

## Note: Fee Shifting: Perspective for EAJA Reformers

### INTRODUCTION

The Equal Access to Justice Act (EAJA) requires the federal government to pay a prevailing opponent's attorney fees whenever the government's litigation position was not substantially justified, and it applies in nearly all civil cases.<sup>1</sup> Congress enacted the EAJA in 1980 to "equalize the litigating strength between the government and private litigants of modest means, and thereby deter government overreaching."<sup>2</sup>

Thirty-two years hence, the EAJA has been pegged with the bull's-eye of reform because of its potential to favor environmental non-profit organizations in litigation against the federal government.<sup>3</sup> While generally available only to litigants with limited net worth,<sup>4</sup> all non-profit organizations—net worth notwithstanding—may receive attorney fees under the statute.<sup>5</sup> This deviation from the American rule against fee shifting may alter parties' incentives in potentially harmful ways.<sup>6</sup>

Unfortunately, these alleged problems are difficult to substantiate empirically because Congress repealed federal reporting requirements on EAJA awards, effective in 1995.<sup>7</sup> This predicament has not halted the EAJA reformers, however. A Republican-sponsored bill, the Government Litigation Savings Act (GLSA), proposes not only putting non-profit organizations on the same level as individuals and organizations subject to a net worth limitation, but also heightening the injury requirement, imposing other caps on award amounts and attorney fee rates, and broadening the exceptions to the EAJA for impermissible behavior.<sup>8</sup>

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<sup>1</sup> Pub. L. No. 96-481, §§ 201-208, 94 Stat. 2321, 2325-30 (codified as amended at 5 U.S.C. § 504 (2012) and 28 U.S.C. § 2412 (2012)). Codified in separate provisions, the EAJA's agency-proceeding arm (5 U.S.C. § 504) and court-proceeding arm (28 U.S.C. § 2412) mirror each other in all material respects.

<sup>2</sup> Harold J. Krent, *Fee Shifting Under the Equal Access to Justice Act—A Qualified Success*, 11 YALE L. & POL'Y REV. 458, 462 (1993) (citing H.R. REP. NO. 99-120 (1985), reprinted in 1985 U.S.C.C.A.N. 132; H.R. REP. NO. 96-1434 (1980), reprinted in 1980 U.S.C.C.A.N. 5003; H.R. REP. NO. 96-1418 (1980); S. REP. NO. 96-253(1979)).

<sup>3</sup> See, e.g., Phil Taylor, *Lawsuit Abuse Charge by Western Lawmakers Enrages Enviro Groups*, N.Y. TIMES, Nov. 19, 2009, available at <http://www.nytimes.com/gwire/2009/11/19/19greenwire-lawsuit-abuse-charge-by-western-lawmakers-enra-54944.html>.

<sup>4</sup> See Krent, *supra* note 2, at 458.

<sup>5</sup> 5 U.S.C. § 504(b)(1)(B) (2012); 28 U.S.C. § 2412(d)(2)(B) (2012).

<sup>6</sup> See *infra* Part III.A-B.

<sup>7</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-650, ENVIRONMENTAL LITIGATION: CASES AGAINST EPA AND ASSOCIATED COSTS OVER TIME 11-12 (2011).

<sup>8</sup> Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012).

Opponents of this proposal counter that in the absence of recent data, such reforms are premature. Both parties appear to be in favor of restoring a reporting requirement, so more data may well be available in the future.<sup>9</sup> Still, to postpone all discussion of reform until then would unnecessarily delay an important vetting process. Even in the absence of recent data, theoretical analysis can provide helpful perspective to those considering EAJA reform. This Note aims to provide such perspective by carefully analyzing the three prominent fee-shifting structures—the American rule, the English rule, and the one-way pro-plaintiff fee-shifting rule.

Part I provides a brief history of the EAJA. Part II highlights alleged problems caused or exacerbated by the Act in environmental litigation. These problems include distorting litigation incentives, encouraging socially disadvantageous litigation behavior, discouraging settlement, increasing administrative costs, and conveying an unwarranted litigation advantage.

Part III analyzes the three most prominent fee-shifting models according to their ability to address or contribute to these potential problems. It also expands the mathematical models used to predict the effects of fee shifting on parties' litigation and settlement incentives. In general, the American rule against fee shifting discourages potential plaintiffs from bringing small claims—whether strong or weak—because the cost of litigating the claim usually exceeds the potential judgment value. The American rule also encourages settling strong claims, but not weak ones. The English rule, also known as two-way fee shifting, encourages bringing strong claims, regardless of judgment value, because it permits the prevailing party to recover his attorney fees. For the same reason, weak claims are strongly discouraged. Risk aversion may, however, cut against the incentives otherwise evoked by the English rule. The English rule also discourages settling strong claims, but encourages settling weak ones. Finally, a one-way, pro-plaintiff fee-shifting rule encourages plaintiffs to bring claims regardless of the claim amount or strength because there is virtually no downside risk of paying the defendant's attorney fees. With respect to settlement, a one-way fee shift generally represents middle ground—doing less than the American rule to encourage settling strong claims and less than the English rule to

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<sup>9</sup> Specifically, members of both parties have recently proposed bills that would impose reporting requirements on EAJA awards. Compare Government Litigation Savings Act, *supra* note 8, with S. 2042, 112th Cong. (2012). Further, a subsequent proposed amendment to an unrelated bill that would have implemented a system for making EAJA data publicly available passed with a voice vote in the House. See H.R. 4078, 112th Cong. (2012); *infra* note 41 and accompanying text.

encourage settling weak ones. All three regimes have a roughly similar effect on settling close claims.

Part IV applies the findings from Part III to the alleged problems associated with the Act to provide perspective for EAJA reformers. Among other things, Part IV addresses how proposed legislation aligns with these findings, and it further modifies the mathematical models to predict the EAJA's incentive effects on litigation and settlement decisions. The EAJA is different from the one-way fee-shifting structure analyzed in Part III because it does not award attorney fees unless the government's position was not substantially justified, and it imposes an hourly rate cap that is typically less than an attorney's market hourly fee on the amount of a fee award. Because the likelihood of winning the fee shift is less than the likelihood of winning the case,<sup>10</sup> the EAJA does not encourage litigation to the same extent as a pure one-way fee-shifting regime—though it still does so more than the American or English rules. The hourly rate cap provision enhances this effect. With respect to settlement, the EAJA generally discourages settling close claims and represents a middle ground, in comparison to the other models, with respect to strong and weak claims. Overall, it also has a general disincentive effect on settlement because the fee shift inquiry gives the parties more over which to disagree.

Ultimately, the EAJA was meant to empower those of modest means with the ability to resist unlawful government conduct.<sup>11</sup> Theoretically, it may successfully accomplish this purpose.<sup>12</sup> Nevertheless, the EAJA only perpetuates potential problems when parties needing no incentive to litigate, like environmental non-profit organizations with a “well-stocked war chest,”<sup>13</sup> can receive attorney fees while other similarly situated individuals or businesses are subject to the American rule. Accordingly, the simplest way to address this problem while preserving the structure and purpose of the EAJA is to impose a net-worth ceiling on non-profit organizations, like all other wealthy individuals and organizations. An essential concomitant requirement will be a substance-over-form inquiry into a litigant's relationship with other individuals and organizations that may have individually, or in the aggregate, a net worth exceeding the statutory ceiling.

Other proposed changes directed at repeat litigants not excluded by the net worth limitation are admirable, but should be viewed carefully as they

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<sup>10</sup> See *infra* note 183 and accompanying text.

<sup>11</sup> Krent, *supra* note 2, at 462.

<sup>12</sup> See *infra* Part IV.A.2.

<sup>13</sup> Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039, 2050 (1993).

may have a deterrent effect upon the class of EAJA beneficiaries that Congress intended to protect.

### I. A BRIEF HISTORY

With the passage of the Clean Air Act in 1970, the federal government invited citizens into the realm of environmental litigation by first, giving them a cause of action and second, authorizing an exception to the American rule against fee shifting.<sup>14</sup> Because “[c]itizen groups . . . may be free from political pressures and can act out of a desire to enforce the applicable law,”<sup>15</sup> thereby “enforcing statutory rights for the benefit of the community as a whole, rather than personal benefit,” they can be valuable substitutes for attorneys general, especially when their meritorious lawsuits are subsidized by opposing parties.<sup>16</sup>

Citizen suit provisions accompanied with a fee shift have since become “a central element of American environmental law.”<sup>17</sup> In the typical case, “[p]laintiffs, usually non-profit citizen organizations, obtain attorney’s fee awards when they are the prevailing party in almost all circumstances, provided the case was brought in good faith.”<sup>18</sup> As a result, fee shifting in environmental litigation has become so ingrained that its “absence . . . would have a chilling effect on citizen suits.”<sup>19</sup>

In this light Congress enacted the EAJA in 1980, “authorizing the award of attorney fees and costs to parties that prevail in certain lawsuits against the federal government”<sup>20</sup> in both administrative and judicial

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<sup>14</sup> Marisa L. Ugalde, *The Future of Environmental Citizen Suits After Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 8 ENVTL. LAW. 589, 592-93 (2002).

<sup>15</sup> *Id.* at 594.

<sup>16</sup> Kerry D. Florio, Comment, *Attorneys’ Fees in Environmental Citizen Suits: Should Prevailing Defendants Recover?*, 27 B.C. ENVTL. AFF. L. REV. 707, 709 (2000). See also Frances Kahn Zemans, *Fee Shifting and the Implementation of Public Policy*, 47 LAW & CONTEMP. PROBS. 187, 196-97 (1984) (“[T]he private attorney general notion implies that the named plaintiff is acting on behalf of some broader public and that fee shifting is provided legislatively for the purpose of advancing the public interest.”); Michel Lee, Comment, *Attorneys’ Fees in Environmental Citizen Suits and the Economically Benefited Plaintiff: When Are Attorneys’ Fees and Costs Appropriate?*, 26 PACE ENVTL. L. REV. 495, 502 (2009) (“Congress indicated the desire to use fee shifting to ‘encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest.’” (citing H.R. REP. NO. 95-294, at 337 (1977))).

<sup>17</sup> George Van Cleve, *Congressional Power to Confer Broad Citizen Standing in Environmental Cases*, 29 ENVTL. L. REP. 10028, 10028 (1999).

<sup>18</sup> Florio, *supra* note 16, at 708.

<sup>19</sup> Ugalde, *supra* note 14, at 596.

<sup>20</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 9.

proceedings.<sup>21</sup> Though many statutes, such as the Clean Air Act, already included citizen suit and fee-shifting provisions, “the federal government in many other cases was not subject to these exceptions and therefore was not authorized to make payments to prevailing parties.”<sup>22</sup> Accordingly, the EAJA “expanded the federal government’s liability for awards of attorney’s fees beyond the traditional realms of civil rights laws and open government laws, and broadly waived the sovereign immunity of the United States with respect to payment of attorney’s fees.”<sup>23</sup>

In the years after 1980, Congress has periodically amended the statute to expand its scope.<sup>24</sup> As it currently stands, the EAJA establishes the general rule that “a court shall award to a prevailing party . . . fees and other expenses . . . in any civil action . . . brought by or against the United States . . . unless the court finds that the position of the United States was substantially justified.”<sup>25</sup> Other material provisions in the EAJA (1) give a court discretion to “reduce the amount to be awarded . . . or deny an award” if the requesting party “engaged in conduct which unduly and unreasonably protracted the final resolution of the matter”<sup>26</sup> or to deny an award when “special circumstances make an award unjust”;<sup>27</sup> (2) cap fee awards at “\$125 per hour unless the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee”;<sup>28</sup> (3) limit the meaning of a party to “individual[s] whose net worth did not exceed \$2,000,000 at the time the . . . action was filed,” or any business “the net

<sup>21</sup> 5 U.S.C. § 504 (2012) (administrative proceedings); 28 U.S.C. § 2412 (2012) (judicial proceedings).

<sup>22</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 9.

<sup>23</sup> Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 220 (1994). This is not exactly correct because the EAJA does not authorize fee shifting in civil suits sounding in tort. 28 U.S.C. § 2412(d)(1)(A) (2012) (“[A] court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort) . . .”).

<sup>24</sup> Though enacted to sunset, Congress permanently codified the EAJA in 1985. Sisk, *supra* note 23, at 220-21 (discussing how the EAJA was initially enacted as an experiment). By 1992, Court of Appeals for Veterans Claims proceedings were integrated into the EAJA. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 506, 106 Stat. 4506, 4513 (1992). As discussed, reporting requirements were eliminated in 1995. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 7, at 11. Then, in 1996, Congress further expanded the EAJA “[b]y raising the cap on the hourly rate for attorney fees, expanding the definition of an ‘eligible party,’ and creating a new basis for a fee award.” Judith E. Kramer, *Equal Access to Justice Act Amendments of 1996: A New Avenue for Recovering Fees from the Government*, 51 ADMIN. L. REV. 363, 388 (1999).

<sup>25</sup> 28 U.S.C. § 2412(d)(1)(A) (2012); *see also* 5 U.S.C. § 504(a)(1) (2012) (enacting the equivalent for administrative proceedings).

<sup>26</sup> 5 U.S.C. § 504(a)(3); 28 U.S.C. § 2412(d)(1)(C).

<sup>27</sup> 5 U.S.C. § 504(a)(1); 28 U.S.C. § 2412(d)(1)(A).

<sup>28</sup> 5 U.S.C. § 504(b)(1)(A); 28 U.S.C. § 2412(d)(2)(A).

worth of which did not exceed \$7,000,000,”<sup>29</sup> with the exception that 501(c)(3) organizations and agricultural cooperative associations are not subject to the net worth limit;<sup>30</sup> and (4) direct that “[f]ees and other expenses awarded . . . to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.”<sup>31</sup>

## II. ALLEGED PROBLEMS WITH THE EAJA

While the EAJA “received relatively little attention” at enactment, one law student Comment foresaw its utility in environmental litigation, speculating that “[the EAJA] has the potential to become a valuable statute for public interest and environmental litigants in the coming years.”<sup>32</sup> The Comment recognized that the EAJA’s one-way fee-shifting standard, which removed “the discretionary approach of [other] environmental statutes’ fee shifting provisions,” boded well for parties opposing the government in environmental litigation.<sup>33</sup>

The fulfillment of this prediction has exposed a number of the EAJA’s weaknesses, which EAJA reformers cite as signs that it is time for change.

### A. Reporting

It is widely agreed that the EAJA’s lack of a reporting requirement is one of its biggest problems.<sup>34</sup> In a recent House Subcommittee on Courts hearing discussing the proposed Government Litigation Savings Act,<sup>35</sup> Subcommittee Chairman Howard Coble lamented the absence of

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<sup>29</sup> 28 U.S.C. § 2412(d)(2)(B); *see also* 5 U.S.C. § 504(b)(1)(B) (same for administrative adjudications).

<sup>30</sup> 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).

<sup>31</sup> 28 U.S.C. § 2412(d)(4); *see also* 5 U.S.C. § 504(d).

<sup>32</sup> Robert Hogfoss, Comment, *The Equal Access to Justice Act and Its Effect on Environmental Litigation*, 15 ENVTL. L. 533, 563 (1985).

<sup>33</sup> *Id.* at 551. Mr. Hogfoss was not the only one to realize the role fee shifting would play in environmental litigation. In the 1970s, when advance funding to encourage public interest litigation was proposed, “[o]ne public interest law firm testified that narrow interest groups such as the Sierra Club would dominate, and it would be more burdensome for regulatory agencies to determine what was in the public interest if constantly faced with special interest concerns.” Lowell E. Baier, *Reforming the Equal Access to Justice Act*, 38 J. LEGIS. 1, 19 (2012) (citing *Public Participation in Government Proceedings Act of 1976: Hearing on S. 2715 Before the S. Comm. on Government Operations*, 94th Cong. 60 (1976) (statement of John T.C. Low, Southeastern Legal Foundation)).

<sup>34</sup> *See, e.g., supra* note 9 and accompanying text.

<sup>35</sup> Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012).

“government-wide accounting of EAJA payments.”<sup>36</sup> Specifically, Coble was worried about not “know[ing] how much money is going out the door” and whether “the EAJA is helping those for whom it was created to help; that is, ordinary Americans and small businesses. Fixing this lack of transparency is something I hope we can agree upon.”<sup>37</sup>

Members of the Congressional Western Caucus echoed similar sentiments in a letter to Attorney General Eric Holder. As summarized in a *New York Times* article, they wrote that “ever since Congress lifted reporting requirements for EAJA payments in 1995, the public has been left in the dark about how much money groups have received under the act and for which cases.”<sup>38</sup> As one recent attempt to empirically analyze awards obtained through the EAJA in litigation involving the U.S. Forest Service concluded, “inconsistencies . . . in the [Forest Service’s] and DOJ’s records substantiate ongoing congressional concerns that EAJA payments are being inadequately tracked by federal agencies.”<sup>39</sup> Though parties may disagree on the substance of the unreported data, the lack thereof prevents cognizance of the import and impact of the EAJA.<sup>40</sup>

The reintroduction of some form of EAJA reporting requirement appears imminent, as the House passed the Red Tape Reduction Act on July 26, 2012.<sup>41</sup> Section 902 of the bill would amend the EAJA by requiring agencies to submit information to be compiled into a detailed annual report to “Congress on the amount of fees and other expenses awarded during the preceding fiscal year.”<sup>42</sup> The amendment would also mandate the “creat[ion] and maint[enance] [of an] online . . . searchable database containing . . . information with respect to each [EAJA] award.”<sup>43</sup> Judging from the passage of the amendment by voice vote and the larger

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<sup>36</sup> *Government Litigation Savings Act: Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Congress 2 (2011) (opening statement of Rep. Coble, Chairman) [hereinafter *GLSA Hearing*].

<sup>37</sup> *Id.*

<sup>38</sup> Taylor, *supra* note 3.

<sup>39</sup> Michael J. Mortimer & Robert W. Malmshemer, *The Equal Access to Justice Act and US Forest Service Land Management: Incentives to Litigate?*, 109 J. FORESTRY 352, 354 (2011). For example, Mortimer and Malmshemer noted that “there is nearly a \$1 million difference between the data provided in the 2006 [sic] by the secretary and the records we obtained from the US Forest Service, and the secretary’s response is nearly double the total amount DOJ records indicate were paid.” *Id.* at 353.

<sup>40</sup> The EAJA has been touted as a means to signal consistent government misconduct. Krent, *supra* note 13, at 2055. But without reporting, this is unreliable. *See id.* at 2055-56 (noting that a lack of information, such as too few fee requests and awards involving particular agencies, would not permit Congress to draw any meaningful conclusions).

<sup>41</sup> H.R. 4078, 112th Cong. (2012).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Bill's unanimous support in the House, chances are the EAJA reformation is in motion.

### *B. Litigation Incentives*

The consensus regarding how to implement reformation stops at reporting.<sup>44</sup> While “some criticize the economic incentives created by fee shifting statutes and citizen suit provisions, others believe that subsidizing litigation . . . through the EAJA is a socially valuable use of public resources.”<sup>45</sup> On one end of the spectrum are individuals and groups like the Congressional Western Caucus and conservationist Lowell E. Baier. The Caucus recently complained that “[u]nder the guise of ‘public interest,’ groups intent on sealing off Western lands to ranchers and energy companies have abused EAJA to further their narrow political agendas.”<sup>46</sup> Mr. Baier has postulated that such abuse may occur through crisis precipitation litigation, which entails “su[ing] the government” repeatedly and recovering “EAJA fees for the litigation, [which] effectively remov[es] the costs of delaying the agency.”<sup>47</sup>

Another disruptive incentive that may be exacerbated by the EAJA is the sweetheart suit.<sup>48</sup> “[S]everal environmental groups that have received millions in EPA grants regularly file suit against that same agency.”<sup>49</sup>

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<sup>44</sup> At two pages, S. 2042 is as short as the Government Litigation Savings Act (13 pages) is long and calls only for some form of basic reporting.

<sup>45</sup> Mortimer & Malmsheimer, *supra* note 39, at 353 (internal citations omitted).

<sup>46</sup> Taylor, *supra* note 3 (paraphrasing letter from the Congressional Western Caucus).

<sup>47</sup> Baier, *supra* note 33, at 19. Baier's hypothetical is apparently not that radical. See WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* 143 (2011) (Crisis precipitation litigation in the realm of 1960s welfare litigation involved “encouraging the filing of so many legal actions that the cost of existing programs” became overwhelming.); see also Bruce Fein, *Citizen Suit Attorney Fee Shifting Awards: A Critical Examination of Government-“Subsidized” Litigation*, 47 *LAW & CONTEMP. PROBS.* 211, 219 (1984) (“[B]y encouraging lawsuits the entire process [of citizen suits against administrative agencies] threatens to overwhelm already overcrowded court dockets.”). For a more general statement implicating a similar scenario, see *id.* at 229 (“[G]overnmental policy might be vindicated, and the basic agency determination validated, but based on a relatively insignificant procedural deficiency, the government may nevertheless be required to pay the costs of a challenge to its judicially sanctioned action.”).

<sup>48</sup> See, e.g., OLSON, *supra* note 47, at 144-45 (noting that sweetheart suits “lock the agency into policies it was glad to adopt anyway while tying the hands of voters, budgeters or later administrations who might take a different view”); Oliver A. Houck, *With Charity for All*, 93 *YALE L.J.* 1415, 1550 (1984) (Corporations “are victims of ‘sweetheart’ suits between colluding environmental groups, for example, and sympathetic government agencies which can result in quick, adverse decisions.”); National Legal Center for the Public Interest, *Regulatory Agencies Move to Expand Jurisdiction; Expansion Not Fast Enough for Some*, 25 *No. 3 JUD./LEGIS. WATCH REP.* 1 (March 2004) (“The Clinton administration was particularly skilled at using sweetheart suits against capitulating federal agencies in order to dramatically expand the judge-created rights of environmentalists.”).

<sup>49</sup> John Merline, *EPA Funds Green Groups that Sue the Agency to Expand*, *INVESTOR'S BUS. DAILY*, July 6, 2011, available at [http://license.icopyright.net/user/viewContent.act?clipid=647273859&mode=cnc&tag=3.8218%3Ficx\\_id%3D577430](http://license.icopyright.net/user/viewContent.act?clipid=647273859&mode=cnc&tag=3.8218%3Ficx_id%3D577430).



Jeffrey R. Holmstead, a former assistant administrator of the EPA, indicated that “[o]ften the suits involve things the EPA wants to do anyway. By inviting a lawsuit and then signing a consent decree, the agency gets legal cover from political heat.”<sup>50</sup> The EAJA’s effect in this relationship is that “the EPA often ends up paying the groups’ legal fees under the [Act].”<sup>51</sup>

On the other end of the spectrum are critics who fear the “chilling effect” on public interest litigation if the EAJA or other fee-shifting mechanisms were unavailable.<sup>52</sup> Somewhere in between lies Professor Harold J. Krent’s position: “[T]he availability of fees in some cases . . . provides public interest lawyers greater resources to fund other litigation . . . . [E]ven . . . the EAJA to a limited extent subsidize[s] public interest attorneys, enabling them to conduct more litigation.”<sup>53</sup>

Attempting to test the theoretical claim that the lack of risk under a one-way regime like the EAJA encourages litigation, Michael J. Mortimer and Robert W. Malmshheimer analyzed recent data on EAJA awards paid by the U.S. Forest Service.<sup>54</sup> Although the data reinforced the theoretical claim that “[t]he EAJA creates a litigation risk asymmetry that may cause stakeholders . . . to embrace litigation,”<sup>55</sup> Mortimer and Malmshheimer felt their results were inconclusive because “[t]he effects of a particular fee shifting policy are highly dependent on contextual variables.”<sup>56</sup>

They should, however, give themselves more credit. Their two primary findings were (1) that many environmental groups are frequent litigators and (2) “most . . . frequent environmental litigants possess substantial financial resources.”<sup>57</sup> Therefore, the EAJA is either modifying the risk calculus of “well financed” environmental groups—opening the door to the problems identified by Baier and the Congressional Western Caucus—or it is subsidizing litigation for a “class of plaintiffs for which the law was

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<sup>50</sup> *Id.* See also Baier, *supra* note 33, at 46 (“[T]he government’s authority to enter into settlement agreements is unmediated and unreviewable, and can be used in any manner the Attorney General or his/her designees see fit . . .”).

<sup>51</sup> Merline, *supra* note 49. See also Baier, *supra* note 33, at 46 (“Alternately, the parties can simply stipulate that one party is the prevailing party, which frequently occurs. In that case the plaintiff can subsequently file for an award under EAJA, which is difficult to rebut, given the stipulation . . .”).

<sup>52</sup> See Ugalde, *supra* note 14, at 596.

<sup>53</sup> Krent, *supra* note 13, at 2053.

<sup>54</sup> Mortimer & Malmshheimer, *supra* note 39, at 355.

<sup>55</sup> *Id.* at 357.

<sup>56</sup> *Id.* at 353. See also *id.* at 357 (“We have previously mentioned the riddle of whether more frequent litigants naturally make more frequent EAJA requests for legal fees or whether more frequent EAJA awards facilitate more frequent litigation. This we can not answer.”).

<sup>57</sup> *Id.* at 355.

[not] designed”<sup>58</sup>—plaintiffs who need no incentive to litigate. In other words, many environmental groups are well financed, and their litigation level will either be unaffected or increased by the EAJA.

### C. *Unrestrained Government Expenditure*

The dearth of EAJA data in recent years makes it difficult to pinpoint its cost to taxpayers.<sup>59</sup> New studies, however, have indicated that EAJA payouts are growing, particularly in environmental litigation.<sup>60</sup> The EAJA’s current fee shifting structure “has the potential to impose a considerable financial burden upon taxpayers and consumers.”<sup>61</sup> This potential was not realized during the years in which EAJA award data was available,<sup>62</sup> but with EAJA awards on the rise, its potential expense may nevertheless be viewed as a threat, especially in a time of national financial distress.

The EAJA has also been criticized for creating un-tabulated costs deriving from time spent by adjudicators and agencies resolving lawsuits. Indeed, the EAJA “adds substantial costs to litigation” that must be borne by taxpayers.<sup>63</sup> Baier, via some rough empirics, even submitted that “for every \$1.00 paid out in fee awards, DOJ alone spends \$1.83 in personnel and administrative costs.”<sup>64</sup>

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<sup>58</sup> *Id.* at 357. Of the environmental groups receiving EAJA awards, “many [were] quite well financed and therefore not the class of plaintiffs for which the law was designed to provide access to the expensive federal litigation system.” *Id.* See also *Id.* at 356 (“Our findings suggest EAJA’s legal eligibility requirements may not be restricting its use to groups with limited financial resources.”).

<sup>59</sup> See *supra* Part II.A.

<sup>60</sup> See Baier, *supra* note 33, at 49-50.

<sup>61</sup> Krent, *supra* note 13, at 2076.

<sup>62</sup> See Baier, *supra* note 33, at 48. Baier cites the increase in litigation over procedural violations by federal agencies as one reason litigation levels today are greater than those during the period for which EAJA award data are available. See *id.* at 50-51.

<sup>63</sup> Krent, *supra* note 13, at 2082-83. For an example of government expenditures not contemplated by legislators but arguably induced by one-way citizen suit fee shifting, see Fein, *supra* note 47, at 223 (noting that the cost of delay in an environmental dispute over a sale of the Alaska Continental Shelf “was estimated to exceed \$75,000,000”).

<sup>64</sup> Baier, *supra* note 33, at 50. Baier analyzed suits against the EPA and the DOJ’s costs of defending it from 1998 to 2010. He found that “DOJ spent \$43 million to defend EPA cases, or \$3.3 million annually. The attorneys’ fee awards paid out by DOJ on behalf of EPA totaled approximately \$1.8 million.” *Id.* This finding is not directly applicable to complaints against the EAJA because many of these fee awards may have been awarded under a less stringent standard. But it does show there are costs to the taxpayer in addition to a fee award. Justices of the Supreme Court have been similarly concerned, “decry[ing] the tendency for fee litigation to dwarf the underlying dispute . . . resulting in, as Justice William J. Brennan, Jr., noted, socially unproductive litigation, ‘which like a Frankenstein’s monster meanders its well-intentioned way through the legal landscape leaving waste and confusion . . . in its wake.’” Krent, *supra* note 13, at 2082 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 455 (1983) (Brennan, J., concurring in part and dissenting in part)).

The final cost criticism included here is that the EAJA's "substantial justification defense . . . initiates collateral litigation over attorneys' fees."<sup>65</sup> But the only practically feasible way to simplify the EAJA and pay out fewer awards is through a return to the American rule.<sup>66</sup>

#### D. Settlement Effects

Some have theorized that the EAJA's current structure discourages settlement.<sup>67</sup> The mechanics of parties' settlement decisions are discussed in detail in Part III.B. Stated simply, settlement is less likely to occur when parties have more to disagree about, and the EAJA is suspect because parties must evaluate both their probability of winning the case and the separate probability of winning the fee shift.<sup>68</sup> This increases the settlement bargaining span between parties, making settlement less likely.<sup>69</sup>

Additionally, an ultimately unsuccessful 2003 House Bill seeking to amend the EAJA also took issue with its lack of "any mechanism . . . that would apply after a small party has prevailed on the merits of its claim to encourage both sides to reach a prompt and reasonable settlement of attorneys' fees."<sup>70</sup> The lack of such a mechanism perpetuates the settlement disincentive derived from the substantial justification inquiry.

#### E. Unwarranted Litigation Advantage

The EAJA is championed as the little guy's statute: "Congress designed the EAJA as a way to equalize the litigating strength between the government and private litigants of modest means, and thereby deter government overreaching."<sup>71</sup> While in many ways accomplishing this purpose, the EAJA has been criticized because non-profit organizations are not subject to its \$7 million net worth cap applied to other individuals and organizations. This has puzzled some legislators, such as Representative Howard Coble: "It is not altogether clear why this exception was included in the original law, but it is clear . . . that it benefits certain well-heeled environmental groups who use litigation as a strategy to advance their ideological agenda."<sup>72</sup> Representative Coble also questioned "[w]hether a

<sup>65</sup> Equal Access to Justice Reform Act, H.R. 2282, 108th Cong. § 2(a)(4)(A) (2003).

<sup>66</sup> Making fees harder to get under the EAJA only complicates the inquiry.

<sup>67</sup> Discouraging settlement may not be problematic in all circumstances. See *infra* Part IV.A.4.

<sup>68</sup> See Krent, *supra* note 13, at 2081-82 (highlighting potential differences between the parties in making these two different estimates).

<sup>69</sup> See *id.* at 2080-81.

<sup>70</sup> H.R. 2282, § 2(a)(4)(B) (2003).

<sup>71</sup> Krent, *supra* note 2, at 462 (citing H.R. REP. NO. 99-120 (1985); H.R. REP. NO. 96-1434 (1980); H.R. REP. NO. 96-1418 (1980); S. REP. NO. 96-253 (1979)).

<sup>72</sup> GLSA Hearing, *supra* note 36, at 2 (opening statement of Rep. Coble, Chairman).

multimillion-dollar organization that already is tax exempt should have the added benefit of being able to collect attorneys fees and costs from the Federal Government.”<sup>73</sup>

Many non-profit organizations are “well-heeled.” The top ten environmental non-profit organizations each maintain average total assets of more than \$500 million<sup>74</sup> and spend an average of nearly \$200 million annually.<sup>75</sup> Additionally, non-profit organizations across the board are enjoying healthy financial growth—at 150 percent the rate of U.S. GDP.<sup>76</sup> Further, in 2010 there were more than 1.5 million non-profit organizations in the United States, accounting for 5.5 percent of GDP and 9.2 percent of wages and salaries paid.<sup>77</sup> The claim that today’s non-profit organizations were not the envisioned EAJA beneficiaries at enactment is quite plausible.

In addition to subsidizing litigation for many organizations that may neither stand in financial need nor need any incentive to litigate,<sup>78</sup> the EAJA may also disadvantage a class akin to one it was enacted to protect. Environmental litigation sometimes results in small business owners’ and individuals’ interests aligning with the federal government’s in defending against lawsuits brought by environmental non-profits.<sup>79</sup> In such

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<sup>73</sup> *Id.*

<sup>74</sup> See National Center for Charitable Statistics, Largest Organizations, Environmental (NCCS Core 2010 Public Charities File)—Total Assets, [http://nccsdataweb.urban.org/PubApps/showTopOrgs.php?cat=C&amt=ass\\_eoy](http://nccsdataweb.urban.org/PubApps/showTopOrgs.php?cat=C&amt=ass_eoy).

<sup>75</sup> See National Center for Charitable Statistics, Largest Organizations, Environmental (NCCS Core 2010 Public Charities File)—Expenses, <http://nccsdataweb.urban.org/PubApps/showTopOrgs.php?cat=C&amt=EXPS>.

<sup>76</sup> THE URBAN INSTITUTE, THE NONPROFIT SECTOR IN BRIEF: FACTS AND FIGURES FROM THE *NONPROFIT ALMANAC* 2 (2007) available at [http://www.urban.org/UploadedPDF/311373\\_nonprofit\\_sector.pdf](http://www.urban.org/UploadedPDF/311373_nonprofit_sector.pdf).

<sup>77</sup> National Center for Charitable Statistics, Quick Facts About Nonprofits, <http://nccs.urban.org/statistics/quickfacts.cfm>.

<sup>78</sup> See *supra* Part II.B.

<sup>79</sup> Baier, *supra* note 33 at 65 (“Americans have unwittingly funded these obstructionist political agendas for far too long at the expense of individuals, small businesses, energy producers, farmers and ranchers who must pay out of their own pocket to defend the federal government against relentless litigation.”). Battles over livestock grazing on public lands is a prime example of such a situation. For instance, an Oregon rancher faced being “put out of business by a suit against the Bureau of Land Management to prevent livestock access to the Owyhee River” by environmental groups. National Cattlemen’s Beef Association, Equal Access to Justice Act (2013) available at <http://www.beefusa.org/equalaccesstojusticeact.aspx>. While the rancher joined the suit and came to a compromise with the special interest groups, “because the government failed to process the appropriate paperwork, [it] voluntarily agreed to pay \$128,000 in EAJA funds to the special interest group.” *Id.* This resulted in the rancher “paying \$42,000 in attorney fees.” *Id.* See also e.g., Natural Resource Support, *Ranchers Support Government Litigation Savings Act* (May 29, 2011) available at <http://naturalresourcereport.com/2011/05/ranchers-support-government-litigation-savings-act/> (quoting National Cattlemen’s Beef Association President, Bill Donald: “Well-funded environmental activists have abused EAJA to advance their agenda to ultimately end grazing and other multiple-use activities on federal lands.”).

circumstances, small business owners and individuals face a disincentive to join the government and defend their interests because they are subject to the American rule.<sup>80</sup> And if they decide to join, they face a formidable foe. The late D.C. Circuit Judge George E. MacKinnon anecdotally reported that “[i]n practically every case I have seen where agency action is attacked by public interest protestants or litigants they are usually very well-funded by voluntary organizations that enjoy tax-free status.”<sup>81</sup> The ironic result of small business owners and individuals being *disadvantaged* by the EAJA magnifies the inherent problems in extending the benefits of the EAJA to well-funded non-profit organizations.

### III. MAJOR FEE SHIFTING STRUCTURES AND THEIR EFFECTS

The EAJA employs a one-way, pro-prevailing-plaintiff fee shift. The two other general models are the American rule against fee shifting and the English rule, or two-way fee shifting.<sup>82</sup> Each model has varying effects on parties’ litigation incentives and behaviors.

This Part briefly relates the largely agreed-upon findings about the incentive effects of the general models and then focuses in more detail on those areas needing additional development and clarification, including highlighting the incentive effects caused by a one-way fee-shifting regime, addressing the effects of risk aversion, and expanding the settlement incentives model. Further, the focus is on those effects most applicable to the alleged EAJA problems—litigation and settlement incentives and their side effects—and what they mean for the ultimate aim of this Note: recommending a fee-shifting model most appropriate for well-funded non-profit organizations litigating against the federal government.

#### A. *Decision to Litigate*

Although “much of the work of lawyers and even of courts is noncontentious,” therefore rendering “the entire question of fee shifting . . . irrelevant to the distribution of the bulk of legal services,”<sup>83</sup> fee shifting

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<sup>80</sup> See Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 139, 153 (1984).

<sup>81</sup> Baier, *supra* note 33, at 31 (quoting *Public Participation in Federal Agency Proceedings Act of 1977: Hearings on S. 270 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 95th Cong. at 394 (1977)).

<sup>82</sup> One-way fee shifting may also be pro-defendant, but such schemes are rare. See Rowe, *supra* note 80, at 141 n.8. This paper will focus on the pro-plaintiff model of one-way fee shifting.

<sup>83</sup> Zemans, *supra* note 16, at 209.

has long been advanced as a means to encourage or discourage litigation.<sup>84</sup> The analysis below tests this assumption theoretically, concluding that a jurisdiction's imposition of a given fee-shifting regime should have some effect on most plaintiffs' choices to litigate.<sup>85</sup>

### 1. *The American Rule*

As summarized by the Supreme Court, the American rule against fee shifting is "that, absent statute or enforceable contract, litigants pay their own attorneys' fees."<sup>86</sup> This rule is traceable to the 1796 case *Arcambel v. Wiseman*, in which the Court overturned an attorney fee award because it did "not think that [the] charge [of attorney fees] ought to be allowed" considering that "[t]he general practice of the United States is in opposition to it."<sup>87</sup> The Court has since "consistently adhered to [this] early holding."<sup>88</sup>

Requiring parties to pay their own attorney fees has a number of effects pertinent to alleged EAJA problems. Parties considering litigation under the American rule are confronted with at least the prospect of paying their own attorney fees and accordingly will sue only when their probability of winning multiplied by the judgment value is greater than their attorney fees.<sup>89</sup> "This salutary cost/benefit analysis by potential litigants helps prevent improvident, unnecessary, and often costly litigation" because "a party will pursue litigation . . . only when the perceived benefits exceed the predicted costs and associated risk attendant to a particular claim."<sup>90</sup> Because of this initial calculation, the American rule discourages parties bringing strong, small claims<sup>91</sup> but also deters plaintiffs with weak or frivolous claims to some extent.<sup>92</sup>

These incentives force prospective claimants to carefully consider their claims and decide whether litigation costs will outweigh potential benefits. Additionally, those without the means to overcome litigation costs, but with claims that could bring potential recovery significantly greater than

<sup>84</sup> See, e.g., *supra* notes 17-19 and accompanying text.

<sup>85</sup> See *infra* Appendix A for further clarification, including numerical examples.

<sup>86</sup> *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975).

<sup>87</sup> 3 U.S. (3 Dall.) 306, 306 (1796).

<sup>88</sup> *Alyeska Pipeline*, 421 U.S. at 249-50.

<sup>89</sup> Keith N. Hylton, *Fee Shifting and Incentives to Comply with the Law*, 46 VAND. L. REV. 1069, 1078 (1993). The litigation decision, expressed mathematically, will be made under the American rule when  $J \times P_p > C_p$ , where  $J$  is the judgment value,  $P_p$  is the "the plaintiff's estimate of the probability of a verdict in his favor," and  $C_p$  is "the plaintiff's cost of litigating." *Id.*

<sup>90</sup> Fein, *supra* note 47, at 217, 223.

<sup>91</sup> Rowe, *supra* note 80, at 148.

<sup>92</sup> Fein, *supra* note 47, at 230.

those costs, have been forced to get creative. Contingency fee arrangements, common funds, and class actions are all functions of the American rule.<sup>93</sup> Moving towards one-way fee shifting mitigates the necessity of these litigation-funding mechanisms because plaintiffs may more easily overcome litigation costs.

Side effects accompany the litigation incentives affected by the American rule. Professor Frances Kahn Zemans has suggested that these side effects include failure to deter defendant misconduct through litigation<sup>94</sup> and “the use of dilatory tactics,” like drawing out discovery, fostered by giving “a wealthy disputant leverage over an impecunious adversary.”<sup>95</sup>

Therefore, the American rule valuably deters weak or frivolous claims, but at the expense of deterring strong, small claims or those brought by penurious plaintiffs. Further, when bearers of these strong claims fail to sue, violation of their rights is implicitly sanctioned, and perhaps even encouraged. Finally, the American rule may leave unaddressed an unfair litigation advantage when adversaries are in significantly different financial positions.

## 2. Two-Way Fee Shifting

“[O]ne of the aspects that make[s] the American rule such a worthwhile subject of study is that on an international level it represents the exception rather than the rule.”<sup>96</sup> That original rule—two-way fee shifting, also known as the English rule—was first formally decreed by East Roman emperor Zenon in 486 A.D. and was codified shortly thereafter by Justinian.<sup>97</sup> “The English rules on costs developed in Law through

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<sup>93</sup> Zemans, *supra* note 16, at 201.

<sup>94</sup> *Id.* at 202 (“[W]ithout fee-shifting the right to a private cause of action is in many cases meaningless . . . since there is no public agency designated to pursue claims under most statutes.”); see also Lorraine Wright Feuerstein, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 162 (1995) (“Yet, it is anomalous to acknowledge a right without a satisfactory means of enforcing it.”). With the growth of the administrative state, perhaps this argument is less compelling today. See Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 700 (2006) (“As a result of all the forces put into play during the New Deal, the American administrative state has grown to a point where it now ‘often looks like Hobbes’ Leviathan itself.” (quoting Jamison E. Colburn, “Democratic Experimentalism”: A Separation of Powers for Our Time?, 37 SUFFOLK U. L. REV. 287, 287 (2004))).

<sup>95</sup> See Zemans, *supra* note 16, at 191-92 (“[U]nder the American rule economic incentives for some litigants (depending on certainty of success and staying power) and for hourly fee-for-service lawyers encourage more and greater discovery.”).

<sup>96</sup> Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 37 (1984).

<sup>97</sup> *Id.* at 42.

piecemeal legislation and in Equity through the exercise of the Chancellor's discretion."<sup>98</sup> Origins aside, two-way fee shifting basically means that "the loser of the initial suit pays the winner's legal costs."<sup>99</sup>

The English rule assumes that "[a] potential litigant is properly motivated when the probable recovery exceeds the cost of litigation and dissuaded when the risk exceeds a possible recovery—or windfall."<sup>100</sup> Because a plaintiff must consider the prospect of paying for not only his own but also his adversary's attorney fees if he loses, "the more optimistic the plaintiff . . . the more likely it is that the plaintiff will bring suit."<sup>101</sup>

The aspects of the American rule that make it a double-edged sword are only magnified under the English rule. "[T]wo-way shifting should encourage strong claims and discourage weak ones" to an even greater extent because the litigation stakes are raised.<sup>102</sup> A plaintiff with limited resources will only bring suit when his prospect of recovery<sup>103</sup> is greater than his risk of losing multiplied by *both* sides' attorney fees.<sup>104</sup> Accordingly, under the English rule: (1) strong claims are encouraged across the board and (2) weak claims are deterred to an even greater extent than under the American rule. Indeed, "the English rule would be a boon to people with honest, but modest, claims,"<sup>105</sup> while presenting a "substantial disincentive[]" that would lead "potential plaintiffs with weak claims to think twice before proceeding."<sup>106</sup>

Risk aversion, however, can temper the aspirations of plaintiffs with strong claims such that "two-way fee shifting may do its job of discouraging nuisance litigation too well, or at least have disincentive effects beyond weak cases that should be discouraged."<sup>107</sup> Nevertheless, Professor Zemans has argued that the potential "chilling effect" that "[t]he risk of losing and bearing the burden of paying two sets of attorneys fees may have . . . on litigation. . . . may be exaggerated."<sup>108</sup> Studies have

<sup>98</sup> *Id.* at 43.

<sup>99</sup> A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 422 (1993).

<sup>100</sup> Feuerstein, *supra* note 94, at 159.

<sup>101</sup> Hylton, *supra* note 89, at 1078.

<sup>102</sup> Rowe, *supra* note 80, at 143.

<sup>103</sup> Recovery here is the judgment amount without regard to the plaintiff's attorney fees, because the decision is whether to incur fees and litigate in the first place.

<sup>104</sup> Thus, a plaintiff will only litigate when  $J \times P_p > (1 - P_p) \times (C_p + C_d)$ , where  $J$  is the judgment value,  $P_p$  is the plaintiff's estimate of his probability of winning,  $C_p$  is plaintiff's attorney fees, and  $C_d$  is the defendant's attorney fees. See Hylton, *supra* note 89, at 1078.

<sup>105</sup> Feuerstein, *supra* note 94, at 158.

<sup>106</sup> Rowe, *supra* note 80, at 150.

<sup>107</sup> *Id.* at 153.

<sup>108</sup> Zemans, *supra* note 16, at 203.



demonstrated that cases reaching the litigation phase are already “those more likely than not to win.”<sup>109</sup>

Risk aversion, however, should not be dismissed so lightly. A risk-averse party theoretically knows that he has a strong claim but *nevertheless* is intimidated by the specter of paying his opponent’s attorney fees. Thus, simply noting that the claim has a good chance of winning fails to dismiss the presence of this behavior. When “the threat of having to pay the other side’s fee can loom so large in the mind of a person without considerable disposable assets that it deters the pursuit of even a fairly promising and substantial claim or defense,”<sup>110</sup> risk aversion represents a real concern for the very potential claimants that the English rule has been touted to protect: impecunious individuals with strong claims.

As with the American rule, secondary side effects follow two-way fee shifting. These include “making [a defendant] take more precautions against harm than he would in a damages-only world”<sup>111</sup> and preventing “a wealthy disputant [from wielding] unconscionable leverage over an impecunious adversary” by doubling the cost of “dilatory tactics.”<sup>112</sup> Two-way fee shifting puts a double premium on time for both parties in a close case and for the potential losing party in a clear one.

Accordingly, two-way fee shifting, first and foremost, rescues strong claims too small to litigate under the American rule. Next, the added prospect of paying both sides’ attorney fees provides an even greater disincentive against bringing weak or frivolous claims. But this sword is double-edged: The specter of paying both sides’ attorneys fees may intimidate a risk-averse party from bringing suit. Nevertheless, a two-way regime may still help vindicate previously unasserted rights and reduce dilatory litigation tactics.

### 3. *One-Way Fee Shifting*

While the American and English rules have “an appealing symmetry . . . [treating] plaintiffs and defendants . . . equivalently,” one-way fee shifting is supported by no such pretense.<sup>113</sup> In the case of the EAJA, “Congress has intervened to confer advantage on one particular side of the controversy.”<sup>114</sup> There are myriad such exceptions to the otherwise

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<sup>109</sup> *Id.*

<sup>110</sup> *Rowe, supra* note 80, at 153.

<sup>111</sup> Bruce L. Hay, *Fee Awards and Optimal Deterrence*, 71 CHI.-KENT L. REV. 505, 509 (1995).

<sup>112</sup> *Zemans, supra* note 16, at 191.

<sup>113</sup> *Krent, supra* note 13, at 2040.

<sup>114</sup> *Id.* at 2040-41.

applicable American rule, many favoring litigants in lawsuits against the federal and state governments.<sup>115</sup>

One-way, pro-prevailing-plaintiff fee shifting is the one “approach that should uniformly encourage the pursuit of claims of all sorts in all situations” because it “permits plaintiffs to expect greater net recoveries, without adding a counterbalancing threat of loss.”<sup>116</sup> The litigation-detering aspect of the two-way rule is traded for the downside protection of the American rule, while the upside prospect of recovering one’s fees under the two-way regime is preserved.<sup>117</sup>

One-way fee shifting “provides potential plaintiffs few disincentives to litigate”<sup>118</sup> and particularly benefits “parties of modest means . . . challeng[ing] governmental and private action . . . when there is no significant monetary stake.”<sup>119</sup> Thus, the one-way fee-shifting model encourages strong claims, while eliminating much of the risk aversion that deters such claimants under a two-way model.<sup>120</sup> Further, this sword cuts in only one direction—for the plaintiff.

The benefits of one-way fee shifting accruing to plaintiffs come at the expense of “an appropriate market constraint on litigation,”<sup>121</sup> namely the cost-benefit analysis more fully preserved by the American and English rules.<sup>122</sup> An optimistic plaintiff under any of the three regimes will have the same expected recovery prior to netting out attorney fees, but will have the highest *net* expected recovery under a one-way fee-shifting regime. Considering litigation incentives alone, a plaintiff will be more likely to pursue his claim under a one-way regime, assuming attorney fees mean anything at all to him.<sup>123</sup> Therefore, the ability of a fee-shifting regime to deter frivolous lawsuits is lost in a one-way system—its “effect, however minor, could *only* be in the direction of more encouragement for nuisance litigation.”<sup>124</sup>

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<sup>115</sup> *Id.* at 2041.

<sup>116</sup> Rowe, *supra* note 80, at 147.

<sup>117</sup> A plaintiff’s decision-to-litigate function can be mathematically depicted as follows:  $J \times P_p > (1 - P_p) \times C_p$ , where  $J$  is the judgment value,  $P_p$  is the plaintiff’s estimate of his probability of winning, and  $C_p$  is plaintiff’s attorney fees. I have adapted this framing from Shavell’s two-way fee-shifting analysis. See Hylton, *supra* note 89, at 1079.

<sup>118</sup> Fein, *supra* note 47, at 218.

<sup>119</sup> Krent, *supra* note 13, at 2088.

<sup>120</sup> See *supra* notes 107-110 and accompanying text.

<sup>121</sup> Krent, *supra* note 13, at 2052. This would “inappropriately shift the litigative balance.” Zemans, *supra* note 16, at 204.

<sup>122</sup> See *supra* notes 89 and 104 and accompanying text.

<sup>123</sup> See *infra* Appendix A for a detailed substantiation of this claim.

<sup>124</sup> Rowe, *supra* note 80, at 153 (emphasis added).

While the fee-shifting literature tends to agree on the side effects of the American and English rules, competing views crop up with respect to one-way fee shifting. Such a regime indeed has “secondary effects,”<sup>125</sup> including increasing<sup>126</sup> (and decreasing<sup>127</sup>) litigation levels and administrative costs and deterring<sup>128</sup> (and over-deterring<sup>129</sup>) bad behavior. One-way fee shifting may also encourage delay and foster dilatory litigation tactics.<sup>130</sup>

The foremost finding on one-way fee-shifting has already been discussed: it encourages litigation more than the other two regimes. Notwithstanding this point, Professor Hylton has suggested that “fee shifting in favor of prevailing plaintiffs [actually] generates the least litigation.”<sup>131</sup> Because of “the greater incentive to sue,” potential defendants face “greater compliance incentives,” and thus “the pool of defendants contains the smallest proportion of guilty defendants relative to the other fee shifting rules.”<sup>132</sup> This may temper a plaintiff’s expectations of winning the case and encourage settlement.<sup>133</sup> His argument assumes, however, that by initially increasing litigation in the short run, litigation will be decreased in the long run because defendants will change their behavior. Considering the government is usually the defendant under one-way fee-shifting regimes,<sup>134</sup> this premise is questionable. Though there will be some marginal deterrent effect,<sup>135</sup> it is unlikely the government’s behavior will be sufficiently deterred by one-way fee shifting to have a measurable impact on the increased litigation levels spawned by one-way fee shifting.<sup>136</sup>

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<sup>125</sup> Zemans, *supra* note 16, at 202.

<sup>126</sup> See *supra* notes 118-120 and accompanying text; Krent, *supra* note 13, at 2045.

<sup>127</sup> Hylton, *supra* note 89, at 1072.

<sup>128</sup> Krent, *supra* note 13, at 2044.

<sup>129</sup> Zemans, *supra* note 16, at 198.

<sup>130</sup> *Id.* at 192.

<sup>131</sup> Hylton, *supra* note 89, at 1072.

<sup>132</sup> *Id.*

<sup>133</sup> This argument is more fully addressed in Subsection III.B.3 below in the settlement incentives discussion.

<sup>134</sup> See Krent, *supra* note 13, at 2041.

<sup>135</sup> See Zemans, *supra* note 16, at 203 (“If one-way pro-plaintiff fee shifting does, as has been argued, increase the real potential (though not necessarily the actual practice) of going to court, then the incentive for asserting legal rights and initiating claims also increases.”).

<sup>136</sup> See *infra* note 167 and accompanying text. Additionally, some have argued that perhaps over-deterrence is an issue. See, e.g., Zemans, *supra* note 16, at 198 (“[O]ne cost will be some degree of overenforcement.”). However, if it is unclear that fee shifting even has a strong deterrent effect on the government, over-deterrence is not a real concern. Nevertheless, the paralyzing effect of crisis precipitation litigation tactics may have an effect similar to over-deterrence. See *supra* note 47 and accompanying text.

Encouraging litigation also logically leads to increased administrative costs. More cases lead to “significant hidden costs [in addition to fees] in terms of attorney time and judicial resources.”<sup>137</sup> Further, one-way fee shifting often involves multi-factored tests with many issues to be disputed, and “[t]he costs increase with the number of litigable issues arising in the fee dispute.”<sup>138</sup>

Professor Bruce L. Hay, notwithstanding the aforementioned, has argued “in principle” that a one-way fee-shifting regime may save litigation costs.<sup>139</sup> He applied the Becker approach to optimal enforcement, which “involves simultaneously raising the penalty imposed on the defendant[, thereby deterring more bad behavior,] and lowering the level of enforcement effort.”<sup>140</sup> This simply makes it more expensive to act illegally. *Ceteris paribus*, “the fee award must leave society better off, since we have conserved enforcement resources without giving up anything else.”<sup>141</sup> His finding’s crucial, and perhaps fatal, flaw is its reliance on the assumption that, in permitting one-way fee shifting, attorneys will not increase their litigation efforts to get the award, or that if they do, the courts will be able to control attorneys’ efforts by monitoring the award amount.<sup>142</sup> But “[g]iven unobservability of effort, it may be that the optimal fee award is zero. The *only* situation in which a positive fee award is certain to reduce aggregate enforcement costs is one in which the court can observe the plaintiff lawyer’s investment of effort.”<sup>143</sup> Further, implementing additional judicial observation only increases administrative costs. Thus, Professor Hay’s finding only holds in a system that is already designed to supervise attorneys’ efforts and fees without adding any additional cost. In America, where the American rule is the default, courts are not so enabled, and therefore the inevitable conclusion is that one-way fee shifting increases overall legal costs.

One-way fee shifting also lends itself “to delay tactics by the plaintiffs in an effort to increase fees and thus force a higher settlement.”<sup>144</sup> The double premium on time that applies to both parties in a two-way fee-shifting regime<sup>145</sup> is removed for a plaintiff, yet fully borne by the

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<sup>137</sup> Krent, *supra* note 13, at 2083.

<sup>138</sup> *Id.* at 2045.

<sup>139</sup> Hay, *supra* note 111, at 509.

<sup>140</sup> *Id.* at 512.

<sup>141</sup> *Id.* at 509.

<sup>142</sup> *Id.* at 511-13.

<sup>143</sup> *Id.* at 513 (emphasis added).

<sup>144</sup> Zemans, *supra* note 16, at 192.

<sup>145</sup> See *supra* note 112 and accompanying text.

defendant, in a one-way regime. This can be leveraged to gain advantage over even a government defendant.<sup>146</sup>

In sum, one-way fee shifting has the direct effect of encouraging litigation, regardless of claim strength, when compared to the American and English rules. Additionally, it has the secondary effects of increasing litigation levels and costs and encouraging delays by plaintiffs. One-way fee shifting may, however, also deter behavior, to some extent, that would otherwise go unchecked under the American rule because plaintiffs would be more willing to assert their rights.

### B. Settlement Incentives

This Section will analyze the effects of each fee-shifting regime on parties' behavior with regard to settlement as compared to the American rule.<sup>147</sup> It is helpful to keep in mind that "it takes two to settle; the decision is one made not in isolation but in interaction with another who may also be affected by the incentives created by a fee shifting policy."<sup>148</sup> The below analysis will nevertheless endeavor to consider the effects of fee-shifting policy changes on both parties at a theoretical level by employing a mathematical model based on Shavell's analysis, as discussed by Professor Hylton,<sup>149</sup> but expanding the model to consider the (at times) sunk attorney fees spent in preparation for settlement negotiations.<sup>150</sup>

It is unlikely that parties will begin settlement discussions without incurring some initial attorney fees.<sup>151</sup> And while a fee-shifting regime may allow one party to recover these fees, they are otherwise sunk for both sides under the American rule and for a defendant under a one-way, pro-plaintiff regime. Thus, when the settlement decision is being made and parties are considering whether to proceed to litigation, the initial settlement preparation attorney fees will be relevant only in a regime where they can be recovered.

With this in mind, as a general matter the key in determining the effect of a fee-shifting regime on settlement incentives is the bargaining span, or

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<sup>146</sup> Blatant bad litigation behavior may, however, result in the loss of a fee-shift. See, e.g., *supra* note 26 and accompanying text. Therefore, one-way fee shifting may promote dilatory conduct up to or close to this level of "bad" behavior.

<sup>147</sup> For further clarification, see *infra* Appendix B, which includes an analysis of a number of hypothetical scenarios to illustrate this Subsection's findings.

<sup>148</sup> Rowe, *supra* note 80, at 155.

<sup>149</sup> Hylton, *supra* note 89, at 107-79.

<sup>150</sup> For further support of these findings, see *infra* Appendix B.

<sup>151</sup> Additionally, it must be noted that this analysis employs a simplifying assumption that there is only one discrete opportunity for settlement—once the decision not to settle is made, parties will commit to litigation.

settlement zone, between the plaintiff and the defendant. Thus, a settlement offer within the bargaining span will be more than the plaintiff's estimated gain from the litigation and less than the defendant's estimated loss. More specifically, the bargaining span is the difference between the defendant's maximum settlement offer ("MSO") and the plaintiff's minimum settlement demand ("MSD").<sup>152</sup>

### 1. *The American Rule Baseline*

Under the American rule, the defendant's maximum settlement offer is his estimate of the plaintiff's probability of winning ( $P_d$ ) multiplied by the judgment value ( $J$ ) plus the attorney fees he would otherwise spend *litigating* the case (and therefore excluding those already incurred in preparation for settlement negotiations) ( $C_{d2}$ ). The plaintiff's minimum settlement demand is his estimate of his own probability of winning ( $P_p$ ) multiplied by the judgment value ( $J$ ) less the attorney fees he would subsequently pay in the absence of settlement ( $C_{p2}$ ).

**Defendant's MSO:**  $P_d \times J + C_{d2}$

**Plaintiff's MSD:**  $P_p \times J - C_{p2}$

Therefore, parties litigating in the shadow of the American rule, or any fee-shifting structure for that matter, may settle where the difference between the defendant's maximum settlement offer is greater than the plaintiff's minimum settlement demand, or in other words, where the bargaining span is positive.

### 2. *Two-Way Fee Shifting*

In a two-way fee-shifting regime, the defendant's maximum settlement offer is his estimate of plaintiff's probability of winning ( $P_d$ ) multiplied by the sum of the judgment value ( $J$ ), plaintiff's total attorney fees (including those incurred in preparation for settlement negotiations) ( $C_p$ ), and his attorney fees if the case is litigated ( $C_{d2}$ ), all minus his estimate of his probability of winning ( $1 - P_d$ ) multiplied by his settlement negotiation preparation attorney fees ( $C_{d1}$ ).<sup>153</sup> The plaintiff's minimum settlement demand is his estimate of his probability of winning ( $P_p$ ) multiplied by the sum of the judgment value ( $J$ ) and his pre-settlement negotiation attorney fees ( $C_{p1}$ ), minus his probability of losing ( $1 - P_p$ ) multiplied by the sum of his attorney fees incurred if litigation is pursued ( $C_{p2}$ ) and defendant's total attorney fees ( $C_d$ ).

<sup>152</sup> Hylton, *supra* note 89, at 1078.

<sup>153</sup> This represents the amount that would otherwise be unrecoverable in absence of litigation.

**Defendant's MSO:**  $P_d \times (J + C_p + C_{d2}) - (1 - P_d) \times C_{d1}$

**Plaintiff's MSD:**  $P_p \times (J + C_{p1}) - (1 - P_p) \times (C_{p2} + C_d)$

These formulas can be better understood by recognizing the basic cost/benefit structure. The defendant's maximum settlement offer is the (1) probable cost of a litigation loss minus (2) the probability of recovering otherwise sunk attorney fees; the plaintiff's minimum settlement demand is (1) the probable benefit successful litigation poses minus (2) any risk of loss due to a fee shift.

Differentiating between pre-settlement negotiation attorney fees and those yet to be incurred if litigation is pursued is a more precise model, showing that the bargaining span between parties is narrower than predicted.<sup>154</sup> Even so, this model aligns with the conventional wisdom about the general effect of a fee-shifting regime on parties' settlement incentives.

Thus, when parties have symmetrical expectations about the outcome of the case, the bargaining span remains unchanged—the prospect of a two-way fee shift is reflected equally in both the defendant's maximum settlement offer and the plaintiff's minimum settlement demand.<sup>155</sup> Where, however, the plaintiff is more optimistic than the defendant is pessimistic, i.e. parties have different probability estimates, a two-way fee-shifting regime reduces the bargaining span and therefore discourages settlement.<sup>156</sup> Conversely, a plaintiff bringing a weak claim will be more likely to settle under the English rule because he faces the real risk of paying for the defendant's attorney fees in addition to his own.<sup>157</sup>

Increasing the stakes may, however, also encourage risk averse parties to settle because they will be exposed to a risk they would not otherwise

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<sup>154</sup> This occurs because the defendant's maximum settlement offer is reduced by the pre-settlement negotiation attorney fees, and the plaintiff's minimum settlement demand is increased by the pre-settlement negotiation attorney fees. Basically, each party risks losing that amount less in case of a loss because the pre-settlement negotiation attorney fees have already been expended when the settle-or-litigate decision is being made, and when a fee shift is allowed the parties stand to gain that amount more. The bargaining span is accordingly reduced by the sum of the parties' pre-settlement negotiation attorney fees; otherwise the conventional wisdom on settlement remains intact.

<sup>155</sup> See Hay, *supra* note 111, at 513 (Where parties have the same estimate of plaintiff's probability of winning, the regime change "should not affect the likelihood of settlement."); Rowe, *supra* note 80, at 163 ("The bargaining span, under these assumptions, is the same size as under the American rule . . . but moved upward."); see also *infra* Appendix B, Scenario 1.

<sup>156</sup> Hylton, *supra* note 89, at 1079 (Settlement is less likely under a two-way fee shifting scheme because it "raises the stakes, which makes litigation more attractive to the parties when the plaintiff places a higher estimate on the likelihood of his winning than does the defendant."); see also *infra* Appendix B, Scenario 2.

<sup>157</sup> See *infra* Appendix B, Scenario 3.

face under the American rule.<sup>158</sup> Further, the pressure to settle will only increase “as the case continue[s] and the other side’s fees [run] up.”<sup>159</sup> Thus, the reduction in bargaining span that “worsens the odds for settlement has a double-edged impact when risk aversion is present; when people have something more to disagree about, they also have something more to worry about.”<sup>160</sup> Professor Rowe tentatively concludes that the net effect of risk aversion on the otherwise settlement-discouraging dip in the bargaining span (for strong claims when the parties disagree on the probable outcome) is to favor settlement for “individual litigants relying on their own resources.”<sup>161</sup>

### 3. One-Way Fee Shifting

Under a one-way, pro-prevailing plaintiff fee-shifting model, a defendant’s maximum settlement offer will be at its highest: the sum of the judgment value ( $J$ ) and the plaintiff’s attorney fees ( $C_p$ ) multiplied by the defendant’s estimate of plaintiff’s probability of winning ( $P_d$ ), plus the defendant’s own attorney fees to be incurred if litigation is pursued ( $C_{d2}$ ). The plaintiff’s minimum settlement demand is his estimate about his probability of winning ( $P_p$ ) multiplied by the sum of the judgment value ( $J$ ) and his pre-settlement negotiation attorney fees ( $C_{p1}$ ) minus the product of his estimated probability of losing ( $1 - P_p$ ) and his attorney fees if litigation is pursued ( $C_{p2}$ ).

**Defendant’s MSO:**  $P_d \times (J + C_p) + C_{d2}$

**Plaintiff’s MSD:**  $P_p \times (J + C_{p1}) - (1 - P_p) \times C_{p2}$

When parties have the same expectations about the outcome of the case, the bargaining span again remains the same; the defendant’s maximum settlement offer and plaintiff’s minimum settlement demand increase to the same extent.<sup>162</sup> Under circumstances in which the plaintiff is more optimistic than the defendant is pessimistic, one-way fee shifting discourages settlement, but to a lesser extent than the English rule. This is the combined result of the elimination of any uncertainty with respect to the defendant’s attorney fees—he *will* pay those—and the existence of some chance for the plaintiff to recover his own total attorney fees from the defendant. In such circumstances the defendant will increase his

<sup>158</sup> Rowe, *supra* note 80, at 159.

<sup>159</sup> *Id.* at 161.

<sup>160</sup> *Id.* at 159.

<sup>161</sup> *Id.* See Appendix B for an example substantiating these findings.

<sup>162</sup> See *infra* Appendix B, Scenario 1.



maximum settlement offer to a greater extent than the plaintiff will increase his minimum settlement demand.<sup>163</sup>

Finally, when a plaintiff brings a weak claim, one-way fee shifting also sits in-between the American and the English rules. It fosters a wider bargaining span than the American rule because the defendant has to deal with the prospect, even if ever so slight, of having to pay for the plaintiff's attorney fees in addition to his own, increasing the defendant's maximum settlement offer to a greater extent than the plaintiff's minimum settlement demand increases. The one-way regime does less to encourage settlement than a two-way regime in this situation, simply because the plaintiff does not bear the downside risk of paying for the defendant's fees. This keeps his minimum settlement offer higher and the bargaining span narrower.<sup>164</sup>

Another consistent finding is that one-way fee shifting should produce higher settlement amounts. Regardless of the parties' expectations on the outcome of the case, the possibility of a fee shift in favor of the plaintiff without the downside risk of paying the defendant's fees, coupled with the defendant having to bear his own fees and the prospect of paying for the plaintiff's attorney fees, shifts the bargaining span upward. Higher settlement amounts logically follow in most cases.

Additionally, "one-way shifting should eliminate the strongest effects of risk aversion among plaintiffs that would be significant under a two-way rule."<sup>165</sup> While, under two-way fee shifting, risk aversion in impecunious plaintiffs (even ones bearing strong claims) may encourage settlement to a greater extent than the reduction in the bargaining span discourages it, one-way fee-shift plaintiffs are protected from the downside risk of paying the opposing party's attorney fees. They will thus be less likely to settle as a result of risk aversion. Plaintiffs not subject to risk aversion at all, e.g. regular litigators or the wealthy, will simply be subject to the settlement-discouraging effect of the reduction in the bargaining span accompanying a change to a one-way fee-shifting model from the American rule or the increase in the bargaining span (with respect to strong claims) if moving from a two-way fee-shifting regime.

Notwithstanding the lack of risk aversion, some argue that the continued application of a one-way fee-shifting regime, because of the increased incentives to sue, eventually conditions defendants to such an extent that "plaintiffs will then rationally estimate that the probability that

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<sup>163</sup> See *infra* Appendix B, Scenario 2.

<sup>164</sup> See *infra* Appendix B, Scenario 3.

<sup>165</sup> Rowe, *supra* note 80, at 164.

a defendant is innocent is reasonably high” and be more likely to settle than predicted under the models.<sup>166</sup> The problem with this conclusion is its reliance on the premise that an increase in suits resulting from one-way fee shifting will deter improper behavior to such a level that it will color the view plaintiffs have of all defendants. When most one-way fee-shifting regimes involve government defendants, however, “the deterrent effect of this fee shifting on government abuse is not clear, since the burden of attorney fees does not fall on the official who makes the decision to pursue a case.”<sup>167</sup> With the primary premise questioned, it seems even less likely that plaintiffs will accordingly inform their estimate of their potential to win or lose the case based on it. As a result, it is doubtful that the increase in lawsuits fostered by one-way fee shifting really has that strong of an effect on a plaintiff’s decision to settle.

A one-way regime, therefore, behaves precisely like the English rule when parties share the same expectations about the outcome of the case, and similarly, but to a lesser extent, when the parties disagree on the probable outcome. Additionally, one-way fee shifting, by always fostering the highest maximum settlement offer and the highest minimum settlement demand, will encourage higher settlement amounts. Further, risk aversion is less of a factor under one-way fee shifting than it is under the English rule, and perhaps even under the American rule, depending upon the defendant’s characteristics.<sup>168</sup> Finally, though the deterrent effects of a one-way regime could modify defendant behavior to such an extent that plaintiffs would rationally temper their expectations of winning cases, the inferential chain is simply too weak and long to give serious weight in predicting settlement decisions.

#### IV. THE PERSPECTIVE

This Part will proceed by discussing the EAJA and its alleged problems, proposed amendments to it, and how the situation ought to be remedied in accordance with the findings in Part III. The discussion will be itemized according to the problems discussed in Part II.

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<sup>166</sup> Hylton, *supra* note 89, at 1072.

<sup>167</sup> Zemans, *supra* note 16, at 207. See also Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 345 (2000) (“If the goal of making government pay compensation is to achieve optimal deterrence with respect to constitutionally problematic conduct, the results are likely to be disappointing and perhaps even perverse.”).

<sup>168</sup> See *infra* Appendix B for an example substantiating these findings.

### A. *The EAJA, the GLSA, and Reform*

#### 1. *Reporting*

The EAJA is currently bereft of any reporting requirements, and has been for seventeen years.<sup>169</sup> This lack of data has restricted any meaningful empirical analysis, which also serves as an excuse to avoid EAJA reform. Without conclusions supported by actual data, parties reticent toward EAJA reform can punt when faced with difficult questions about the EAJA's problems.

Fortunately, this hurdle may soon be overcome following the House's unanimous passage of an EAJA amendment requiring yearly reports on awards and other data.<sup>170</sup> Data on EAJA awards are essential to the successful evaluation of most theoretical claims. As Mortimer and Malmshemer have recently noted, consistent data is a necessary condition for stable empirical conclusions.<sup>171</sup>

Nevertheless, there is one conclusion that needs no further bolstering before being pursued. It is unquestioned that the EAJA encourages litigation more than the American rule.<sup>172</sup> When similarly situated individuals and businesses are subject to the American rule, well-funded non-profit organizations should be as well. Certain reforms affecting a wider swath of litigants may be better served by waiting for empirical data, but continuing to allow wealthy non-profit organizations to line their pockets with attorney fees obtained through the EAJA under the ruse that data is needed before the law should be changed is to substitute pretense for reason.

#### 2. *Litigation Incentives*

The EAJA applies to only a certain class of plaintiffs.<sup>173</sup> Those excluded are simply subject to the American rule unless there is another applicable fee-shifting statute. Individual and organizational plaintiffs with

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<sup>169</sup> See GLSA Hearing, *supra* note 36.

<sup>170</sup> H.R. 4078, 112th Cong. (2012); see also Press Release, Congresswoman Cynthia Lummis, Lummis Wins Long-Sought Equal Access to Justice Act Improvements (July 27, 2012), available at <http://lummis.house.gov/news/documentsingle.aspx?DocumentID=304919>; *supra* Part II.A. A Senate Bill also proposed less detailed reporting requirements, see S. 2042, 112th Cong. (2012) ("The Attorney General shall submit to Congress and make publically available online an annual report regarding the amount of fees and other expenses awarded during the preceding fiscal year under this subsection."), but it may be mooted if the Senate reciprocates the House's vigor in support of re-imposing EAJA reporting requirements.

<sup>171</sup> Mortimer & Malmshemer, *supra* note 39, at 357.

<sup>172</sup> See *supra* notes 116-118. See generally Part III.A.

<sup>173</sup> See 28 U.S.C. § 2412(d)(2)(B); see also 5 U.S.C. § 504(b)(1)(B) (describing its agency proceeding counterpart).

net worth exceeding \$2 million and \$7 million, respectively, are excluded by the EAJA, but non-profit organizations are not subject to limitation.<sup>174</sup>

The GLSA, which reached the floor after making its way through the House Judiciary Committee on July 11, 2012, would have limited the one-way fee-shifting rule to an even smaller class of plaintiffs.<sup>175</sup> In addition to eliminating the EAJA's non-profit organization net-worth exception, the amendment as first proposed would have imposed other limitations across all classifications of plaintiffs, including requiring the prevailing party to have "a direct and personal monetary interest in the adjudication," capping a single fee award at \$200,000, and generally limiting a fee-recovering party to three adversary adjudications per year.<sup>176</sup> Finally, the GLSA would also have increased the statutory cap on an attorney's hourly rate from \$125 to \$175.<sup>177</sup>

While this Note is primarily focused on the problems associated with well-funded environmental non-profit organizations benefitting from the EAJA, many EAJA plaintiffs do not fit this description. Thus, to the extent that the GLSA modifies the ability of individuals or businesses to sue, particularly those for whom the EAJA was enacted,<sup>178</sup> I harbor reservations about making any specific recommendation—that is simply not the purpose of this Note. The focus here is on a certain class of plaintiffs that are affected in a certain manner by the EAJA's fee-shifting structure.

Under a typical one-way fee shifting regime, a plaintiff will sue when his estimated probability of winning multiplied by the judgment value is greater than his estimated probability of losing multiplied by his attorney fees.<sup>179</sup> But the EAJA varies from this general model in two ways.

First, a prevailing plaintiff receives a fee award only when the government fails to show that its position was substantially justified.<sup>180</sup> Professor Krent describes this rule as a one-way fee shift with an independent fault assessment.<sup>181</sup> Because the one-way fee shift is not automatic, the plaintiff's estimated probability of recovering his attorney fees will probably be less than his estimated probability of winning the

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<sup>174</sup> 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. § 504(b)(1)(B).

<sup>175</sup> Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012) (as introduced May 25, 2011).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> Namely parties lacking in expertise and resources to fund litigation against the government. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 9 (citing H.R. REP. 96-1434, at 20-27 (1980)).

<sup>179</sup> See *infra* Appendix A; *supra* note 117.

<sup>180</sup> 28 U.S.C. § 2412(d)(1)(A). For the administrative proceeding counterpart to § 2412(d)(1)(A), see 5 U.S.C. § 504(a)(1).

<sup>181</sup> See Krent, *supra* note 13, at 2081.

case, though this depends upon how the “substantially justified standard” is applied. The generally accepted rubric for determining that the government’s position is substantially justified is to ask whether it had a reasonable basis in both law and in fact.<sup>182</sup> This reliance on a reasonableness inquiry opens the door to uncertainty and supports the conclusion that the EAJA’s one-way fee-shifting regime will encourage litigation to a lesser extent than an automatic one-way fee-shifting regime because, theoretically, a successful plaintiff does not automatically receive a fee award.<sup>183</sup>

Second, an EAJA fee award is generally limited to compensating attorneys at \$125 an hour,<sup>184</sup> even though, as of 2010, the national average hourly rate for an attorney was estimated at \$295 an hour.<sup>185</sup> Thus, the greater the difference between the EAJA hourly cap and the market hourly rate, the more the EAJA looks and behaves like the American rule. A prevailing plaintiff would be able to recover only a portion of what he pays his attorney.<sup>186</sup> Nevertheless, the relevance of the EAJA cap is debatable.<sup>187</sup> As a result, the EAJA’s effects on the decision to litigate should be considered under both the assumption that the cap is regularly applied and that the cap is regularly evaded.

Considering these two alterations from the standard one-way fee-shifting model in turn, it logically follows, first, that the EAJA encourages

<sup>182</sup> See *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Court preferred framing the question as whether the government’s position was “justified to a degree that could satisfy a reasonable person,” but indicated this was “no different from the ‘reasonable basis both in law and fact’ formulation adopted” by many of the circuits. *Id.* This inquiry is still in use today. See, e.g., *United States v. Hurt*, 676 F.3d 649, 652 (8th Cir. 2012) (“‘Substantially justified’ means the government’s position ‘has a reasonable basis in law and fact.’”); *United States v. Pecore*, 664 F.3d 1125, 1131 (7th Cir. 2011).

<sup>183</sup> Expressed mathematically, a plaintiff will litigate when  $J \times P_p > P_{pl} \times C_p$ , where  $J$  is the judgment value,  $P_p$  is the plaintiff’s estimate of his probability of winning,  $P_{pl}$  is the plaintiff’s estimate of his probability of losing the substantially justified inquiry, and  $C_p$  is plaintiff’s attorney fees. I have adapted this framing from Shavell’s two-way fee-shifting analysis. See Hylton, *supra* note 89, at 1079.

<sup>184</sup> 28 U.S.C. § 2412(d)(2)(A) (permitting an exception if “the court determines that an increase in the cost of living or a special factor . . . justifies a higher fee”); 5 U.S.C. § 504(b)(1)(A).

<sup>185</sup> Press Release, ALM Legal Intelligence, ALM Legal Intelligence Releases 2011 Survey of Billing and Practices for Small and Midsize Law Firms (February 10, 2011), available at <http://www.businesswire.com/news/home/20110210006626/en/ALM-Legal-Intelligence-Releases-2011-Survey-Billing>.

<sup>186</sup> The plaintiff’s decision to litigate could be expressed mathematically as follows:  $P_p \times J > (1 - P_{pl}) \times (C_p \times (1 - cmr)) - P_{pl} \times C_p$ , where  $cmr$  is the cap to market ratio (hourly cap divided by market hourly rate).

<sup>187</sup> See Baier, *supra* note 33, at 37 (“The statutory cap is now a cap in name only.”); Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorney’s Fees for Unreasonable Government Conduct (Part Two)*, 56 LA. L. REV. 1, 128-29 (1995) (suggesting that EAJA fee awards are regularly made in excess of the statutory cap). Further, the statutory cap is less relevant where plaintiffs benefit from some alternate fee arrangement with their attorney.

litigation to a lesser extent than a pure one-way fee shift under all circumstances.<sup>188</sup> The magnitude of this difference depends on the parties' expectations of winning the "substantially justified" inquiry. Second, litigation will always be encouraged more than the American or English rules under the EAJA (absent a cap on the hourly fee rate). Adding the hourly cap into the equation deters litigation to a greater extent, especially where a plaintiff bears a strong but small claim. In such a situation, the EAJA actually encourages litigation to a lesser extent than the English rule.<sup>189</sup>

In predicting the effects of the EAJA, it is helpful to remember that they are bounded by the American rule on one end and a one-way model on the other. The more confident the plaintiff and/or the smaller the difference between the hourly cap and the market hourly rate, the more the incentives produced will align with a one-way regime's effects, which will strongly encourage litigation. The less confident the plaintiff, the more the incentives align with the American rule's effects, which deter small claims regardless of strength. In other words, the EAJA will always encourage litigation more than the American rule but less than a pure one-way regime.

Thus, understanding (1) that the EAJA was enacted to encourage litigation against the federal government above and beyond the American rule,<sup>190</sup> and assuming (2) that encouraging weak or frivolous claims was not included in that aspiration, the EAJA's basic structure is probably appropriate. Keeping in mind the real concern that risk aversion under a two-way regime would cut back against the incentive the regime provides to potential plaintiffs bearing strong claims,<sup>191</sup> but not wanting to encourage too much undue litigation, the EAJA strikes a decent balance. Its *intended* beneficiaries, at least in this respect, are being well served considering the need to balance competing interests.

But there is simply no need to extend such a fee shift to well-funded environmental non-profit organizations. "There is little question but that public interest groups and private attorneys who litigate frequently against the federal government benefit from one-way fee shifting."<sup>192</sup> The EAJA's tempered one-way fee shift is no different. While the incentive effects of

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<sup>188</sup> This occurs because it is more difficult for a plaintiff to win the EAJA fee shifting inquiry than it is to win the case. See *supra* notes 182 and 183 and accompanying text.

<sup>189</sup> See *infra* Appendix A.

<sup>190</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 7, at 9 (citing H.R. Conf. Rep. 96-1434, at 20-27 (1980)).

<sup>191</sup> See *supra* note 107 and accompanying text.

<sup>192</sup> Krent, *supra* note 13, at 2088.

fee shifts may have less of an effect on non-profit organizations with “a well-stocked war chest,”<sup>193</sup> the move away from the American rule at the very least encourages some litigation.<sup>194</sup> Even if only a marginal amount is encouraged, the additional money gained from obtaining fees under the EAJA can be used for other means, including funding additional litigation.<sup>195</sup> Further, the concerns about risk aversion distorting litigation incentives are inapposite to well-funded parties.<sup>196</sup> Therefore, the GLSA’s proposed EAJA amendment imposing a net worth limitation on non-profit organizations is an easy choice. This would return such organizations to the American rule, like all other financially stable entities under the Act.<sup>197</sup>

Further limiting the EAJA with other restrictions based on frequency of litigation, amounts of fee awards, and extent of an injury, however, requires careful thought about how such provisions would affect the EAJA’s intended beneficiaries and the EAJA’s incentive-based rationale. These additional limitations are perhaps meant to catch repeat litigants, thereby staying true to the purposes of the statute, or even to catch non-profits strategically skirting the net worth ceiling. But there is a risk of throwing the baby out with the bathwater. Individuals and organizations with limited resources are more likely to be induced into acting under the EAJA and would therefore be more sensitive to the imposition of additional restraints. Accordingly, I can make no strong recommendation for or against these other proposed changes.

The final substantial change included in the GLSA as first introduced is the increase of the hourly cap from \$125 to \$175. This increase would narrow the gap between the hourly rate cap and the market hourly rate, which would in turn make litigation more likely.<sup>198</sup> This would serve the bearers of strong, small claims well—the hourly cap handles a portion of the plaintiff’s attorney fees under the American rule, which has the strongest deterrent effect on those bearing small claims, regardless of

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<sup>193</sup> *Id.* at 2050.

<sup>194</sup> See Rowe, *supra* note 80, at 153.

<sup>195</sup> See Krent, *supra* note 13, at 2053. Further, the budgets of most environmental non-profit organizations include more than litigation expenses. They must decide whether pursuing litigation best serves their ideals or whether the money should be spent elsewhere.

<sup>196</sup> Rowe, *supra* note 80, at 153 (limiting discussion of the effects of fee shifting to litigants with modest means).

<sup>197</sup> In its current form, the EAJA exempts non-profit organizations and certain agricultural cooperatives from the net worth limitations. 28 U.S.C. § 2412(d)(2)(B); 5 U.S.C. § 504(b)(1)(B). There is no good reason to treat the two differently for purposes of the EAJA if the organization has a net worth of over \$7,000,000. Thus, EAJA reform should impose the net worth ceiling on both.

<sup>198</sup> See *supra* note 189 and accompanying text. The actual effect may only be marginal, however, if the hourly cap is routinely evaded. See *supra* note 187 and accompanying text.

strength. The larger the gap between the cap and market rates, the more these small claims will be deterred. Further, there are more appropriate structures with which to alter parties' litigation incentives than the creation of a statutory cap on fee awards that is disconnected from the market rate. Accordingly, this effort by the EAJA reformers, even though affecting all EAJA litigants, seems commendable.

Ultimately, failing to impose a net worth limitation on non-profit organizations under the EAJA also risks perpetuating inappropriate behavior such as crisis litigation and sweetheart suits.<sup>199</sup> Based on the findings from Part III, it is evident that the EAJA's one-way fee-shifting regime only encourages litigation.<sup>200</sup> And with that comes the risk of subsidizing inappropriate litigation behavior without any concurrent benefit.<sup>201</sup> These tactics may not be altogether halted by keeping well-funded environmental groups from receiving attorney fees in lawsuits where the EAJA is applicable, but this should reduce the incentive and eliminate taxpayer subsidy and concomitant sanction of such behavior.

Though some scholars have wrestled with whether environmental groups sue because of the EAJA or whether EAJA awards simply follow an already naturally or strategically litigious lot,<sup>202</sup> this question need not be answered before pursuing EAJA reform. The clearest takeaways from this Note are (1) the EAJA encourages litigation beyond the American rule and (2) environmental non-profit organizations with a net worth over the EAJA's ceiling—benefiting from the EAJA's fee shifting structure—are not the intended beneficiaries. Returning non-profit organizations to the American rule, like their non-tax exempt counterparts, should be one of the first EAJA reforms.<sup>203</sup>

### 3. *Unrestrained Government Expenditure*

The primary additional expenses associated with a fee-shifting regime come in two forms: (1) expenses from administering the fee shift and (2) expenses resulting from the potential increase in litigation. As discussed above, the latter type of expense may be a necessary cost accompanying

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<sup>199</sup> See *supra* notes 47 and 48 and accompanying text.

<sup>200</sup> See *supra* note 124 and accompanying text.

<sup>201</sup> See *supra* notes 46 through 51 and accompanying text.

<sup>202</sup> See, e.g., Mortimer & Malmshemer, *supra* note 39, at 357.

<sup>203</sup> EAJA's secondary effects on litigation track those discussed in Part III.A.3 and need not be repeated here. Thus, for the same reasons that the EAJA's basic incentive structure should be preserved, the need for deterrence (if the government can be deterred) counterbalances the associated increase in litigation costs and the risk of a plaintiff's delay tactics under the regime. Where a plaintiff has limited resources, the need to promote using a private right of action to protect one's rights and temper inappropriate behavior ought to be encouraged.



the appropriate incentive given to parties of modest means by the EAJA. However, administrative expenses are dependent upon the complexity of the fee-shifting regime. “[T]here are significant hidden costs in litigation spawned by one-way fee shifting, costs in terms of attorney time and judicial resources. Those costs are likely to be particularly high when fee shifting statutes contain many issues that the parties may dispute.”<sup>204</sup>

Already a complicated fee shifting statute, the EAJA would only become more so if the GLSA is passed in its entirety. The EAJA presently includes an inquiry into whether the government’s position was substantially justified and gives the court discretion to increase the rate under which an attorney’s fee is calculated and reduce or deny an award to a prevailing party for protracting final resolution of the case.<sup>205</sup> The GLSA would additionally require a more detailed inquiry into whether the prevailing party had a sufficient interest in the adjudication in order to receive fees, an inquiry into the litigant’s past litigation history under the EAJA, and it would give a court additional discretion to deny an award if the prevailing party “acted in an obdurate, dilatory, mendacious, or oppressive manner, or in bad faith.”<sup>206</sup> With reducing administrative expenditures as the rubric, the EAJA is already too complicated, and further reform should embrace a simplifying approach. Imposing the net-worth cap does not offend notions of simplicity, but the other modifications do.

The cost of enacting the GLSA wholesale may be countered by a reduction in litigation levels, thereby decreasing total administrative costs. But it is unclear that the GLSA’s tightening-up of the EAJA would speak clearly enough to litigants to dissuade them from attempting to recover their attorney fees. With so many litigable issues, litigation levels may actually increase as a result of its complexity, thereby making the EAJA even more expensive to administer.

#### *4. Discouraging Settlement*

Just as the EAJA alters the litigation incentives of the automatic one-way fee shift, it also alters the settlement incentives in most circumstances

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<sup>204</sup> Krent, *supra* note 13, at 2083.

<sup>205</sup> 5 U.S.C. § 504(a)(1), (3), (b)(1)(A); 28 U.S.C. § 2412(d)(1)(A), (C), (2)(A).

<sup>206</sup> Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012) (as introduced May 25, 2011).

because settlement is less likely when the parties have more about which to disagree.<sup>207</sup>

The EAJA adds complexity and potential uncertainty through its “substantially justified” inquiry preceding the fee shift. Rather than having the probability of a party recovering fees also turn on the probability of that party prevailing, a plaintiff weighing his settlement options under the EAJA will most likely assign a different probability to his chances of winning than to his chances of recovering fees. This results from, as has been discussed, the difference between the civil evidentiary standard and the substantially justified standard, with the latter treating the government more favorably.<sup>208</sup> Accordingly, the plaintiff’s estimate about his likelihood of winning the case should always be higher than his likelihood of winning the substantially justified inquiry; the inverse is true for the government.

Additionally, the EAJA’s hourly cap also modifies settlement incentives when compared to an automatic one-way fee shift by limiting the amount of fees that can be shifted (and thus working like the American rule in this respect).

Therefore, under the EAJA (without initially considering the hourly cap<sup>209</sup>), the government’s maximum settlement offer equals its estimate of the plaintiff’s probability of winning the case ( $P_d$ ) multiplied by the judgment value ( $J$ ) plus the product of its estimate of its probability of losing the fee shift ( $P_{dl}$ ) and the plaintiff’s total attorney fees ( $C_p$ ) and adding its own attorney fees that would result if litigation is pursued ( $C_{d2}$ ). The plaintiff’s minimum settlement demand will be his estimated probability of winning the case ( $P_p$ ) multiplied by the sum of the judgment value ( $J$ ) and his pre-settlement negotiation attorney fees ( $C_{p1}$ ) minus the product of his estimated probability of losing the fee shift ( $P_{pl}$ ) and his attorney fees if litigation is pursued ( $C_{p2}$ ).

**Defendant’s MSO:**  $P_d \times J + P_{dl} \times C_p + C_{d2}$

**Plaintiff’s MSD:**  $P_p \times (J + C_{p1}) - P_{pl} \times C_{p2}$

If the EAJA’s hourly cap is considered, then the fees that may be shifted must be limited by the ratio of the hourly cap to the market hourly rate ( $cmr$ ). The attorney fees outside of the cap will be considered by the

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<sup>207</sup> Krent, *supra* note 13, at 2081-82 (“This result is intuitive—when parties have more to disagree over, the prospect of agreement dims.”).

<sup>208</sup> See *supra* note 182 and accompanying text.

<sup>209</sup> It is worth considering the EAJA with and without the hourly cap, because questions about whether the hourly cap is regularly applied are not answered in this Note.

plaintiff in reducing his benefit from litigating and by the government in reducing its cost<sup>210</sup>:

$$\text{Defendant's MSO: } P_d \times J + P_{dl} \times C_p \times cmr + C_{d2}$$

$$\text{Plaintiff's MSD: } P_p \times (J + C_{p1}) - (1 - P_{pl}) \times (C_{p2} \times (1 - cmr)) - P_{pl} \times C_{p2}$$

Based on this analysis, settlement is generally less likely for both close and weak claims under this regime when compared to the other fee-shifting regimes; considering the EAJA's hourly cap only makes settlement even less likely.<sup>211</sup> The reduction in the bargaining span is attributable to the number of variables involved that give the parties more issues about which to disagree.<sup>212</sup>

Strong, small claims, however, receive a boost in settlement prospects under the EAJA as compared to a pure one-way shift system (though failing to surpass the American rule's encouraging effect), even when the cap is considered (though to a lesser extent), because the plaintiff's minimum settlement demand decreases at a greater rate than does the defendant's maximum settlement offer. This results from the plaintiff feeling the loss of recovering his attorney fees more than the defendant feels the benefit of no longer having to pay for a portion of the plaintiff's fees.

In addition to these specific points, and as a general rule, the EAJA's effects on the government's maximum settlement offer and the plaintiff's minimum settlement demand will never be higher than those resulting from one-way fee shifting and will never be lower than those resulting from the American rule. This occurs because if the government's position was substantially justified, then the plaintiff is subjected to the American rule. On the other hand, if the plaintiff does recover his attorney fees, then he is the beneficiary of a one-way fee shift. Nevertheless, because the plaintiff's and the defendant's estimates of the plaintiff's probability of winning the case need not correlate with their estimates of the plaintiff's probability of recovering his attorney fees, the bargaining span fluctuates somewhat inconsistently. The closer the parties get to agreeing, the more the results will look like either the American rule or the one-way fee shift, depending

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<sup>210</sup> The aim in considering the EAJA's hourly cap compared to the market rate is to get at what the litigation is really costing the parties. To the extent that the market rate does not reflect what the litigation is costing the parties, then this analysis would need adjusting. *See supra* note 187 and accompanying text for a discussion of the hourly cap's relevance.

<sup>211</sup> *See infra* Appendix B, Scenarios 1 and 3.

<sup>212</sup> *See* Krent, *supra* note 13, at 2080-81.

upon whether the parties' estimates of the plaintiff's likelihood of winning favor the plaintiff (one-way) or defendant (American rule).<sup>213</sup>

In sum, the GLSA's attempt at tightening up the EAJA across the board,<sup>214</sup> as compared to simply subjecting non-profits to the net worth ceiling, risks discouraging settlement by perpetuating areas of potential disagreement between the parties.

If one is operating under the normative assumption that all claims should be settled in all circumstances, then there is no clear fee-shifting model that gets it right every time. Under the American rule, settling strong claims is encouraged and settling weak ones discouraged. The English rule fails to encourage settling strong claims, but encourages settling weak ones. Finally, one-way fee shifting does more than the English rule and less than the American rule in encouraging settling strong claims, and less than the English rule and more than the American rule in encouraging settling weak claims. All the standard models have the same general effect on settlement incentives with respect to close claims, but the EAJA does make settling these claims less likely because of its added complexity.<sup>215</sup>

Fortunately, a healthy debate about the desirability of settlement and its role in a legal system has been ongoing since Professor Owen Fiss's conversation starter, *Against Settlement*.<sup>216</sup> Most scholars have more recently concluded (or conceded) that settlement has an important place in resolving disputes, though many still deliberate over its proper role.<sup>217</sup> Some general principles can nevertheless be garnered from this scholarship that are intuitively appealing.

First, some cases ought to be litigated in order to promote the public good because civil adjudication produces rules and precedents, and publicizes facts through discovery.<sup>218</sup> Under this rubric, the public would be better served if close claims were litigated because of the unresolved nature of the law and facts. Conversely, where a plaintiff brings a strong claim, its confidence must spring, at least in part, from perceived clarity in the law. Encouraging the settlement of such claims, therefore, would not

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<sup>213</sup> See *infra* Appendix B.

<sup>214</sup> See Government Litigation Savings Act, H.R. 1996, 112th Cong. (2012).

<sup>215</sup> See *infra* Appendix B.

<sup>216</sup> Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

<sup>217</sup> See, e.g., David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) ("[I]maginary legal systems in which no cases settle, like those in which all cases settle, would be thoroughly undesirable."); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2669 (1995) ("[W]e need both adjudication and settlement.").

<sup>218</sup> See Luban, *supra* note 217, at 2622-26.

risk compromising benefits inuring only from adjudication.<sup>219</sup> Finally, encouraging the settlement of weak claims may reward parties who use the specter of potentially expensive litigation to coax some money out of their opponents. Though the law is probably equally clear in cases of weak and strong claims alike, and therefore the benefits of litigating mentioned above are lacking in some respects, rewarding weak claims with settlement does not feel right, even if it is less expensive for a defendant to settle a weak claim than to litigate and “win.” This is because adjudication, as opposed to settlement, is a “visible expression of public values,”<sup>220</sup> and a claim’s weakness and potentially inaccurate facts are never proven in settlement.<sup>221</sup> This truth-proving value of adjudicating weak claims cuts back against the justification for encouraging their settlement.

Thus, settlement ought to be encouraged in cases of strong claims, but not in cases of weak or close claims. The American rule best meets this standard because it generally encourages settling strong claims and discourages settling weak claims to the greatest extent.

Accordingly, this finding reinforces the necessity of imposing the net worth limitation on non-profit organizations because doing so would subject them to the American rule. From the settlement perspective, further modifications complicating the EAJA should be cautioned against; rather, reform efforts should focus on simplification.

##### *5. Unwarranted Litigation Advantage*

To further solidify the conclusion that permitting well-funded non-profits to obtain their attorney fees under the EAJA is counter to the Act’s fundamental premise, it is worth noting that in some cases individuals and businesses with limited resources are paired with the government in defending against actions initiated by wealthy non-profit organizations.<sup>222</sup> But the very class of litigants whom the EAJA is designed to protect against government pestering are subject to the American rule, which, as demonstrated, acts as a disincentive to joining the litigation when their interests and the government’s coincide. This is not an argument for

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<sup>219</sup> Cf. Menkel-Meadow, *supra* note 217 (discussing reasons why settlement may be favorable in more circumstances).

<sup>220</sup> See Luban, *supra* note 217, at 2626.

<sup>221</sup> *Id.* at 2639. (“[I]f legal justice arises from applying law to facts, it presupposes accurate facts. To the extent that out-of-court settlements are based on bargaining power and negotiation skills, facts lose their importance to the outcome, and the outcome will resemble legal justice only coincidentally.”).

<sup>222</sup> See *supra* note 79 and accompanying text.

permitting these parties to recover their fees; rather, the playing field should simply be equalized.

A. *Anticipating the End-around*

The GLSA's sponsors have done at least two important things right. First and foremost, they have advocated a hearty reporting regime, which has a strong chance of becoming law. Second, they have pushed to equalize all litigants under the Act in terms of net worth—those above the ceiling get no special treatment, because the EAJA was not enacted for them. The remaining modifications are less worthy of support when considering their effects on administrative costs and settlement incentives. They may nevertheless be true to the EAJA's fundamental purpose, directed at repeat litigators needing no prompting to sue. Or they might be additional netting designed to catch crafty litigants skirting the net worth ceiling. However, reformers should proceed cautiously in this respect because of the risk of affecting the EAJA's intended beneficiaries and the need for bipartisan support.

A more appropriate avenue through which to inject further limitations on litigants attempting to circumvent the net worth ceiling<sup>223</sup> is the ceiling itself, applying it in a substance-over-form manner to the express litigant and any other entities too closely related to be considered separate. This would reduce the number of litigable issues, thereby increasing the likelihood of settlement and decreasing administrative costs.<sup>224</sup>

Though a detailed discussion about the best way to oversee this imposition of the American rule on wealthy non-profit organizations is one for another day, corporate law may provide a helpful starting point. Like those concerned about a “subsidiary [becoming] a mere conduit or instrumentality of the parent corporation,”<sup>225</sup> any EAJA reformer advocating for the application of the net worth ceiling to all parties should be concerned about strategic behavior that allows well-funded entities to benefit from the EAJA by litigating through less wealthy, related entities.

Courts determining whether to pierce the corporate veil and hold a parent corporation liable for its subsidiary will consider “many factors [that] resolve themselves primarily into what might be termed the *test of control*, namely, the extent to which the parent controlled or dominated the

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<sup>223</sup> This assumes, of course, that well-funded litigants will care enough about recovering attorney fees to get crafty. *See supra* Part IV.A.2.

<sup>224</sup> *See supra* notes 204 and 207 and accompanying text.

<sup>225</sup> 16 AM. JUR. PROOF OF FACTS 2D 679 § 1 (originally published in 1978).

subsidiary corporation.”<sup>226</sup> EAJA reformers might consider implementing a similar inquiry to ensure that the litigants fitting under the net worth ceiling are not being controlled by entities that may either individually or in aggregate with the litigant have a net worth exceeding the ceiling. Federal legislators are not unfamiliar with such an inquiry.<sup>227</sup> Though this would add one litigable issue, it focuses reform efforts on one of the EAJA’s largest problems and avoids the risk of tightening EAJA coverage for its intended beneficiaries (thereby garnering additional political capital)—something that the GLSA risks doing in some other respects.

In summary, the net worth limitation should be protected by requiring some careful inquiry by the courts, perhaps modeled after corporate law, into whether the litigant in question is so closely associated with an individual or organization with a net worth exceeding the EAJA’s ceiling that they are effectively shielding the latter entity from the ceiling’s effect.

#### CONCLUSION

A foremost consideration when contemplating EAJA reform is that the proposed legislation’s successful passage will depend upon bipartisan support. Reform efforts have a better chance of garnering support when they are measured and implemented carefully and thoughtfully. The EAJA’s specialized one-way fee shift theoretically encourages litigation, and until empirical evidence proves otherwise, its *purpose* should be honored with respect to plaintiffs of modest means. This Note’s findings support the conclusion that the EAJA’s purpose can be effected under its current structure if its beneficiaries are accordingly limited.

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<sup>226</sup> *Id.* at § 6. For an example of such factors, which are generally state-specific, see, e.g., *Skidmore, Owings & Merrill v. Canada Life Assur. Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990) (applying Colorado law) (“In deciding whether to allow disregard of the corporate form, we look for the existence of the following factors: (1) The parent corporation owns all or majority of the capital stock of the subsidiary. (2) The parent and subsidiary corporations have common directors or officers. (3) The parent corporation finances the subsidiary. (4) The parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation. (5) The subsidiary has grossly inadequate capital. (6) The parent corporation pays the salaries or expenses or losses of the subsidiary. (7) The subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation. (8) In the papers of the parent corporation, and in the statements of its officers, ‘the subsidiary’ is referred to as such or as a department or division. (9) The directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take direction from the parent corporation. (10) The formal legal requirements of the subsidiary as a separate and independent corporation are not observed.”).

<sup>227</sup> *See, e.g.*, 15 U.S.C. § 6809(6) (defining affiliate); 26 U.S.C. § 1563(a) (defining a controlled group of corporations for tax purposes); 29 U.S.C. § 1301(a)(14) (discussing organizations under “common control”); 42 U.S.C. § 7625 (inquiring into control via stock ownership inquiry).

Reform is therefore possible to address the problem of well-funded environmental and other non-profit organizations, which need no incentive to litigate, benefitting under and perhaps taking advantage of the EAJA to engage in inappropriate litigation behavior, like crisis precipitation litigation or sweetheart suits. Reform should proceed primarily through imposing a net worth ceiling on non-profit organizations, thereby treating them as equivalent to other wealthy organizations by returning to the American rule as the fee-shifting default. This modification balances the competing needs of reducing frivolous or nuisance litigation with preserving the EAJA's incentive structure for impecunious parties.

To give the net worth inquiry any teeth, however, imposing the net worth ceiling on non-profit organizations should be accompanied by a substance-over-form inquiry into whether the non-profit in question is being used as a screen to circumvent the net worth provision for an otherwise over-the-limit individual or organization. Well-developed corporate law, with respect to measuring the substance of the parent-subsidiary relationship, is a nice starting point.

Based upon the unanimous support for including reporting requirements in the EAJA in the House recently, change may be around the corner, but perspective must precede reform.

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♦ Tayler W. Tibbitts, B.S. 2010 Brigham Young University-Idaho; J.D. 2013 University of Virginia School of Law. I send a special thank you to Professor Caleb Nelson for his insight and encouragement, my wife for her patience, and my children for their optimism, all of which contributed greatly to my writing this Note.



## APPENDIX A

Below is a summary of the findings from Part III Section A, analyzing three different types of claims under the major fee-shifting models.<sup>228</sup> The following table explains the variables and the subsequent one presents the findings.

Variables	Value			Description
	Strong, Small Claim	Weak Claim	Close Claim	
$J$	\$10,000	\$50,000	\$50,000	Judgment value
$C_p$	\$8,000	\$15,000	\$15,000	Plaintiff's attorney fees
$C_d$	\$8,000	\$15,000	\$15,000	Defendant's attorney fees
$P_p$	75%	25%	50%	Plaintiff's estimate of his probability of winning the case
$P_{pl}$	40%	80%	60%	Plaintiff's estimate of his probability of losing the fee shift
$cmr$	50%	50%	50%	Cap to market ratio – EAJA hourly cap (\$125) divided by market rate estimate (\$250)

<sup>228</sup> The mathematical models employed for the American rule and the English rule are directly attributable to Professor Hylton's excerpting of Shavell's analysis, and the one-way and EAJA formulas have been adapted and added to therefore. See Hylton, *supra* note 89, at 1078-79. Note also that this analysis does not, however, factor in Professor's Rowe's risk aversion findings, which are impossible to accurately quantify at this level. See *supra* notes 107-110, 120.

Incentive/ (Disincentive) Surplus	American Rule	Two-way	One-way
<b>Formulas</b>	$P_p \times J - C_p$	$P_p \times J - (1 - P_p) \times (C_p + C_d)$	$P_p \times J - (1 - P_p) \times C_p$
<b>Close claim</b>	\$10,000	\$10,000	\$17,500
<b>Strong, small claim</b>	(\$500)	\$3,500	\$5,500
<b>Weak claim</b>	(\$2,500)	(\$10,000)	\$1,250

Incentive/ (Disincentive) Surplus	EAJA	EAJA (including cap)
<b>Formulas</b>	$P_p \times J - P_{pl} \times C_p$	$P_p \times J - (1 - P_{pl}) \times (C_p \times (1 - cmr)) - P_{pl} \times C_p$
<b>Close claim</b>	\$16,000	\$13,000
<b>Strong, small claim</b>	\$4,300	\$1,900
<b>Weak claim</b>	\$500	(\$1,000)

## APPENDIX B

Below is a summary of the findings from Part III, Section B and an analysis of those findings under three hypothetical situations.<sup>229</sup> These hypotheticals demonstrate a fee-shifting scheme's effect on the likelihood of settlement and settlement amounts when the plaintiff is more optimistic than the defendant is pessimistic, when the parties have the same expectations on the outcome if the case were litigated, and when the plaintiff is more pessimistic than the defendant. It perhaps bears reminding that the larger the bargaining span, the more likely settlement is to occur and vice versa.

See the tables below for the formulas and variables employed in each scenario:

<b>Formulas</b>			
	<b>American Rule</b>	<b>Two-way</b>	<b>One-way</b>
Defendant's Max. Settlement Offer ( $d$ )	$P_d \times J + C_{d2}$	$P_d \times (J + C_p + C_{d2}) - (1 - P_d) \times C_{d1}$	$P_d \times (J + C_p) + C_{d2}$
Plaintiff's Min. Settlement Demand ( $p$ )	$P_p \times J - C_{p2}$	$P_p \times (J + C_{p1}) - (1 - P_p) \times (C_{p2} + C_d)$	$P_p \times (J + C_{p1}) - (1 - P_p) \times C_{p2}$
Settlement Bargaining Span	$d - p$	$d - p$	$d - p$

<sup>229</sup> See *supra* note 149 and accompanying text. Note also that this analysis does not, however, factor in Professor's Rowe's risk aversion findings, which are impossible to accurately quantify at this level. See *supra* notes 158 and 165 and accompanying text.

Formulas		
	EAJA	EAJA (including cap)
Defendant's Max. Settlement Offer ( $d$ )	$P_d \times J + P_{d1} \times C_p + C_{d2}$	$P_d \times J + P_{d1} \times C_p \times cmr + C_{d2}$
Plaintiff's Min. Settlement Demand ( $p$ )	$P_p \times (J + C_{p1}) - P_{pl} \times C_{p2}$	$P_p \times (J + C_{p1}) - (1 - P_{pl}) \times (C_{p2} \times (1 - cmr)) - P_{pl} \times C_{p2}$
Settlement Bargaining Span	$d - p$	$d - p$

Variable	Value in Scenario			Description
	Scenario 1	Scenario 2	Scenario 3	
$J$	\$1,000,000			Judgment value
$C_p$	\$100,000			Plaintiff's attorney fees
$C_{p1}$	\$15,000			Plaintiff's pre-settlement attorney fees
$C_{p2}$	\$85,000			Plaintiff's attorney fees if litigation is pursued
$C_d$	\$100,000			Defendant's attorney fees
$C_{d1}$	\$15,000			Defendant's pre-settlement attorney fees
$C_{d2}$	\$85,000			Defendant's attorney fees if litigation is pursued
$P_p$	50%	90%	20%	Plaintiff's estimate of his probability of winning the case
$P_d$	50%	75%	60%	Defendant's estimate of Plaintiff's probability of winning the case

$P_{pl}$ <sup>230</sup>	60%	40%	85%	Plaintiff's estimate of his probability of losing the fee shift
$P_{dl}$	40%	60%	35%	Defendant's estimate of his probability of losing the fee shift
\$125				EAJA attorney fee award hourly cap
\$250				Estimated market attorney hourly rate
$cmr$	50%	50%	50%	Cap to market ratio – EAJA hourly cap divided by market rate estimate

#### A. Scenario 1

Scenario 1 – Close Claim					
	American Rule	Two-way	One-way	EAJA	EAJA (incl. cap)
Def.'s Max. Settlement Offer	\$585,000	\$585,500	\$635,000	\$625,000	\$610,000
Plaintiff's Min. Settlement Demand	\$415,000	\$415,000	\$465,000	\$464,000	\$447,000
Settlement Bargaining Span	<b>\$170,000</b>	<b>\$170,000</b>	<b>\$170,000</b>	<b>\$161,000</b>	<b>\$158,000</b>

<sup>230</sup> Note the logical conclusion that because the standard for winning a case and the standard for getting fees are different, the former more difficult than the latter for a plaintiff, the plaintiff's estimated probability of losing the fee shift will always be greater than his estimated probability of losing the actual case.

**B. Scenario 2**

<b>Scenario 2 – Strong Claim</b>					
	<b>American Rule</b>	<b>Two-way</b>	<b>One-way</b>	<b>EAJA</b>	<b>EAJA (incl. cap)</b>
Def.'s Max. Settlement Offer	\$835,000	\$885,000	\$910,000	\$895,000	\$865,000
Plaintiff's Min. Settlement Demand	\$815,000	\$895,000	\$905,000	\$881,000	\$855,500
Settlement Bargaining Span	<b>\$20,000</b>	<b>(\$10,000)</b>	<b>\$5,000</b>	<b>\$14,000</b>	<b>\$9,500</b>

**C. Scenario 3**

<b>Scenario 3 – Weak Claim</b>					
	<b>American Rule</b>	<b>Two-way</b>	<b>One-way</b>	<b>EAJA</b>	<b>EAJA (incl. cap)</b>
Def.'s Max. Settlement Offer	\$685,000	\$705,000	\$745,000	\$720,000	\$702,500
Plaintiff's Min. Settlement Demand	\$115,000	\$55,000	\$135,000	\$142,750	\$136,375
Settlement Bargaining Span	<b>\$570,000</b>	<b>\$650,000</b>	<b>\$610,000</b>	<b>\$577,250</b>	<b>\$566,125</b>