
Volume 47

Issue 2 Winter 1998: Symposium - Contingency Fee
Financing of Litigation in America

Article 2

Introduction: Contingency Fee Financing of Litigation in America - Third Annual Clifford Seminar on Tort Law and Social Policy

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Recommended Citation

Stephan Landsman, *Introduction: Contingency Fee Financing of Litigation in America - Third Annual Clifford Seminar on Tort Law and Social Policy*, 47 DePaul L. Rev. 227 (1998)

Available at: <https://via.library.depaul.edu/law-review/vol47/iss2/2>

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INTRODUCTION

*Stephan Landsman**

In this Symposium some of the foremost experts in America discuss contingency fee financing of litigation. The work presented here helps to fill a serious gap in our knowledge about one of the crucial aspects of America's system of adjudication. Until recently, we have been in a situation like that encountered by the great Yogi Berra while a student in high school. Yogi was not a keen scholar and after one particularly poor examination was asked by his teacher: "Mr. Berra, don't you know anything?" Yogi answered, as only Yogi could: "Teacher, I don't even suspect anything!"¹

We, like Yogi, for many years did not even have reasonable suspicions about how the contingency fee system works. Recently, however, we have come to suspect a great deal² and maybe even to know a few things. The present Symposium is intended to increase our knowledge of the contingency fee system. It begins with a piece on the history of the contingency fee written by University of Pittsburgh legal historian Peter Karsten. In his essay, entitled *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, Professor Karsten suggests that the contingency fee has been with us a good deal longer than many commentators had thought and is the result of fundamental American concerns about the right to counsel and access to the courts.

We turn from the past to the present with Herbert Kritzer's article entitled, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*. Professor Kritzer, of the University of Wisconsin, is perhaps the leading student of the contingency fee in America today.³ He re-

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1. This story was presented as a part of Ken Burns's PBS documentary, *BASEBALL*.

2. For an articulation of some suspicions, see generally Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 *UCLA L. REV.* 29 (1989) and Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee*, 44 *EMORY L.J.* 173 (1995).

3. A representative sample of Professor Kritzer's work on contingency fees includes: HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990); HERBERT M. KRITZER, *RHETORIC AND REALITY . . . USES AND ABUSES . . . CONTINGENCIES AND CERTAINTIES: THE POLITICAL ECONOMY OF THE AMERICAN CONTINGENT FEE* (University of Wis.

ports on path-breaking research in his home state that assesses how lawyers go about using the contingency fee in their everyday practice. He takes us not only into the scholar's study to examine the literature on contingency fees, but into lawyers' offices as they fix such fees, structure their legal practice around them, and in some cases, adjust contingency fees in response to perceived inequities. Professor Kritzer's article is then discussed by several commentators.⁴

Our third major piece is an imaginative and thought-provoking essay by Professor Samuel Gross of the University of Michigan, entitled, *We Could Pass a Law . . . What Might Happen If Contingent Legal Fees Were Banned*. Professor Gross helps us visualize a system where contingency arrangements have been outlawed. He explores our likely systemic responses including a search for alternative ways to shift litigation costs and risks away from individual litigants, an inclination to reduce costs and risks throughout the system, and a possible shifting toward techniques that curtail the overall number of claims brought. Professor Gross's work is followed by a lively discussion in reaction to his speculations.⁵

Our fourth major article comes from Professor Ted Schneyer of the University of Arizona. Entitled, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, Schneyer's article explores a wide range of problems arising out of the use of contingency fee financing as well as possible responses to those problems. The proposed responses include greater insistence on formalities and disclosures, bans on contingency arrangements in certain contexts, tailoring of special mechanisms to protect litigants when a contingency relationship sours, and a host of other ideas—many tied to changes in our ethical standards or increased judicial intervention in fee determinations. Again, a number of commentators provide reactions to the main paper and Professor Jeffrey O'Connell of the University of Virginia will sketch his proposal for the regulation of the contingency system.

Inst. for Legal Studies Disputes Processing Research Program Working Paper No. 11-8, Jan. 1995 [hereinafter KRITZER, RHETORIC AND REALITY] (on file with the *DePaul Law Review*); Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 *LAW & CONTEMP. PROBS.* 125 (1984); Herbert M. Kritzer, *Fee Arrangements and Negotiation*, 21 *L. & SOC'Y REV.* 341 (1987).

4. See Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 *DEPAUL L. REV.* 347 (1998); Robert H. Mnookin, *Negotiation, Settlement and the Contingent Fee*, 47 *DEPAUL L. REV.* 363 (1998); Jeffrey O'Connell, *Early Offers as Contingent Fee Reform*, 47 *DEPAUL L. REV.* 413 (1998).

5. See Alexander, *supra* note 4.

Our final article, entitled, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, comes from Professor Marc Galanter of the University of Wisconsin. It is a meditation on the place of the contingency fee in America's legal world. Based on gleanings from social science materials, popular culture (including a wonderful set of lawyer jokes) and history, Professor Galanter raises questions about the durability of the contingency idea.

Some of the critical issues the Symposium raises are the following:

- Whether the classical, atomistic, vision of the lawsuit and its financing by contingent fees remains viable in light of modern trends toward both formal and informal aggregation⁶ in lawyers' offices as well as on court dockets;
- Whether hourly billing is a panacea, especially in light of growing corporate hostility to such billing;⁷
- Whether anything can be learned from the increasing acceptance of contingency arrangements in England and Scotland⁸ as governments formerly hostile to contingency fees search for means to afford their citizens access to courts in an era of shrinking public resources;
- Whether contingency fee mechanisms should be permitted where there is little contingency about the likelihood of recovery, though there may be about its size or timing;⁹
- Whether judges should continue to show lawyers deference with respect to fee questions or become more actively involved in assessing the propriety of fees charged;¹⁰
- Whether proposed reforms in contingency fee practice are legitimate efforts at reform or disguised efforts to undermine the enforcement of substantive legal rights—especially in the tort area;¹¹ and

6. For an excellent analysis of aggregation practices, see generally Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996).

7. See John W. Toothman, *Real Reform*, 81 A.B.A. J., Sept. 1995, at 80, 81-83.

8. See Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*, 71 CHI.-KENT L. REV. 625, 627 n.10 (1995).

9. See generally KRITZER, RHETORIC AND REALITY, *supra* note 3 (examining the contingency fee system in America from a lawyer's perspective).

10. See Resnik et al., *supra* note 6.

11. It may be appropriate to observe that an outspoken critic of contingency fees is the Manhattan Institute, which for many years has championed the cause of tort reform and that many of those who have challenged contingency fee arrangements, including Lester Brickman and Michael Horowitz, among others, have also labored over tort reform. Compare LESTER BRICKMAN ET AL., *RETHINKING CONTINGENCY FEES* (1994) (examining the contingency fee system and suggesting a proposal to reform the system), with Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755 (1994) (arguing that financial incentives push plaintiffs' expert witnesses to expand tort liability in the same manner as such incentives push plaintiffs' attorneys).

- Whether changes in contingent fee arrangements will have a significant effect on settlement practices—the bedrock of the present adjudicatory system.

In the end, I hope this Symposium will help us get beyond the suspicion stage with respect to contingency fees and move us toward the sort of knowledge that allows for a reasoned assessment of the merits and flaws of our system.

Finally, our thanks to Bob Clifford, without whose input and support this Symposium would not have been possible. DePaul University and the legal system are lucky to have such a friend.