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FACTS ABOUT LAWYERS' INCOME AND FEES

LAWYERS' INCOME

- According to the most recent data from the Bureau of Labor Statistics, in May 2010, the median annual pay of all lawyers was $112,760, *i.e.*, half of all lawyers made less than that.[1] Moreover, "the lowest 10 percent earned less than $54,130, and the top 10 percent earned more than $166,400."[2] By comparison, the annual median pay for physicians and surgeons in 2010 was equal to or greater than $166,400,[3] making their wages "among the highest of all occupations."[4] Primary care doctors received total median annual compensation of $202,392, while specialists received $356,885.[5] Looking only at specialists, median annual compensation ranged from $189,402 (family practice without obstetrics) to $407,292 (anesthesiology).[6]

- If any lawyers are making excessive income, it's corporate lawyers, not trial lawyers. According to *American Lawyer*, in 2011 the average partner pay at the U.S.'s highest-grossing law firms ranged from $390,000 to $4,460,000.[7] Similarly, *Corporate Counsel* reports that the 100 highest-paid Fortune 500 general counsel earned hundreds of thousands of dollars in cash compensation in 2011,[8] with 89 GCs taking home $1 million or more.[9]

CONTINGENCY FEES

- **The contingency fee system provides injured consumers with access to the courts.** Injured people may be in pain, unable to work, or lack funds to pay next month's mortgage or rent, let alone pay an hourly attorney fee. Under a contingency fee arrangement, a lawyer will take a case without any money up front. In return, the lawyer is entitled to a percentage of the amount of money collected if the case is successful – usually one-third. If the victim does not prevail, the attorney receives no fee at all. Without such a system, injured consumers could never find attorneys to fight insurance companies or take on large corporations and institutions, like the drug and tobacco industries. James Gattuso, then with the conservative Heritage Foundation, agreed in a 1986 *Wall Street Journal* piece, stating that the contingency fee system "acts to provide the services of attorneys to injured people who may not be able to otherwise afford legal representation, at no cost to the taxpayer."[10]

- **Contrary to popular myth, contingency fees are reasonable.** A 2005 American Enterprise Institute (AEI) report found that "little if any empirical evidence buttresses the contention that contingent-fee lawyers earn above-normal returns…."[11] According to the authors, "In part, the outrage over contingent fees represents a case of mistaking that which is seen for all that there is. After a case has been settled or concluded, contingent fees may appear large relative to the number of hours a lawyer has put into that particular case. But the fee needs to be evaluated *ex ante* – that is, before the case begins."[12]

  Moreover, "the data have provided no evidence of 'abuse' or 'extortionate' practices in contingent-fee pricing."[13] This was the finding of a systematic study of Wisconsin contingent fee attorneys by Law Professor Herbert M. Kritzer, who discovered a one-third contingency fee in 88 percent of the cases that specified the fee as a fixed percentage of the recovery.[14] Five percent of the cases called for fees of 25 percent or less, one percent specified fees around 30 percent and *less than one percent specified fees exceeding 33 percent*.[15]

  In addition, as the AEI report explains, "The argument that contingent-fee lawyers are earning substantial excess returns is also inconsistent with basic economic theory and the fact of extensive competition in the market for lawyers."[16] More specifically,

  > If contingent-fee lawyers were "not infrequently" earning thousands or tens of thousands of dollars an hour, they would be earning far more than hourly fee lawyers – that is, defense lawyers and corporate lawyers. That seems highly unlikely. Plaintiff and defense lawyers have very similar amounts of education and skill, so we would expect them to have similar earnings. If contingent-fee lawyers were earning markedly higher fees than defense lawyers, the defense lawyers would switch practice until earnings were equalized.[17]

- **The contingency fee system deters frivolous litigation.** Lawyers who take cases on a contingency fee take a big risk – if the case is lost, the lawyer is paid nothing. Moreover, contingency fee attorneys must front the costs of litigation themselves. Sometimes, this amounts to thousands or even millions of dollars. When a trial lawyer takes a case and loses, s/he has essentially been unemployed for the entire time s/he's been working on the case. In other words, contingency-fee attorneys cannot afford to bring baseless or frivolous cases.

  "A contingent-fee lawyer will not take on a case that he expects to lose,"[18] argued AEI's 2005 report, or as former Heritage Foundation policy analyst James Gattuso put it in the *Wall Street Journal*, "[T]here is no incentive for a lawyer to file a losing case – he gets paid only if he wins. It is consequently difficult to persuade a lawyer to risk his time and resources on what seems a losing cause. Thus, rather than encourage baseless lawsuits, the contingent fee actually helps screen them out of the system."[19]

  Moreover, according to AEI, "Blaming contingent fees for out-of-control courts is like blaming credit cards for personal bankruptcy. While there may be some connection between credit cards and bankruptcy, it is easy enough to go bankrupt without a credit card, and there are so many benefits of credit cards that we would not want to discourage their use. Similarly, the connection between contingent fees and out-of-control courts may not be zero, but restricting contingent fees is a poor way of reining in the courts."[20]

- **Capping contingency fees protects wrongdoers from accountability.** Limiting contingency fees below the standard one-third makes it less likely attorneys could afford to risk bringing many cases, providing practical immunity for many wrongdoers. As James Gattuso explained in the *Wall Street Journal*, limiting contingency fees "will make it harder to get a lawyer to file a case," "will not help the consumer, but simply make the product unavailable," and as a result, "many people who really have been wronged will find themselves without access to the legal system."[21]

CLASS ACTION LAWSUITS AND ATTORNEY FEES

- Class action cases typically result in reasonable fees for attorneys. This was the conclusion of a comprehensive empirical study by Professors Theodore Eisenberg, Cornell Law School, and Geoffrey P. Miller, New York University School of Law, who examined 689 class action lawsuits that settled between 1993 and 2008.[22] Among their major findings:

    - The median attorney fee was only 24 percent of the class recovery.[23]

    - In consumer class action suits, the median attorney fee was only 20 percent of the class award.[24]

    - In tort class action suits, the median attorney fee was only 20 percent of the class recovery.[25]

    - There is no strong evidence of significant differences between attorneys' fees as a percentage of class recoveries in federal and state courts.[26] In fact, the median fee to class recovery ratio for state court cases was 20 percent, slightly lower than the overall median ratio of 24 percent,[27] which "suggests somewhat less encouragement of class action activity by state courts compared to federal courts."[28]

    - Attorneys' fees have a significant correlation with the risk of pursuing a case.[29]

    - Class recovery and fee amount are strongly correlated.[30] But as class recovery increases, the fee percentage for attorneys actually decreases, which provides more money for clients.[31]

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NOTES

[1] Bureau of Labor Statistics, U.S. Department of Labor, "Lawyers," *Occupational Outlook Handbook*, 2012-13 Edition, http://www.bls.gov/ooh/Legal/Lawyers.htm#earnings (visited July 27, 2012).
[2] Bureau of Labor Statistics, U.S. Department of Labor, "Lawyers: Pay," *Occupational Outlook Handbook*, 2012-13 Edition, http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-5 (visited July 27, 2012).
[3] Bureau of Labor Statistics, U.S. Department of Labor, "Physicians and Surgeons," *Occupational Outlook Handbook*, 2012-13 Edition, http://www.bls.gov/ooh/Healthcare/Physicians-and-surgeons.htm (visited July 27, 2012).
[4] *Ibid*.
[5] *Ibid*.
[6] Bureau of Labor Statistics, U.S. Department of Labor, "Physicians and Surgeons: Pay," *Occupational Outlook Handbook*, 2012-13 Edition, http://www.bls.gov/ooh/Healthcare/Physicians-and-surgeons.htm#tab-5 (visited July 27, 2012).
[7] *American Lawyer*, "The Am Law 100: Firms Ranked by Compensation – All Partners," http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202549384444. *See also*, "The Am Law 100 2012," *American Lawyer*, May 1, 2012, http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202489912232.
[8] Cash compensation, which includes salary and bonus/nonequity incentive compensation, was usually only one component of GCs' total take-home compensation. Stock grants, option grants and cash-outs, often worth hundreds of thousands of dollars and sometimes millions, were frequently part of the GCs' pay packages. "The 2012 GC Compensation Survey," *Corporate Counsel*, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202562613886. *See also*, Shannon Green, "The 2012 GC Compensation Survey," *Corporate Counsel*, August 1, 2012, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1341783741529.
[9] "The 2012 GC Compensation Survey," *Corporate Counsel*, http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202562613886.
[10] James L. Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986 (on file with CJ&D).
[11] Eric Helland and Alexander Tabarrok, *Two Cheers for Contingent Fees*. AEI Press: Washington, D.C. (2005) at 25, www.aei.org/files/2005/08/22/20050817_book827text.pdf.
[12] *Ibid.*
[13] *Id.* at 27, citing work by Law Professor Herbert M. Kritzer.
[14] Herbert M. Kritzer, "Seven Dogged Myths Concerning Contingency Fees," *Washington University Law Quarterly* (2002) at 759, http://ssrn.com/abstract=907863.
[15] *Ibid*.
[16] Eric Helland and Alexander Tabarrok, *Two Cheers for Contingent Fees*. AEI Press: Washington, D.C. (2005) at 26, www.aei.org/files/2005/08/22/20050817_book827text.pdf.
[17] *Id.* at 26-7.
[18] *Id.* at 33.
[19] James L. Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986 (on file with CJ&D).
[20] Eric Helland and Alexander Tabarrok, *Two Cheers for Contingent Fees*. AEI Press: Washington, D.C. (2005) at 33, www.aei.org/files/2005/08/22/20050817_book827text.pdf.
[21] James L. Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986 (on file with CJ&D).
[22] Theodore Eisenberg and Geoffrey P. Miller, "Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008," NYU Law and Economics Research Paper No. 09-50, Cornell Legal Studies Research Paper No. 1497224, October 30, 2009 at 4, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1066&context=clsops_papers.
[23] *Id.* at 12.
[24] *Id.* at 15.
[25] *Ibid*.
[26] *Id.* at 3, 28, 32.
[27] *Id.* at 12, 14.
[28] *Id.* at 14.
[29] *Id.* at 3, 18, 28, 29, 30, 32.
[30] *Id.* at 12, 28.

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[31] *Id.* at 3, 16, 17, 18, 31, 32.