 S.W.2d at 831.

102. *Id.* at 159, 901 S.W.2d at 830.

103. *In r*e Kunstler, 914 F.2d 505 (4th Cir. 1990).

104. *Crockett*, 321 Ark. at 159, 901 S.W.2d at 830–31 ("The trial court should consider (1) the reasonableness of the opposing party's attorney's fees, (2) the minimum to deter, (3) the ability to pay and (4) factors relating to the severity of the Rule 11 violation.")(citing *In r*e Kunstler, 914 F.2d 505 (4th Cir. 1990)).

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

E. Chipping Away at the American Rule (Substantively)

In addition to the new procedural rules, the Arkansas state legislature passed several statutes during the latter half of the twentieth century providing substantive rules for the recovery of attorney's fees at the culmination of discrete categories of lawsuits.[106] This set of exceptions to the American rule has been expanded to include more types of claims, recovery of a greater portion of the attorney's fees, and recovery in broader categories of litigation.[107]

One fee-shifting statute that is distinct from section 16-22-308 is the loss claims statute,[108] which provides that a party who prevails against an insurance carrier may recover both a penalty added to the amount recovered and the amount of their attorney's fees from the losing party.[109] This statute only allows for recovery by the insured if the insured is the plaintiff, and the statute limits recovery based on how successful the insured is in recovering the amount demanded in the complaint.[110] The loss claims statute is, by these limitations, a clearer enactment of the public policy than the prevailing-party statute. It counteracts the chilling effect of prolonged litigation that may arise from suing sophisticated parties with deep pockets like insurers, and it provides some relief for individuals who have likely incurred significant fees in pursuing enforcement of the contract they entered with the in-

106. *See generally* ARK. CODE ANN. § 4-56-101 (Repl. 2011) (providing that attorney's fees are recoverable in suit to collect on promissory note); *Id.* § 18-15-605 (Repl. 2015) (providing that attorney's fees are recoverable in suits against water companies' condemnation actions); *Id.* § 11-9-715 (Repl. 2012) (dividing attorney's fees between employer and employee in workers' compensation claims); *Id.* § 23-79-208 (Repl. 2014) (providing that attorney's fees are recoverable in suits against insurer); *Id.* § 9-12-309 (Repl. 2015) (providing that attorney's fees are recoverable in actions for divorce); *Id.* § 16-22-308 (Repl. 1999).

107. For example, the enactment of section 16-22-308 essentially made section 4-56-101 obsolete by covering the promissory notes along with several other types of suits, and Act 800 of 1989 added breach of contract to section 16-22-308.

108. ARK. CODE ANN. § 23-79-208 (Repl. 2014).

109. *Id.* § 23-79-208 (a) ("(a)(1) In all cases in which loss occurs and the . . . insurance company . . . liable therefor shall fail to pay the losses within the time specified in the policy after demand is made, the person, firm, corporation, or association shall be liable to pay the holder of the policy . . . in addition to the amount of the loss, twelve percent (12%) damages upon the amount of the loss, together with all reasonable attorney's fees for the prosecution and collection of the loss.").

110. ARK. CODE ANN. § 23-79-208(d)(1)–(2) (Repl. 2014) ("Recovery of less than the amount demanded by the person entitled to recover under the policy shall not defeat the right to the twelve percent (12%) damages and attorney's fees provided for in this section if the amount recovered for the loss is within twenty percent (20%) of the amount demanded or which is sought in the suit. [I]n all cases involving a homeowner's policy, the right to reasonable attorney's fees provided for in this section shall arise if the amount recovered for the loss is within thirty percent (30%) of the amount demanded or which is sought in the suit.").

surer.[111] The public policy underlying the law is implicit in the statute because it makes apparent what is being encouraged and who the statute seeks to protect, distinguished from the prevailing-party statute, which includes no limiting language that would reveal its purpose.

Despite the fact that the loss claims statute applies primarily to contract enforcement claims, the Supreme Court has held that the prevailing-party statute is not applicable to actions by an insured against an insurer.[112] Additionally, the Supreme Court of Arkansas held in *Gafford v. Allstate Insurance Co.* that a prevailing party may not use section 16-22-308 to recover attorney's fees when their ultimate award from the defendant insurance company did not meet the statutory minimum for recovery under the loss claims statute.[113]

Another, earlier fee-shifting statute provides the foundation of section 16-22-308. It was the first Arkansas statute to change the common law rule (American Rule) of no attorney's fees: section 4-56-101 of the Arkansas Code (hereinafter referred to generally as "the promissory note" statute).[114] It provides that:

> (a) A provision in a promissory note for the payment of reasonable attorney's fees, not to exceed ten percent (10%) of the amount of principal due, plus accrued interest, for services actually rendered in accordance with its terms is enforceable as a contract of indemnity. (b) This section shall apply only to notes executed from and after June 7, 1951.[115]

The adoption of this statute explicitly allowed parties to a promissory note executed after the date of enactment to recover attorney's fees in a sum equal to or less than ten percent of the amount due on the promissory note, if the note provided for such recovery.[116] This ten percent limitation applied even if the parties had agreed to another amount, and, even when a trial

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111. The fact that the statute provides a protection for the insurer/plaintiff and does not by any means have a chilling effect is made clear by section (a)(2):
In no event will the holder of the policy or his or her assigns be liable for the attorney's fees incurred by the insurance company, fraternal benefit society, or farmers' mutual aid association in the defense of a case in which the insurer is found not liable for the loss.
ARK. CODE ANN. § 23-79-208 (Repl. 2014).

112. Vill. Mkt. v. State Farm Gen. Ins., 334 Ark. 227, at 229–30, 975 S.W.2d 86, 87 (1998) ("[T]he General Assembly never intended that attorney's fees be awarded to insurers when an insured has filed an action seeking recovery for a claim under his or her policy.").

113. Gafford v. Allstate Ins., 2015 Ark. 110, at 6, 459 S.W.3d 277, 280 ("Thus, because ARK. CODE ANN. § 16-22-308 does not contain any such condition on a fee award, ARK. CODE ANN. § 23-79-208 falls squarely within ARK. CODE ANN. § 16-22-308's exception that it does not apply when attorneys' fees are 'otherwise provided by law.'").

114. *See* BRILL, *supra* note 60 (listing this as the statute that changed the "long established rule").

115. ARK. CODE ANN. § 4-56-101 (Repl. 2011).

116. *Id.*

court awarded attorney's fees to the prevailing party, the court was not expected, much less required, to award the full ten percent.[117]

The promissory note statute was also discretionary,[118] like the current prevailing-party statute;[119] however, it defined the scope narrowly and limited the amount of attorney's fees based on the amount of money in controversy.[120] Also, a substantial difference from the current statute was the requirement that a promissory note have *some* provision or clause allowing recovery of attorney's fees.[121] The limited scope of this statute did little to move Arkansas law away from the American Rule. Other than in promissory notes, contract clauses shifting attorney's fees were still not enforceable in the state until the second *Griffin* case in 1994 (*Griffin v. First Nat'l Bank of Crossett*, hereinafter referred to as *Griffin II*).[122]

1. Expansion of Fee-shifting with the Introduction of Section 16-22-308 into Promissory Note Disputes

In *First Nat'l Bank of Crossett v. Griffin* (hereinafter referred to as *Griffin I*), a bank sued a guarantor following the lapse of a commercial loan for which he had given a personal guaranty.[123] The bank appealed, in part, from the lower court decision to deny its claim for attorney's fees.[124] The bank argued that the promissory note statute permitted recovery of attorney's fees.[125] The Court did not consider this claim due to a procedural error on the bank's part.[126] Instead the Court looked to a clause in the guaranty agreement:

> [T]he guaranty agreement provides that the guarantor agrees: "to pay all expenses, legal and/or otherwise (including court costs and attorney's

117. Troutt v. First Fed. Sav. & Loan Ass'n, 280 Ark. 505, at 507, 659 S.W.2d 183, 184 (1983) ("The 10% provision is to be regarded as a *ceiling* on the fee allowed, at least in the absence of extraordinary circumstances.").

118. Bowen v. Danna, 276 Ark. 528, at 535, 637 S.W.2d 560, 565 (1982).

119. Caplener v. Bluebonnet Mill. Co., 322 Ark. 751, at 760, 911 S.W.2d 586, 591 (1995).

120. ARK. CODE ANN. § 4-56-101 (Repl. 2011) (The statute only applies to promissory notes and limits the attorney's fees to "ten percent (10%) of the amount of the principal due.").

121. First Nat'l Bank of Crossett v. Griffin (*Griffin I*), 310 Ark. 164, at 174, 832 S.W.2d 816, 821 (1992).

122. Griffin v. First Nat'l Bank of Crossett (*Griffin II*), 318 Ark. 848, at 856, 888 S.W.2d 306, 311 (1994) ("We hold now such an agreement is enforceable in accordance with its terms. This is independent of the statutory authorization providing for attorney's fees under the circumstances covered by ARK. CODE ANN. § 16-22-308.").

123. *Griffin I*, 310 Ark. at 167, 832 S.W.2d at 818.

124. *Id.* at 166–67, 832 S.W.2d at 818.

125. *Id.* at 173, 832 S.W.2d at 821.

126. *Id.*, 832 S.W.2d at 821.

> fees, paid or incurred by said Bank in endeavoring to collect such indebtedness, obligations and liabilities, or any part thereof, and in enforcing this guaranty)."[127]

Based on this clause, the court reversed the denial of fees.[128] Holding that the recently enacted section 16-22-308 provided for recovery, the court reasoned that "[t]his grant of authority to award such fees absent agreement between the parties implicitly authorizes the courts to enforce such an agreement between the parties where one exists."[129] The case was remanded for the trial court to determine reasonable attorney's fees but without much direction on what services could be included in the award of attorney's fees, specifically whether or not the earlier bankruptcy proceedings or the future appeals could be included in the trial court's decision.[130]

In *Griffin II*, the bank appealed on the argument that the bank's recovery of fees should not be limited by section 16-22-308 to the recovery on the contract, but instead should adhere to the provision in the agreement.[131] The supreme court held that the bank was correct and that the broad language of the guaranty agreement would be enforced "independent of the statutory authorization,"[132] allowing the bank to recover its attorney's fees exactly as the contract provided, including the fees incurred on appeal. As a result of the court overturning the longstanding rule and reinterpreting the prevailing-party statute, now the law not only implies the prevailing-party provision in every promissory note or contract entered into in the state, but will also permit enforcement of contract provisions that are far more expansive than the statutory allowance.[133]

Lastly, another significant difference between the promissory note statute and the prevailing-party statute is that the promissory-note statute was held to be inapplicable to leases,[134] though the court made it clear that the General Assembly may change that by legislative action.[135] Today, accord-

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127. *Id.*, 832 S.W.2d at 821.

128. *Id.* at 174, 832 S.W.2d at 821.

129. *Griffin I*, 310 Ark. at 173–74, 832 S.W.2d at 821.

130. *Id.* at 174, 832 S.W.2d at 821 (The instruction from the Court was limited to: "Upon remand, the trial court should award an appropriate attorney's fee pursuant to the agreement of the parties.").

131. Griffin v. First Nat'l Bank of Crossett (*Griffin II*), 318 Ark. 848, at 855–56, 888 S.W.2d 306, 310–11 (1994).

132. *Id.* at 856, 888 S.W.2d at 310–11 ("Here Griffin agreed with the Bank to pay all of the Bank's attorney's fees and expenses incurred by the Bank in collecting the Bearhouse debt and in enforcing Griffin's guaranty. We hold now such an agreement is enforceable in accordance with its terms. This is independent of the statutory authorization providing for attorney's fees under the circumstances covered by Ark. Code Ann. § 16–22–308 (1994).").

133. *Griffin I*, 310 Ark. at 174, 832 S.W.2d at 821.

134. *See* Hough v. Cont'l Leasing Corp., 275 Ark. 340, at 345, 630 S.W.2d 19, 22 (1982).

135. *Id.*, 630 S.W.2d at 22 ("Until the General Assembly provides otherwise . . . .").

ing to the State legislature,[136] the public policy favors the English rule in disputes arising from basically any commercial agreement.[137] Leases are only the latest addition to the list of agreements that fall under section 16-22-308 and the latest iteration of the legislature's effort to undo the American rule.

III. ARGUMENT

A. What can be done?

The simplest, easiest, and probably most effective response to this situation is to repeal the prevailing-party statute. Arkansas would still have the promissory note statute, loss claims statute, and the procedural rules, but these are less problematic due to their limitations described above. A repeal of the prevailing-party statute would not prevent parties from contracting to shift attorney's fees as they wished. Most contracts could still include a provision for attorney's fees to be paid to the prevailing party if the parties agreed at the outset to include such a provision in the agreement, and this agreement would be enforced under *Griffin II*, which did not limit its holding based on section 16-22-308.[138] Barring this outcome, there are a few alternatives to repeal: creation of judicial standards,[139] rewriting the statute to express a purpose,[140] or rewriting the statute with some limitations to protect unsophisticated parties from surprise and oppression.[141]

B. Cases Interpreting Section 16-22-308, or the Need for Judicial Standards

Here lies the crux of the issue with the prevailing-party statute: there have been no official interpretations of section 16-22-308 that address what factors a court should consider when determining whether or not to order attorney's fees. Many cases interpreting the statute are brought to appeal on the issue of determining who the prevailing party was or determining whether the statute encompasses the underlying claims.[142] Some cases have

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136. Brewer v. Poole, 362 Ark. 1, at 16, 207 S.W.3d 458, 467 (2005) ("[T]he General Assembly establishes public policy.").

137. *See supra* note 58.

138. *See* Griffin v. First Nat'l Bank of Crossett (*Griffin II*), 318 Ark. 848, at 856, 888 S.W.2d 306, 311 (1994).

139. *Infra* Part III, Section B.

140. *Infra* Part III, Section C.

141. *Infra* Part III, Section D.

142. *See, e.g.*, In re Hunter, 203 B.R. 150, 151 (Bankr. W.D. Ark. 1996) (holding that a creditor may recover attorney's fees under ARK. CODE ANN. § 16-22-308 in a bankruptcy proceeding); Marcum v. Wengert, 344 Ark. 153, at 163, 40 S.W.3d 230, 237 (2001) (revers-

merited an appeal and a higher court's opinion on the question of a reasonable fee, but superior courts are more likely to review these issues on appeal precisely because the superior courts have promulgated a standard of review for issues of reasonableness.[143] Without any standard on which to evaluate discretion of when to award fees, almost any reasonable fee award could be considered to be within a court's discretion.

Similar standards could be adopted for the application of this law as those that were adopted for Rule 11, requiring explanation by the trial court,[144] or Rule 56, requiring a finding of bad-faith.[145] Or limitations could be adopted similar to the loss claims statute, limited in scope to certain types of parties,[146] and the promissory note statute, limited by a maximum fee amount relative to the amount in controversy.[147]

C. Finding a Purpose

1. When Should It Be Applied?

Another possible revision for the prevailing-party statute is to change the nature of the claims to which it applies. The law does not apply to several causes of action that should be thought of as forms of wrongful conduct, intentional misconduct, or acts in bad faith stemming from the entrance into a contract or resulting in a breach of contract.[148] Causes of action that stem from intentional misconduct on the part of one of the contracting parties would lead a reasonable person to agree that the party responsible for the intentional misconduct should bear the burden of the other party's attorney's fees incurred in enforcing their rights. This line of thought resembles that behind the availability of punitive or exemplary damages.[149] With damages that go beyond what is necessary for a party to be made whole again, a decision maker is essentially saying that the conduct of the losing party is such

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ing trial court determination that there was no prevailing party); Murchie v. Hinton, 41 Ark. App. 84, at 88, 848 S.W.2d 436, 438 (1993) (holding that a warranty deed is a type of contract, so a party may recover attorney's fees under ARK. CODE ANN. § 16-22-308 in a suit to enforce a deed covenant).

143. *See* S. Beach Beverage Co. v. Harris Brands, Inc., 355 Ark. 347, at 356, 138 S.W.3d 102, 107–08 (2003) ("This court discussed the criteria to examine in determining whether attorney's fees are reasonable," followed by much discussion of what constitutes an evaluation of reasonableness).

144. ARK. R. CIV. P. 11(c)(3).

145. ARK. R. CIV. P. 56(g).

146. ARK. CODE ANN. § 23-79-208(a) (Repl. 2014).

147. *Id.* § 4-56-101 (Repl. 2011).

148. These are both causes of action sounding in tort, and so section 16-22-308 does not apply.

149. HOWARD W. BRILL & CHRISTIAN H. BRILL, ARKANSAS PRACTICE SERIES: LAW OF DAMAGES § 9.1, Westlaw (2018).

that the party should be punished or that the party should be made an example of to deter like-minded parties.[150] The problem with relying on punitive damages in these cases is that, while the courts have been relaxing the restrictions on punitive damages in contract cases,[151] there are still fairly broad limitations on them.[152] In addition, where the plaintiff in a suit may rely on theories of contract and tort, and the tort claims allow punitive damages, "the plaintiff must specifically plead and prove" the tort claims to recover punitive damages.[153] To allow punitive damages in contract claims or to suggest blurring the line between contract and tort recovery would be an overreach, but it is reasonable to limit the exception to the American rule to claims founded on bad faith or intentional misconduct.

This would change the statute to something similar to the Rule 11 sanctions discussed above.[154] In the contract enforcement analogue to Rule 11, the court would be required to make a determination of fact as to whether the losing party acted in bad faith or otherwise intentionally engaged in misconduct. Intentional conduct by definition would require a scienter element, but a bad faith sanction under a revised prevailing-party statute could also include a scienter requirement. The bad faith breach may be defined as an intent to avoid a duty imposed by the contract "without a good-faith defense,"[155] a formulation similar to that used in bad faith insurance tort doctrine in Arkansas.[156] Examples of bad faith would include dishonesty, coercion, and oppressiveness, as well as more severe cases of "hatred, ill will, or a spirit of revenge" in avoiding a duty.[157] This definition of bad faith can be distinguished from the bad faith addressed by Rule 11 because here the bad faith does not arise in the pursuit or delay of litigation, but occurred before the litigation and is a substantive part of the claim.

A narrow formulation of this type would substantially undo the reversal of the American rule but would not eliminate the option of including a fee-shifting provision in contracts allowed by *Griffin II*.[158] Parties could still

150. *Id.*

151. *Id.* at § 9.3.

152. *Id.*

153. *Id.*; *compare* L.L. Cole & Son, Inc. v. Hickman, 282 Ark. 6, at 9, 665 S.W.2d 278, 281 (1984) ("A plaintiff should either plead and prove his cause of action in contract or in tort."), *with* DWB, LLC v. D & T Pure Tr., 2018 Ark. App. 283, 550 S.W.3d 420, *reh'g denied* (June 6, 2018) (allowing a plaintiff to plead both contract and tort actions and recover punitive damages, but the tort was conversion and not a business tort).

154. *See supra* Part II, Section D.

155. Ark. Model Jury Instruction 2304 (2018).

156. Nathan Price Chaney, *A Survey of Bad Faith Insurance Tort Cases in Arkansas*, 64 ARK. L. REV. 853, 859 (2011).

157. *Id.*

158. Griffin v. First Nat'l Bank of Crossett (*Griffin II*), 318 Ark. 848, at 856, 888 S.W.2d 306, 311 (1994).

decide at the outset of the agreement whether they prefer the American or English rule. These rules would not interfere because a finding of bad faith will never lie with the prevailing party. Instead, parties would be allowed to include a fee-shifting clause if they wanted one, but would only otherwise be ordered to pay the prevailing party's fees in a situation where the prevailing party proved bad faith before moving for fees. The inclusion of a requirement of bad-faith would thus reframe the prevailing-party statute to give it a purpose of sanctioning the conduct of the losing party. This would be an effective means of correcting the overbroad application of the statute. The General Assembly is free to do so, and it may decide to do so, but the repeal option is preferred as a simpler approach to the problem.

The bad faith option invites at least one argument in favor of the statute as it is written: encouraging representation of consumers in defending suits brought by lenders or credit-holders.[159] This argument is fairly simple and was borne out, in part, in Florida.[160] There, a fee-shifting statute makes any contract "provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract" a reciprocal fee provision at the discretion of the court.[161] This means that even though the parties only agreed that the holder of a note may recover attorney's fees in a suit to collect on the note, the borrower may also recover fees if he or she prevails in defending the suit based on a reciprocal clause implied by the statute.[162] The effect of the statute is that attorneys have been more likely to represent defendants in foreclosure, consumer debt, and landlord-tenant lawsuits because of the possibility of collecting their fees from the plaintiff after a successful defense.[163] The same argument may be made for Arkansas's prevailing-party statute, that it works both ways and may allow claims to be brought or defenses to be raised that otherwise would be too costly for that party.

D. A Statute of Limited Scope

1. The Real Problem—Implying Fee-Shifting Provisions

Another counterargument, in favor of the statute, is that a statute implying fee-shifting into contracts discourages pursuit of lower quality claims.[164] The argument makes sense at a superficial level, because it seems

159. Nash et al., *supra* note 18, at 1077.
160. *Id.* at n.42.
161. FLA. STAT. ANN. § 57.105 (LexisNexis 2019).
162. *Id.*
163. Nash et al., *supra* note 18, at n.42.
164. James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J. L. & ECON. 225, 248 (1995) (conclud-

that the defendant will potentially have to pay more than the plaintiff claimed and so will offer a better settlement. But, of course, the plaintiff will also have to consider that he may have to pay the defendant's fees if he loses, inclining the plaintiff to accept a lower settlement rather than run that risk. Add to this the uncertain duration of the litigation and the uncertainty of jury awards. At this point, the preceding discussion is still a very superficial analysis. Several well-recognized scholars of law and economics have not been able to agree on whether the English rule does or does not encourage settlement or whether it does or does not reduce litigation costs.[165] Because the only consensus is that it is difficult to determine how parties will act when faced with the two options in real-world cases, the counterargument of encouraging settlement with the English rule should not be given much weight without some strong evidence in support.

Because there is not much agreement about the conclusion that fee-shifting encourages settlement, that argument in favor of the prevailing-party statute should not be enough to allow it to change the content of every contract in Arkansas. The statute not only forces sophisticated parties to contract back into the default rule, but potentially forces unsophisticated parties to suffer a contract provision they never knew existed. It is far more important to avoid surprising these parties with a potentially expensive and oppressive contract term, than to use economic theories to attempt to dissuade them from using the courts to settle their claim.

2. Beyond the Jurisdiction – Do You Know if Anyone Else Does This?

A few other states have similar fee-shifting statutes.[166] Texas's statute is as simple as Arkansas's, providing that "a person may recover reasonable

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ing that the English rule increased settlement and verdict amounts because it reduced the likelihood of plaintiffs pursuing "low-award claims").

165. *Compare* John Donohue*, Opting for the British Rule, or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093 (1991) (pointing out that Posner and Shavell's work does not account for parties contracting to shift fees after the breach has occurred and concluding that the jurisdictions fee rule does not make a difference); *with* Charles R. Plott, *Legal Fees: A Comparison of the American and English Rules*, 3 J. L. ECON. & ORG. 185, 192 (1987) (arguing that the American rule reduces fees); *and* A. Mitchell Polinsky & Daniel L. Rubinfield, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519, 519 (1998) (answering the title's question in the negative).

166. *See* Arizona (ARIZ. REV. STAT. ANN. § 12-341.01 (2019) (West)); Delaware (DEL. CODE ANN. tit. 6 § 4344 (West 2019)); Florida (FLA. STAT. ANN. § 83.48 (West 2019)); Idaho (IDAHO CODE ANN. § 12-120 (West 2019)); Illinois (735 ILL. COMP. STAT. ANN. 5/15-1510 (West 2019)); New Mexico (N.M. STAT. ANN. § 47-8-48 (West 2019)); Oklahoma (OKLA. STAT. ANN. tit. 42, § 176 (West 2019)); Pennsylvania (41 PA. STAT. AND CONS. STAT. ANN. § 503 (West 2019)); Texas (TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2019)).

attorney's fees . . . if the claim is for . . . an oral or written contract."[167] Delaware similarly allows for award of attorney's fees, but without discretion from the trial court.[168] Delaware's statute interestingly adds that the defendant shall be considered the prevailing party "if the defendant tendered to the plaintiff the full amount to which the plaintiff is entitled, and . . . deposits in the court . . . the amount so tendered."[169] Oklahoma's statute limits the scope to liens, but provides that the prevailing party "shall be entitled to recover a reasonable attorney's fee" with no discretionary language or express purpose.[170] These three states have fee-shifting rules that are similar to Arkansas's in their overbroad striking of the American rule. However, the statutes of interest here are the ones that provide for fee-shifting but limit the application in a reasonable way. This rule is found in Arizona.

Arizona's prevailing-party statute provides that "[i]n any contested action arising out of a contract . . . the court may award the successful party reasonable attorney fees" and then includes a provision that deems the losing party to be the prevailing party if the losing party made an offer of settlement and the judgment came out "equal to or more favorable" to the offeror than the settlement offer.[171] This is similar to Arkansas's statute, with a twist regarding prior settlement offers, but the next clause provides Arizona's purpose, "to mitigate the burden of the expense of litigation to establish a just claim or a just defense."[172] This statement of purpose provides something for the courts to consider when making their decisions of whether to award attorney's fees and for how much. However, this statute only serves as an example of a statute with a stated purpose. The purpose statement of an Arkansas statute should be the inverse of Arizona's. A party should only be awarded attorney's fees in order to mitigate the expense of defending against an unjust claim or pursuing a claim wherein the defendant has no meritorious defenses. This phrasing establishes a greater burden for the party requesting attorney's fees and avoids the effect of punishing claimants who brought meritorious claims but lost.

IV. CONCLUSION

Though very few cases reach a final judgment, the prospect of being on the hook for attorney's fees after litigation is yet another means to encourage settlement of what may be meritorious claims. Settlement of claims without resorting to litigation is considered a valid public policy, but the

167. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (West 2019).
168. DEL. CODE ANN. tit. 6 § 4344 (West 2019).
169. *Id.*
170. OKLA. STAT. ANN. tit. 42, § 176 (West 2019).
171. ARIZ. REV. STAT. ANN. § 12-341.01 (West 2019).
172. *Id.*

settlement of claims should be based on valuation of the claims and likelihood of success, not fear of adding undetermined attorney's fees to the claim amounts. The prevailing-party, or fee-shifting, statute as presently written presents an unpredictable and, at times, unfair means of extracting further payment from the losing party. The legislature has proclaimed as the public policy of the state that parties should have the opportunity to request fees and that judges have the discretion to award them, but without any limitations other than "reasonableness" on the award and amount of fees. While the American rule may not be "strictly correct in principle,"[173] it is this note's contention that the English rule could be described in exactly the same way. A strong argument[174] has already been made in favor of creation of another statute to protect residential landlords and tenants from the chilling effects of section 16-22-308, but that note stopped short of the reformation necessary to correct this abrogation of the American rule. The best reform would be for the Assembly to repeal this statute. Short of that, the Assembly should replace the statute with one that limits the scope by limiting the applicable parties, limiting application to bad faith breach, or setting out a purpose mitigating expense. Failing all else, the Supreme Court of Arkansas should at least define some standard for when attorney's fees should or should not be awarded.

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

174. Stephanie Mantell, Note, *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*, 39 U. ARK. LITTLE ROCK L. REV. 105, 121 (2016) ("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.").

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