

CONTINGENT FEES AND TORT REFORM: A REASSESSMENT AND REALITY CHECK

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I

INTRODUCTION

Many consumer organizations, public advocates, labor unions, and plaintiffs' lawyers view the United States' system of contingent fees as nothing less than the average citizen's "key to the courthouse door," giving all aggrieved persons access to our system of justice without regard to their financial state.¹ Others, including some defense counsel and academics funded by or speaking for corporations and their insurers, view them as the bane of our legal system, the source of frivolous and expensive litigation that lines the pockets of the claimants' lawyers with unwarranted and extravagant fees.² Despite a 1994 formal opinion of the American Bar Association finding contingent fees to be squarely within the bounds of American legal ethics,³ they remain subject to attack by their critics.⁴ As Congress and some state legislatures continue to debate the

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1. Philip H. Corboy, *Contingency Fees: The Individual's Key to the Courthouse Door*, LITIG., Summer 1976, at 27, 27-30. Mr. Corboy is a leading member of the plaintiffs' bar and the senior partner of Philip H. Corboy & Associates in Chicago.

2. See, e.g., LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 69-83 (Manhattan Inst. Monograph Series No. 1, 1994), reprinted in Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173 app. at 194-211 (1995). The Manhattan Institute generally advocates the interests of corporate defendants, not individuals, in the civil justice system. See Barry J. Nace, *The "Legal Scholars" Speak on Contingency Fees*, TRIAL, Apr. 1994, at 7.

3. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (discussing contingent fees).

4. See, e.g., Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996); Allison F. Aranson, Note, *The United States Percentage Contingent Fee System: Ridicule & Reform from an International Perspective*, 27 TEX. INT'L L.J. 755, 761-63 (1992). See generally John F. Grady, *Some Ethical Questions About Percentage Fees*, LITIG., Summer 1976, at 20; Horowitz, *supra* note 2; Stewart Jay, *The Dilemmas of Attorney Contingent Fees*, 2 GEO. J. LEGAL ETHICS 813 (1989); Angela Wennihhan, Comment, *Let's Put the Contingency Back in the Contingent Fee*, 49 SMU L. REV. 1639 (1996); John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8; *Time for Real Legal Reform Now, Before Lawyers Bring the Nation Down*, SUN-SENTINEL, Jan. 4, 1996, at 14A.

subject of "tort reform,"⁵ however its advocates may define it, contingent fees will almost certainly remain among the primary targets of the cries for change.

Most of the calls to limit or eliminate contingent-fee compensation are at best misguided. If there are real inefficiencies associated with litigation, they do not arise out of the actions of injured plaintiffs and their attorneys, who have no motive to make litigation slower or more expensive. Rather, it is the manufacturers, their insurers, and their attorneys whose economic self-interest leads to prolonged litigation and, in the process, makes the system cumbersome and expensive. This article reviews the role of contingent-fee compensation in the United States' legal system, considers the criticisms leveled against it, and offers alternatives to the critics' suggestions on how to redress the problems that, according to their claims, are the products of such fees.⁶

II

THE ROLE OF THE CONTINGENT FEE

In theory, any litigant may retain counsel on a contingent fee basis to pursue or defend against most actions.⁷ Plaintiffs retain counsel on a contingent fee basis to pursue a wide variety of claims outside the arena of tort law, such as actions based on the violation of federal civil rights, antitrust, and securities statutes, and even garden variety collection cases. But the overwhelming number

5. Past efforts by Congress to enact "tort reform" legislation have included measures that, if enacted, would have limited contingent-fee compensation of plaintiffs' counsel. See 141 CONG. REC. H2651-03, H2652 (daily ed. Mar. 3, 1995) (statement of Rep. Bryant). Congress continues to contemplate various tort reform proposals that could become vehicles for efforts to limit or abolish contingent fees in tort cases. See Rhonda McMillion, *Seeking Cures for a Veto*, 83 A.B.A. J., May 1997, at 102, 102.

6. This article refers to "contingent fees" as a shorthand for the method of retention that is common in the United States' tort law regime, by which an attorney is either paid a percentage (usually ranging from 25 to 40%) of the client's recovery in the event that the client's claim succeeds, or paid nothing in the event that the client's claim fails. In fact, conditionality of the fee owed and the manner in which the fee is to be computed are separable: A retention agreement could make the attorney's compensation contingent on the client's recovery, but not compute the fee then due on a percentage-of-recovery basis. See Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 531-33 (1978). Thus, unless otherwise stated, all references in this article to "contingent fees" should be understood to mean, in the language of Clermont and Currihan, "contingent percentage fees." *Id.* at 533.

7. Professional ethics and public policy forbid attorneys from accepting employment on a contingent-fee basis only in some specific areas. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(1) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 538-41 (1986) (domestic relations cases); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(d)(2) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(C) (1980); WOLFRAM, *supra*, at 535-38 (representations of criminal defendants). The ABA has explained the prohibition of contingent-fee retainers in criminal cases by pointing out that "legal services in criminal cases do not produce a *res* with which to pay the fee." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1980). The ABA's logic is hardly compelling, as the fee to be paid upon a successful result can always be set by reference to something other than a monetary recovery. The prohibition of contingent fees in divorce cases is grounded in the concern that it would undermine the marital relationship by giving counsel a strong incentive to prevent reconciliation and litigate divorces to conclusion. See RESTATEMENT (SECOND) OF CONTRACTS § 190 cmt. c (1981). Legislative lobbying appears at one time to have been among the forbidden topics, but the present rules of professional conduct do not forbid attorneys from lobbying on a contingent-fee basis. See WOLFRAM, *supra*, at 541-42.

of contingent-fee retentions occur in tort cases, and so for the most part, it is the contingent-fee contract between a tort plaintiff and counsel that has drawn the most attention from the bar and commentators.

For at least a century, the use of contingent-fee contracts for legal services has been an accepted practice in the United States.⁸ In this respect, the system of justice in the United States has parted company with its English counterpart, which does not permit contingent-fee contracts.⁹ The English common law considered them illegal on the ground that they were champertous.¹⁰ The ban appears to have survived in present-day England in large part because of a perception that contingent fees are responsible for excesses resulting from the commercialization of American jurisprudence,¹¹ as well as the relative reluctance of British subjects to resort to the legal system to redress wrongs.¹²

It is perhaps ironic that American critics of the contingent-fee contract cite England as the preferred model.¹³ What they ignore is that in England, a plain-

8. See WOLFRAM, *supra* note 7, at 526-27. Before the Civil War, many states proscribed contingent-fee contracts. See *id.* at 527 & n.10. The states began to repeal the statutory prohibitions in the mid-19th century. For example, the 1848 enactment of New York's Field Code repealed the statutes regulating attorney fees, and subsequent revisions of the 1848 act expressly freed lawyers and clients to enter into compensation agreements of their choosing. See Field Code, 1848 N.Y. Laws ch. 379, § 258; N.Y. Code of Remedial Justice, ch.1, tit. II, art. 2, § 66 (1876). Other states followed New York's lead, and contingent fees became an accepted practice in most states by the end of the 19th century. See WOLFRAM, *supra* note 7, at 527 & n.10; Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 37 & n.27 (1989). The ABA formally accepted the use of contingent-fee contracts in its 1908 Canons of Ethics, albeit with language (removed in 1933) alerting courts to supervise the arrangement to protect clients from "unjust charges." WOLFRAM, *supra* note 7, at 527 & n.12.

9. See WOLFRAM, *supra* note 7, at 526-27 & n.7.

10. See Alfred D. Youngwood, *The Contingent Fee—A Reasonable Alternative?*, 28 MOD. L. REV. 330, 331-32 (1965). Champerty is "an agreement between a stranger to a lawsuit and a litigant by which the stranger pursues the litigant's claim as consideration for receiving part of any judgment proceeds." BLACK'S LAW DICTIONARY 224 (7th ed. 1999). "The English view that the contingent fee is champertous has not been accepted either by the courts or the legislatures of the states." Youngwood, *supra*, at 332.

11. An English commentator, discussing Lord Mackay's suggestion that contingency fees be permitted as part of an effort to reform the English legal system, noted that those who opposed the suggestion "look to America and think they see contingent fees degrading professionalism and turning litigation into a lottery." *Lord Mackay's Legacy*, ECONOMIST (Survey of the Legal Profession), July 18, 1992, at 15, 17. The commentator takes issue with this view, observing that "it is not contingency fees that are the problem in America," but rather "the unpredictability of the legal system" caused by large but inconsistent jury awards in civil cases "which distort[s] the incentive effects of contingency fees." *Id.* The size and consistency of civil jury awards, and their effects (if any) on the commercialization and equity of the American civil justice system, is beyond the scope of this article. The author notes, however, that the issue is at best debatable, as empirical studies have suggested that judges deciding personal injury actions following bench trials tend to be more generous and, perhaps, inconsistent than civil juries. See, e.g., Kevin M. Clermont & Theodore Eisenberg, *Trial By Jury Or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124 (1992).

12. See Corboy, *supra* note 1, at 30-32. One must question, however, whether this supposed reluctance is the cause or the effect of the ban's survival. Perhaps if counsel were more freely available to British tort victims, they might seek the aid of the courts with as much frequency as their American counterparts. "But as any barrister will attest, [Britain's system] also deters legitimate claims by those who cannot afford the risk, however small, of losing." *Lord Mackay's Legacy*, *supra* note 11, at 17.

13. References here are to the legal system of England, rather than that of the United Kingdom as a whole.

tiff with limited means and a claim to assert has recourse to that country's substantial Legal Aid program, which is financed by the government.¹⁴ The United States, of course, has no comparable nationally financed legal aid program for providing counsel to aggrieved persons in civil cases. Because the United States lacks such a system, the contingent-fee contract is widely recognized as the means by which all Americans may retain counsel to seek legal assistance, no matter what their means may be. Critics in the United States do not suggest the substitution of a nationwide government-funded legal aid system for the contingent fee. Rather, they urge the abolition of the contingent fee—and with it any real access to the courts for individual tort victims. As an English commentator has observed, “contingent fees are generally allowed in the United States because of their practical value in enabling the poor man with a meritorious cause of action to obtain competent counsel . . . [W]ithout a comprehensive legal aid system a contingent fee system is necessary.”¹⁵

The contingent-fee contract serves another salutary end (so far as tort victims are concerned) beyond opening the courts to plaintiffs: It evens the victim's odds of a fair recovery against tort defendants. In most tort suits, the defendant is represented by an insurer, the real party in interest. The insurer manages a portfolio of cases and spreads the risk of losing any one case among them all. The tort victim, on the other hand, has only his or her own case and has no opportunity to spread the risk of loss, and the attendant costs of losing, among an inventory of cases. This disparity, if unaddressed, would leave tort victims much more vulnerable to the risks of losing than their adversaries. That heightened risk would, in turn, leave tort victims at a disadvantage in negotiating settlements of their claims at fair values.¹⁶

The plaintiff's attorney, representing a portfolio of clients under contingent-fee contracts, plays a role not unlike the defendant's insurer. Like the insurer, the attorney has an inventory of cases, and the risk of losing any one of them is spread across the entire inventory. The attorney's risk aversity approximates that of the adversary, and so the attorney is better able to strike settlements in the clients' behalf that are in line with the fair value of their claims.¹⁷

14. See WOLFRAM, *supra* note 7, at 526 n.7; Youngwood, *supra* note 10, at 334.

15. Youngwood, *supra* note 10, at 334.

16. See Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations & the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 348-49 (1991). As Gross & Syverud explain:

The real parties in interest on the defense side of personal injury cases are almost always repeat players at the game of litigation—usually insurance companies, occasionally businesses or governments. Personal injury plaintiffs, however, are always individuals—one-shot players who cannot spread their costs across a multiplicity of cases. As a result, personal injury plaintiffs are, in general, quite risk averse with respect to litigation costs Even plaintiffs who could manage to pay the costs of trials would be extremely reluctant to do so, since the likely consequence of a trial would be a debt of thousands or tens of thousands of dollars. This is a scary prospect under the best of circumstances, but to a plaintiff who has recently suffered a serious loss or injury it can be intolerable.

Id. at 349.

17. Gross & Syverud again explain:

In addition, linking the lawyer's payment to the outcome of the case gives the plaintiff the sense that the attorney is a partner in interest. A plaintiff represented by counsel under an hourly-fee arrangement will not have the same sense, as counsel's payment is not tied to the results obtained. The contingent-fee contract will more likely produce a greater sense of client satisfaction by the end of the retention.¹⁸

Thus, contingent-fee retentions are generally beneficial to tort plaintiffs because they give plaintiffs access to the courts, even the odds of a fair recovery or settlement, and foster confidence in and satisfaction with counsel. Indeed, it is indicative of the contingent-fee contract's role in securing access to the courts and fair settlement values for tort victims that labor unions and consumer advocates usually defend it, while those advocating corporate interests typically attack it—albeit often in terms that profess a pious concern that plaintiffs (their adversaries in the tort system) need to be protected from their own counsel.¹⁹

III

THE USUAL CRITICISMS OF CONTINGENT-FEE COMPENSATION ARE WITHOUT MERIT

The critics of contingent-fee contracts make three attacks. They claim, on the one hand, that contingent-fee contracts spur frivolous litigation and mire industry and the judiciary in unwarranted, protracted, and expensive proceedings.²⁰ In addition, according to them, contingent-fee contracts generate fees that are not commensurate with either the risks of nonrecovery presented or

Contingent fee contracts enable plaintiffs to transfer responsibility for trial costs to their attorneys. These attorneys—unlike plaintiffs—are likely to be (comparatively) risk neutral with respect to such costs, both because they have greater resources and because they are repeat players The position of plaintiffs' attorneys limits the strategic bargaining power of the defendants in personal injury cases, and restores some balance to pretrial negotiations.

Id.

18. See Clermont & Currivan, *supra* note 6, at 566-70. As they observe:

Another problem frequently attributed to [an hourly] fee is the plaintiff's possible dissatisfaction with having to pay his lawyer for a losing effort. The notion that the lawyer guarantees only representation and not a particular outcome may not temper the client's sensation of inequity. Indeed, the suspicion that the certainty of the lawyer's fee resulted in indifferent representation by the lawyer may intensify this sensation of inequity. To the extent that our legal system sees party satisfaction as a goal, this problem is a serious one. Here again a contingent arrangement has a relative advantage: Conditioning payment on outcome increases client satisfaction.

Id. at 567-68.

19. See Nace, *supra* note 2, at 7; Wennihan, *supra* note 4, at 1669. It is clear that the economic motivation of many who attack the contingent-fee contract—often representatives of or funded by the manufacturing and insurance industries—is to make the representation of tort claimants less attractive and less profitable, with the hope that fewer will be represented, by less able lawyers, and with lower overall recoveries over time against manufacturers and their insurers.

20. See Aranson, *supra* note 4, at 761-62; Jay, *supra* note 4, at 878-79; Wennihan, *supra* note 4, at 1653, 1658-59; see also *News Notes: Fees—Contingent Fees*, 9 ABA/BNA LAWYERS MANUAL ON PROF. CONDUCT 320, 320 (1993) (statements of Barry Keene, leader of the Association for California Tort Reform).

the amount of work performed in any individual case.²¹ But, on the other hand, they argue that contingent-fee contracts place attorneys in an impermissible conflict of interest with their clients, as attorneys will seek a “quick kill” at lower than fair values in lieu of spending more time on their cases to maximize their clients’ recoveries.²²

As shown below, these stated concerns provide no justification for limiting or abolishing the contingent-fee contract. Experience demonstrates that their concern about frivolous litigation is simply without merit. The other two concerns are not unique to contingent-fee contracts, but instead are endemic to every method of retention available to attorneys and clients. As shown in the following section, to the extent that genuine reformers wish to simplify litigation and reduce its associated costs, there are far better routes to that end. Limiting the contingent-fee contract would certainly reduce the flow of litigation, but that reform could come at the cost of the legitimate interests of the many claimants whose injuries would simply go unredressed as a result.

A. Contingent-fee Contracts Do Not Encourage Frivolous Suits or Prolong Litigation

The evil most often attributed to the contingent-fee contract is that it encourages the filing of non-meritorious lawsuits and prolongs expensive litigation, contributing to a tort litigation “crisis” that threatens to overwhelm the civil justice system of the United States.²³ Critics who attack the contingent fee on these grounds, however, belie their bias against giving aggrieved parties their day in court. As one commentator observes: “To refute this contention as a general matter, we need only restate it as an argument for lightening court burdens by closing the courthouse doors to certain meritorious suits, especially suits brought by the poor.”²⁴

This argument first errs by suggesting that the nation’s courts and businesses are inundated with a rising tide of tort suits and tort liability claims. If anything, the opposite is true. The number of tort suit filings was nearly constant from 1975 through 1990 and has actually fallen since then.²⁵ Most of the ten million civil actions filed each year in state courts are divorce, estate, contract, and property disputes.²⁶ Only ten percent of all civil suits are tort suits; of these, nearly half are auto accident cases, ten percent are medical malpractice cases,

21. See Grady, *supra* note 4, at 24.

22. See Wennihan, *supra* note 4, at 1652-53.

23. See, e.g., Aranson, *supra* note 4, at 761-63.

24. Clermont & Currivan, *supra* note 6, at 571.

25. See Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50, 52; *Order in the Tort*, ECONOMIST (Survey of the Legal Profession), July 18, 1992, at 8, 11.

26. See Budiansky et al., *supra* note 25, at 52; *Order in the Tort*, *supra* note 25, at 11, 12 (chart). As *The Economist* observed: “Death and divorce are lamentable, but they are not symptoms of runaway litigiousness.” *Order in the Tort*, *supra* note 25, at 11.

and only three percent are products liability actions.²⁷ Nor is there a rising tide of large awards: The average recovery in a products liability case has been estimated at only \$48,000.²⁸ These numbers suggest that tort suits are not the crippler of courts and industry that the proponents of tort reform suggest.²⁹ If there is a growth industry in litigation, it is to be found in complex commercial litigation, where attorneys on both sides are paid by the hour and the suit's ultimate objective may well be collateral to the claims asserted.³⁰

Thus, there is no empirical data to suggest a rising tide of tort litigation. Nor is there any such data that suggest that contingent-fee contracts encourage frivolous litigation.³¹ In fact, there is no rising tide of tort litigation precisely because the contingent-fee contract does *not* encourage frivolous litigation. To be sure, the contingent-fee contract does give plaintiffs a risk-free means of asserting claims. But it does not eliminate the risk—and costs—of failure. Instead, it merely shifts the risk from the client to the attorney. Since the attor-

27. See Budiansky et al., *supra* note 25, at 52. A RAND Institute study has estimated that tort actions may amount to no more than four percent of all civil litigation. See Mark Thompson, *Letting the Air out of Tort Reform*, A.B.A. J., May 1997, at 64-68. But for asbestos-related suits, the share of products liability suits would be yet smaller. Asbestos-related suits comprise by far the bulk of the outstanding products liability suits on the state and federal court dockets. That is the case largely because exposures to asbestos in the building and shipyard trades were pervasive until the 1970s, and because the asbestos miners and manufacturers clearly knew by the 1940s of the substance's carcinogenic properties. See BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 49-137 (4th ed. 1996). Putting aside the asbestos cases, which are to a large degree *sui generis*, product liability suits actually declined by 36% from 1985 through the early 1990s, as did medical malpractice cases over the same period. See *Order in the Tort*, *supra* note 25, at 11.

28. See Budiansky et al., *supra* note 25, at 52. Nor is a threat of punitive damages as great as is claimed by tort reform proponents. Only 353 punitive damage awards were entered in product liability cases from 1965 to 1990; the average punitive damages award at trial amounted to \$625,000 but was reduced to \$135,000 after appeals. See *id.*

29. In fact, no one has undertaken the empirical research that would be required to state with certainty the impact of tort litigation on industry and the courts. Furthermore, no study has addressed the effects of tort reform proposals that have been enacted in the various states, necessarily reducing the public debate on this topic to conjecture and anecdote. See Thompson, *supra* note 27, at 68-69. Nonetheless, the data that are available, set forth here, suggest that tort litigation—and, in particular, the products liability tort litigation that is the focus of the tort reform movement—constitutes a mere fraction of one percent of the open cases on the state and federal court dockets. See *generally* Budiansky et al., *supra* note 25; Thompson, *supra*.

30. See *Order in the Tort*, *supra* note 25, at 11-12. Businesses often choose to employ the legal system and file suit to gain leverage in commercial transactions or for other business considerations, without concern to the ultimate outcome of the suit. "Businessmen do not call such litigation frivolous; they call it 'strategic.'" *Id.* at 11.

31. See Clermont & Currihan, *supra* note 6, at 571-73; see also Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, INT'L REV. L. & ECON., May 1990, at 3, 25-26. Indeed, one author, who constructed an economic model to explore the assertion that contingent fees encourage frivolous suits, observed that, if anything, contingent fees provide less of an incentive for such suits than hourly fees. See Thomas J. Miceli, *Do Contingent Fees Promote Excessive Litigation?*, 23 J. LEGAL STUD. 211, 223 (1994). Miceli concluded that his model's results "provide little basis for the charge that contingent fees promote excessive litigation. In fact, according to the model, when the threat of frivolous litigation is highest . . . the hourly fee actually results in more frivolous suits and higher total litigation costs." *Id.* One recent study of lawyers in Wisconsin concludes that contingency fee lawyers actually function as useful gatekeepers screening out substantial numbers of potential clients usually because they have no basis for suit. See Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, JUDICATURE, July-Aug. 1997, at 22.

ney's fee is contingent upon success, the attorney has a compelling economic incentive not to accept cases in which the probability of success is so low as to make the case a poor investment of time and money.³² Indeed, the contingent-fee contract more likely deters the filing of frivolous cases because it puts the risk of failure on the lawyer, who is the person best-positioned to assess its merits.³³ As one economic analysis of the question concluded: "In other words, under a contingent fee the primary screening function shifts to the lawyer, and the lawyer will probably do a more effective screening job. We can at least conclude that contingency itself gives little or no encouragement to groundless speculative suits."³⁴

Finally, the argument against contingent-fee contracts errs by suggesting that plaintiffs and their contingent-fee counsel are the ones responsible for delays and protracted litigation in the tort system. In fact, the opposite is true. It should be self-evident that tort plaintiffs themselves have no interest in delay; their interests lie in being made whole as soon as possible. As discussed in the following section, attorneys retained under contingent-fee contracts have an economic incentive to maximize their profits by minimizing the hours and resources that they invest in a case. That incentive is hardly consistent with the claim that contingent-fee plaintiffs' lawyers are responsible for the costs of protracted litigation.³⁵

If any group of lawyers has an incentive by reason of their fee arrangements for delay or for taking frivolous positions in litigation, it is counsel who bill by the hour. Subject to the goals of the client, an attorney paid by the hour has no economic incentive to economize in a client's defense, and indeed, has an incen-

32. This economic incentive not to file frivolous suits is, of course, reinforced by other disincentives. Rule 11 of the Federal Rules of Civil Procedure and its state-law analogues expose attorneys to the imposition of sanctions for signing papers that present claims that are not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." FED. R. CIV. P. 11(b)(2). The rules of professional conduct also forbid the filing and prosecution of frivolous suits. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1983) ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-109 (1980) ("A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such a person wishes to . . . present a claim or defense in litigation that is not warranted under existing law.").

33. Where the lawyer is paid by the hour, the restraining influence of the lawyer decreases, and it falls to the client to decide whether the case is worth the expense of litigation. "But in most instances the client cannot perform the screening function as well as the lawyer. The client is in a uniquely poor position to evaluate his claim objectively and knowledgeably." Clermont & Currivan, *supra* note 6, at 571.

Although the client will often be risk-averse and therefore will shrink from the risk of greater loss under a certain fee, this may not effectively deter groundless speculative suits, because a certain fee presents the client with the chance for an even bigger windfall, thus heightening the "pot of gold" mentality necessary to prompt such suits.

Id. at 572.

34. *Id.*

35. See *supra* text accompanying notes 31-33.

tive to work longer hours on a matter than is required by the circumstances of the case.³⁶

The real source of delay in the tort system, however, stems neither from plaintiffs represented under contingent-fee contracts nor from defense counsel paid by the hour. Rather, the delays arise from the economics of the tort system and the insurance industry, which combine to create an impetus for defendants to withhold realistic settlement offers. Insurance companies earn their profits from the investment of premiums that they collect from their insured. The longer the insurers can delay payments to plaintiffs, the greater the return they will realize on the funds withheld.

The insurers' incentive to exploit the time value of money is compounded by a tort system that imposes no costs on them or their insured clients for delay in the payment of claims. If an insurer can settle a case on the eve of trial for the same amount it would have cost to settle the claim years earlier when the plaintiff first sued, then no incentive exists to move the insurer to settle and pay the claim earlier. Indeed, given that the insurer is given a free float of the amounts owed the tort victim, the system gives insurers and self-insured defendants a huge incentive not to settle early because an early settlement would forfeit the time value of the money.

Practice proves the hypothesis. Defendants and their insurers routinely withhold meaningful settlement offers until the case nears trial, the time available to hold the money has expired, and a verdict well in excess of settlement expectations is a near-term possibility.³⁷ So long as defendants and their insurers are allowed free use of the funds required to compensate tort victims, they will continue to be moved by simple and obvious economic self-interest to engage in protracted litigation, even in cases where their liability cannot credibly be contested as a matter of law. It is this economic incentive, which exists in *all* meritorious cases, that drives the costs and delays of tort litigation, not some self-destructive desire of plaintiffs' lawyers to pursue funded defendants with frivolous, and thus likely unsuccessful, claims.

B. The Contingent-Fee Contract Is No More Inequitable to the Client Than Any Other Form of Compensation

Some maintain that contingent-fee contracts are unfair to plaintiffs who are forced by economic circumstance to employ counsel on a contingent-fee basis. According to these critics, the contingent-fee contract is unfair because it often produces a fee that is vastly larger than the amount the attorney would have re-

36. See *supra* text accompanying note 31. As one experienced jurist has observed:

Given the time value of the money the [contingent-fee] attorney has invested in a case, he or she has a substantial incentive to reach a settlement and collect a contingency fee sooner rather than later. On the other hand, if the fee is calculated on [an hourly] basis, there may be an urge to pile up litigation time before concluding the case.

Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 503 (1994).

37. In New York County, the routine phrase used by the trial assignment judge was "settle or pick [a jury]." That was when the cases settled.

ceived had he or she been compensated on an hourly or flat-fee basis.³⁸ These critics argue that a such a “premium” fee is out of line with market compensation and is justified, if ever, only where there was substantial doubt as to the probability or amount of recovery on the plaintiff’s claim.³⁹

These post-hoc criticisms view the contingent fee through the wrong end of the telescope and blur the distinction between the contingent nature of the fee and the percentage of recovery basis for its calculation. The ABA rejected these criticisms with the observation that they “rest on a faulty notion as to the number of cases regarding which at the onset of the engagement the lawyer can say with certainty that the client will recover.”⁴⁰ It is easy enough, with the benefit of hindsight, to find anecdotes of cases where an attorney received a large fee (from an even larger recovery) relative to the amount of work invested in the case and then to ignore the factors that produced the result while generalizing from such isolated examples. The problem, of course, is that as a general matter no lawyer thinking of taking on a plaintiff’s case knows in advance whether it may be settled in a day, a year, or five years. Indeed, no one even knows whether the case will ever be resolved on terms that will provide any recovery (and any fee) at all because in almost every instance it is the defendant, not the plaintiff, who decides the timing of settlement.

The basic relationship that supports the percentage of recovery as a measure of the fee is an undertaking by the attorney to take all steps necessary and reasonable to accomplish the client’s goal. These steps might include litigation through discovery, trial, appeal, remand, and further trial and appellate proceedings at one extreme, or settlement in response to a demand letter or phone call at the other. While a quick resolution, assuming a fair settlement, is both efficient and desirable, the plaintiff’s lawyer bears the risk of prolonged proceedings—a risk that cannot be avoided except with his adversary’s cooperation—and is the banker for the entire system. Because the defendant determines whether or not there will be a prompt settlement, and because it is in the defendant’s economic self-interest not to settle quickly, the plaintiff’s lawyer accepts the risk that the necessary efforts may be very protracted.

Thus, while there is some theoretical possibility that plaintiff’s counsel working on a contingent-fee basis has the opportunity, by settling early, to reap a large contingent fee relative to the number of hours invested in the case, that is not the ordinary experience of plaintiffs’ lawyers. Instead, they usually must pursue defendants for years to the verge of trial, even on cases that are considered likely winners, for a relatively modest recovery.⁴¹ Nor is it apparent, at the time of the retention, which (if any) of the plaintiffs’ counsel’s cases will settle

38. See Grady, *supra* note 4, at 20, 24-25; Wennihan, *supra* note 4, at 1655-56; *Taming Runaway Lawyers*, WALL ST. J., Jan. 24, 1995, at A22.

39. See, e.g., Brickman, *supra* note 8, at 70-72.

40. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (discussing contingency fees).

41. As already noted, the average recovery in a tort case is only \$48,000. See Budiansky et al., *supra* note 25, at 52.

quickly, which will be the subject of years of litigation, which will settle at jury selection, or which will require trial to verdict and appeals. This is true not only because the defendant and its insurers will be motivated to retain and maximize the time value of the funds to be paid in settlement, but also because defendants rarely concede liability as a general matter.⁴² As the ABA's standing committee on ethics recently observed, "defendants often vigorously defend and even win cases where liability seems certain."⁴³ The jury might enter judgment against the defendant on liability, yet award only nominal damages. Even if the defendant loses and a substantial award is entered, there remains the task of collecting the judgment and the risk that it might never be paid.

In those instances where the contingent-fee contract produces a fee in excess of the attorney's fair hourly "market" rate, the academic critics complain that the resulting "premium" must be justified on the grounds that it compensates the attorney for the risk, which is undertaken at the time of retention, that the suit might fail and the attorney may be paid nothing at all for the effort.⁴⁴ In their eyes, contingent fees are not acceptable where there is no "contingency" in the outcome of the case—where recovery is certain. They reason that because most claims asserted by plaintiffs do, in fact, generate some recovery, the rationale for contingent fees is weakened.⁴⁵

These critics correctly observe that the risk that a plaintiff will recover nothing at all from a tort suit is, indeed, quite small. Ninety percent of all cases filed are settled short of trial with some payment made to the plaintiff; factoring in the cases settled before the institution of legal proceedings, at least ninety-five percent of cases handled by plaintiff's counsel settle without trial.⁴⁶ Of the few cases that do go to trial, half are won by plaintiffs, so that exceedingly few claims handled by plaintiff's counsel are lost at trial and receive no recovery at all.⁴⁷

But all of these criticisms are beside the point. It is nowhere written in the canons of ethics or in the decisions establishing the validity of the contingent-fee contract that such a contract be employed only where there is a substantial

42. Even in asbestos liability cases, in which the general causation issues arising from exposure to asbestos have long since been proven, defendants hotly contest liability (not to mention the amount of damages) on grounds that the plaintiff was not exposed to a particular defendant's product, or that the plaintiff's pulmonary disease was caused by cigarettes or some other carcinogen, or that the plaintiff's disease is not the sort that is caused by exposure to asbestos. See *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 868 (Bankr. E. & S.D.N.Y. 1991).

43. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 94-389 (1994). "Additionally, a previously undiscovered fact or an unexpected change in the law can suddenly transform a case that seemed a sure winner at the outset of the representation into a certain loser." *Id.* (citing *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (abolishing the long-standing and universally recognized doctrine of aider and abettor liability in securities fraud cases brought under § 10(b) of the Securities Act of 1934)).

44. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 448-49 (1977).

45. See, e.g., Brickman, *supra* note 8, at 72-74.

46. See Grady, *supra* note 4, at 24; see also *Gair v. Peck*, 160 N.E.2d 43, 46 (N.Y. 1959), *cert. denied and appeal dismissed*, 361 U.S. 374 (1960); Richard M. Birnholz, Comment, *The Validity and Propriety of Contingent Fee Controls*, 37 UCLA L. REV. 949, 957 (1990).

47. See Grady, *supra* note 4, at 24.

risk of nonrecovery.⁴⁸ The burden the plaintiff's counsel assumes in a contingent-fee retention is not the risk that there will not be any recovery by way of settlement or trial. Rather, it is that the plaintiff might receive little for the claim, that he or she may not receive it for a number of years, and that it might require counsel to invest disproportionate time and effort to effect a recovery.

The role of the attorney for the plaintiff is to move the case from intake to payment, something that usually requires years of work—gathering data, preparing pleadings, and presenting the case informally to representatives of the defendants, as well as formally to the courts through motions, trial, and appeals. Even in cases that seem sure winners, the large windfalls suggested by critics of the contingent fee are rarely produced. In some isolated cases, the plaintiff's counsel may receive a large fee for relatively few hours worked, while in others, the attorneys might receive no fee at all following a monumental effort.⁴⁹ The fact is that on balance, the plaintiff's lawyer is compensated at levels that are roughly equal to or below those of his adversary defending the same cases.⁵⁰

The conventional wisdom of the insurance industry is that one dollar is spent for legal defense for every dollar of indemnity compensation paid. If \$100 is paid by way of indemnity compensation, a one-third⁴ above contingent fee will give the plaintiff's lawyer a thirty-three dollar fee, while the defendant's lawyer receives \$100. Even though the \$100 spent on defense also includes the ancillary costs of the process, which the plaintiff's lawyer typically recovers in addition to his fee, it is erroneous to assume that percentage fees, on average, result in substantially higher compensation to lawyers than what would have been received had they billed by the hour. Indeed, according to a RAND study of 3,800 asbestos claims that were tried and/or settled with respect to all or nearly all defendants, or dismissed prior to the Manville Corporation bankruptcy, for every dollar paid by defendants and their insurers, thirty-seven cents was spent on defense fees and costs, twenty-six cents was spent on plaintiffs' fees and costs, and thirty-seven cents was left for the plaintiff in net compensation.⁵¹ Thus, whether based upon colloquial wisdom, experience in the courthouse, or scientific analysis (where available), there is no reason to think that plaintiffs' lawyers, who are operating on a contingent-fee basis, are paid substantially different amounts for prosecuting cases to a conclusion than defen-

48. See Jay, *supra* note 4, at 835-36 (1989). Even Mr. Brickman, whose entire attack on contingent-fee contracts focuses on the absence of risk in the usual contingent-fee representation, conceded that "the early cases on contingent fees did not dwell on the necessity of risk," but instead "focused on whether the contingent-fee arrangement was champertous and whether champerty violated public policy." Brickman, *supra* note 8, at 74.

49. To illustrate, Mr. Corboy relates the experience of one Otto Pritchard, whose lawyers spent over 15,000 hours in the unsuccessful prosecution of his claims against a tobacco manufacturer. Had Mr. Pritchard paid his attorneys by the hour at only \$50 an hour, his fees would have exceeded \$750,000. See Corboy, *supra* note 1, at 34-35.

50. See *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) (observing that fee awards under federal fee-shifting statutes tend to be larger where computed on an hourly basis than on a percentage of recovery basis); Jay, *supra* note 4, at 826.

51. See JAMES S. KAKALIK ET AL., RAND, COSTS OF ASBESTOS LITIGATION at vii tbl. S-2 (1983).

dants' lawyers, who bill by the hour and are paid to defend the very same cases to conclusion.

While the contingent-fee contract might produce disparities in an individual case between the number of hours of work performed and the amount paid, such disparities are not unique to contingent-fee compensation. A flat fee will accurately reflect the amount of work actually required in a particular case only by pure happenstance. Even when lawyers bill by the hour, they are doing something not very different, albeit a bit more complicated, from what is done under a contingent-fee contract. Just as a contingent percentage fee does not discriminate in any significant way between the difficulty of the representation by averaging the quality and quantity of the work across all cases—and perhaps all lawyers—neither do the hourly rates charged in any hourly retention take into account the difficulty or the quality of the work required and performed. Senior partners charge high hourly rates irrespective of whether they indeed bring greater efficiency, quality, or judgment to the matter of their retention or to the specific tasks performed. Their higher rates presume that on average, over a long period of time, they will bring greater experience and knowledge to bear on particular problems. Thus, they provide not only higher quality advice, but also more efficient advice. They will, however, inevitably prove themselves less experienced or less efficient on some matters, or devote time to problems insufficiently complex to justify their attention and charges.

Even if the contingent fee produces fees that do not correlate as closely with the number of hours expended as does an hourly-fee retention, it is unclear whether that correlation is really as important as the critics of contingent fees contend. At the very least, the contingent fee reflects the most important element of the value of legal services, which the hourly fee ignores: the result obtained.⁵² One does not pay the cobbler who fails to nail the new heel to the shoe, no matter how many hours were devoted to the failure. Because the contingent fee is measured as a percentage of the plaintiff's recovery, it can never exceed the client's recovery; an hourly fee, however, divorced from the results obtained, may become disproportionately large in comparison with the plaintiff's recovery and even consume it altogether.⁵³ Ultimately, the plaintiff does not care how many hours the lawyer worked, so long as the result obtained is a fair one. He or she wants passionately to win and to receive the lion's share of the spoils. The contingent fee spurs counsel to victory on the client's behalf and fixes the fee at a percentage, agreed to in advance, that ensures that the client will keep the better part of the recovery. It can hardly be considered an inequitable method of compensation.

52. See Clermont & Currivan, *supra* note 6, at 569.

53. See *id.*

C. The Contingent-Fee Contract Does Not Place Attorneys in Conflict with Their Clients to Any Greater Degree Than Any Other Method of Retention

The same critics who claim that the contingent-fee contract generates too much litigation also complain that it generates too little.⁵⁴ They charge that the contingent-fee contract places counsel in conflict with their clients' interests because it gives attorneys an incentive to try to strike a quick, cheap settlement that will produce a large fee for a few hours of work.⁵⁵ Their clients' interests, however, presumably would be better served by counsel working considerably more hours to maximize the dollar value of the claim in settlement or at trial.⁵⁶

This contention is based on the incorrect premise already shown that plaintiffs' lawyers dictate the timing of settlement, when in fact, they do not. As a practical matter, then, this claimed conflict rarely, if ever, occurs. But what if plaintiffs' lawyers did, in fact, dictate the timing of settlement? The contingent-fee contract gives attorneys an incentive to maximize their clients' recovery, as every extra dollar produced for the client returns a fraction to the attorney. At some point, perhaps, the attorney's opportunity costs incurred in squeezing the last few dollars from a defendant might outweigh the benefits the attorney would receive by working on other matters. At that point, the possibility for conflict between the attorney's and the client's respective economic interests might arise.⁵⁷

In fact, the data on the amounts of work that contingent-fee and hourly-fee counsel put into their respective cases show that, in the aggregate, the differences are not substantial.⁵⁸ That is not to say that both groups of lawyers put the same effort into all of their cases. Rather, contingent-fee lawyers put in less effort for smaller cases than do hourly-fee lawyers, but they put in more time for

54. See Aranson, *supra* note 4, at 764; Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1133-35 (1970); Wennihan, *supra* note 4, at 1655.

55. See Aranson, *supra* note 4, at 764; Schwartz & Mitchell, *supra* note 54, at 1133-35; see also WOLFRAM, *supra* note 7, at 529.

56. See, e.g., Aranson, *supra* note 4, at 763-66.

57. See Clermont & Currivan, *supra* note 6, at 543-46. As Clermont & Currivan summarize:

The lawyer's and the client's economic interests [under a contingent-fee contract] align only partially. Although lawyer and client share a common interest in victory, misalignment exists with respect to the number of hours the lawyer should work. Because the client's net recovery varies directly with the gross recovery, and because the client must pay a fixed percentage fee without regard to the number of hours worked, the client's economic interests are best served when the lawyer devotes a very large number of hours to ensure the maximum settlement or judgment. However . . . the lawyer optimizes his own economic position by working a much smaller number of hours; direct economic incentive prods him to obtain a respectable settlement with relatively slight effort, thus securing for himself the maximum profit. Here again our legal system must rely on restraints other than direct economic incentive to make the lawyer act in the client's best interests.

Id. at 536; see also Jay, *supra* note 4, at 853-54 ("Yet there comes a point when the marginal return for the lawyer from additional work is not worth the effort. That moment occurs when the lawyer could devote those additional hours to some other matter that would earn a greater return.").

58. See Herbert Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 LAW & SOC'Y REV. 251, 266 (1985).

the bigger cases.⁵⁹ The differences, however, become statistically significant only for cases involving stakes of relatively modest amounts of \$10,000 or less; in those cases, contingent-fee lawyers spend substantially less time than do their hourly-fee counterparts.⁶⁰ Even so, it does not necessarily follow that contingent-fee lawyers slight those clients by spending less time on them than their hourly-fee counterparts. Contingent-fee lawyers must be more sensitive to the productivity of their time and the stakes of the case and tend to sacrifice “purely craft-oriented considerations” to maximize their probability of success using the fewest possible hours in smaller cases.⁶¹ One might ask why hourly-fee lawyers devote significantly greater time to small disputes! A reduction in overall effort when the stakes are low would be in the interest of society as a whole.

If contingent fees do place the lawyer and client in conflict, that conflict is not unique to the contingent-fee contract.⁶² Consider the case of a fixed-fee retention, in which the client pays the attorney a flat rate regardless of the outcome or the amount of work required. In such a retention, the attorney has a self-evident, immediate, and continuing interest in putting as little work into the case as possible.⁶³ Unlike the contingent-fee case, in which the conflict arises only when the attorney’s opportunity costs can be perceived to exceed the benefits of enlarging the client’s recovery, the conflict between attorney and client in a fixed-fee case is endemic from the outset of the representation.

The hourly-fee contract presents its own sets of conflicts between the economic interests of attorney and client. If the contingent-fee contract, in theory, encourages attorneys to err by not doing enough to maximize their clients’ recovery, the hourly-fee contract encourages them to err by doing too much and thus charging too much.⁶⁴ Because their hourly fees are not contingent upon success but are guaranteed, attorneys paid by the hour are indifferent as to the optimal number of hours to be worked to obtain the best results for their cli-

59. *See id.* at 267. “Such behavior would be economically rational. The contingent-fee lawyer’s potential return is closely related to the potential recovery (*i.e.*, stakes) and if a greater effort with a ‘big’ case will substantially increase the recovery, lawyers would be behaving rationally in expending more effort.” *Id.*

60. *See id.* at 269.

61. *Id.* at 272. Thus, while Kritzer’s team found an “effort gap” in the smallest cases, they observed that “we do not know whether this gap affects case outcomes, nor do we know whether any lesser outcomes can be justified by offsetting advantages of the contingent fee to the client.” *Id.* at 273.

62. Even Professor Brickman, who otherwise is generally skeptical of contingent-fee contracts, recognizes that this conflict, if any, “is not unique to the issue of contingent fees, but rather is an example of a larger and more pervasive issue of professional responsibility.” Brickman, *supra* note 8, at 48. Brickman explains:

A central element of all fee-for-service professional relationships is the reliance on the professional’s judgment as to the nature and extent of the services required. An inherent conflict exists between the professional’s financial well-being and the needs of the client, patient or penitent. A decision that services are needed results in a financial benefit for the professional; a decision that services are not required deprives the professional of the financial gain of a contrary decision.

Id.

63. *See id.* (noting that “a fixed fee provides incentive to be less complete”).

64. *See id.* (noting that “an hourly fee provides incentive to work longer than absolutely necessary”).

ents.⁶⁵ While this renders the defense counsel “indifferent” to the hours worked as a matter of economic theory, in practice it often leads to overbilling in hourly-fee retentions.⁶⁶ Indeed, Justice Scalia has observed that the disincentive to economize in an hourly-fee retention “often (perhaps generally) results in a larger fee award than the contingent-fee model,” as hourly-fee compensation “give[s] lawyers incentives to run up hours unnecessarily, which can lead to overcompensation.”⁶⁷

Indeed, the hourly-fee defense lawyer faces additional potential conflicts not confronted by the plaintiff and his or her counsel. As noted above, most tort defendants are insured, and the insurer usually conducts the defense with lawyers of its own choosing. The insurer and the defendant, as well as the lawyer hired to represent them, have the same ultimate objective—to win the case—and are bound to each other by the mutual obligations contained in the insurance contract. Even so, the insurer and the defendant may have a number of subsidiary interests that may lead to sharp conflict. A defendant may want to litigate a case to judgment despite the insurer’s interest in settlement, to vindicate its reputation, or to establish nonliability for an allegedly dangerous product. Or the insurer might wish to litigate a case to judgment despite the defendant’s interest in settlement, to establish a point of law relevant in other cases in its portfolio of risks.⁶⁸ Defense counsel face these additional potential conflicts in addition to those posed by the hourly-fee retention.

In truth, there is no way for clients to compensate attorneys without generating conflict of one type or another between their respective economic interests. Economics provides its own constraints on abuse. A contingent-fee lawyer who sets the percentage too high will be undercut by other lawyers willing

65. See Clermont & Currivan, *supra* note 6, at 540-43. Clermont & Currivan explain:

If [the hourly-fee lawyer’s] workload happens to be light, the lawyer would tend to work more than the particular number of hours required to maximize his client’s net recovery—a strategy obviously to his client’s disadvantage. The overworked attorney would tend to work fewer than the particular number of hours, also to the client’s detriment. In short, the lawyer’s economic interests do not align with those of his client. At best, the certain hourly fee leaves the lawyer indifferent to the client’s economic interests. Absent a direct economic incentive to make the lawyer work in the client’s best interests, our legal system must rely exclusively on noneconomic or indirect restraints to forestall the potential economic conflict of interest between lawyer and client [under an hourly-fee contract].

Id. at 536.

66. As Judge Weinstein has observed, hour-based compensation “often leads to unnecessary discovery and delays so the lawyers’ profit per hour can be aggregated into a large sum.” Weinstein, *supra* note 35, at 525. “Some defendants do not settle because their attorneys are earning high fees in conducting unnecessary and overstuffed discovery or otherwise stringing out litigation.” *Id.* at 532; see also Budiansky et al., *supra* note 25, at 53 (reporting that legal auditors routinely find overbilling on the part of attorneys retained on an hourly-fee basis, with one auditor claiming that “he finds overcharges of 25 to 50 percent in 90 percent of the cases he is hired to examine”); Michael E. Tigar, *2020 Vision: A Bifocal View*, 74 JUDICATURE 89, 92 (1990) (“I have been studying complex lawsuits. I find—and I concede that the evidence is so far anecdotal—that lawyers are convincing sophisticated consumers of legal services, such as corporate and public parties, that the right amount of discovery and motions practice is what the client can afford, and not what the case inherently requires.”).

67. *City of Burlington v. Dague*, 505 U.S. 557, 566 (1992) (discussing fee awards to prevailing counsel under federal fee-shifting statutes).

68. See Gross & Syverud, *supra* note 16, at 380.

to undertake the representation at lower rates. The hourly-fee lawyer who bills too many hours risks losing the account altogether when the bill is reviewed.

But economics is not the sole, and may not even be the dominant, consideration. Lawyers, whether compensated by contingent fee or by the hour, doubtless may be sensitive to economic concerns, but are not necessarily driven by them when confronted by competing non-economic considerations.⁶⁹ The rules of professional conduct require a lawyer to act zealously in the representation of clients.⁷⁰ Most lawyers take their fiduciary duty to their client seriously. Most lawyers like to win their cases. A lawyer who loses, or who develops a reputation for poor preparation, will soon be a lawyer without clients. As always, consumers of legal services must confide their trust in the non-economic incentives that encourage attorneys to act against their own economic interests to discharge their fiduciary duties to their clients, as required by the canons of legal ethics.⁷¹ The removal of the contingent-fee contract from an individual's options for retaining counsel will not lessen these conflicts.

IV

ALTERNATIVES FOR SYSTEMIC REFORM

Advocates of tort reform are correct in noting that the wheels of justice grind needlessly, and seemingly endlessly, in many suits.⁷² They err, however, by laying the blame on plaintiffs and their counsel. As already shown, it is defendants, insurers, and their counsel who largely control the pace and timing of litigation and settlement in tort suits. If real reform is to succeed in curtailing the incentives for delay and its associated costs, it must address the incentives identified above, which lead defendants, insurers, and their counsel to prolong litigation even in those cases where their liability is certain.

A. Existing Proposals

Alternatives to the contingent-fee contract have been offered as possible reforms to the system, but often these proposals have not provided well-reasoned solutions. For instance, Congress once before attempted to enact legislation, which was later vetoed by the President, that adopted in large part the "Manhattan Proposal" as a model for reforming the contingent-fee contract.⁷³ The

69. See Kritzer et al., *supra* note 57, at 253-54.

70. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. 1 (1983) ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980).

71. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-1 (1980) ("The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. . . . [H]is personal interests . . . should [not] be permitted to dilute his loyalty to his client.").

72. See, e.g., Aranson, *supra* note 4, at 762; Gross & Syverud, *supra* note 16; *Order in the Tort*, *supra* note 25, at 11.

73. See 141 CONG. REC. H2651-03, H2652 (daily ed. Mar. 3, 1995) (statement of Rep. Bryant); Wennihan, *supra* note 4, at 1670-72. For the complete text of the Manhattan Proposal, see BRICKMAN ET AL., *supra* note 2, at 69-82.

Manhattan Proposal sought to spur plaintiffs' counsel to settle tort cases quickly by capping their fees at hourly rates, plus only a modest share of recoveries in excess of a defendant's opening settlement offer.⁷⁴ But the Proposal would be ineffective in curtailing the costs incurred by delay in the tort system because, as already shown, plaintiffs do not control the timing of settlement, and the real source of delay lies with defendants and their counsel.

Another suggestion would follow Lord Mackay's 1989 program for fee reform in Britain.⁷⁵ Under Lord Mackay's proposals, which were not adopted in Britain, an attorney could agree to represent a client on a contingent-fee arrangement, but the size of the fee, if successful, would be measured not by a percentage of the award, but rather by the attorney's hourly fee plus an "uplift" of ten percent to compensate the attorney for the delay in payment.⁷⁶ Such a "reform," however, would be the worst of both worlds and would be less likely to find acceptance among either lawyers or their clients in the United States. The contingent-fee lawyer would be relegated to second-class status by comparison with attorneys paid on a certain hourly-fee contract. Unlike the hourly-fee lawyer, the contingent-fee lawyer would not be compensated for the cases lost, yet would earn only the hourly fee (plus the small uplift) for cases won. From the plaintiff's perspective, it raises a risk not present in a contingent-fee contract, that the attorney's hourly fees might exceed any recovery received on the claim. Curiously, none of these criteria suggest a corollary: that defense counsel's fees be limited to a small percentage of the difference between the plaintiff's first settlement demand and the ultimate result.

B. Prejudgment Interest Awards Could Affect Real Tort Reform

One simple dramatic improvement in the system would be to provide for large, automatic awards of prejudgment interest in personal injury tort cases. Strikingly, although many states provide for awards of prejudgment interest in actions for breach of contract or interference with the enjoyment of property,⁷⁷ the general rule prohibits the award of prejudgment interest on unliquidated tort claims.⁷⁸ Awards of prejudgment interest in personal injury tort cases

74. See BRICKMAN ET AL., *supra* note 2, at 69-82.

75. See, e.g., Aranson, *supra* note 4, at 787-92.

76. See *id.*; Lord Mackay's *Legacy*, *supra* note 11, at 15-17. This alternative mirrors the one posed in 1978 by Clermont & Currivan. See Clermont & Currivan, *supra* note 6, at 546-50, 581-85.

77. See, e.g., N.Y. C.P.L.R. 5001(a), (b) (McKinney 1992) ("Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property . . . from the earliest ascertainable date the cause of action existed. . ."). A recent study by The Council on Judicial Administration of the Association of the Bar of the City of New York has resoundingly supported awarding pre-verdict interest. See *Report in Support of Pre-Verdict Interest in Personal Injury Cases*, 55 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF N. Y. 496, 521-24 (2000).

78. See 3 JACOB A. STEIN, *STEIN ON PERSONAL INJURY DAMAGES* § 17.58 (3d ed. 1997).

would give defendants and their insurers an economic incentive to make realistic settlement offers before the parties reach the courthouse steps.⁷⁹

If awards of prejudgment interest are to achieve their goal of expediting litigation, then the rate of interest awarded under such a scheme must be structured in such a way as to provide plaintiffs and defendants alike an incentive to dispose of their cases promptly. The rate of interest awarded for the period between the accrual of the claim and the filing of the complaint ought to approximate the rate of inflation over the relevant period. If it were substantially greater, it would give plaintiffs an incentive to “bank” their claims and file them toward the end of the limitations period for asserting them.⁸⁰

Once suit is filed, the focus shifts from fairness to the plaintiff to removing the insurer’s disincentive to settle. This shift in focus suggests that the rate of interest to be awarded from filing to judgment ought to exceed the average rate of return on insurers’ funds.⁸¹ Most insurers, as institutional investors, are able to invest their assets in ways that produce returns that substantially exceed the rate of inflation—indeed, at some multiple of the prime interest rate. If awards of prejudgment interest following the filing of a complaint were limited to the rate of inflation, rather than something like two times the prime rate of interest, insurers would still be able to realize a large return on the funds needed to pay the liability, albeit at a narrower margin. Thus they would retain an incentive to delay settlement and payment of claims until trial.

The assessment of prejudgment interest in tort litigation in this manner should have the effect of lowering litigation costs throughout the tort system. Many tort cases would settle out at a much earlier stage of proceedings. The dockets of state and federal trial courts would be lightened, and judicial resources would be freed for other matters. Corporations would be spared endless litigation and would spend far less on defense counsel. As the representation of tort plaintiffs became less of a long grind to judgment, and therefore more lucrative, more lawyers would compete to represent plaintiffs. The resulting market forces would drive down the percentage attorneys charge clients under their contingent-fee contracts. The only losers would be the insurers and self-insured corporate defendants, who would lose the free ride they now enjoy at their victims’ expense during the long interstice between injury and compensation. As a matter of simple fairness, they ought to lose it.

Awards of prejudgment interest, if structured as suggested, would remove the economic incentives that defendants now have to prolong litigation and to delay settlement and payment of tort claims. Such awards would do nothing, however, to remove the incentives that may influence outside defense counsel, who bill by the hour, to increase their fees by prolonging litigation. As Stanley

79. *See generally* AMERICAN LAW INST., ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 297-315 (1991).

80. *See id.* at 311.

81. *See id.*

G. Feldman, Chief Justice of the Supreme Court of Arizona, has tartly observed, “fee abuse is not the exclusive province of plaintiffs’ lawyers.”⁸²

One must hope that professionalism and ethics still mean something in the marketplace, namely that most attorneys—whether they represent plaintiffs or defendants—take seriously their fiduciary duties to their clients and that most attorneys place their clients’ interests ahead of their own when their respective economic interests diverge. Accordingly, this article does not advocate measures to restrict the freedom of clients and counsel to strike whatever fee arrangements they find most appropriate in the circumstances of any particular case. If, however, Congress decides that measures to curtail the use of contingent-fee arrangements are required—and we maintain that they are not—they must be even-handed. If the Congress again deems the Manhattan Proposal’s approach to expediting litigation necessary or desirable, or if it finds merit in Britain’s unimplemented reforms, they must be modified to spur defense counsel, as well as plaintiff’s attorneys, to offer and effect prompt settlements. Such modifications might take the form of limiting defense counsel’s hourly fees to some amount related to the difference between the parties’ opening positions to reflect a relationship between the work done and the result achieved. But as we find all these proposals to be an overreaction to a problem that exists, if at all, more in economic theory than in legal practice, we leave it to others to propose detailed modifications to make them apply in an even-handed fashion to all counsel.

V

CONCLUSION

While there are certainly critics who sincerely worry about its fairness to plaintiffs, it is a fair summary of this aspect of the tort reform movement to observe that its staunchest critics are the targets of the plaintiffs who have retained counsel on a contingent-fee basis to sue them. In the continuing tort reform debate, Congress must decide whether tort victims ought to have unfettered access to experienced counsel to prosecute and whether it will be left to the tort system to arrange for compensation of the injured and for the motivation for due care. If the answer for society remains in the affirmative, the contingent-fee contract is the only means available to enable tort victims to retain counsel, short of the creation of a federally funded legal aid scheme to provide them with counsel. Given the fate of the late Legal Services Corporation, whose mandate was much narrower than what would be required of a comprehensive legal aid scheme for tort victims, the nation clearly lacks the political will to undertake such a venture.⁸³

82. Horowitz, *supra* note 2, at 184 (quoting Letter from Stanley G. Feldman to Michael Horowitz (Mar. 1, 1994) (on file with the Emory Law Journal)); see also *Order in the Tort*, *supra* note 24, at 11-12.

83. Even if the political will to resurrect the Legal Services Corporation existed, one would have to question the logic of a decision to socialize legal services, with the concomitant inefficiencies and loss of control by consumers and providers of legal services that it would entail. See Corboy, *supra* note 1, at

If, then, one accepts the need for the contingent-fee contract to give tort victims access to the courts, the question becomes whether the percentages routinely charged are fair in the circumstances. Here, it must be recognized that the risk is not principally the risk of nonrecovery, although that risk does exist. It is the risk that the percentage of the amount recovered paid to the attorney will or will not represent fair remuneration for the amount of effort required to obtain the recovery in a context where it is the opposing party who defines the amount of effort required. As the statistics demonstrate, overall the portion of the cost of the personal injury system attributed to the plaintiffs' lawyers is no larger than and may be substantially less than the portion attributed to defense lawyers. What could be fairer?

If there is to be a reduction in transaction costs, the parties to the transaction must be motivated to reduce their efforts at delay. The only parties with economic incentives to create delay are the defendants, their insurers, and their counsel. The simple device of including prejudgment interest in awards for personal injury, at rates exceeding average market returns once the plaintiff files suit, would remove that incentive, drive defendants to settle quickly, and lower transaction costs for all parties, as well as for the state and the federal judiciary.

30-32. Britain's legal aid scheme is underwritten at huge and growing public expense, yet still fails to provide counsel for many who find themselves too affluent to qualify for aid, but too poor to retain counsel on their own. See *Lord Mackay's Legacy*, *supra* note 11, at 16-17. Its failings have elicited criticisms such as "inefficient, demand-led but producer-run, rife with vested interests," and "deserv[ing] to be shaken to its core." *Id.* at 17.