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ADAM SHAJNFELD

A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements

ABOUT THE AUTHOR: B.A., New York University, 2004; J.D., Columbia University, 2007. The author would like to thank Saul Shajnfeld, Avi Luft, Craig Steiner, Zachary J. Zweihorn, and Katherine G. Smith for their extremely helpful comments on drafts of this article.

> *A New Yorker asked Wm. M. Evarts what he would charge for managing a certain law case. "Well," said Mr. Evarts, "I will take your case on a contingent fee." "And what is a contingent fee?" "My dear sir," said Mr. Evarts, mellifluously, "I will tell you what a contingent fee to a lawyer means. If I don't win your suit I get nothing. If I do win it you get nothing. See?"*[1]

> *The man looked at the check he received after winning his suit against the city. "Wait a minute!" he said to his attorney. "This is only a third of the full amount!" "That's right," said the attorney. "I took the rest." "You!" screamed the man. "I was the one who was hurt!" "You forget. I provided the intelligence required to build the case, the expertise to find precedents, and the oratory to convince the jury. Any asshole could fall down a manhole."*[2]

Contingent compensation arrangements for legal representation are as ubiquitous as they are controversial. Proponents argue that such arrangements increase poor persons' access to the courts, decrease frivolous litigation, and are structured to maximize client welfare. Opponents disagree with all but the first claim, and assert that contingent fees vastly overcompensate rapacious attorneys and create perverse incentives. Traditionally the province of lawyers and ethicists, economists and economically minded legal scholars have recently weighed in, resulting in a burgeoning corpus of economic analysis. Despite this surge of attention from both scholars and an often angry public, little has changed in contingent fee practice.

This article will critically survey the contingent fee landscape. First, it collects and discusses the law and literature on all major aspects of contingent arrangements, presenting a unified, singular reference point on the subject. Second, it critically analyzes that law and scholarship, indicating where errors have been made and suggesting ways to correct them.

Part I introduces the contingent fee arrangement, its history and justifications, and reports on average hourly compensation thereunder. Part II canvasses general rules governing such arrangements. Part III discusses and proposes significant changes in the use (or lack thereof) of contingent fees in criminal, domestic relations, and corporate matters. Part IV seeks to rectify misconceptions concerning risk and agency, the core economic themes underlying the contingent fee. Part V suggests and examines various proposals to reform unreasonable and uncompetitive contingent fee pricing. Part VI considers the empirical question of whether contingent arrangements promote litigation, and the normative question of whether it matters if they do.

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1. Mark Twain et al., Wit and Humor of the Age: Comprising Wit, Humor, Pathos, Ridicule, Satires, Dialects, Puns, Conundrums, Riddles, Charades, Jokes and Magic 386–87 (Chicago Star Publ'g Co. 1883).

2. Jeff Rovin, 500 Great Lawyer Jokes 40 (1992). For an analysis of these jokes see Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and its Discontents*, 47 DePaul L. Rev. 457 (1998).

I. INTRODUCTION TO CONTINGENT FEE ARRANGEMENTS

A. Definition

An attorney-client fee arrangement is "contingent" if the attorney's compensation depends, in any part, on success in the representation. There are many variants of such arrangements, though from a thematic perspective, three emerge: (1) a lawyer is paid a fixed hourly rate or specified sum based on the number of hours worked, but only if successful;[3] (2) a lawyer charges a flat or hourly fee, with a bonus accruing to her if she is successful; or (3) a lawyer is paid only a percentage of any recovery obtained for the client. In the first and third arrangements, the lawyer's compensation is predicated on success, with no pecuniary benefit redounding to her in its absence. The most controversy, and the bulk of scholarly discussion, concerns the third arrangement.[4]

Today, percentage-based contingent fees generally range from 33% to 50% of the client's award.[5]

B. Historical Development and Justifications

The story of the contingent fee is but a subplot of the American narrative of creative economic development and social progressivism. In the Middle Ages, a contingent fee arrangement "was not only void, but constituted . . . the [criminal] offense of champerty."[6] This was, in part, because "to acquire a share in such a claim is essentially a speculation and in the Middle Ages [was] tainted with the discredit which attached to every form of speculation."[7] In the United States, over time, the contingent fee "won a grudging acceptance as a 'necessary evil.'"[8] And, by 1858, one high court, referring to the contingent fee, noted that "[w]hat was before not only illegal but disreputable is now lawful, if not respectable."[9]

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3. Some scholars refer to this arrangement as "conditional," reserving the label "contingent" for the third variant. *See, e.g.*, Alexander Tabarrok & Eric Helland, Two Cheers for Contingent Fees 6 (Michael S. Greve ed., AEI Press 2005).

4. Not all portions of this article's analysis will apply to each of these scenarios.

5. Lester Brickman et al., Rethinking Contingency Fees 13 (1994). The percentage usually depends on the stage of litigation at which the case terminates. *See id.*

6. Max Radin, *Contingent Fees in California*, 28 Cal. L. Rev. 587, 587 (1940). Champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds." Black's Law Dictionary 246 (8th ed. 2004).

7. Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 69 (1935–1936). *See generally* Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940*, 47 DePaul L. Rev. 231 (1998) (discussing contingent fees since the Middle Ages).

8. Louis P. Contiguglia & Cornelius E. Sorapure, Jr., Comment, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 Cornell L. Q. 683, 685 (1955–1956).

9. Rooney v. Second Ave. R.R. Co., 18 N.Y. 368, 373 (1858). The Supreme Court expressed approval of contingent fees around the same time. *See* Wylie v. Coxe, 56 U.S. 415, 420 (1853).

When evaluating the regulation of contingent fees, one must also consider evolving views of the legal profession. "Early lawyers in Great Britain viewed the law as a form of public service, rather than as a means of earning a living, and they looked down on 'trade' as unseemly."[10] In the United States, that quixotic view has shifted, though not completely, toward an acknowledgement that the attorney is also a tradesperson, concerned with earning a living.[11] Conflicting ethical precepts often reflect the tension between the view of an attorney as a fiduciary and public servant, and the view of an attorney as a businessperson.[12]

There are four principal policy justifications for contingent fee arrangements. First, such arrangements enable the impecunious to obtain representation. Such persons cannot afford the costs of litigation unless and until it is successful. Even members of the middle- and upper-socioeconomic classes may find it difficult to pay legal fees in advance of success and collection of judgment. This is particularly so today as litigation has become more complex, often involving suits against multiple parties or multinational entities, and concerning matters requiring expert scientific and economic evidence. Second, contingent fee arrangements can help align the interests of lawyer and client, as both will have a direct financial stake in the outcome of the litigation. Third, by predicating an attorney's compensation on the success of a suit, the attorney is given incentive to function as gatekeeper, screening cases for both merit and sufficiency of proof, and lodging only those likely to succeed.[13] Fourth, and more generally, all persons of sound mind should be permitted to contract freely, and restrictions on contingent fee arrangements inhibit this freedom.[14]

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10. Bates v. State Bar of Ariz., 433 U.S. 350, 371 (1977).

11. *Id.* at 371–72 ("[T]he belief that lawyers are somehow 'above' trade has become an anachronism . . . .").

12. "This schizophrenia is the source of a permanent division in our thinking about the legal profession, and many of the most familiar dilemmas of legal ethics, which can be restated with endless variety but never really solved, trace their origins to it." Anthony T. Kronman, *A Nation Under Lost Lawyers: The Legal Profession at the Close of the Twentieth Century: The Fault in Legal Ethics*, 100 Dick. L. Rev. 489, 493 (1996).

13. Implicit in this rationale is the belief that lawyers are better than clients at gatekeeping. Lawyers can be better gatekeepers than many clients because lawyers have more knowledge of the legal merit of claims and the likelihood of success in or out of court. *See* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 Cornell L. Rev. 529, 571 (1978).

14. *See, e.g.*, Comm'rs on Practice and Pleadings, First Report of the Commissioners on Practice and Pleadings: Code of Procedure 204–05 (Comm'rs on Practice and Pleadings ed., 1848) ("We cannot perceive the right of the state, to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill and labor . . . . Freedom of industry is one of the strongest demands of the time. This includes not only the right of each citizen to engage, at will, in any honest calling, but to receive such rewards as he can agree for it."). *See generally* Lochner v. New York, 198 U.S. 45 (1905) (invalidating statutory restriction prohibiting parties from contracting for labor exceeding specified time limits).

C. The Role of Reputation

Throughout this article, the effects of and incentives created by contingent fees are assessed. While the discussion does not always refer to reputational concerns, these must be considered at every step. An attorney's concern for her reputation often provides incentive to perform well and act responsibly toward her client, and can mitigate the potential harm caused by perverse incentives attending fee arrangements.

Nonetheless, there is still good reason to be concerned with such perverse incentives. First, clients, particularly unsophisticated ones, may be unable to determine when an attorney has underperformed or acted irresponsibly;[15] in these instances, an attorney's reputation would be unaffected, and thus the risk of reputational harm would not adequately protect against malfeasance. Second, even when clients are aware of an attorney's poor performance or irresponsibility, they may lack the means, media, or credibility to effectively harm the attorney's reputation. Third, the interests of attorney and client are more closely aligned, *ceteris paribus*, when fee arrangements are structured so as to minimize perverse incentives.

D. Average Hourly Compensation Under the Contingent Fee

It is hard to measure actual average hourly compensation of contingent fee attorneys in the absence of contemporary and statistically sufficient information regarding the number of hours they work and the economic results of that labor. Such figures are generally unreported. However, a few studies have been undertaken. The first is a 1980 study by the Civil Litigation Research Project focusing on a sample of cases from South Carolina, Philadelphia, New Mexico, Milwaukee, and Los Angeles.[16] While the mean hourly rate of compensation for contingency lawyers was $89, the median was $43.[17] The median hourly rate for non-contingency fee

15. The sophisticated client is in a superior position to leverage reputational concerns to his or her benefit. Sophisticated clients are repeat legal consumers and have more knowledge of the legal market and the value of their claims and the services they seek than do plebeian consumers. An attorney who performs well and maintains a positive reputation is most likely to garner additional business from the sophisticated client. An attorney who performs poorly or bills unethically is likely to be caught and lose repeat business. *See* Nuno Garoupa & Fernando Gomez-Pomar, *Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees Over Contingent Fees*, 24 J. L. Econ. & Org. 458, 471 (2008).

16. Herbert M. Kritzer, *What Are Contingency Fees Really Like?*, 12–13 (Mar. 15–16, 2002) (unpublished), *available at* http://users.polisci.wisc.edu/kritzner/research/contfee/ilep.pdf (citing David M. Trubek et al., Civil Litigation Research Project Final Report: Part C 52-59, at 78 (Madison: University of Wisconsin Law School 1987)).

17. *Id.* The mean is the numerical average of all values in a set. The mean can obscure reality, though. For instance, if nine lawyers earn $10 per hour, and one earns $1000 per hour, the mean hourly compensation for all ten lawyers is $109 each, even though nine of the ten attorneys earn far less than this amount, and one earns substantially more. A more accurate picture is obtained by considering, in addition to the mean, the median, which may indirectly measure, in some degree, the most common grouping of compensation.

lawyers in this study was $50.[18] In the second study, based on Herbert Kritzer's extensive surveys of Wisconsin attorneys coupled with data from a Rand Corporation study, the mean and median hourly rates of non-contingency attorneys were within the range of $125 to $140, while contingent fee attorneys averaged $169 (with the median being lower; when the top 5% of earners were dropped, the mean hourly rate for contingent fee attorneys dropped to $137).[19]

Lester Brickman, critical of Kritzer's methodology, data, and conclusions, responded with other data indicating that contingent hourly rates were much higher than Kritzer reported.[20] One source of such data is an analysis by the Congressional Joint Economic Committee, which found that of the $16.74 billion paid to attorneys in auto injury cases in 2001, 71% (or $11.93 billion) was paid to plaintiffs' attorneys and 29% (or $4.82 billion) to defense attorneys.[21] Brickman also noted that even if Kritzer's conclusion was true—that contingency-fee lawyers earn hourly rates comparable to those earned by hourly rate attorneys—the financial incentives that both drive plaintiffs' lawyers and make it profitable for defendants to adopt intransigent settlement postures lead to intolerably high transaction costs and a dysfunctional—and sometimes extortionate—tort system.[22]

At the very least, the studies by Kritzer and the Civil Litigation Research Project indicate that popular belief about what contingent fee attorneys earn per hour, fueled by reports of uncommon but attention-grabbing profits, may not be correct. More empirical analysis is necessary.[23]

II. GENERAL RULES GOVERNING CONTINGENT FEE ARRANGEMENTS

A. Advisory Rules

Contingent fees have, for some time, been subject to advisory rules, though the regulation they provide is rather generic and thin. It has remained the province of official commentaries, opinions, and the common law to construct an edifice of comprehensive regulation and guidance upon this minimalist foundation.

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18. Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States 184 (2004).

19. *Id.* at 188–90. This suggests that a small percentage of attorneys earn very large fees.

20. *See generally* Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 Wash. U. L. Q. 653 (2003).

21. Staff of Joint Econ. Comm., 108th Cong., Choice in Auto Insurance: Updated Savings Estimates for Auto Choice 14–19 (Comm. Print 2003), *available at* http://www.house.gov/jec/tort/07-24-03.pdf. It is unclear to what extent, if any, a plaintiff's obligation to bear the burden of proof is responsible for a portion of the larger fees charged by, and paid to, plaintiffs' attorneys.

22. Brickman, *supra* note 20, at 665. Brickman's point is important. Simply comparing contingency and non-contingency hourly rates does not give one a sense of whether either is fair relative to some alternate legal universe. Prices, after all, can be similar yet inflated.

23. "I suspect that, barring a massive investment of research dollars, the question of how much the typical contingency fee attorney earns per hour will always be controversial . . . ." Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 Tex. L. Rev. 1465, 1491 (2007).

The American Bar Association ("ABA") promulgated the Model Code of Professional Responsibility ("Model Code") in 1969.[24] In 1983, the ABA adopted the Model Rules of Professional Conduct ("Model Rules").[25] On their own, these rules are not mandatory authority in any jurisdiction. Instead, they serve as models for individual states to adopt (with or without modification), and as suggested guideposts for ethical behavior.

The Model Rules prohibit a lawyer from charging an "unreasonable fee."[26] In making the fact-sensitive determination of whether a fee is unreasonable, relevant considerations include "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly,"[27] as well as "whether the fee is fixed or contingent."[28]

In 1998, the American Law Institute adopted the Restatement (Third) of the Law Governing Lawyers (the "Restatement"). The Restatement provides that, unless the fee is unreasonable, "a lawyer may contract with a client for a fee the size or payment of which is contingent on the outcome of a matter."[29]

B. State Rules

Most states have adopted either the Model Code or the Model Rules, usually with minor variation.[30] Some, however, have made more substantial modification.

Florida, for instance, extensively regulates contingent fees, particularly in personal injury suits, where specific permissible percentages of attorney compensation are delineated based on the amount of recovery and stage of litigation in which the suit terminates. These percentages constitute presumptive (yet rebuttable) ceilings on reasonable contingent fees.[31] For example, "[i]f all defendants admit liability at the time of filing their answers and request a trial only on damages," the presumptive ceilings are lower than they would be if liability were contested.[32] Hawaii added to the Model Rules a requirement that in determining whether a contingent fee is

24. Model Code of Prof'l Responsibility Preface (1969), *available at* http://www.abanet.org/cpr/mrpc/mcpr.pdf.

25. Model Rules of Prof'l Conduct Preface (1983), *available at* http://www.abanet.org/cpr/mrpc/preface.html.

26. *Id.* at R. 1.5(a).

27. *Id.* at 1.5(a)(1).

28. *Id.* at 1.5(a)(8).

29. Restatement (Third) of Law Governing Lawyers: Contingent-Fee Arrangements § 35 (2000).

30. Forty-nine states and the District of Columbia have adopted some form of the Model Rules. Center for Professional Responsibility, *ABA Model Rules of Professional Conduct*, *State Adoption of Model Rules*, http://www.abanet.org/cpr/mrpc/model_rules.html (last visited Mar. 5, 2010). California has adopted its own rules. *Id.*

31. *See* Rules Regulating the Florida Bar: Rules of Prof'l Conduct § 4-1.5(f) (2010).

32. *See id.* at § 4-1.5(f)(4)(B)(i)(b)–(c).

reasonable, one should consider "the risk of no recovery and the conscionability of the fee in light of the net recovery to the client."[33]

An alternative source of attorney conduct regulation is general state "fiduciary duty" doctrine. An attorney may breach a fiduciary duty to her client if she attempts to collect an unreasonable or unconscionable fee.[34] Noting that disciplinary complaints against lawyers based on contingent fee abuses "virtually never result in disciplinary action against the lawyers," Brickman reports two cases where clients successfully sued their attorneys, based on contingent fee abuses, under a theory of breach of fiduciary duty.[35]

C. Examples of Federal Law

Generally, state law governs the availability and propriety of attorney-client fee arrangements.[36] Nonetheless, federal law and court practice occasionally supplement or supplant state regulation.

1. Federal Class Actions

When a large number of potential plaintiffs have fairly identical claims against the same defendant(s), the class action device may be used to consolidate all claims and parties into a single litigation. Once consolidated, the court appoints lead counsel to represent the class of plaintiffs. Class action lawsuits foster judicial economy. Rather than having hundreds of duplicative lawsuits prosecuted and defended in different courts, the parties and claims come together in one forum for final determination. Additionally, class actions "protect plaintiffs' rights and promote accountability by permitting dispersed, disorganized plaintiffs who may have suffered only small injuries to find redress by acting as a group where they would lack sufficient incentive to do so individually."[37]

Class action lawsuits often involve large sums of money, and raise interesting issues of attorney appointment and emolument. Often, when a class action lawsuit initially is filed, many plaintiffs represented by many different attorneys come forward seeking certification as lead plaintiff. Once an attorney's client is appointed lead plaintiff, the attorney stands a fair chance of being appointed lead counsel. Attorneys clamor for the opportunity to be so appointed by the court and thus be assured a monopoly over potentially sizeable attorneys' fees. Unlike smaller suits

33. Hawaii Rules of Prof'l Conduct § 1.5(a)(8) (1994).

34. *See* Affiliated Computer Serv., Inc. v. Kasmir & Krage, L.L.P., No. 05-98-00227-CV, 2000 WL 1702635, at *4 (Tex. App. Nov. 15, 2000).

35. Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 Fordham L. Rev. 247, 293 (1996). The cases reported by Brickman are *Richfield v. Heuser & Carr*, No. 92 CV 1797 slip op. (Colo. Dist. Ct. Jan. 13, 1994) and *Eich v. Gregory A. Maceau, P.C.*, No. 96 CA1354 slip op. (Colo. Ct. App. Nov. 28, 1997).

36. Geoffrey C. Hazard & W. William Hodes, The Law of Lawyering § 66.6 (3d ed. 2001).

37. *In re* Auction Houses Antitrust Litig., 197 F.R.D. 71, 72 (S.D.N.Y. 2000).

with fewer plaintiffs, class members often are bound by the court's selection of lead counsel, and effectively lose the ability to be represented by counsel of their own choosing. Additionally, many class members will never be named in the action or appear in the litigation.[38] Finally, the large number of class members and diffuse damages incurred may give few (if any) incentives to sufficiently monitor attorney conduct.[39] Given the dynamics that strain the lawyer-client relationship, courts should, at least in theory, exercise greater oversight of fee awards in class action cases than in others. Indeed, in federal class actions involving monetary relief, judges must regulate and approve attorney fee arrangements and award amounts.[40] Oversight is maintained in a variety of ways. For instance, some courts have revolutionized the way attorney compensation is set in class actions, using the process of selecting lead counsel as leverage. One example is the *Auction Houses* litigation, where the judge selected lead counsel through an auction in which firms bid downward on the percentage of the recovery they would seek if successful in the litigation.[41]

2. *Tax Practice*

In connection with practice before the United States Internal Revenue Service ("IRS"), "a practitioner may not charge a contingent fee for preparing an original tax return or for any advice rendered in connection with a position taken or to be taken on an original tax return."[42] However, a practitioner may do so in connection with an amended return or claim for refund, but only if she "reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the [IRS]."[43] By requiring anticipation of substantive review, the IRS rules essentially necessitate a greater-than-nominal risk of non-recovery to justify charging a contingent fee with a risk premium.

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38. *See* Tobin D. Kern, *Approval of a Class Action Settlement Under C.R.C.P. 23(E)*, 31 Colo. Law. 71, 71 (2002) ("Unnamed class members typically have been absent from the case prior to settlement and thus are unable to monitor effectively the prosecution of their claims by class counsel and the class representatives. In fact, class members may not even learn of the litigation until their representatives propose a settlement."); Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 U.C.L.A. L. Rev. 991, 1043 n.273 (2002) ("The law of class actions recognizes the problem that the interests of class members not active in the litigation may not be adequately represented.").

39. *See Auction Houses*, 197 F.R.D. at 78.

40. *See* Fed. R. Civ. P. 23(g); *see also* Manual for Complex Litigation § 14.1 (4th ed. 2004); Foster v. Boise-Cascade, Inc., 420 F. Supp. 674, 680 (S.D. Tex. 1976).

41. *See Auction Houses*, 197 F.R.D. at 72; *see also In re* Oracle Sec. Litig., 132 F.R.D. 538 (N.D. Cal. 1990); *In re* Bank One S'holders Class Actions, 96 F. Supp. 2d 780 (N.D. Ill. 2000).

42. Treas. Dep't, *Regulations Governing the Practice of Attorneys, Certified Public Accountants, Enrolled Agents, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers Before the Internal Revenue Service*, Circ. No. 230 (Rev. Apr. 2008); *see also* 31 C.F.R. § 10.27 (2005).

43. Treas. Dep't, *supra* note 42; *see also* 31 C.F.R. § 10.27 (2005).

D. Formal Requirements of Contingent Fee Arrangements

States generally follow the Model Rules with respect to the formal requirements attending contingent fee agreements. Such agreements must be in writing, signed by the client, and state "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible."[44] In particular, the agreements shall state

> the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated.[45]
>
> The agreement also must list any expenses or fees that the client will be required to pay even if the case is unsuccessful.[46] Upon conclusion, the lawyer must "provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination."[47]

III. CONTINGENT FEES IN DOMESTIC RELATIONS, CRIMINAL, AND CORPORATE MATTERS

There are two areas in which most governing authorities prohibit the use of contingent fees: criminal and certain domestic relations matters. Typical is ABA Model Rule 1.5(d), which states:

> A lawyer shall not enter into an arrangement for, charge, or collect: (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or (2) a contingent fee for representing a defendant in a criminal case.[48]

A. Domestic Relations Matters

The Supreme Court of Michigan adeptly stated the principal justification for the domestic relations ban over a hundred years ago:

> Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, that families shall not be broken up for inadequate causes, or from unworthy motives; and where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible.

44. Model Rules of Prof'l Conduct R. 1.5(b) (2004).

45. *Id.* at 1.5(c).

46. *Id.*

47. *Id.*

48. *Id.* at 1.5(d).

> Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties as a method of obtaining relief from real or fancied grievances which otherwise would pass unnoticed.[49]

While this justification is often bandied-about, there is little reported empirical data to support it.[50] Even if valid, a similar objection can be lodged against many other contingent arrangements, and it seems anomalous that it should only prevail in the domestic relations context. Those who use the justification only in this context likely believe not just that the familial relation is sacrosanct, but that it occupies a rung on the ladder of social importance above contractual or partnership relations. Additionally, its proponents may believe that in domestic relations matters, the feuding spouses, by virtue of their matrimonial relationship, are more likely than unrelated parties to respond to alternatives to litigation. These positions, however, are not without controversy. First, some might posit that reconciliation is always a goal to be pursued, and fee arrangements always should be structured to promote it. From an economic perspective, reconciliation in other contexts may be more valuable, and failure to achieve it much more detrimental, than in matrimonial matters. Second, parties in domestic relations cases may be less amenable to alternatives to litigation. One could argue that given these parties' close relationships, were reconciliation possible, it would surely have been attempted, if not achieved, before resort to adversarial litigation, and thus is unlikely to be achieved beyond that point.

There are exceptions to the ban. Many jurisdictions permit contingent fees in domestic relations matters where divorce is a certainty, such as suits to enforce previously awarded but unfulfilled monetary support obligations.[51] Oddly, as F.B. MacKinnon trenchantly observes, there is no exception that would allow the spouse attempting to prevent dissolution of the marriage to enter into a contingent fee arrangement.[52] In this regard, the ban is overly broad in addressing its own possibly misguided policy rationale.

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49. Jordan v. Westerman, 28 N.W. 826, 830 (Mich. 1886). Understanding that many women seeking divorce do not possess the funds necessary to pursue such an action, the court provided that "[i]n every suit, brought either for divorce or for a separation, the court may, in its discretion, require the husband to pay any sums necessary to enable the wife to carry on or defend the suit during its pendency." *Id.* at 829 (citation omitted) (internal quotation marks omitted).

50. In *Kraus v. Naumburg*, 36 Pa. D. & C.2d 746 (Pa. Com. Pl. 1965), the court stated that it was "satisfied that very few, if any, attorneys would think of discouraging the reconciliation of estranged spouses, and that any attorney who is so fee hungry as to do so would be as likely to do so for a fixed fee as for a contingent fee." *Id.* at 755. This, of course, does not end the matter, and further study is necessary.

51. *See, e.g.*, Fletcher v. Fletcher, 591 N.E.2d 91, 94 (Ill. App. Ct. 1992).

52. F.B. MacKinnon, Contingent Fees for Legal Services: Professional Economics and Responsibilities 47 (n. prtg. 2008).

B. Criminal Cases

Historically, prohibitions on contingent fees in criminal matters have been justified on the grounds that (1) such fees incentivize dishonesty and misconduct by attorneys, in particular by providing an attorney with incentive to discourage plea bargaining; (2) indigent defendants in criminal proceedings are provided free representation, obviating the need for contingent arrangements to ensure access to counsel; and, in any case; (3) success in a criminal action produces no fund from which to award fees.

This "conventional" analysis, however, "is seriously incomplete."[53] First, contingent fees offer no greater incentive for attorney misconduct in criminal matters than in civil matters, although they are permitted in the latter. Second, perverse incentives, such as those to forgo plea-bargaining, can be minimized with properly structured arrangements. Third, while most successful criminal matters produce no fund for a fee award, prohibition ignores the possibility of reverse contingent fee arrangements.[54] Success in a criminal matter may permit the client to retain funds otherwise removable by asset forfeiture or monetary fines, and may also allow the client to continue working so that additional funds can be procured. Legal fees could then be paid with these funds.[55] Fourth, a guarantee of counsel—likely minimally compensated counsel—does not reduce the economic desirability of incentive structures in the form of bonuses.

Pamela Karlan suggests subtler but more compelling reasons for prohibition. First, with payment contingent on success, lawyers will screen cases for merit. This can hamper effective, truthful communication between lawyer and client, as the latter has a direct economic incentive to sugarcoat the facts, and transforms "the lawyer into a mini-judge," which may "deprive the defendant of his right to a zealous advocate."[56] While a similar objection may be lodged in the civil context, it is more meaningful in criminal adjudication because the criminal defendant, unlike the civil plaintiff, is an involuntary participant in the judicial system; as such, there is no gatekeeping function for the attorney to perform.[57] Second, most persons charged with crimes either plead guilty or are convicted. As a result, lawyers cannot expect to construct a portfolio of all, or nearly all, winning cases. To make up for shortfalls in contingency cases caused by so many losers, lawyers would have to charge higher fees to clients with winning cases. "Clients with winning cases will subsidize the legal expenses of clients with losing cases."[58] It is thought that this practice is unfair and may be unethical.[59]

53. Pamela S. Karlan, *Contingent Fees and Criminal Cases*, 93 Colum. L. Rev. 595, 637 (1993).

54. For a discussion of reverse arrangements, see *infra* Part IV.C.3.

55. *See* Karlan, *supra* note 53, at 603.

56. *See id.* at 631–32.

57. *See id.* at 616.

58. *Id.* at 621.

59. This objection is not limited to the criminal context. It is explored more expansively *infra* Part IV.A.2.a.

These added reasons fail to justify a categorical ban. First, it is unclear how merit screening would reduce zealous advocacy. If a potential client's case is deemed meritorious, the attorney should provide zealous representation. If the attorney refuses to take the case on contingency, then the client can obtain the zealous representation of fixed-fee or appointed counsel. Second, it is erroneous to assume that contingent fee lawyers will accept losing cases, thus presenting the opportunity to subsidize them. In reality, such subsidization rarely occurs, as attorneys are loath to accept risky cases.[60] To the extent that attorneys refuse to accept on contingency clients with risky cases, or will only do so charging exorbitant risk premiums, such clients have the options of paying conventional hourly or flat fees, or, if indigent, being appointed counsel at no charge. As lawyers tend to reject contingent representation in all but winning cases (and winning cases are a distinct minority), and instead charge conventional fees, market forces will have directed the same outcome as would result from a ban, albeit with two beneficial exceptions: clients who could afford hybrid hourly and bonus-like contingent fees, and clients with winning cases, would be able, if they deemed it helpful under their respective circumstances, to utilize these potentially economically useful arrangements. These options are precluded by an all-encompassing ban. It would also be unfair to prohibit such clients from utilizing contingent arrangements simply because some defendants, who have the option of non-contingent representation, may choose to be untruthful with their attorneys in order to obtain better representation. Thus, a ban on contingent fees for criminal defense attorneys is unnecessary and unjustified.

Typically, the fee literature ignores, or only addresses in a brief and conclusory manner, contingent fees for the criminal prosecutor.[61] Recall that Model Rule 1.5(d) does not even reference the matter, though the drafters likely would not countenance such an arrangement. This disregard only begs the question: If contingent fees should be permitted for criminal defendants, why prohibit prosecutors from being paid on contingency?[62]

There are a number of objections to such a practice. First, unlike parties in a civil action[63] and the defendant in a criminal action, the prosecutor is not simply an

60. *See* discussion *infra* Part IV.A.2.a.

61. *See* Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 Ohio St. J. Crim. L. 441, 449 (2009) (referencing the "one law professor to write in this area").

62. Since prosecutors occupy salaried positions, contingent fees, if permitted, would likely be in the form of bonuses.

63. Martin Redish argues that as an ethical and constitutional matter, attorneys representing the government in civil litigation should also be prohibited from being remunerated through contingent fees. *See* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications* (Northwestern Law, Searle Center on Law, Regulation and Economic Growth, Working Paper 2008-032), *available at* http://www.law.northwestern.edu/searlecenter/uploads/Redish_revised.pdf; *see also* Bruce A. Green, *Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 Widener J. Pub. L. 235 (2000). In his thorough discussion, Green calls attention to habeas corpus and certain enforcement cases, both of which, while civil, are imbued with criminal character. *See* Green, *supra*, at 244–46.

adversary. The prosecutor has a duty to do justice.[64] Conviction is sometimes, but not always, a proxy for doing justice. In some cases, justice involves not filing charges against an innocent person, dismissing a case against a defendant in light of new evidence, or exercising the discretion to not prosecute guilty persons based upon mitigating circumstances. Contingent fees should reward success, but in the context of criminal prosecution, success is not always clearly defined. Because success is doing justice, it may be impossible to determine, ex ante, what outcome justice requires, and thus what outcome a contingent fee should reward.[65] Second, the consequences of contingent-fee-induced misconduct, even if such misconduct is rare, are unacceptably pernicious in the prosecutorial context.

This second objection, while rich in historical support,[66] may not be sound. For instance, if the risk of misconduct would result in innocent persons being convicted in a small number of cases, some might argue that the overall cost to society is acceptable—that the harm to those few individuals is less than the harm to society caused by failure to secure convictions against a large number of guilty persons. A more nuanced argument for the ban, borrowing from the lessons of act and rule utilitarianism,[67] is that the possibility that an innocent person may be convicted, and the inability of any member of society to know if she might be that person, is a substantial harm (in the form of insecurity) to many persons, not just the innocent individual who ends up being convicted. The harm, then, is not just the wrongful conviction, which befalls a particular person, but the insecurity resulting from the risk of misconduct, which falls on everyone and may outweigh the harm to society of some guilty persons avoiding conviction. Even this argument is not flawless; it still raises the possibility that at some point, the harm resulting from an innocent person's conviction might not outweigh the harm caused by failure to convict a large number of guilty persons.[68] Nonetheless, considering the difficulty in drawing this line and the problems identified earlier with regard to defining success, retaining the ban on contingent fees for criminal prosecutions is justified.

C. Corporate Practice

Contingent fees also exist in corporate practice. Frequently, fees in mergers and acquisitions transactions are tied to the success of a takeover, or alternatively, the

64. Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

65. Baca v. Padilla, 190 P. 730, 731 (N.M. 1920) (invalidating a contract for payment to private criminal prosecutor based on contingency, as "the size of his fee, or possibly whether he receive[s] any fee at all, would be dependent upon the conviction of the defendant, however innocent he might be").

66. *See* Alexander Volokh, *n Guilty Men*, 146 U. Pa. L. Rev. 173 (1997); People v. Galbo, 218 N.Y. 283, (1916).

67. *See* Donald C. Emmons, *Act vs. Rule-Utilitarianism*, 82 Mind 226, 226 (1973).

68. "[W]e must be on our guard against those sentimental exaggerations which tend to give crime impunity, under the pretext of insuring the safety of innocence." William Twining, Theories of Evidence: Bentham & Wigmore 98 (1985).

defeat of an unwanted takeover.[69] Likewise, fees for public offerings are often pegged to whether the securities successfully come to market and to the amount generated in the offering.[70]

The ABA approves of the use of contingent fee arrangements in non-litigation matters, subject to the same restrictions that are applicable in the litigation context.[71] While such arrangements do exist,[72] little regulatory, judicial, or scholarly attention has been paid to them. This is probably because such matters are rarely, if ever, litigated, and because corporate clients are generally more sophisticated than contingent-fee-litigation clients, and thus less likely to be taken advantage of or otherwise agree to unfavorable contractual terms.

The extension of contingent fee arrangements into the corporate context is commendable, though in some instances malapropos. For instance, Richard Painter argues that attorneys should not be compensated on contingency in securities transactions because the practice creates perverse incentives.[73] "Counsel should be paid to ferret out problems with a transaction as well as to promote its virtues, and legal fees that depend so much on whether a deal closes undermine this objective."[74] Understanding the potential influence of this perverse incentive, Warren Buffet once quipped that "[i]f I'm going to pay $5 million to somebody if they give me the advice and the deal goes through, then I think I probably ought to pay $5 million to somebody else whose advice I listen to who gets paid the $5 million only if the deal doesn't go through."[75] In light of economic common sense and the experiences of the last decade, this advice should be heeded.

IV. RISK AND AGENCY IN CONTINGENT FEE ARRANGEMENTS

A. *Risk and Reasonableness*

1. *The Concept of Risk*

Key to understanding contingent fee arrangements is appreciating the concept of risk. Generally, contingent fees may exceed hourly fees for the same work because an attorney must be compensated for accepting the risk that payment will be either

69. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994).

70. *Id.*

71. *See id.*

72. *See*, *e.g.*, Daniel Hertzberg & James Stewart, *Contingency Legal Fee for Merger Breaks Ground, Stirs Controversy*, Wall St. J., Oct. 24, 1986, at 31, col. 4.

73. *See The Role of Attorneys in Corporate Governance, Hearing Before the Subcomm. on Capital Mkts., Ins. & Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 108th Cong. (2004) (statement of Professor Richard W. Painter, Guy Raymond, and Mildred Van Vorhis Professor of Law, University of Illinois College of Law), *available at* http://financialservices.house.gov/media/pdf/020404rp.pdf.

74. *Id.* at 6.

75. Lawrence A. Cunningham, *Beyond Liability: Rewarding Effective Gatekeepers*, 92 Minn. L. Rev. 323, 354 (2007) (internal quotation omitted).

inadequate for the services performed, or entirely absent.[76] This premium is a familiar concept to those in business and finance, where riskier investments command higher rates of return than safer ones.

Chief among the risks attending litigation include the possibilities that (1) the client fires the attorney before recovery but after significant work has been undertaken; (2) the client demands that the attorney accept a low settlement offer from the opposing party, or rejects a reasonable offer in favor of risky litigation; (3) the applicable law changes during the pendency of the case; (4) the case is lost; (5) the case is won, but the award is minimal; and (6) the award is adequate, but the defendant is unable to pay it.

2. Competing Views of Risk and the Reasonableness of Contingent Fees

Imagine that a drunk driver injures an indigent laborer, a video recorder captures the entire episode, and the drunk driver's insurance company typically settles such claims. Imagine further that the injured laborer seeks and obtains representation at the standard, one-third contingency rate. Finally, it is apparent at the outset that the case will require minimal effort by the victim's attorney, and involves little risk. Does this fee arrangement pass ethical muster? What does the generally accepted requirement that an attorney's fee be "reasonable" mean vis-à-vis risk? Is a *standard*, fixed-percentage contingent fee always proper, or is a dynamic fee, i.e., a percentage sensitive to the degree of risk inherent in the matter, preferable or even required? The answers depend on whether one adopts the aggregative- or individual-case view of reasonableness.

a. The aggregative view. Proponents of the aggregative view believe that those who criticize the fee charged to the injured laborer have the wrong focus—a microanalysis of a *particular* case, rather than a macroanalysis that applies "reasonableness" and ethical considerations at a more general level. While the fee in a particular case might appear unreasonably high, the attorney maintains a portfolio of cases with varying degrees of risk that, to some degree, offset one another.[77] Thus, what seems a windfall in one case is actually a subsidy for another indigent client who may have a harder offensive to mount. Viewed in the aggregate, the attorney is performing a form of redistribution of costs among clients to ensure that all have adequate representation.

The aggregative view has garnered some support within the plaintiffs' bar, though it has no prominent academic support and its critics are legion. One critic contends that this justification of the aggregative view does not exist in practice, despite protestations to the contrary, and that in any event the justification is unethical. First, he claims there "is simply no empirical evidence to support the

76. *See, e.g.*, Pennsylvania v. Del. Valley Citizens for Clean Air, 483 U.S. 711, 735–36 (1987) (Blackmun, J., dissenting on other grounds) (This premium "compensates for the risk of non-payment if the suit does not succeed.").

77. *See* Kritzer, *supra* note 18, at 11 (characterizing the contingency fee caseload as a form of portfolio management).

proposition that lawyers use their windfall fees to subsidize other clients," as "[c]ontingency fee lawyers generally do not accept high-risk cases where the likelihood of prevailing is small."[78] By undertaking careful screening, attorneys eliminate the very cases that this justification of the aggregative view assumes counsel would accept. Second, he argues that the aggregative view is "inconsistent with attorneys' fiduciary obligation to deal fairly with each individual, existing, client."[79]

Brickman's first objection to the aggregative view may be sound in practice, but it sidesteps a serious theoretical question. Suppose that some lawyers do in fact take on at least some cases where the risk-reward ratio is not necessarily favorable to the attorney, on the theory that losses could be recouped by charging other clients a fee greater than their particular risk classifications warrant. In these situations, should such subsidization be prohibited, as Brickman contends? The answer, in part an issue of redistributive justice, depends on one's political philosophy.

b. The individual-case view. Proponents of the individual-case view believe that a microanalysis of reasonableness is appropriate—that contingent fee pricing must be sensitive to the risk posed in each particular case. It is important to note that this view is consistent with a form of subsidization, though not the type contemplated by the aggregative view. To illustrate this point, suppose a bank lends money to ten borrowers of equal creditworthiness, and each is given the same interest rate. If one defaults, any risk premium he has paid in the form of interest is of little use to the bank—it will not come close to compensating the bank—for the loss of principal upon default. Who *does* make the bank whole? Other borrowers, who do in fact pay both principal and interest, essentially cover the loss because the interest rates they are charged include both a compensation-for-the-use-of-money component and a risk component. The risk component of the interest on these other loans, in the aggregate, makes the bank whole for the loss from the defaulting borrower. Without this "cover," bank lending would be unprofitable and impracticable.

Arguing that the attorney cannot charge the client a premium to cover some loss from another is akin to arguing that the bank cannot include a risk component in the interest rate it charges all borrowers as a cover for the loss from a defaulting borrower. Such an argument threatens the existence of contingent fee arrangements, and consequently, representation for the poor. One cannot have it both ways—enabling contingent economic arrangements while maintaining *absolute* individual-client-oriented ethics. In condemning the subsidization inherent in the aggregative view, proponents of the individual-case view believe that individual-client ethics is inconsistent not with charging a risk-based rate, but with charging a rate *greater than* one commensurate with the risk posed by an individual client. Because interest from some borrowers—usually specifically tailored to the particular risks they pose—will

78. Brickman, *supra* note 35, at 283.

79. Brickman et al., *supra* note 5, at 23. The contingent fee lawyer could argue that implicit in any client's consent to the contingent arrangement is an understanding that the fee may be used to subsidize another client. Whether such an understanding exists in the case of each particular client is, of course, debatable, and doubtful.

cover losses from others, individual-case contingent fee lending contains elements of aggregation and subsidization, though permissibly so.

The ABA, the Restatement,[80] and most state courts that have considered the matter have adopted some form of the individual-case view. In *Maynard Steel Casting Co. v. Sheedy*, one of many plaintiffs in a settling class action lawsuit hired a lawyer on a contingency basis to recover its portion of the settlement.[81] The extent of the attorney's efforts was to "mail claim information and supplemental claim information to the claims administrator," resulting in payment of some $400,000 to the plaintiff.[82] The attorney retained roughly $136,000 in legal fees.[83] The Court of Appeals of Wisconsin found the fee unreasonable and affirmed reduction of the attorney's recovery to $4200.[84] The court noted that "the fee was not justified by the time and labor, amount of money, or attendant risks involved."[85]

3. *Re-assessing Risk and Reasonableness*

Assuming, as the individual-case view does, that the contingent fee charged must be tailored to the risk inherent in each particular case, when is that risk to be assessed? To what extent may courts consider the reasonableness of a fee percentage or amount based on circumstances not known until after execution of the retainer agreement?[86]

It would, at first glance, appear that any tribunal reviewing the reasonableness of a fee agreement should, as did the parties to that agreement, consider only the circumstances that existed at the time the agreement was reached. It is odd, to say the least, to think of analyzing risk ex post, i.e., once it is clear whether the risk has in fact materialized. Despite the apparent validity of this basic and intuitive principle, there exists a considerable body of case law that neglects it. For instance, the Arizona Supreme Court once stated that a "contingent fee, proper when contracted for, may later turn out to be excessive," and held that, "if at the conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon the contract; he must reduce the fee."[87] This holding inappropriately places a particular view of professional ethics over economic reality in a manner that threatens to raise the cost of contingent legal services; to insure against the risk of ex post downward adjustment, the attorney—who cannot know ex ante which cases run this risk—must charge all clients a higher

80. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS: CONTINGENT-FEE ARRANGEMENTS § 35 cmt. c (2000).

81. 746 N.W.2d 816, 818 (Wis. Ct. App. 2008).

82. *Id.* at 819.

83. *Id.*

84. *Id.* at 824.

85. *Id.*

86. The analysis in this section is concerned with potential assessment only of the risk component of the contingent fee, not the compensation-for-the-use-of-money component.

87. *In re* Swartz, 686 P.2d 1236, 1243 (Ariz. 1984).

fee. This view is akin to forcing life insurance companies to return premiums to clients who do not die while covered—a practice that would spell the end of an industry that serves a useful social purpose.

The Arizona Supreme Court is not alone in subscribing to this misguided view. In *In re Gerard*, an attorney was hired on contingency to locate and recover certain missing certificates of deposit that his client believed were stolen.[88] Shortly after executing the fee agreement, the attorney discovered that the certificates had not been stolen and simply required re-registration.[89] Upon re-registering them, the attorney sought to collect the contingent fee.[90] Ordering the attorney suspended from practice for one year, the Illinois Supreme Court noted that the agreement should have been reformed as it "was based on a mutual mistake of fact: that someone had stolen the certificates and would either make a claim to them or wrongfully redeem them."[91] A closer analysis of the facts suggests that there was no "mutual mistake." The client was not certain that the assets had been stolen, and the attorney had no idea what recovery of the certificates, if even possible, might require.[92]

An attorney takes a risk the instant she accepts a matter on contingency. The case may require years of effort and produce no recovery. It may resolve itself within minutes of acceptance through no effort of the attorney. It may, as most cases do, fall somewhere in between these two extremes. Assuming that she prices the risk at an appropriate level considering all facts known to her at the time the agreement is reached, the attorney's contingent fee should be upheld. The attorney must be compensated for taking risk, or she will not take it. While it seems distasteful to allow an attorney to collect a large contingent fee in a case where victory proves to be all but assured shortly after retention, consider that the attorney generally does not enjoy the ability to rescind a fee agreement should success prove more elusive than at first expected.[93] It would be unfair to force attorneys to revisit fee levels in winning cases, but not allow them to do so in losing cases.[94] The effect of such a system would be simply to drive up overall contingent fee percentages, and it is highly unlikely that

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88. 548 N.E.2d 1051, 1052–53 (Ill. 1989).

89. *Id.* at 1053.

90. *Id.* at 1053–54.

91. *Id.* at 1052, 1057.

92. *See id.* at 1052–53.

93. *See* Haines v. Liggett Group, Inc., 814 F. Supp. 414, 427 (D.N.J. 1993) ("Having contracted with [client] on a contingency fee basis, [attorney] cannot now walk away from the contract because the case may not generate the return it expected at the outset . . . . Contrary to [attorney]'s suggestion, profitability is not a 'basic assumption' of a contingency fee contract."). One could argue that there is in fact an instance in which an attorney may permissibly withdraw from unprofitable litigation: an attorney retained on contingency who discovers at any point in the litigation that it lacks merit is positively required to withdraw from the matter. Thus, it may be that clients should be granted some analogous rights identical in scope should it prove impossible for the attorney to recover anything less than full compensation.

94. Conversely, in jurisdictions that permit an attorney to withdraw from representation that is, in some measure, unprofitable, the client should, absent a discount in the contingent fee charged to reflect this power, enjoy a mutual privilege. *See, e.g.,* Smith v. R.J. Reynolds Tobacco Co., 630 A.2d 820, 831 (N.J.

the authorities advocating ex post analysis in the name of client welfare would countenance a general fee increase.

None of this is to say that ex post analysis cannot be permitted. The point, rather, is that *all* economic effects must be understood and deemed acceptable. Thus, a legislative or judicial body is of course free to impose on attorneys an un-waivable obligation to conduct certain minimal discovery, aimed at ensuring that a matter is indeed controversial, before a fee is assessed, provided the attorney is aware of the requirement and is permitted to price her services accordingly. Similarly, society may legitimately determine that the harm to a particular client who is charged a retrospectively excessive fee is greater than the harm wrought on all winning clients who are charged a slightly higher fee to insure against this risk. However, neither courts nor legislatures can insist that attorneys accept greater obligations or risks without granting attorneys the power to assess additional fees.

B. Incentives, Control, and the Principal-Agent Problem

The attorney-client relationship is one of agency: the principal (client) contracts with the agent (attorney) to accomplish a certain task for a fee. Ideally, the interests of principal and agent should perfectly align. In practice, this is rarely the case. As a result, there exists a body of literature exploring various ways to structure agency relationships so as to approximate perfect interest-alignment. A notable and heavily analyzed example is executive compensation.[95]

In the attorney-client context, agency problems arise in many forms. Some, such as those attending case settlement or discharge of the attorney, present dual agency and risk issues. Those problems are discussed in the next section. Others, unique to agency issues, are addressed first.

1. Comparing the Hourly and Contingent Fee, and Getting the Best of Both Worlds

The contingent fee rewards an attorney for a successful result, but can encourage minimal effort and sub-optimal client (but not attorney) recovery. An attorney has incentive to pursue a recovery for each individual client that maximizes the ratio of the attorney's contingent fee to hours expended, perhaps at the expense of a greater recovery for the client. This problem is illustrated below in the context of settlement. Alternatively, the hourly fee rewards an attorney for effort and time expended, but can discourage timesaving and is not as result-oriented as the contingent fee. Given this polarity, it is difficult, if not impossible, to obtain perfect interest-alignment.

Kevin Clermont and John Currivan suggest a fee structure that is designed to approach optimal alignment. They propose a hybrid method of compensation that

Super. Ct. App. Div. 1993) (noting that under certain circumstances an attorney may be able to withdraw from a contingent fee representation for "unreasonable financial burden").

95. *See, e.g.,* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. of Fin. Econ. 305 (1976); Kevin J. Murphy, *Executive Compensation* (June 1999), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=163914.

combines contingent and hourly fees, called the "contingent hourly-percentage fee."[96] Under the proposal, "[t]he dollar amount of the proposed contingent fee would be computed by adding (1) the lawyer's time charge for the hours worked to (2) a percentage (say five or ten percent) of the amount by which the gross recovery exceeds that time charge."[97] This proposal, through its two components, rewards both effort and success.

2. *Calculating Contingent Fees so as to Reduce Interest Misalignment*

a. Percentage of gross or net recovery? If an attorney recovers an award for her client, should the attorney's contingent fee percentage be applied to the gross recovery or only to the portion of recovery that the client ultimately receives after costs and expenses have been paid?

Calculating fees from net proceeds ensures that the client obtains some compensation and incentivizes cost-cutting.[98] This is one way to reduce misalignment of attorney and client interests, and to improve agency control. William Hodes relates variants of the following examples, which illustrate this point:[99] In the first variant, an attorney recovers $60,000 in a personal injury action. The attorney spent $45,000 on medical expert reports and depositions. After taking the attorney's one-third contingent fee—$20,000—off the gross recovery, and subtracting medical expenses from the remainder, the client is left owing $5000! Had the attorney subtracted her fee from the net recovery, the client would have recovered $10,000. In the second variant, an attorney recovers $60,000 in a personal injury action. The attorney, utilizing effective cost-cutting measures, incurred only $15,000 in expert medical expenses, and thus, after subtracting the expenses from gross recovery, and taking a one-third contingent fee—$15,000—off the net recovery, the client recovers $30,000. Under a percentage-of-the-gross system, it is argued, the attorney lacks direct financial incentive (as opposed to a reputational and attendant indirect financial incentive) to rein in excess spending and ensure that the lawsuit has practical value to the client. The attorney's incentive would, rather, be to err on the side of increasing the chance of victory, no matter what the cost, because she does not share in that cost. Under a percentage-of-the-net regime, the attorney, who can retain a portion only of the client's post-expense recovery, has direct financial incentive to minimize

96. Clermont & Currivan, *supra* note 13, at 537.

97. *Id.*

98. *See, e.g.*, Lan v. Ludrof, No. 1:06 CV 114, 2008 WL 763763, at *23 (W.D. Pa. Mar. 21, 2008) (approving award of counsel fees based on percentage of gross recovery, and noting that in certain securities actions, an attorney's fee award may only be had of the client's net recovery); *In re* Cardinal Health Inc. Sec. Litig., 528 F. Supp. 2d 752, 771 (S.D. Ohio 2007) ("[T]he Court chooses to subtract the expenses before awarding Lead Counsel its fee award. The net recovery more truly approximates the amount of money that benefits the Class.").

99. W. William Hodes, *Cheating Clients with the Percentage-of-the-Gross Contingent Fee Scam*, 30 Hofstra L. Rev. 767, 767–72 (2002). "To allow the lawyer to receive the same fee as if he had achieved the same result without the expenditure of client resources is to reward inefficiency and to break apart the community of interests that the contingent fee is supposed to promote." *Id.* at 772.

those expenditures, though not to the extent of unduly endangering her client's case, which might result in no fee for the attorney.

The claim that under a percentage-of-the-gross system an attorney lacks direct financial incentive to avoid profligate spending may be overly broad. It is the attorney, after all, who will advance the expenses for the client, and thus has *some* incentive to minimize the amount of her own money that she puts at risk.

Additionally, it is not always clear what constitutes excessive spending. For instance, it may not be clear to the attorney in a personal injury action whether a local medical expert will suffice or whether an expensive, nationally renowned expert is necessary, and the client may not wish the attorney to cut costs through such a gamble. Thus, while a percentage-of-the-net regime minimizes perverse incentives, the extent of the practical effects of a gross regime is unclear.

b. Structured awards. Successful plaintiffs are not always paid a lump sum of money. Sometimes, they are paid in installments over some period of time and the period may or may not be definite. Such structured awards raise questions regarding the calculation and timing of payments to attorneys. These issues, and the cases analyzing them, generally arise in the absence of contractual provisions in the attorney-client retainer agreement that normally would dictate particular resolutions.

First, should the attorney be paid in one lump sum, or in installments at the same intervals as when the client receives her own award? Although courts are divided, a majority favors the former.[100] Those authorities favoring the latter approach claim it is necessary to ensure that the attorney has adequate incentive to obtain the payout schedule most favorable to the client. These authorities believe true interest-alignment is obtained when the form and timing of payment are the same for both attorney and client.

Second, is the attorney to be paid a fee based on the present or the future value of the award? An award of $100,000 payable immediately has an equivalent present value, while an award of $100,000, to be paid to the client without interest in ten annual installments of $10,000 each, is presently worth considerably less than $100,000. Those courts holding that contingent fees are to be paid once, and up front, generally hold that the amount awardable under a contingent fee agreement is calculated using the present value of the award.[101]

C. *Hybrid Risk and Agency Issues*

1. *Discharging the Contingent Fee Attorney*

One risk that the contingent fee lawyer faces is being fired by the client at any stage before disposition of the case. A majority of jurisdictions permit a client,

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100. *See* Ravsten v. Dept. of Labor and Industries, 736 P.2d 265 (Wash. 1987) (majority view); Sayble v. Feinman, 142 Cal. Rptr. 895 (Cal. Ct. App. 1978) (minority view); Restatement (Third) of the Law Governing Lawyers: Contingent-Fee Arrangements § 35 cmt. e (minority view). Typically, under the majority view, the defendant is required to pay the attorney's lump-sum fee, as the client will not yet have recovered anything with which to pay the attorney.

101. *E.g.*, Robinson, Bradshaw & Hinson, P.A. v. Smith, 532 S.E.2d 815, 824 (N.C. Ct. App. 2000).

without penalty, to discharge an attorney with or without cause.[102] Most jurisdictions have practices in place to adequately protect the attorney in such a situation, though these practices are not homogeneous, and some create agency problems. Consider the following variations: [103]

> i. The discharged attorney recovers in *quantum meruit* (the fair market value of the services he has rendered, not the benefit conferred) regardless of the client's success in the underlying matter.[104]
>
> ii. The discharged attorney recovers in *quantum meruit* only if the client is successful in the underlying matter.[105]
>
> iii. The discharged attorney recovers under the contingent fee percentage, provided that the client is successful in the underlying matter.[106]
>
> iv. The discharged attorney may elect immediate compensation in *quantum meruit* (independent of future success or failure) or potential future compensation under the contingent fee percentage if the client is successful in the underlying matter.[107]

The "overwhelming tendency" of courts in cases of discharge is to use the *quantum meruit* method of compensation, and thus not allow recovery based on the contingent percentage.[108] Some jurisdictions vary the practice used based on the stage of the matter and the amount of work already performed at the time of discharge. For example, in the District of Columbia, "an attorney who enters into a contingent fee agreement with his client, substantially performs, and is then prevented by his client from completing performance is entitled to the full amount specified in the fee

102. *See, e.g.*, Martin v. Camp, 219 N.Y. 170, 174 (1916), *amended by*, 220 N.Y. 653 (1917).

103. *See generally* Lester Brickman, *Setting the Fee When the Client Discharges a Contingent Fee Attorney*, 41 Emory L. J. 367 (1992).

104. *See, e.g.*, *In re* Estate of Callahan, 578 N.E. 985, 987 (Ill. 1991); Skeens v. Miller, 628 A.2d 185, 186–87 (Md. 1993).

105. *See, e.g.*, Rosenberg v. Levin, 409 So. 2d 1016, 1022 (Fla. 1982); Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 60 (Mo. 1982).

106. *See, e.g.*, Action Law, S.C. v. Habush, Habush Davis & Rottier, S.C., 592 N.W.2d 319, 1999 WL 47585, at *1 (Wis. App. 1999). Courts have employed various methods to allocate contingency awards among successive attorneys. *See* James E. Towery and Julia M. Hollenback, *Dividing Attorney Fees Among Successive Attorneys—Settled and Unsettled Areas of Law Under Fracasse*, 33 Lincoln L. Rev. 105, 108–09 (2005–2006).

107. *In re* Downs, 363 S.W.2d 679, 686 (Mo. 1963).

108. Robert L. Rossi, 1 Attorneys' Fees § 3:12 (3d ed. 2002–2008).

agreement."[109] Where the "attorney renders less than substantial performance . . . quantum meruit [is] the appropriate measure of damages."[110]

Use of the first and fourth practices listed above may obviate the need for the portion of a risk premium that is based on risk of discharge, as the risk of non-recovery flowing from discharge may be avoided. Where the second and third practices prevail, an attorney's contingent percentage should include some premium to insure against the risk that the client's new attorney bungles the case or otherwise fails to obtain the same recovery that the discharged attorney would have. On the other hand, if an attorney is discharged and the client finds another attorney who "rescues" the case, the discharged attorney receives the unearned benefit of the fee flowing from recovery, based on the skill of the new attorney, which the discharged attorney might not have been able to obtain on her own.

Potential drawbacks of the various practices abound. First, where the discharged attorney's *quantum meruit* compensation is independent of the client's success in the underlying matter, the client, who is often unable to afford representation in the first place absent a contingent arrangement, would have to bear the burden of legal fees even if unsuccessful, and the attorney could have the perverse incentive to be discharged if recovery becomes unlikely.[111]

Second, when recovery is in *quantum meruit*, but is dependent on the client's success in the underlying matter, two possible perversions exist: In one possible scenario, the product of an attorney's hourly rate and the number of hours worked may exceed the fee that the attorney would have obtained under a fixed percentage upon contingency, thereby permitting the attorney to recover a greater fee than would be received had she not been discharged. Thus, some have suggested that in these jurisdictions, *quantum meruit* should be capped at the amount of contingent payment had the client not discharged the attorney.[112] In a second possible scenario, a client who acquires information indicating that the defendant is very likely to offer an acceptable settlement has incentive to discharge the attorney, forcing her to be paid in *quantum meruit* instead of the more profitable contingent fee.[113]

Third, as previously discussed, if the discharged lawyer is paid only upon success in the underlying matter, and unless this risk is built into the contingent fee normally charged, the discharged attorney unfairly bears the risk that the client's new attorney may perform more poorly than she would have.

Fourth, while the election-of-remedies option described in the fourth practice above does not suffer from the following shortcoming, an election doctrine that allows an attorney to choose between *quantum meruit* and contingent percentage

109. Kaushiva v. Hutter, 454 A.2d 1373, 1374 (D.C. 1983).

110. *Id.* at 1374; *see also* Barret v. Freise, 82 P.3d 1179, 1194 (Wash. Ct. App. 2003).

111. Assuming, of course, that the client has any money with which to pay the attorney's *quantum meruit* fee.

112. *E.g.*, Plaza Shoe Store, Inc. v. Hermel, Inc., 636 S.W.2d 53, 59–60 (Mo. 1982).

113. Omri Ben-Shahar & Robert A. Mikos, *The (Legal) Value of Chance: Distorted Measures of Recovery in Private Law*, 7 Am. L. & Econ. Rev. 484, 499 (2005).

recovery *at the end of the suit*, as opposed to the time of discharge, must be eschewed.[114] Under such a regime, the attorney's risk would be reduced, without a concomitant reduction in the price of her services. The attorney initiated representation on the basis that success would be rewarded with a percentage of recovery and failure would earn no fee. By virtue of being discharged, the attorney is guaranteed the highest possible payment. If the suit is unsuccessful, the attorney will be paid at least in *quantum meruit*. If the suit is successful, the attorney can recover the contingent percentage. The attorney, then, has a perverse incentive to be discharged as a way of hedging against the risk of non-recovery while ensuring maximal remuneration.

2. *Settlement*

Other risks faced by an attorney being paid on contingency are that a client rejects a sensible settlement offer in favor of riskier litigation, or forces acceptance of an unreasonably low offer. It is, after all, the client's decision, and not the lawyer's, that governs acceptance or rejection of settlement.[115] It is thought that these are some of the risks justifying a risk premium.

This position is not without controversy.[116] Brickman argues that in practice, the attorney heavily influences, if not completely dominates, the settlement decision. Consider the following perversion, all the more pernicious when the lawyer dominates the settlement decision: The attorney has incentive to accept an early settlement offer when it is thought that the marginal- and opportunity-costs of obtaining each additional dollar of recovery are not worth the attorney's time or effort. As the case progresses, the ratio of hours expended to money recovered may increase significantly, and the attorney must forgo other cases where quick settlement is likely and the ratio lower.

To illustrate: Suppose that in the typical personal injury action, an attorney is able to obtain a $10,000 settlement offer for her client after ten hours of work. Suppose further that with an additional twenty hours of work, including more extensive negotiation and evidentiary investigation, the attorney would be able to

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114. Ben-Shahar and Mikos suggest that at least one court applies such a rule. *See id.* at 500 ("Therefore, if the award the client eventually collects is high, the attorney may elect the benefit-based measure of recovery, namely, a fraction of the client's award; otherwise the attorney may elect the cost-based measure of recovery, namely, the hourly fee."). However, the case they cite implies that the election would occur at the time of discharge, not at the end of suit. *See In re* Downs, 363 S.W.2d 679, 686 (Mo. 1963) ("In such event, if the lawyer has a contingent contract and is without fault, he has the election to claim a reasonable fee for the work done, as upon a mutual rescission, or to wait until the claim is liquidated by judgment or settlement and then sue (if necessary) for his contract fee.").

115. Model Rules of Prof'l Conduct R. 1.2(a) (2004).

116. *See* Brickman, *supra* note 35, at 284; MacKinnon, *supra* note 52, at 196 ("Although theoretically the client has the control over such decisions, as a practical matter it is usually handled by the attorney."). Brickman cites a survey and study by the Rand Corporation, the results of which tend "to disprove the myth, implicit in traditional tort approaches, that individual litigants exercise control over their own cases and that intimate contact and consultation between lawyers and clients forces lawyers to respond faithfully to their clients' wishes." Brickman, *supra* note 35, at 284 (quoting Deborah R. Hensler, *Resolving Mass Toxic Torts; Myths and Realities*, 1989 U. Ill. L. Rev. 89, 92–97 (1989)).

extract a $25,000 offer from the opposing party. Finally, suppose that the attorney has only thirty hours of time to spend, and that there are numerous potential cases available to the attorney presenting the same payout ratios. An individual client's welfare is maximized when the attorney spends the entire thirty hours on that client's matter, recovering $25,000. The lawyer's welfare is maximized by taking three cases and devoting only ten hours to each. The former situation yields compensation to the lawyer equal to the contingent fee percentage of $25,000, while the latter yields compensation equal to the fee percentage of $30,000. Thus, while the latter situation represents the best economic use of the attorney's time, it also represents a sub-optimal level of recovery for the individual clients.

Assuming, though, that clients do exercise some control over settlement decisions—and surely there are instances when they do—what is a lawyer to do when the client is unreasonable in either refusing an acceptable settlement offer or demanding acceptance of a low one? Courts have given a client-friendly answer: the attorney must abide by the client's wishes, even at the cost of the attorney's fees. The following view is typical:

> The attorney is of course not entitled to be paid . . . on the basis that the suit should or could have been settled. The cause of action is the client's. If his purpose is not to cheat his attorney, he may, completely unfettered by any agreement with or relationship to the attorney, litigate or settle as he wills or whims. On the other hand, the attorney, in a measure, continues to be bound by the contract of retainer. His fees (being by agreement contingent upon such "sums received or recovered by [the client] by suit, settlement or otherwise") cannot be computed on the agreed percentage of that sum which the client might have received by way of settlement had the lawyer's advice been accepted.[117]

While this position seems harsh, the attorney can insure against this risk by adding an appropriate premium to the fee charged to all winning clients.

It is unclear whether an attorney may contractually circumvent these limitations and provide, in the retainer agreement, for compensation in the event the client does not follow the attorney's advice regarding settlement. In an ethics opinion, the Philadelphia Bar Association stated that a lawyer would be permitted to include a fee conversion provision in the retainer agreement "if a clear objective is specified in the agreement and full disclosure is provided to the client."[118]

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117. Matarrese v. Wilson, 118 N.Y.S.2d 5, 9–10 (Sup. Ct. Bronx County 1952) (citations omitted); *see also* Miller v. St. Louis Car Co., 14 S.W.2d 464, 465 (Mo. Ct. App. 1929) (plaintiff's counsel entitled to percentage of settlement amount only, where plaintiff awarded $900 at trial and, upon defendant's appeal, plaintiff settled for $300 without informing his attorney); Kay v. Home Depot, Inc., 623 So.2d 764, 767 (Fla. Dist. Ct. App. 1993) (The attorney obtained $40,000 settlement offer but withdrew one week before trial when client refused settlement, the attorney believing that at trial the claim would be valued for substantially less. Replacement counsel obtained $45,000 settlement, and client accepted. The court held that the initial attorney was not entitled to any fees.).

118. Phila. Bar Ass'n, Op. 2001-1 (2002), *available at* http://www.philadelphiabar.org/page/EthicsOpinion2001-1?appNum=2&wosid=taZWfZvScKZF1cPmJcxTkw.

For example, with proper disclosure and contractual language, an attorney and client may agree that the representation's objective is to secure monetary relief on a contingency fee, and that if the client deviates from this objective and instead demands acceptance of injunctive relief only, the fee is to be computed on an hourly basis. It is unclear how such an agreement would fare in other states. For instance, the New York County Lawyers' Association has opined that a lawyer in a personal injury matter may not contract with her client for a shift from contingent to hourly fees if the client refuses a settlement offer the attorney believes should be accepted.[119] This could, but need not, be interpreted to foreclose the option left open by the Philadelphia Bar Association. The most that can be said is that, if permissible, the existence of a fee conversion provision would warrant a reduction in risk premium charged.

3. Reverse Contingent Fee Arrangements

Contingent fees are not just for plaintiffs' counsel. Defendants have also sought to utilize the economic and interest-aligning benefits of such arrangements. In the typical reverse arrangement, a defendant facing monetary liability pays his attorney a percentage of the amount by which the attorney is able to reduce liability from an established baseline.

The ABA has approved the use of reverse contingent fees in appropriate circumstances.[120] Such an arrangement is permitted provided that "the amount saved is reasonably determinable, the fee is reasonable in amount under the circumstances, and the client's agreement to the fee arrangement is fully informed."[121]

In *Brown & Sturm v. Frederick Road Ltd. Partnership*, a law firm was successfully sued for legal malpractice and failure to disclose material facts necessary for its clients to make an informed payment decision based on misconduct in a reverse fee arrangement.[122] The clients had been assessed \$60 million in tax liability, but the matter was eventually settled for \$20 million.[123] Choosing \$60 million as the baseline exposure, the law firm demanded some \$4.8 million pursuant to a reverse contingent fee agreement.[124] The appellate court, affirming judgment for the clients, held the fee unreasonable given that the law firm knew or should have known that the initial tax liability assessment was inflated, and that actual potential liability was much lower.[125] This case illustrates the most important yet challenging aspect of structuring reverse contingency arrangements—establishing an appropriate baseline of liability.

119. NYCLA Comm. on Prof'l Ethics, Formal Opinion No. 736 (2006), *available at* http://www.nycla.org/siteFiles/Publications/Publications286_0.pdf.

120. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-373 (1993).

121. *Id.*

122. 768 A.2d 62 (Md. App. 2001).

123. *Id.* at 70, 72.

124. *Id.* at 72.

125. *Id.* at 87–89.

V. THE PERVASIVE PROBLEM OF UNREASONABLE CONTINGENT FEE PRICING, AND MODELS FOR REFORM

A. The Problem

With the number of lawyers already high and still increasing,[126] one might have thought that contingent fee lawyers would compete with one another and thus reduce the price of legal services—that the invisible hand of the market could prevent and curb pricing abuses. That does not seem to be the case. There is compelling empirical evidence that contingent fee pricing is largely insensitive to factors such as risk.[127] In fact, many courts note the prevalence of "standard" contingent fee percentages,[128] a phenomenon inconsistent with reasonable pricing.

Brickman suggests a number of reasons for the lack of competition, including: client ignorance of the value of his or her claim, inherent risks in litigation and differing competence levels of attorneys, and a lack of attorney price advertising.[129] In fact, ethical regimes that prohibit price advertising in order to protect clients from being misled and to maintain an air of "professionalism"[130] may in fact have the perverse effect of disabling competition and increasing the cost of legal services. Competition is also hindered by psychological phenomena such as price signaling:[131] some believe that the more expensive a product or service, the more likely it is to be of relatively high quality.[132] While this belief may be justified in a competitive and efficient market, it is often invalid in an uncompetitive one.

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126. According to the ABA, in the United States, there were 1,162,124 active lawyers in 2008 and 1,180,386 active lawyers in 2009. National Lawyer Population by State, http://new.abanet.org/marketresearch/publicdocuments/2009_natl_lawyer_by_state.pdf (last visited Feb. 14, 2010). In 2000, there were 1,066,328 lawyers. Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in 2000 27 (2004), *available at* http://www.abanet.org/marketresearch/pdfs/lawyer_statistical_report_2000.pdf.

127. *See* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 Cardozo L. Rev. 65, 78 (2003); *see also* MacKinnon, *supra* note 52, at 187. MacKinnon reports that the personal injury claimant "usually is presented with a standard form contract (frequently printed) and the assurance, either express or implied, that the customary or scheduled fee rates are a 'given' in the situation." MacKinnon, *supra* note 52, at 187. Further, "[w]hile some claimants 'shop around' for a low, competitive price, this is the rare exception." *Id.*

128. *See, e.g.*, Freeman v. Mayer, 95 F.3d 569, 570 (7th Cir. 1996) (referring to "standard one-third contingent fee"); King v. Fox, No. 97 CV 4134, 2004 WL 68397, at *7 (S.D.N.Y. Jan. 14, 2004) ("A one-third contingency fee is standard throughout the state and country.").

129. Brickman, *supra* note 127, at 77.

130. MacKinnon, *supra* note 52, at 4 ("[T]he financial rewards to the lawyer are so large as to encourage competitive solicitation of potential clients, impairing the professional disinterest necessary to sound advice to his client and weakening the ties between fellow lawyers which form one of the essential characteristics of a profession.").

131. *See* Brickman, *supra* note 127, at 101–02.

132. *See, e.g.*, Hilke Plassmann et al., *Marketing Actions Can Modulate Neural Representations of Experienced Pleasantness*, 105 Proc. Nat'l Acad. Sci. 1050, 1050 (2008) ("[I]ncreasing the price of a wine increases subjective reports of flavor and pleasantness."); Eitan Gerstner, *Do Higher Prices Signal Higher Quality?*, 22 J. Mktg. Res. 209, 209 (1985).

In the class action context, the lead counsel auction is one attempt to create a competitive market. It has also been suggested that the market mechanism can be trusted in corporate matters paid on contingency, as corporate clients are often sophisticated legal consumers who understand the value of their claims and possess the ability to solicit competitive bids from legal service providers.[133] The issue, then, is how to increase competition in pricing for the benefit of unsophisticated clients.

B. *Models for Reform*

1. *Market-Based Solutions*

a. Indirect price competition through alternative financing arrangements. It would be sensible for some plaintiffs to borrow money and pay hourly fees to prosecute their claims, rather than pay the exorbitant rates charged by contingency lawyers. Some plaintiffs might have adequate credit to obtain regular bank loans, while others could obtain credit only by using the lawsuit as collateral. Thomas Miceli suggests that a market for loans using lawsuits as collateral does not exist because lenders would have the same difficulty as clients in valuing claims and risk.[134] The problem that Miceli notes, though, may not apply in certain cases where valuing legal claims is not difficult, such as claims arising out of an airline accident.

In contrast to the assignment-like financing that characterizes the arrangements described below, in the usual bank loan the borrower must repay the loan regardless of any contingency, and the collateral is not the preferred form of payment. I shall call this arrangement a "typical bank loan." One reason for the lack of typical bank loans secured by lawsuits could be that such lending, often riskier than that secured by physical property, may require interest rates that exceed statutory caps for loans. The atypical, assignment-like lenders discussed below make the obligation to repay contingent upon recovery and not absolute in order to circumvent prohibitions on usury.[135] As Douglas Richmond notes, "[i]f repayment is based upon a contingency, a transaction is more like an investment or a joint undertaking than a loan," and there are no artificially imposed limitations on investment returns.[136]

A plaintiff would be better off with a typical, non-contingent bank loan secured by her lawsuit than with a contingent fee arrangement only if the sum of the interest on the loan and the attorney's aggregate hourly fee is sufficiently lower than the contingent fee percentage of the client's recovery. By "sufficiently," I mean not just nominally lower, but low enough to compensate for the value of the non-recourse protection afforded by the contingent fee arrangement. Whether this situation

133. Jill E. Fisch, *Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction*, 102 Colum. L. Rev. 650, 671–72 (2002).

134. Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. Legal Stud. 211, 224 n.27 (1994).

135. *See* Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649, 665 (2005). Usury is the illegal act of charging an interest rate for a loan above that permitted by law. *Id.*

136. *Id.*

actually would obtain with any frequency is not entirely clear, though it is likely to do so in low-risk litigation. To enable typical bank lending for lawsuit prosecution, legislators may need to reform statutory interest rate caps for loans that may be riskier than a bank's physical-property-collateralized loans, and thus permit arrangements that could benefit both borrowers and lenders, rather than force clients to undertake through contingent fee arrangements the functional equivalent of borrowing at potentially higher interest rates.

There is a nascent market for litigation financing, although not of the "typical" variety. Consider the following two (non-exhaustive) potential markets for legal claims in which a personal injury plaintiff wishes to sell his claim and potential recovery so as to immediately obtain a sum certain ("assignment-like" financing). In the "pure market," a third party is able to purchase the claim and *take over* prosecution of the action, such that the client cedes to the purchaser control over the suit and entitlement to any amount recovered. In the "partial market," a third party is able to purchase the rights to a portion (or all) of any recovery in the matter, but the plaintiff and his non-contingent-fee attorney retain control and decisionmaking authority over the suit.

The pure market offers a competitive alternative to contingent fee pricing when the purchase price of the claim is greater than the recovery in the suit less an attorney's contingent fee. Nonetheless, a number of common law doctrines effectively preclude development of a pure market for buying, selling, and trading in legal claims.[137] These include rules that prohibit assigning claims to others, as well as the doctrines of "barratry, maintenance, and champerty, which prohibit a stranger to a controversy from, respectively, inciting litigation, assisting in prosecuting litigation, and agreeing to take over litigation."[138] A number of scholars argue that a pure market for claims is useful and should be legal.[139] The primary economic benefit of a pure market is that those who purchase and subsequently litigate claims are likely to be sophisticated legal consumers who are able to obtain competitive prices for legal services and effectively monitor their attorneys' behavior. These economic benefits could inure to

137. One must distinguish a market for legal claims from a market for legal pricing. The discussion earlier about competition among lawyers to reduce the contingent percentages they charge clients does not involve impermissible assignments of or interests in claims.

138. Michael Abramowicz, *On the Alienability of Legal Claims*, 114 Yale L. J. 697, 699 (2005) (footnote omitted). Abramowicz provides a detailed analysis of the philosophical and economic arguments for and against a prohibition on alienating legal claims. *Id.*; *see also* McKellips v. Mackintosh, 475 N.W.2d 926 (S.D. 1991) (voiding agreement between bank officer and borrower for loan to fund patent infringement prosecution in exchange for a percentage of recovery).

139. For the argument that creating an expansive market for purchasing, selling, and trading tort claims is currently prohibited, but that the prohibitions are obsolete, unjustified, and counter-productive, see generally Peter Charles Coharis, *A Comprehensive Market Strategy for Tort Reform*, 12 Yale J. on Reg. 435 (1995); Isaac Marcushamer, *Selling Your Torts: Creating a Market for Tort Claims and Liability*, 33 Hofstra L. Rev. 1543 (2005); James E. Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 Geo. J. Legal Ethics 223 (2003). For the suggestion that attorneys self-interestedly promote anti-assignment rules, see Samuel R. Gross, *We Could Pass A Law . . . What Might Happen If Contingent Fees Were Banned*, 47 DePaul L. Rev. 321, 327–30 (1998).

the advantage of consumers, particularly through competition among pure-market-claims purchasers.

The partial market offers a competitive alternative to contingent fee pricing whenever the lender's payment to the plaintiff, less the attorney's aggregate hourly fee, is greater than the full recovery less the attorney's contingent fee.[140] Richmond has examined this type of litigation funding and concluded that under certain conditions it is ethical, legal, and useful.[141] Currently, though, the partial market is not price-competitive with contingent fees.[142]

b. Optimization under the current regime. The market for litigation financing is still in its infancy, perhaps bound by what some consider an ill-informed and overprotective parent that refuses to let it mature. Current rates for existing non-recourse litigation funding are not promising. At such high rates, lenders hardly provide a competitive alternative to contingent fee arrangements. It is possible that as the market for lawsuit lending develops, the interest rates assessed will decrease. Additionally, if litigation financers in the partial market for claims were able to bundle their loans, securitize them, and trade the securities on an open market, it would increase the availability and reduce the cost of litigation funding. It may be, though, that true reform will come only from proliferation of a pure market for claims.

Efforts to introduce new forms of litigation financing should be part, but cannot be the entirety, of contingent fee price reform. First, a legal claim is unlike a home or vehicle. It is neither fungible nor otherwise standard. An individual legal claim may be hard to value, and it is not clear that a robust market will ever exist for individual claims.[143] Second, partial market and typical bank lenders must contend with most of the risks a contingent fee attorney would normally face, in addition to the risk of lack

140. This assumes that the client uses the advance to pay the attorney's hourly fees, rather than an advance arrangement where the attorney is still retained on a contingent basis.

141. *See* Richmond, *supra* note 135, at 681–82. In addition to analyzing traditional issues such as maintenance and champerty, Richmond also discusses issues of confidentiality (in disclosing aspects of the case to a lender), conflicts of interest imposed by a lender, and fee-sharing problems. *Id.*; *see also* Susan Lorde Martin, *Financing Plaintiffs' Lawsuits: An Increasingly Popular (And Legal) Business*, 33 U. Mich. J. L. Reform 57 (2000).

142. *See, e.g.*, Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217 (Ohio 2003) (effective interest rate over 100%). These loans may be useful for reasons having little to do with competitive pricing, and the current discussion only considers utility *qua* pricing. For instance, these loans help clients who, for whatever reason, need immediate liquidity and would suffer harm by having to wait until the end of suit to recover, even if the recovery would be larger than the pre-recovery advance.

143. In discussing the economics of a market for claims, Abramowicz notes that even if legal, "[t]here are reasons, however, to think that the market in legal claims would be thin." Abramowicz, *supra* note 138, at 743. While Abramowicz raises many good points to support this proposition, his discussion of the adverse selection problem is incomplete. Arguing that, in theory, claimants who agree to sell their claims "will not be a random sample of all parties, but those who anticipate that buyers will most overvalue their claims relative to other claims," *id.*, Abramowicz fails to consider that where standard contingent fee percentages remain high, those with valuable claims are likely to sell them so as to avoid losing a sizeable portion of the recovery to attorneys' fees.

of control over the attorney's conduct and decisionmaking. This could make such lending less attractive and more costly. Third, whether typical, partial-, or pure-market lending is sustainable at rates lower than contingent fee percentages is not yet fully known. Further empirical analysis and economic modeling is necessary. Fourth, it is unclear if litigation-funding arrangements, in their various forms, will pass legal and ethical muster, and, if they fail to, whether law reform is attainable. Fifth, and most importantly, it is unclear whether unsophisticated clients would benefit from alternative means of litigation financing. A client who lacks the sophistication to aggressively price-shop for legal representation probably lacks the sophistication to obtain financing. Proliferation of litigation-financing alternatives might increase public awareness of the need to shop for price, just as the proliferation of banks and brokers seems to have done for mortgage lending. Much remains to be seen.

As things currently stand, the best an individual client can do to create a competitive market for pricing is to identify, through referrals and basic research, a core group of attorneys who are arguably competent to handle the client's matter, and propose to each that the client's business will go to the lowest bidder. The problem with this method, sensible as it may seem, is that the client runs the risk that the lawyer he chooses will focus less on the client's case and more on other cases whose rates of return are higher, and thus more profitable, for the lawyer. Absent proper monitoring, this risk can only be avoided by ensuring that all other clients are being charged similarly low (fair) rates. This is added reason for increased legislative and judicial regulation.

Potential clients could also use the Internet creatively. It might be sensible to create an auction site for legal services, with representation requested by the client so as not to run afoul of prohibitions on attorney solicitation of clients. The site could utilize attorney-written questionnaires to elicit from each potential client important basic facts about his case.[144] Attorneys could follow up with the potential client, inquiring as to any additional facts necessary, and then submit contingent-fee-percentage proposals. Potential clients could then choose among the offers,

144. Some courts have held that information provided by potential clients on attorney-written questionnaires is privileged. *E.g.*, *In re* Auclair, 961 F.2d 65, 69 (5th Cir. 1992) ("[C]ommunications made in the course of preliminary discussions with a view to employing the lawyer are privileged though employment is not . . . accepted."); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319 (7th Cir. 1978) ("The fiduciary relationship existing between lawyer and client extends to preliminary consultation by a prospective client with a view to retention of the lawyer, although actual employment does not result."); Gates v. Rohm & Haas Co., No. 06-1743, 2006 WL 3420591, at *3 (E.D. Pa. Nov. 22, 2006) ("Where courts have specifically addressed the discoverability of questionnaires completed by putative class members, the dispositive factor typically is whether the putative class members were seeking legal advice or representation at the time they filled out the questionnaires."); Vodak v. City of Chi., No. 03 C 2463, 2004 U.S. Dist. LEXIS 532, at *7–8 (N.D. Ill. Jan. 16, 2004) ("[T]he persons who completed the form questionnaires reasonably believed that they were consulting counsel in their capacity as lawyers and they completed the questionnaire for the purpose of requesting legal representation."). *But see* Morisky v. Pub. Serv. Elec. & Gas Co., 191 F.R.D. 419, 423 (D.N.J. 2000) ("[The plaintiff's law firm] cannot establish that the . . . employees who completed the questionnaires were clients or sought to become clients at the time the employees returned the completed . . . questionnaires.").

presumably taking the best offers from lawyers with whom the clients are comfortable.[145] While rudimentary, this option should be explored.

2. *Value-Added Contingent Fee*

Brickman's proposed solution to contingent fee abuse is a value-added contingent fee, which works as follows: Before the expiration of two months after the plaintiff retains an attorney, both plaintiff and defendant are to provide basic yet minimal discovery, and the defendant is then given an opportunity to make a settlement offer. Should the defendant make such an offer, the plaintiff's attorney is paid a contingent fee based on the value added by her services—the amount that the attorney is able to recover for the plaintiff above the initial settlement offer. If the defendant does not make any settlement offer at that time, it is presumed that the defendant anticipates a fair chance of success, and thus there is enough risk to the plaintiff to justify charging a contingent fee on any amount recovered. If the defendant makes a settlement offer and the plaintiff accepts, the attorney is limited to an hourly fee for the representation.[146]

While Brickman's proposal ensures that the client pays a contingent fee only when real value is produced, it does not ensure that the fee is commensurate with the risk involved in the representation. The proposal is also limited to the extent that defendants are unable or reluctant to submit settlement offers before significant investigation and discovery has occurred. The ABA has rejected the proposal.[147]

3. *Case-by-Case Scrutiny*

Some suggest that contingent fee abuses can be curbed through case-by-case judicial scrutiny of fee arrangements and awards.[148] They point to judicial regulation of fees in the class action context as an exemplar. Brickman contends that such scrutiny would be impracticable (and perhaps impossible), as some million new contingency cases are filed each year, and only a small fraction are actually litigated and thus come before a judge.[149]

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145. Some might object to this proposal on the ground that clients may have no way of knowing whether attorneys who submit bids are competent. This objection, even if true, does not necessarily militate against the proposal. It assumes that clients who locate and retain attorneys through traditional means possess greater knowledge of the competence of the attorneys they hire. It also assumes that any informational benefits attending traditional methods of retaining attorneys could not be imported to the Internet. This too may not be true. For example, auction sites like eBay have effectively implemented reputational ratings for buyers and sellers. On the other hand, the types of services (e.g., rapid shipment) reputational rankings on eBay rate are much simpler than legal services.

146. *See* Brickman et al., *supra* note 5, at 24–28.

147. ABA Comm. on Ethics and Prof'l Responsibility, Formal Opinion 94-389 (1994).

148. *E.g.*, Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, 2 Litig., Summer 1976, at 27, 35.

149. Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 Wash. & Lee L. Rev. 1339, 1349–51 (1996).

Others suggest that abuses can be adequately monitored and addressed using the traditional disciplinary mechanism of oversight by each jurisdiction's attorney disciplinary committee. Brickman, however, argues that, for a number of reasons, disciplinary committees do a poor to non-existent job of punishing and deterring abuse. First, the *descriptive* proposition that standard contingent fees are general and widespread is mistakenly taken to bear *normative* implication. That is, people use the descriptive claim that a 33% contingent fee is "normal" or "standard" as a normative justification for its propriety. Disciplinary cases generally are heard only if a client files a complaint—a rarity.[150] With industry-standard contingent fees, there is no baseline from which a client can judge fee excesses, and thus know when to complain. Second, while disciplinary committees can, unlike many courts, exercise jurisdiction over ethical lapses in legal matters settled without resort to litigation, few do. Many disciplinary committees fail to even recognize contingent fee abuses as ethical lapses, either viewing them as fee disputes to be referred to confidential fee arbitrators or as entirely unproblematic.[151]

4. *Capping Fees*

Some jurisdictions have enacted ceilings on the percentage of a client's recovery an attorney may retain as a contingent fee, generally "barring rates above 50%."[152] Some jurisdictions have enacted sliding-scale measures of maximum contingency percentages that depend on the amount of recovery or stage of litigation in which the case terminates.[153]

Capping fees can have unintended consequences. First, while it may seem intuitive to enact a low cap for a fairly minor, low-risk matter, this could have the effect of precluding potential representation, as the attorney's fee would not be worth the effort or time necessary to obtain it.[154] The dollar amount of these claims may be so nugacious as to merit disregard, but others, at the very least those on the margin, might be financially significant to the client but insignificant to the lawyer at the capped rate. These marginal cases (and, since "marginal" is a relative term, it is unclear just how few they might be) would fall to the wayside if the fee were capped too low. Second, and more importantly, to the extent that caps are insensitive to the risk involved or effort required in a particular case, they are crude, and threaten to preclude contingent representation in very risky or labor-intensive matters.[155] After all, the problem is not purely one of a higher fee, but rather of a fee insensitive to risk

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150. *See* Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DePaul L. Rev. 371, 400 (1998) ("[C]lients, with their recoveries fresh in hand, rarely see any basis for complaining that their lawyers' fee were excessive.").

151. *See generally* Brickman, *supra* note 149 (reporting cases and discussing results of survey).

152. Brickman et al., *supra* note 5, at 17; *see, e.g.*, Okla. Stat. Ann. tit. 5, § 7 (2009).

153. *See, e.g.*, Rules Regulating the Florida Bar: Rules of Prof'l Conduct § 4-1.5(f)(4)(B) (2010).

154. *See* Contiguglia & Sorapure, *supra* note 8, at 701.

155. Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 4 Geo. J. Legal Ethics 813, 834 (1989).

or difficulty. While legislatively and popularly tempting, this procrustean measure is economically unsound.

5. *Working Together for Reform*

As the reader has likely gathered, no single proposal is perfect, and none standing alone can reform contingent fee pricing abuse. True reform only can result from a concerted effort. This effort should include further development of litigation financing alternatives, increased judicial and disciplinary committee scrutiny of fees, educational campaigns aimed at informing clients that fees need not be standard and that clients should negotiate with their attorneys and solicit more than one "bid" for representation,[156] and adoption of a value-added regime.

VI. DO CONTINGENT FEE ARRANGEMENTS PROMOTE LITIGATION, AND DOES IT MATTER?

Whether reasonably priced or not, critics of the contingent fee have for years castigated it as a device by which frivolous and excessive litigation is promoted.[157] This assessment, however, largely misses the mark. Recall that Brickman noted in his critique of the aggregative view of an attorney's contingent fee caseload that subsidization of very risky cases does not occur because attorneys carefully screen cases for merit. These comprehensive screening processes have been empirically documented.[158] Their consequences are considerable.

Initially, a move from hourly to contingent fees may increase the quantity of cases, insofar as it opens the courthouse doors to parties who would otherwise have been unable to afford to litigate.[159] To those who have a general, visceral distaste for

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156. *See, e.g.*, Federal Trade Commission, *Need a Lawyer? Judge for Yourself* (June 2002), http://www.ftc.gov/bcp/edu/pubs/consumer/products/pro14.shtm ("The size of a contingency fee, usually a percentage of any money you receive to resolve the case, is always negotiable . . . . The size of the contingency fee should reflect the amount of work that will be required by the attorney. Some cases are straightforward; others can be novel or uncertain.").

157. *See, e.g.*, Edith Greene et al., *"SHOULDN'T WE CONSIDER . . . ?" Jury Discussions of Forbidden Topics and Effects on Damage Awards*, 14 Psychol. Pub. Pol'y & L. 194, 197 n.2 (2008) (in the public eye, contingency fees are "perceived as encouraging the filing of frivolous lawsuits"); Yu-Hsin Lin, *Modeling Securities Class Actions Outside the United States: the Role of Nonprofits in the Case of Taiwan*, 4 N.Y.U. J. L. & Bus. 143, 179 (2007) ("Under the allure of contingency fees, lawyers, being the major beneficiaries of the settlements following frivolous litigation, bring up all potential lawsuits, regardless of their merit, to maximize their 'portfolio' gains."); Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 Case W. Res. L. Rev. 291, 297 n.35 (1994) ("Contingent fees are banned in most foreign countries to avoid frivolous litigation . . . .").

158. *See* Kritzer, *supra* note 18, at 67–89.

159. However, for those lawyers who insist that certain hourly fee clients who are able to afford litigation remunerate them instead on a contingency basis, the shift might decrease the quantity of litigation, as these lawyers will be less willing to accept risky cases. This assumes, though, that the clients would have been willing to pay an hourly fee in risky cases. It also assumes that some lawyers would rather be compensated on a contingency basis, even when the client can afford to pay a regular fee, because of the possibility of high returns.

litigation, this increase is deleterious. Assuming, as one should, that society should object only to frivolous litigation, the real issue is whether contingent fee arrangements decrease the *quality* of litigation. As stated by the court in *Thallhimer v. Brinckerhoff*, "[t]he excitement of suits is an evil, when suits are unjust; but when right is withheld, and the object of the suit is just, to promote the suit, is to promote justice."[160]

Economic modeling suggests that contingent fee arrangements reduce frivolous suits when compared to hourly fee arrangements.[161] The reasoning is simple: When an attorney's compensation is based solely on success, as opposed to hours billed, there is great incentive to accept and prosecute only meritorious cases.[162]

At least one empirical analysis concludes that "hourly fees encourage the filing of low-quality suits and increase the time to settlement (i.e., contingency fees *increase* legal quality and decrease the time to settlement)."[163] One problem with this analysis is its measure of case quality: "the probability that the plaintiff drops the case without either a settlement or award. A drop . . . occurs when the plaintiff unilaterally decides not to pursue the case any further."[164] In the hourly fee context, a drop may in fact reflect a plaintiff's growing assessment that the expected return from prosecuting the matter is less than the expected cost. However, a drop also may reflect a plaintiff's mere inability to continue to finance the litigation. With a thin market for litigation financing, many plaintiffs who are not in upper-socioeconomic classes would be forced to drop meritorious cases as legal fees mounted. Counting such drops as reflective of case quality is wrong. It is unclear what percentage of drops reflect actual low case quality, and thus what conclusion to draw from the data.

The authors respond that "liquidity constraints" fail to account for the increase in drops under the hourly fee: first, for liquidity constraints "to explain an increase in drops would require that plaintiffs fail to foresee at the time that their case begins that their funds will be insufficient to carry the case forward;"[165] second, if liquidity constraints are indeed common, the time to settlement should decrease under hourly fees, as plaintiffs would demand early resolutions to their cases. In fact, the study revealed that time to settlement increased when contingent fees were limited, thus negating a significant explanatory role for liquidity constraints.

160. 3 Cow. 623, 643 (N.Y. 1824).

161. *See* Miceli, *supra* note 134, at 223 ("[W]hen the threat of frivolous litigation is highest . . . the hourly fee actually results in more frivolous suits and higher total litigation costs.").

162. There are still situations where an attorney paid on contingency would accept a low-quality suit. The attorney's expected return from any lawsuit is the sum of the product of the probability and value of each possible outcome. The greater the possible reward, the less likelihood of success necessary to justify accepting the representation. Thus, a low-quality suit with the potential for a very large recovery might still be worth pursuing, even on contingency. *See* David E. Bernstein, *Procedural Tort Reform: Lessons from Other Nations*, 19 Reg. 71, 79 (1996) (contingent fee arrangements "encourage[] attorneys to engage in speculative litigation in the hope of landing an occasional large jackpot").

163. Eric Helland & Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J. L. Econ. & Org. 517, 517 (2003).

164. *Id.* at 521.

165. *Id.* at 539.

The authors' response is problematic. First, it is entirely possible that a plaintiff, particularly an unsophisticated one, would fail to appreciate the full cost of litigation at its commencement. Second, in the hourly fee context, liquidity constraints can actually lengthen the time to settlement, such as when a client requires additional time to obtain funds to further finance the litigation.

The debate over whether contingent fees increase or reduce frivolous litigation continues, and further empirical analysis is necessary to resolve this important question. However, the popular view of the contingent fee as promoter of frivolousness is, at the very least, dubious.

VII. CONCLUSION

Contingent fee arrangements are useful and important, but they must be structured so as to track risk, increase interest-alignment and minimize perverse incentives and effects. Additionally, courts and legislatures must understand the economics behind such arrangements. Toward these ends, this article has presented the case for reforming certain aspects of contingent fee practice, and has offered suggestions for reform. By following this advice, and appreciating opposing views in contested areas, society can move closer to a just and economically efficient system of contingency representation.