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AMERICANS REJECT THE ENGLISH RULE ("LOSER PAYS")

BACKGROUNDER

The founders of our nation believed our civil courts should be available to everyone, not just kings and aristocrats. That's why they said "no" to the English Rule, sometimes called "loser pays." In our country, we stand by the American Rule.[1]

Some political and corporate lobby groups have recently urged replacing our American Rule with the English Rule. This is an appalling and anti-patriotic idea. In fact, this proposal is perhaps the singularly most unpopular "tort reform" ever considered.[2] Nearly every state rejects it. As Indiana governor in 2013, Mike Pence withdrew support for it following significant opposition by state lawmakers.[3]

That's because the English Rule would wipe out legitimate lawsuits while saving no money. Its sole purpose is to benefit big corporations, insurance companies and wrongdoers who kill or injure innocent people, including children. It has no place in America.

WHAT IS THE "ENGLISH RULE"?

The English Rule is a "fee-shifting" rule that requires you to pay the hourly fees and court costs of a big corporation or insurance company if you happen to lose against them in court. It means, by way of example, that if you sue General Motors and the company prevails in court, you would have to pay all of GM's inflated hourly corporate legal bills. Even when you have a strong legal case, the risk of financial ruin if a wrongdoer overwhelms you in court and wins is likely not a risk worth taking. That is why big corporations want this law. It would not only chill our right to trial by jury guaranteed by the 7th Amendment to our Constitution and nearly every state but also allow bad corporate actors to get away with doing harm with no accountability.

WHAT IS THE "AMERICAN RULE"?

The American Rule says that parties in lawsuits are responsible for their own costs and fees – not those of the other side. Under this rule, an everyday American with a legitimate case does not

have to fear pursuing it on the chance they would lose and be economically devastated by having to pay all of a corporation's or insurance company's legal costs. Their constitutional rights are preserved. It is why the American Rule has always existed here.

DO MOST STATES SUPPORT THE AMERICAN RULE?

Yes. There are just a handful of exceptions, such as Alaska,[4] and a few states in very specific and limited circumstances.[5] Texas enacted a version of the English Rule in 2011. Its horrendous impact can be illustrated through the story of Connie Spears. Her legs were unnecessarily amputated because of apparent negligence by ER doctors. Since Texas adopted the English Rule and enacted other state "tort reforms," Connie could not find an attorney. Finally, one heroic attorney took her case, saying, "Her life has basically been ruined by all of this, and there was just no way I could turn her down." However, "the case fell apart under the new expert-witness rules," and "if the patient "fail[s] to produce adequate expert reports within 120 days of filing their cases, they are liable for defendants' legal fees." Connie tried but couldn't meet this time-frame because of the law's punishingly difficult requirements. As the *Texas Tribune* wrote, "With her retirement savings tapped and her husband out of work, she is afraid they will lose their home."[6] Connie died several months later.

WHAT ABOUT OTHER COUNTRIES, LIKE ENGLAND?

Britain, of course, has the English Rule. But their system is very different, most particularly because "legal expense" insurance is common there. Someone who cannot afford the risk of paying a corporation's legal costs can often purchase such insurance – if they can afford the expensive premium that is. Among the many problems with this system, aside from the cost, is that it turns the insurance industry, which represents defendants in cases, into the gatekeeper of who gets to use the courts. That is not the American way. Our justice system was founded on the principle that the courthouse doors should be open to all no matter their income. The English Rule can also increase overall legal system costs because there is inevitably additional litigation over the payment of the legal fees.

IS THE U.S. CIVIL JUSTICE SYSTEM OVERRUN WITH FRIVOLOUS LITIGATION?

No, unless you count banks and debt collectors who are flooding the courts.[7] Nearly half of the civil caseload is contract-based, which in addition to debt collections and mortgage foreclosures *against* consumers, are often corporations suing each other.[8] As for personal injury cases – the target of English Rule proponents – those kinds of lawsuits represent only 7% of all incoming civil cases today.

Notably, in the 1990s, the Rand Institute for Civil Justice found that for the typical injury, "the injured person does not even consider the notion of seeking compensation from some other person or entity…." Only 10 percent file a claim, which includes informal demands and insurance claims. Only two percent file a lawsuit.[9] Considering the work of current Food and Drug Administration Commissioner Marty Makary, formerly of Johns Hopkins University School of Medicine, who found that only about 1% of adverse events due to medical negligence result in a claim,[10] it is clear little has changed since Rand's initial study. If anything, fewer

victims are choosing to sue. Far more harm is occurring for which no one is being held accountable.

Moreover, if someone does go to court, our legal system has checks and balances in place so that if a person brings a case that a judge deems frivolous, the case is thrown out and sanctions may be available. But the truth is that attorneys do not bring frivolous cases because lawyers who represent injured people are only paid if they win. Many conservatives have praised this system for screening out baseless litigation. They believe the system works.[11]

IS THERE A "FRIVOLOUS LAWSUIT HIDDEN TAX"?

No. An inflammatory "$4,200 frivolous lawsuit hidden tax" figure has been listed in some recent paid advertising, as if thousands in cash would end up in our pockets by enactment of the English Rule. It is absurd. In fact, the entire notion of a "hidden tax" or "tort tax" has been widely debunked for years.[12] The number was concocted by the Institute for Legal Reform (ILR), the "tort reform" branch of the nation's second largest corporate lobby group, the U.S. Chamber of Commerce.[13] To reach it, ILR does not look at anything remotely connected to the courts: jury verdicts, settlements or even the costs of maintaining our civil court system. Instead, it totals insurance premiums. Premiums incorporate all kinds of bloated insurance industry expenses – multimillion-dollar executive salaries and bonuses, jet planes, advertising – not to mention the industry's enormous profits.[14] It also includes auto liability claims (such as fender-benders) that are overwhelmingly settled without claimants hiring attorneys or suing anyone. In sum, not only does ILR's figure have nothing to do with so-called "frivolous lawsuits," it has nothing to do with lawsuits or the legal system at all.

IF THERE WERE FEWER LAWSUITS, WOULD AMERICANS SAVE MONEY?

No. The only possible avenue for cost savings would be lower insurance premiums for policyholders. But five decades of evidence show that this never happens.[15] Weakening our legal rights ("tort reform") may reduce costs for insurers. But those cost savings are never passed on to policyholders. That money goes right into the pockets of insurance companies.

In fact, because the legal system saves far more money than it costs, the English Rule will cost us money. That's because the civil justice system has an important economic function: to deter "noncost-justified accidents," with tort law creating economic incentives for "allocation of resources to safety."[16] The amount of money lawsuits actually save local, state and federal economies in terms of injuries and deaths prevented, health care costs not incurred, wages not lost and so on is incalculable. And it is important to note that proposals to block legitimate lawsuits do not eliminate injuries or the need for compensation. They merely shift the costs away from the wrongdoer onto someone else, namely taxpayer-funded health and disability programs like Medicaid. We all pay for that.

WHAT ARE THE COSTS OF THE CIVIL JUSTICE SYSTEM?

While no entity has ever credibly compiled the costs of the civil justice system, we do know certain things. According to the most recent Benchmark Survey from RIMS, the annual insurance and claims costs for U.S. businesses including property damage, workers compensation and all other premium and claim costs is just $10 per $1000 of revenue, where it has hovered for years.[17] Meanwhile small business surveys have consistently listed "lawsuits" or "liability" at the bottom of their list of concerns, if they are mentioned at all.[18] In fact, this issue – the cost of liability and lawsuits – now ranks an extraordinary 72nd out of 75 possible topics of concern to small business owners.[19] Needless to say, small businesses, like the rest of the country, have other priorities.

NOTES

[1] Our rule "took root in colonial America and matured during the nineteenth century." John F. Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice," 42 *Am. U. L. Rev*. 1567 (1993). As one scholar has written, "The American acceptance of ideas about easy access and the value of counsel were signaled on the civil side by the resounding rejection" of the English Rule. Stephan Landsman, "The History of Contingency and the Contingency of History," 47 *DePaul L. Rev*. 261 (1998).

[2] "Tort reform" laws make it more difficult for injured people to sue in civil court, or limit the power of judges and juries to make decisions in injury cases. But even Victor Schwartz, General Counsel of one of the nation's largest tort reform lobby groups, the American Tort Reform Association, testified against the English Rule, telling Congress, "Loser-pays has not been something that I think can work well in this country...." Hearing before the Committee on the Judiciary, House of Representatives (108th Congress), June 22, 2004, https://www.congress.gov/event/108th-congress/house-event/LC14886/text

[3] Mary Beth Schneider, "Gov. Mike Pence-backed tort reform bill exits quietly," *Indianapolis Star*, January 31, 2013.

[4] *See* Matthew Naiman, "The Plaintiff's Plight: Altering Alaska's Rule 82 to Better Compensate Plaintiffs," 39 *Alaska L. Rev.* 139 (2022), https://scholarship.law.duke.edu/alr/vol39/iss1/14; Susanne Di Pietro, "The English Rule at Work in Alaska," 80 *Judicature* 88 (September-October 1996). ("[T]he effects of Alaska's English rule were complex and often contradictory.")

[5] For example, Colorado has a fee-shifting provision but only as part of its car Lemon Law. The other area where a few states have enacted fee-shifting provisions has been in the context of "offer of settlement" or "offer of judgment" statutes, which are very different. Early offer and settlement programs allow a wrongdoer to approach a victim, or the family of an injured child, and offer them money to settle a case before the family has any idea what will be needed to provide care. Victims may also be unrepresented by counsel. If the family rejects an offer, goes to trial and wins their case but obtains a judgment that is simply less than the offer (or loses), they must pay the defendants' attorney fees and costs. The details of these laws vary. Some apply only in medical malpractice cases, for example. But each one tilts the playing field in favor of a defendant and penalizes victims. States that have some versions of this include: California, Colorado, Georgia, North Carolina, Oklahoma, Oregon, South Carolina and Washington. Notably, however, in 1985, Florida repealed its loser pays law for medical malpractice cases that had been in effect in the 1980s.

[6] Becca Aaronson, "Despite Counsel, Amputee Hindered by Tort Laws," *Texas Tribune*, January 25, 2013, https://www.texastribune.org/2013/01/25/double-amputee-challenges-texas-tort-reform

[7] *See*, *e.g.*, Pew, "Debt Collection Cases Continued to Dominate Civil Dockets During Pandemic," September 18, 2023, https://www.pewtrusts.org/en/research-and-analysis/articles/2023/09/18/debt-collection-cases-continued-to-dominate-civil-dockets-during-pandemic; Pew, "How Debt Collectors Are Transforming the Business of State Courts," May 6, 2020, https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/how-debt-collectors-are-transforming-the-business-of-state-courts

[8] *See* Center for Justice & Democracy, "How Low Can They Go? State Civil, Tort, Med Mal, Products Caseloads and Jury Trials," October 24, 2024, https://centerjd.org/content/how-low-can-they-go-state-civil-tort-med-mal-products-caseloads-and-jury-trials

[9] Rand Institute for Civil Justice, *Compensation for Accidental Injuries in the United States* (1991).
[10] Martin A. Makary and David E. Newman-Toker, "Measuring Diagnostic Errors in Primary Care," *JAMA Intern. Med.*, March 25, 2013, http://archinte.jamanetwork.com/article.aspx?articleid=1656536. The Harvard School of Public Health put it this way: Legitimate claims are being paid, non-legitimate claims are generally *not* being paid, and "portraits of a malpractice system that is stricken with frivolous litigation are overblown." David M. Studdert et al., "Claims, Errors, and Compensation Payments in Medical Malpractice Litigation," *NEMJ,* May 11, 2006.
[11] *See* Center for Justice & Democracy, "Courthouse Cornerstone: Contingency Fees and Their Importance for Everyday Americans" (2013), https://centerjd.org/content/white-paper-courthouse-cornerstone-contingency-fees-and-their-importance-everyday-americans
[12] *See more* in Center for Justice & Democracy, "False, Inflated Drivel: What's Wrong With The U.S. Chamber Of Commerce's 'Tort Cost' Report," December 12, 2022, https://centerjd.org/content/false-inflated-drivel-what%E2%80%99s-wrong-us-chamber-commerce%E2%80%99s-%E2%80%9Ctort-cost%E2%80%9D-report
[13] The U.S. Chamber of Commerce reported lobbying expenditures of $76.26 million, making it the second-highest spender after the National Association of Realtors. For many years, it was first. *See* Open Secrets, "Top Spenders," https://www.opensecrets.org/federal-lobbying/top-spenders (viewed March 29, 2025).
[14] NASDAQ, "Verisk and APCIA Report $170 Billion Estimated Net Income for U.S. Insurance Industry in 2024, Marking First Underwriting Gain in Four Years," March 25, 2025, https://www.nasdaq.com/articles/verisk-and-apcia-report-170-billion-estimated-net-income-us-insurance-industry-2024 ("Full-year 2024 net income for the insurance industry is estimated at $170 billion, with an adjusted estimate of $100 billion when accounting for capital gains, highlighting strong financial performance.")
[15] *See* Center for Justice & Democracy, "Limiting Lawsuits Will Not Lower Insurance Premiums (2024 Update)," January 5, 2024, https://centerjd.org/content/limiting-lawsuits-will-not-lower-insurance-premiums-2024-update; Joanne Doroshow, Douglas Heller and J. Robert Hunter, *How the Cash Rich Insurance Industry Fakes Crises and Invents Social Inflation*, Consumer Federation of America and Center for Justice & Democracy (2020), https://centerjd.org/content/study-how-cash-rich-insurance-industry-fakes-crises-and-invents-social-inflation
[16] William Landes and Richard A. Posner, *The Economic Structure of Tort Law*. Cambridge, MA: Harvard University Press (1987).
[17] RIMS, "2019 RIMS Benchmark Survey: Now Available," August 16, 2019, https://www.rims.org/about-us/newsroom/2019-rims-benchmark-survey-now-available
[18] *See* Center for Justice & Democracy, *Limiting Lawsuits; Small Businesses' Least Concern* (2020), https://centerjd.org/content/study-limiting-lawsuits-small-businesses-least-concern
[19] National Federation of Independent Business, *Small Business Problems & Priorities* (2024), https://nfib.com/wp-content/uploads/2024/10/2024-Small-Business-Problems-Priorities.pdf ("The 10 least severe problems for small business owners of the 75 business problems assessed, beginning with the least severe and moving up the list are: 'Exporting My Products/Services,' 'Importing My Products/Services,' 'Out-of-State Sales Tax (e.g., internet sales),' 'Costs and Frequency of Lawsuits/Threatened Lawsuits,' 'Credit Rating/Record Errors,' 'Winning Contracts from Federal/State/Local Governments,' 'Bad Debts (not delinquencies) and/or Bankruptcies,' 'Obtaining Long-Term (5 years or more) Business Loans,' 'Obtaining Short-Term (less than 12 months or revolving) Business Loans,' and 'Cost and Availability of Child Care.' 'Exporting My Products/Services,' the least severe problem proves critical for 4 percent of small business owners, nearly unchanged since 2012.")