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SYMPOSIUM ON FEE SHIFTING

Harold J. Krent
Symposium Editor

The Fee-Shifting Remedy: Panacea or Placebo? Harold J. Krent 415

Fee Shifting and Predictability of Law Keith N. Hylton 427

This Article explores the influence of fee-shifting rules on the predictability of law. The Article concludes that a pro-plaintiff shifting rule, which requires the defendant to pay the legal expenses of the prevailing plaintiff, is the best rule on predictability grounds.

Liability-Based Fee-Shifting Rules and Settlement Mechanisms Under Incomplete Information Eric Talley 461

In the last fifteen years, a number of law and economics scholars have opined about the effect that default fee-shifting rules have on private settlement negotiations, especially when the parties possess private information about the strengths of their cases. A number of game-theoretic models suggest that the English loser-pays rule may retard settlement efforts in such settings; however, these models employ somewhat particularistic procedures to analyze negotiations. Consequently, it is difficult to assess their generality. This Article employs the game-theoretic technique of “mechanism design” to provide a more robust account of the interaction between indemnity rules and settlement and demonstrates in a general setting that when one or both parties possess private information about the likelihood of prevailing, not only is a loser-pays rule inept at facilitating settlement, but it is uniquely inept in that regard. In fact, if one’s sole interest were to maximize settlement rates among otherwise litigating parties, a seemingly perverse winner-pays rule would be optimal.

Fee Awards and Optimal Deterrence Bruce L. Hay 505

Hundreds of federal and state statutes call for the award of attorney fees to plaintiffs who successfully sue to enforce the statutes. This Article addresses, in theoretical terms, the problem of determining the appropriate fee award in a legal system whose object is to achieve optimal deterrence of undesirable activities. Drawing on the literature on optimal penalties, the Article derives some of the basic properties of an optimal fee award scheme in the context of civil damage actions.
Federal Rule of Civil Procedure 68 and similar offer of settlement devices have received increasing attention in case law and commentary over the past decade as a means of fostering pretrial settlements in civil litigation. Under Rule 68, a party can formalize an offer to settle, with the offeree exposed to post-offer legal cost or attorney fee liability if the offer is rejected and the ensuing verdict is inferior to that offer. This Article provides the first empirical evidence drawn primarily from practitioner subjects on the effects of offers of settlement. The results indicate that Rule 68 has the potential to influence settlement bargaining, but that changes like those being considered for Rule 68 should be considered with caution, as even increased stakes may not carry the potency often ascribed to the Rule. This research also tests the Sincerity Rule, an exemplary offer rule based on game theoretical models, with promising results.

"Equal Access to Justice Acts" (EAJAs) are one-way fee shifts in which the government reimburses the attorney fees of private parties prevailing in litigation against it, under specified circumstances. A survey of cases under thirty state EAJAs finds that they have generally attracted the types of cases legislators intended more than the federal EAJA has and the types of cases law and economics theory would predict. Nevertheless, limits on the types of eligible parties or claims and a restrictive standard of recovery in many states constrain their goal of equalizing litigation resources between private parties and the government.

This Article asks whether fee shifting should be extended to criminal cases involving retained counsel. It identifies four categories of cases in which defendants are especially likely to be vindicating important societal interests or suffering unjustifiable injuries as a result of the operations of the criminal justice system. Finally, it considers the question of whether fee shifting should occur in cases where a defendant is acquitted.

This Article examines a variant of the English rule in which the tort plaintiff is permitted to shift to her lawyer the risk of an adverse fee award. This system, the English rule with risk shifting, would in general be preferable to the English rule without risk shifting; however, some limits should be placed on the compensation that the plaintiff's lawyer can demand in return for assuming the plaintiff's risk of an adverse fee award.

This Article examines the economic and ethical implications of risk sharing by lawyers and their clients. In particular, this Article discusses whether the market for lawyer risk sharing is competitive, and whether there are feasible alternatives to that market, such as insuring litigation costs with third parties. The Article concludes that regulation of contingent fees is a poor substitute for a competitive market, and sug-
gests that in at least some areas of litigation a competitive market for third-party legal
cost insurance should be established.

**THE KENNETH M. PIPER LECTURE**

**THE TENSIONS BETWEEN REGULATING WORKPLACE HARASSMENT AND THE FIRST AMENDMENT:**

*Nadine Strossen*  
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The only way to classify any particular workplace expression as either protected free speech or prohibited sexual harassment is by considering the expression in its full context, taking into account all the facts and circumstances. Contrary to this fact-specific approach, many employers and some lower courts have erroneously deemed any sexually-oriented expression in the workplace to be sexually harassing, regardless of its context. This false equation between sexual expression and sexual harassment violates employees' free speech rights and also undermines women's right to be free from gender-based discrimination in employment.

**SEXUAL HARASSMENT LAW AND THE FIRST AMENDMENT**

*Linda S. Greene*  
729  

Critics of workplace sexual harassment laws mistakenly argue that these laws violate the First Amendment because they are content- and viewpoint-based rules. This Article argues that the sexual harassment rules are constitutionally valid because they aim to prevent speech that results in different terms and conditions of employment rather than prohibit all offensive speech or conduct employees might encounter in the workplace.