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## COURTHOUSE CORNERSTONE: Contingency Fees and Their Importance for Everyday Americans

### INTRODUCTION

Courtrooms are closing around the country due to budget cuts. Government-funded legal services and public defender systems are struggling to exist. While all of these budgetary issues swirl around our nation’s justice system today, there is one remarkable aspect of the system that depends on no government financing whatsoever. Yet it performs an integral function, providing people in need with attorneys and keeping meritless cases from clogging our courts. That system is the contingency fee system, a system that provides anyone with a legitimate injury case, regardless of their financial means, with access to an attorney. The attorney takes a case without charging any money up front and is paid only if the case is successful.

Remarkably, this system had functioned for centuries without any government interference. But in the 1980s, lobbyists for big corporations, medical societies and the insurance industry began to change all that, lobbying for government-imposed schedules and “caps” on contingency fees. At the same time, corporations and insurance companies reject reciprocal limits on what they pay their own high-priced attorneys. The impact of this kind of lopsided government regulation is obvious. Wrongdoers can continue to hire the best attorneys money can buy while the sick and injured cannot. That’s why the movement for government-imposed contingency fee limits has not come from the everyday Americans who hire these attorneys and actually use the system, but rather from lobby groups representing those who are sued. In the words of one commercial litigator,

[I]t 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.<sup>1</sup>

...

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.<sup>2</sup>

Statutory limits on contingency fees, which are essentially government-imposed wage and price controls, interfere directly with the contractual arrangements between people and their own attorneys and turn a free-market approach to providing legal representation into a botched system of government regulation that harms injured victims' quest for justice. This paper shows why.

## **OVERVIEW – WHAT IS THE CONTINGENCY FEE SYSTEM?**

When someone has been hurt due to the wrongdoing of another, the Seventh Amendment to the U.S. Constitution (as well as every state through constitution or statute) ensures this individual's right to resolve his/her dispute and seek compensation through the civil justice system. As Americans, the right to civil jury trial is one of our most fundamental rights. However, without an attorney to help an individual navigate the legal system, or perhaps even more commonly, deal with the wrongdoer's insurance company, this guarantee amounts to a right without any practical significance. In real terms, as University of Minnesota Law School Professor Herbert Kritzer,<sup>3</sup> “widely viewed as the leading academic on contingent fee representation,”<sup>4</sup> put it:

Insurers may happily pay a claimant based on the expenses the claimant documents, but the typical claimant does not know what is compensable, nor does he or she know how to document all the expenses that a lawyer would present to an insurer (for many cases, this is in fact the lawyer's most important contribution). Insurance claims adjusters are not paid to help personal injury claimants identify all compensable elements of their claims; they are paid to dispose of claims quickly and economically, and this means a claims adjuster will not tell a claimant to wait to settle in case the injury does not fully heal. An adjuster will also not tell a claimant when the claimant has overlooked some obvious (to the adjuster) element of damages.<sup>5</sup>

Other studies show that the cost and complexity of medical malpractice cases make it virtually impossible to pursue a case pro se, and evidence shows that of the claims that result in payment, only 0.1% are brought by victims without an attorney.<sup>6</sup>

Clearly, sick and injured people who file claims for compensation need the assistance of counsel. But with medical expenses, disability, pain with which to deal and often an inability to work, most everyday people would lack funds to pay next week's rent or mortgage, let alone an hourly attorney's fee. As one attorney told American Bar Association (ABA) Foundation researchers Stephen Daniels and Joanne Martin, "The simple truth is at least 95% of our clients could not afford to pay the lawyer and could not finance the lawsuit. They just couldn't – at least 95%."<sup>7</sup>

That is why the contingency fee system is so important. Under this system, an attorney agrees to take a case without any money up front. The attorney fronts all costs and gets paid only if successful. In return, the lawyer is entitled to a percentage of the money collected if the case succeeds.

The ABA has long regarded the contingency fee system as "squarely within the bounds of American legal ethics."<sup>8</sup> The ABA's Model Rules for Professional Conduct provide guidance as to the types of cases where contingency fees are prohibited<sup>9</sup> and warn against charging unreasonable fees.<sup>10</sup> Attorneys who would do so risk sanctions. They would risk going out of business. As Caplin & Drysdale commercial litigator Elihu Inselbuch wrote in a Duke University law review article, "A contingent-fee lawyer who sets the percentage too high will be undercut by other lawyers willing to undertake the representation at lower rates."<sup>11</sup>

As the ABA has noted, "straight contingent fees typically range from 25% to 33%."<sup>12</sup> In his survey of Wisconsin attorneys, Professor Kritzer found that "of the cases with a fixed percentage, a contingency fee of one-third of the judgment or settlement won by the attorney was by far the most common fee, accounting for 88% of those cases. Five percent of the cases called for fees of 25% or less, 1% specified fees around 30%, less than 1% specified fees exceeding one-third of the recovery; the exact percentage was not ascertained for 4% of the cases."<sup>13</sup> Kritzer points out that there are "several studies – in addition to [his] that show substantial variation in contingency fee percentages and that a significant portion of contingency fees are less than 33%."<sup>14</sup>

Additionally, he found that for cases that employed a variable percentage the most common pattern "called for a contingency fee of one-quarter if the case did not involve substantial trial preparation (or, in some cases, did not get to trial) and one-third if the case got beyond that point. The contingency fee rose to 40% or more only if the case resulted in an appeal. For cases not involving a lawsuit, the contingency fee percentage could be as low as 15% or as high as 33%."<sup>15</sup>

Kritzer's research revealed that in some cases, attorneys will actually take a smaller percentage than their initial agreement. Attorneys usually pointed to one of two situations for this occurring: 1) if the attorney believed that "taking a smaller fee would facilitate a settlement"<sup>16</sup>; and 2) in cases where "substantial payments had to be made to subrogated parties, lawyers often reduced their fee to a level that they split what was left after paying the subrogated claims with the client."<sup>17</sup> In such cases, "lawyers expressed the view that the lawyer would not walk away with more than the client."<sup>18</sup> He also found that "[o]ccasionally, when the case yields a minimal payoff, the lawyer will simply waive any fees owed. Sometimes a lawyer will waive a fee on a small case as a means of

generating good will, particularly if the client is in a good position to refer potential clients to the lawyer.”<sup>19</sup>

Over the last few decades, use of contingency fees has expanded beyond tort or personal injury cases. In its 2004 *Report on Contingent Fees in Medical Malpractice Litigation*, the ABA Tort Trial & Insurance Practice Section observed, “Contingent fees are now commonly offered to plaintiff-clients in collections, civil rights, securities and anti-trust class actions, real estate tax appeals and even patent litigation.”<sup>20</sup> What’s more, there has been a growing trend for individual inventors and small businesses to rely on contingency fee attorneys in patent litigation.<sup>21</sup> Large patent aggregators, universities, small patent holding companies – and even large companies – have begun used contingency fee attorneys in patent case.<sup>22</sup> And as Professor Kritzer has detailed, several variations of the contingency fee system, also called “contingent fees” or “no win, no pay,” exist throughout the world.<sup>23</sup>

## **THE VALUE OF AND RISK UNDERTAKEN BY CONTINGENCY FEE ATTORNEYS**

There is a common misperception of no financial risk for someone who hires a lawyer on a contingency basis and files a lawsuit. Yet it is clear that while an individual’s finances may not be at risk, the contingency fee attorney’s finances are. The contingency fee system does not eliminate financial risk. It merely shifts it, placing it entirely on the attorney. Or as Caplin & Drysdale commercial litigator Elihu Inselbuch put it, “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 risks from client to the attorney.”<sup>24</sup>

In fact, lawyers who take contingency fees take a huge risk – if the case is lost, the lawyer is paid nothing. As the ABA Tort Trial & Insurance Practice Section explains,

A defense verdict means that the plaintiff walks away without a recovery and the plaintiff’s lawyer with no fee for professional services, for investigative costs, for expert witness fees, etc. Although the out-of-pocket costs of the action can be charged back to the client, the clients’ financial conditions usually preclude that... [T]he ethical rules now allow contingent fee agreements to make repayment of expenses also contingent upon the successful outcome of the case.<sup>25</sup>

Moreover, as Professor Kritzer has noted, the risk of losing the case completely is not the only risk faced by contingency fee lawyers:

[R]ecover or no recovery is only one part of the uncertainty inherent in litigation. The other contingencies faced by the lawyer (and the client) include:

- uncertainty about the amount that will be recovered (and hence the fee the lawyer will receive);
- uncertainty about what it will cost, in both effort and expenses, to obtain the recovery; and

- uncertainty about how much time will pass before the recovery is obtained.<sup>26</sup>

Attorney Elihu Inselbuch put it this way:

[N]o 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 the settlement....

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....

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. 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.<sup>27</sup>

By allowing lawyers to distribute their risks among cases, the contingency fee system allows them to survive professionally even if ultimately receive little for the time spent on a case.<sup>28</sup> Professor Kritzer illuminates the problem with this example:

One of the lawyers I observed settled a case on the eve of trial for \$60,000, having started out with a demand for \$200,000. The lawyer, who had a nominal billing rate of \$175 per hour, had devoted about 300 hours to the case. While the lawyer did receive a fee of \$20,000, about \$8,000 of this went into time devoted to the case by the lawyer's paralegal. In the end, the lawyer netted about \$40 per hour. From the viewpoint of the lawyer, this case was a clear loser.<sup>29</sup>

Specifically regarding medical malpractice cases, the ABA Foundation's Stephen Daniels and Joanne Martin put it this way:

As Herbert Kritzer reminds us, a contingency fee-based practice is a constant balancing of cost, risk and potential return. For medical malpractice it is more like a high-wire act with no safety net. If a lawyer cannot strike and maintain the right balance, the fall can be fatal to a practice. Although the return on investment can be substantial, these are especially risky and costly cases.<sup>30</sup>

Contingency fee attorneys face risks in very high-stakes cases as well. A favorite tactic of corporate attorneys is to starve out the victims or overwhelm them with legal attacks and costs. The following demonstrates how this played out in tobacco litigation. J. Michael Jordan, an attorney in charge of representing R.J. Reynolds in

California cases, explained in a memo why a number of lawyers were dropping their cases against the tobacco giant:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynold's money, but by making that other son of a bitch spend all his.<sup>31</sup>

Clearly, a corporation with hundreds of lawyers can drag out a case for 10 or 20 years to avoid paying a large damage award. A single person faced with such a lengthy legal battle would be ruined financially, and would give up long before that.

But contingency fees are equally appropriate in low-risk cases. As the ABA Tort Trial & Insurance Practice Section explained in its *Report on Contingent Fees in Medical Malpractice Litigation*, the ABA's Model Rules of Professional Conduct advise that "even in a so-called 'riskless' case – one where liability is apparent and recovery certain – a contingent fee can still be appropriate because it will require lawyer expertise and time or genuine risk suddenly arises."<sup>32</sup>

As the ABA Standing Committee on Ethics and Professional Responsibility noted in its December 1994 opinion on contingent fees, early settlements can occur precisely because of the value an attorney brings to a case – for which they should not be penalized:

[A]n early settlement offer is often prompted by the defendant's recognition of the ability of the plaintiff's lawyer fairly and accurately to value the case and to proceed effectively through trial and appeals if necessary. There is no ethical reason why the lawyer is not entitled to an appropriate consideration for this value that his engagement has brought to the case, even though it results in an early resolution.<sup>33</sup>

In addition, winning is never guaranteed. As the ABA Standing Committee on Ethics and Professional Responsibility noted in its December 1994 opinion on contingent fees:

Defendants often vigorously defend and even win cases where liability seems certain. 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 representation into a certain loser. See, e.g., *Central Bank of Denver v. First Interstate Bank of Denver*, 114 S.Ct. 1439 (1994) (where the Supreme Court held that a private plaintiff may not maintain an aiding and abetting suit under § 10(b) of the Securities Act of 1934, overruling every circuit court which for decades had allowed such suits).<sup>34</sup>

As Elihu Inselbuch of Caplin & Drysdale also pointed out, "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."<sup>35</sup>

Finally, it should be noted the hypocrisy of those corporate representatives who complain about fees for plaintiff's attorneys while paying their own attorneys very high rates, in some cases, for little value at all. As Elihu Inselbuch of Caplin & Drysdale points out:

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.<sup>36</sup>

## **THE SOCIETAL VALUE OF CONTINGENCY FEES**

There are three main societal functions of the contingency fee system: 1) it allows all persons access to the courthouse; 2) it screens out frivolous lawsuits; and 3) it helps ensure that the interests of the attorney and client are aligned.

### **Contingency Fees Provide Everyday People With Access to the Courts**

The attorney representing an injury victim has a difficult and complex job. Inselbuch puts it this way:

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.<sup>37</sup>

There are only three possible ways for an injured person to acquire counsel for help. One is a government-funded attorney, an option unavailable to the injured who seek compensation in the United States (unlike England and other nations).<sup>38</sup> The second option is to hire an attorney at an hourly rate as do defense counsel and insurance companies. As noted earlier, very few injured parties have the financial resources to do this.

The other option – one developed in this country centuries ago – is the “contingency fee” system, which is the only real option for most people. As one attorney told the

ABA Foundation's Stephen Daniels and Joanne Martin in their survey of Texas lawyers,

Ninety percent of the people out there make their living, they pay for the kids to go to school, they pay to take care of their kids, they pay for the mortgage, they pay for their one or two cars, and at the end of the month, they may have \$100 left over if they're the lucky ones... And so, for someone to have the ability to go hire a lawyer on anything other than a contingency fee, you know, I think it's a fiction.<sup>39</sup>

The roots of the contingency fee system are deep within our nation. It has been an accepted (and even celebrated) arrangement for more than 150 years,<sup>40</sup> recognized by jurists since at least the mid-1800's as critical to providing access to court. In her recent Emory Legal Studies Research Paper, "Justice in Crisis: Victim Access to the American Medical Liability System," Emory University Associate Law Professor Joanna Shepherd noted the following illustrative quotes dating back to the 19th century:<sup>41</sup>

- Delaware High Court Justice Samuel Harrington stated, in 1840, "The poor suitor may not have the present means of payment, and this policy [of avoiding contingent fee contracts] may deprive him of counsel... His rights are nothing unless he can have the means of enforcing them."<sup>42</sup>
- New Hampshire's Chief Justice Samuel Bell stated, in 1862, "It is not uncommon that attorneys commence actions for poor people, and make advances of money necessary to the prosecution of the suit upon the credit of the cause. Thus a man in indigent circumstances is enabled to obtain justice in cases where, without such aid, he would be unable to enforce a just claim."<sup>43</sup>
- Missouri Judge Robert Bakewell stated, in 1876, "Many a poor man with a just claim would find himself unable to prosecute his rights, could he make no arrangement to pay his advocate out of the proceeds of his suit... If [such agreements] are immoral or illegal, there are perhaps few attorneys in active practice amongst us who have not been habitual violators of the laws."<sup>44</sup>

In a 1963 case, Pennsylvania Supreme Court Justice Michael A. Musmanno agreed:

If it were not for contingent fees, indigent victims of tortious accidents would be subject to the unbridled, self-willed partisanship of their tortfeasors. The person who has, without fault on his part, been injured and who, because of his injury, is unable to work, and has a large family to support, and has no money to engage a lawyer, would be at the mercy of the person who disabled him because, being in a superior economic position, the injuring person could force on his victim, desperately in need of money to keep the candle of life burning in himself and his dependent ones, a wholly unconscionable meager sum in settlement or even refuse to pay him anything at all. Any society, and especially a democratic one, worthy of respect in the spectrum of civilization, should never tolerate such a victimization of the weak by the mighty.<sup>45</sup>

As might be expected, today “[m]any consumer organizations, public advocates, labor unions, and plaintiffs’ lawyers view the United States’ system of contingency 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.”<sup>46</sup> But they are not the only ones. Even one of the harshest critics of contingency fees acknowledges this function and recognizes their inherent value. Lester Brickman, who has “established himself as the leading proponent of the view that contingency fees [are] a problem and that they [need] to be substantially limited,”<sup>47</sup> has noted that “[c]ontingency fees are vital to the vindication of important legal rights in that they enable accident victims and other injured persons to have access to both legal counsel and the courts which would not otherwise be feasible.”<sup>48</sup>

Even organizations generally known for their support of so-called “tort reform” have also recognized this critical function of the contingency fee system. In their book *Two Cheers for Contingent Fees* published by the conservative American Enterprise Institute, Associate Economics Professors Alexander Tabarrok and Eric Helland, of George Mason University and Claremont McKenna College, respectively, wrote, “A second advantage of contingent fees [the first being cost reduction] is improved access to the legal system.”<sup>49</sup> Analogizing contingency fee attorneys to free-market “venture capitalists,” the authors said,

A contingent-fee lawyer is, in effect, a venture capitalist of torts. The contingent-fee lawyer combines a claim with funding and expertise to produce a product to be presented to judge and jury. Without venture capital, good ideas would lie dormant. Without contingent fees, good cases would lie dormant.<sup>50</sup>

Similarly, on May 15, 1986, just as corporate attacks on the contingency fee system were heating up politically, James L. Gattuso, then with the conservative Heritage Foundation, wrote a *Wall Street Journal* article entitled, “Don’t Rush to Condemn Contingency Fees.” He too argued that the contingency fee system ensures that injured persons who could not otherwise afford legal representation have access to the legal system.

In sum, without this system to finance a case, everyday Americans would find it simply impossible to afford counsel to fight against high-paid insurance company attorneys.

### **Contingency Fees Screen out Meritless Cases**

Another nearly universally-recognized function of the contingency fee system is the screening of baseless lawsuits. Contingency fees provide a strong incentive for attorneys to carefully screen cases, ensuring that “frivolous” cases never move forward. That is because the attorney has to carefully weigh the risk and cost of losing, which, as noted earlier, are often more than just the cost of his or her time.

Many others have studied this phenomenon and agree. For example, the ABA Tort Trial & Insurance Practice Section noted, “Logic suggests that contingent fees actually prevent frivolous suits.”<sup>51</sup> And well-known conservatives agree. As Professors Tabarrok and Helland wrote in their American Enterprise Institute book: “Contingent-fee lawyers ‘screen’ potential cases and clients. In constructing a litigation portfolio for his firm, the lawyer will reject weak cases and agree to handle stronger ones. This screening function

is useful both for clients and, most likely, for the legal system at large.”<sup>52</sup> And as James L. Gattuso similarly wrote in his 1986 *Wall Street Journal* article, “rather than encourage baseless lawsuits, the contingent fee actually helps screen them out of the system.”<sup>53</sup>

As further evidence of how universally-accepted this screening function is, the insurance industry – a bitter opponent of the U.S. contingency fee system – was actually among the most outspoken supporters of contingency fees in Britain. The context of the British debate was the government’s recommendation in 1998 (and ultimately enacted in 1999) to curtail use of government-sponsored legal aid, which until then had provided the very poor and most vulnerable with the means to bring cases for money damages in Britain.<sup>54</sup> In supporting this move, both the Association of British Insurers (ABI) and the Association of Insurance and Risk Managers (AIRMIC) strongly endorsed the British contingency fee system for extending access to justice while limiting meritless claims, thus *reducing* defense costs. The ABI said, “Removing [weak] cases will reduce the costs not only to the legal-aid fund but to all defendants who presently face these speculative claims.”<sup>55</sup>

Similarly, AIRMIC’s Executive Director Ina Barker said contingency fees will make lawyers “take cases truly on their merits,” will enable genuine cases to proceed and will also reduce the total number of claims and cases being brought, therefore reducing the administrative costs borne by defendants.<sup>56</sup> She also said that because future claims were more likely to succeed once they had been screened by the contingency fee system, “companies must therefore ensure that they have sound risk management practices in place to reduce the potential for claims to an absolute minimum.”<sup>57</sup>

In the United States, the evidence is clearly in the statistics. Professor Kritzer found that, “[o]verall, lawyers reported accepting cases from a mean of 46% (median 45%) of the potential clients who contacted them” and that “simply stated, contingency fee lawyers generally turn down at least as many cases as they accept, and often turn down considerably more than they accept.”<sup>58</sup> A survey by ABA researchers Daniels and Martin show a smaller rate of acceptance. “Plaintiffs’ lawyers typically take only a small percentage of the calls they get from potential clients. Overall, our respondents signed up, on average 25% of the callers. The percentage was slightly higher for lawyers who specialize in automobile accidents – 34%; and the percentage was much lower for lawyers specializing in medical malpractice cases – 10%.”<sup>59</sup>

In Professor Shepherd’s survey of only medical malpractice attorneys, the rates were even lower. “Another report of medical malpractice attorneys’ practice patterns found that 77.1 percent of attorneys reject more than 90 percent of the cases they screen.”<sup>60</sup> As Kritzer explains, “Lawyers are extremely cautious in accepting medical malpractice cases, and the lawyers I observed spent a lot of time explaining to these potential clients why their negative medical outcome did not constitute malpractice, or the difficulty in establishing that it did arise from malpractice....”<sup>61</sup> Thus, Kritzer concludes, “[t]his research makes it clear that contingency fee lawyers do operate as gatekeepers: they turn away substantial numbers of potential clients....”<sup>62</sup>

If the contingency fee’s screening function were failing, we would likely see evidence of that in the case filing data as well. However, the data suggest the opposite. Long-term National Center for State Court data show that from 1999 to 2008, tort filings *fell* by 25

percent.<sup>63</sup> In 2010, tort cases represented *only 6 percent* of all civil caseloads in the general jurisdiction courts of 17 states reporting.<sup>64</sup> This is consistent with previous years, where tort filings were equally low as a percentage of civil caseloads – 5 percent in the general jurisdiction courts of 16 states reporting in 2009<sup>65</sup>; 4.4 percent in seven states reporting in 2008<sup>66</sup>; and 6 percent in seven states reporting in 2007.<sup>67</sup> In fact, Americans were more likely to sue a century ago than they are today.<sup>68</sup>

The data also prove that attorney advertising, which helps injured people find lawyers, has had no appreciable impact on the rate of new case filings. Lawyers who operate on a contingency fee still acquire the majority of their clients through traditional means: “client referrals, referrals from other lawyers, and referrals through community contacts.”<sup>69</sup>

In sum, the contingency fee system enables everyday people with legitimate injuries to find counsel, but keeps frivolous cases out of the system.

### **Contingency Fees Align Attorney-Client Interests and Promote Efficiency of Judicial Resources**

Contingency fee attorneys are outcome-focused, not time-focused. Their interest is to work hard and achieve the best possible results for their clients in a timely, efficient manner. As Elihu Inselbuch put it, “[L]inking the lawyer’s payment to the outcome of the case gives the plaintiff the sense that the attorney is a partner in interest.”<sup>70</sup> He expounded further:

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. ...[A]ttorneys 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.<sup>71</sup>

However, this does not mean that contingency fee attorneys have an incentive to short-change their clients and settle a case too quickly. Because contingency fee attorneys receive most of their cases through referrals, maintaining a reputation as a strong advocate for their client is very important. “The lawyer has to be concerned not only about his or her return from current cases but of the prospect of getting future cases,” explains Kritzer.<sup>72</sup> An attorney who gains the reputation as someone who quickly settles is less likely to achieve the maximum results for their client. “The typical view is that a lawyer must be recognized as someone who would be willing and able to take cases to trial because insurance adjusters and defense attorneys are less inclined to make top-dollar settlement offers to a lawyer with a reputation for wanting to settle quickly. The best way to get quick, good settlements is to have a reputation for being an aggressive trial lawyer – aggressive both at trial and negotiation.”<sup>73</sup>

Defense attorneys paid by the hour are another story, however. Unlike contingency fee attorneys, defense counsel profit the longer a case goes on. What’s more, delay allows an insurer-client to hold onto money longer. Explained Inselbuch,

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

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.<sup>74</sup>

Even conservative U.S. Supreme Court Justice Antonin Scalia observed that an hourly-fee compensation leads to over-billing, *i.e.*, it "give[s] lawyers incentives to run up hours unnecessarily, which can lead to overcompensation."<sup>75</sup>

In sum, the interests of contingency fee attorneys are aligned with those of their clients to work efficiently and productively. The real drain on the courts is the defense and their insurance companies.

## **CAPPING OR LIMITING CONTINGENCY FEES HURTS VICTIMS**

Half the states in this country have some type of law dealing with contingency fees (*see* Appendix, Contingency Fee Limits By State), although not every law amounts to a barricade to the courthouse. Some states simply allow for judicial review of fees while others cap fees at levels considered fair and ethical, *i.e.*, one-third.<sup>76</sup>

However, most state laws covering contingency fees do indeed block victims' ability to hire counsel. Sometimes not all injured are affected; at least a dozen state laws apply to medical malpractice cases only. In rare instances, like Indiana, there is an absolute 15% fee cap on any award exceeding \$100,000 from the Patient's Compensation Fund.<sup>77</sup> But more often, states limit fees using sliding scales, with the most severe limits on the highest award, *i.e.*, in the most serious cases. New York's law is a good example. New York limits contingency fees in medical malpractice cases to 30% of the first \$250,000, 25% of the second \$250,000, 20% of the next \$500,000, 15% of the next \$250,000 and just 10% of anything over \$1.25 million.<sup>78</sup>

Recently, there has been some movement to repeal unfair schedules like this. In January 2013, the Governor of Illinois signed new legislation, which replaces that state's

restrictive fee schedule in medical malpractice cases with a requirement that fees be no greater than the standard one-third. The law also eliminates attorneys' ability to petition a court for higher fees. The Governor's spokesperson said, "Flat rates for contingency fees in medical malpractice cases will provide more consistency and certainty for both malpractice victims and attorneys, while eliminating the awarding of additional attorney compensation by the courts."<sup>79</sup>

Of course, there are many more reasons why restrictive caps and fee schedules are problematic. For instance, they "reflect a lack of understanding of what representation of injured parties entails,"<sup>80</sup> even for cases that settle early. The ABA Tort Trial & Insurance Practice Section explained specifically that "[s]etting fixed limits on such early settlements may fail to account for much of the value added by the professional services in such cases...."<sup>81</sup> Indeed, as noted above, settlements do not just happen even in "slam dunk" cases. Expertise and time are always required even in the best of circumstances, and an attorney's reputation can also greatly influence the speed of settlement. This has clear value. And even these cases take time. Notes Professor Kritzer:

From my observation, the lawyers move reasonably promptly to settle routine cases as soon as the client's medical condition has reached a suitable state; through that time, the lawyer has been monitoring the client's medical situation, collecting documentation related to expenses and other losses, and counseling the client to be sure that there is documentation and that the client has obtained appropriate treatment. By the time the case is ripe for settlement, the lawyer will have put in a nontrivial amount of time. The time required to prepare a demand letter with the relevant documentation of loss and to negotiate the actual settlement will, for a large proportion of cases, represent a time investment worth considerably more than 10% of the recovery.<sup>82</sup>

The purpose for contingency fee caps is clear: making it harder for victims to find competent counsel and file legitimate lawsuits. In its 2004 *Report on Contingent Fees in Medical Malpractice Litigation*, the ABA Tort Trial & Insurance Practice Section put it this way: "The only goal of people who want to eliminate contingent fees is to reduce the incidence of lawsuits."<sup>83</sup> In addition, they found that "limitations on fees would likely reduce optimal compensation for all victims and, in effect, reduce the deterrent effect on medical negligence."<sup>84</sup>

In 2009, researchers from RAND's Institute for Civil Justice (ICJ) surveyed 965 plaintiffs' attorneys who were presented with "hypothetical meritorious cases" and asked if they would take the case given that either noneconomic damages caps or attorney fee limits were in effect. ICJ concluded that caps and attorney fee limits each "make it harder to retain counsel."<sup>85</sup> In states where both types of laws are in effect, the impact on victims with the most serious harm is even more severe, as attorneys simply cannot afford to front high litigation costs when the possible recoverable damages are so limited.

What's more, noted the ABA Tort Trial & Insurance Practice Section, just as caps on non-economic damages have a disproportionate impact on women, children, minorities and the poor,<sup>86</sup> so do attorney fee caps:

Elimination of, or significant constraints on, contingent fees would make legal assistance available only to those injured persons who are wealthy. The poor, retired, African Americans, and women especially will suffer because they are often unable to afford hourly fees.<sup>87</sup>

The reason caps on fees has this impact is obvious: costs. As the ABA Tort Trial & Insurance Practice Section report found, “[I]mposing such limitations will likely preclude many medical malpractice actions from being filed because the prospective damages and resulting attorneys’ fees will not justify the expected time and expense associated with the litigation,”<sup>88</sup> which often costs the attorney hundreds of thousands of dollars. Practically speaking, this means that “[o]nly those most grievously injured by the grossest medical negligence would likely be able to bring an effective action”<sup>89</sup> and that, for many victims, limiting contingent fees “would have virtually the same effect as prohibiting them.”<sup>90</sup> Indeed, such limitations would have the additional impact of driving attorneys out of the system altogether, particularly those specializing in costly and complex cases like medical malpractice:

If prices for lawyer’s services are fixed below what the market would yield, lawyers will have incentive to employ their services elsewhere, where their expertise and skill match the demand for them....

Limiting contingent fees will likely squeeze lawyers out of medical malpractice litigation, leaving some, perhaps many, victims with no representation.<sup>91</sup>

Indeed, the contingency fee system provides the injured with access not just to any lawyer, but to one who is capable of fighting an insurance company on a somewhat level playing field. As the ABA Tort Trial & Insurance Practice Section put it,

Limitations [on contingency fees] do not simply serve to ignore medical error and to eliminate medical malpractice victims from the system, they also would shift meritorious cases to less experienced (and therefore less expensive) lawyers. This could have the effect of reducing the likelihood or amount of recovery. Plaintiffs would not really be able to have the counsel of their choice and might have to settle for counsel unfamiliar with the procedural intricacies of the specialized area of practice.<sup>92</sup>

At the same time,

[T]here would be no limit on the numbers of lawyers the defense could employ or the amount of fees those lawyers could charge. That creates a potential imbalance in favor of the defense. Thus, even where medical malpractice victims could find representation, the law would say to them, “you are not allowed to use a lawyer whose market valuation is equivalent to those who might represent the defendant.”<sup>93</sup>

There is no question that the “tort reform” movement has been skillful in getting everyday Americans to support this kind of imbalance while undermining their own constitutional rights of access to the civil justice system. This is precisely what was accomplished in Florida in 2004 with the passage of Amendment 3, a voter initiative.

This amendment to the Florida State Constitution was sponsored by the state's medical lobbies, and it imposes caps on contingency fees in medical malpractice cases. The amendment as passed limits contingency fees to 30% of the first \$250,000 awarded and 10% of any amounts above \$250,000.<sup>94</sup>

What is remarkable and dangerous about Amendment 3 is the way that the medical lobbies won popular support for it. Specifically, the Amendment was couched in manipulative language suggesting that the law's purpose was to allow injured patients to keep more of their recovery. In reality, its aim and impact were no different than any other contingency fee limit law: preventing injured patients from obtaining competent counsel.

Specifically, the law reads as follow:

(a) Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first \$250,000.00 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of \$250,000.00, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

When the Florida Supreme Court allowed this Amendment on the ballot, Justice R. Fred Lewis dissented, recognizing it for what it was – an attempt to mislead voters. He wrote that the Amendment:

attempt[s] to "hide the ball" from the voters and disguise a very clear end...[with] false promises of benefits when [it] really restrict[s] existing rights... Clearly the proposed amendment as written portrays that it will provide protection for citizens by ensuring that they will actually personally receive a deceptive amount of all money determined as damages in any medical liability action. However, the amendment actually has the singular and only purpose of impeding a citizen's access to the courts and that citizen's right and ability to secure representation for a redress of injuries. Its purpose is to restrict a citizen's right to retain counsel of his or her choice on terms chosen by the citizen and selected counsel and to thereby negatively impact the right of Florida citizens to seek redress for injuries sustained by medical malpractice. This is truly a wolf in sheep's clothing.<sup>95</sup>

He went on to write of the Florida Medical Association, "[The FMA] should not falsely claim they are providing a benefit to those injured by medical malpractice when they are in fact restricting their rights to secure adequate legal representation. There really is no other purpose of this proposed amendment."<sup>96</sup>

Similar deception has been used by the American Legislative Exchange Council (ALEC), an organization comprised of conservative politicians and corporations that ghostwrite model bills and shop them around to state legislatures. ALEC's Civil Justice Task Force has written numerous bills designed to limit victims' access to the civil justice system.

Two of these bills deal with ordinary contingency fees: “The Legal Consumer’s Bill of Rights,”<sup>97</sup> and the “Honesty in Lawyering Act.”<sup>98</sup>

These ALEC bills would require a contingency fee attorney to immediately inform clients of the number of hours the attorney will work on a case (the attorney must later submit records of the actual hours worked) and the expected costs and expenses. As has been made clear throughout this paper, trial lawyers are outcome-focused, not time-focused, unlike defense lawyers who are paid by the hour. That means trial lawyers do not keep time records or create the overhead and expenses that this would entail. Moreover, when lawyers take cases, they are acting on minimal information. Their work depends on issues like the existence of quality medical records – things the attorney can’t possibly know beforehand. As has been noted earlier, the outcome of a case is dependent on the behavior of insurance companies, who can drag out cases to egregious lengths. In other words, these consumer friendly-sounding bills are anything but. Their only impact would be to discourage contingency lawyers from taking cases.

The only hope for stopping the spread of these kinds of “wolves in sheep’s clothing” is for the public to become educated. Hopefully, this paper assists in that goal.

Finally, it is important to note that a client’s fee arrangement with their attorney is a private contractual matter, mutually agreed upon between the attorney and the client. An individual’s right to freely enter into a legal contract was acknowledged in the first report issued by New York’s Commissioners on Practice and Pleadings in 1848:

We cannot perceive the right of the state, to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill and labor.... Freedom of industry is one of the strongest demands of the time. This includes not only the right of each citizen to engage, at will, in any honest calling, but to receive such rewards as he can agree for it.<sup>99</sup>

Before this code was adopted, “access to justice was nonexistent.”<sup>100</sup> Afterward, “statutes regulating lawyers’ fees began to be repealed”<sup>101</sup> and the code “allowed attorney compensation to be governed by contract, and ‘not restrained by law.’”<sup>102</sup> One might think such a development would be supported by the “tort reform” movement, a basic precept of which is that contractual arrangements provide greater market efficiencies than the tort system. This is why they claim to advocate for anti-victim proposals like mandatory binding arbitration. Yet laws that interfere directly with a victim’s contractual relationship with his or her own attorney has been a central focus of the “tort reform” movement, including medical lobbies like the Florida Medical Association, from the beginning – and remains so.<sup>103</sup> In fact, their passion for this even went as far as attempting to prevent patients harmed by medical malpractice from contractually waiving fee limits that passed in Florida in 2004. Fortunately, their efforts were unsuccessful and in 2006 the Florida Supreme Court affirmed the right of an individual to freely enter into a contract for legal fees.<sup>104</sup> The Court made it clear that this right has been “long recognized”<sup>105</sup> and ordered that the Florida Bar create a rule that would permit, rather than prohibit, waiver.<sup>106</sup>

Not everyone in the “tort reform” movement agrees with caps on fees that interfere with a private contract between a client and their attorney, however. In their book *Two Cheers*

*for Contingent Fees* published by the conservative American Enterprise Institute, Professors Alexander Tabarrok and Eric Helland put it this way: “Restrictions on contingent fees are restrictions on the freedom to contract and, as such, must clear a high hurdle to be justified.”<sup>107</sup>

As the evidence undeniably demonstrates, this hurdle is far from being cleared.

## NOTES

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<sup>1</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.

<sup>2</sup> *Ibid.*

<sup>3</sup> There are very few empirical studies that focus exclusively on contingency fees in the United States. Two of the most widely-cited were completed by Professor Herbert Kritzer, who examined contingency fee practice in the state of Wisconsin, and by the American Bar Foundation’s Steven Daniels and Joanne Martin, who examined how plaintiffs’ lawyers in Texas were adjusting to the changing legal market in the late 1990s based on “ninety-six in depth interviews with Texas plaintiffs’ lawyers and a large-scale mail survey with 554 useable responses.” See Stephen Daniels and Joanne Martin, “Plaintiffs Lawyers: Dealing with the Possible but Not Certain,” 60 *DePaul L. Rev.* 337 (2011); Stephen Daniels and Joanne Martin, “It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas,” 80 *Tex. L. Rev.* 1781 (2002); Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002).

<sup>4</sup> David L. Schwartz, “The Rise of Contingent Fees in Patent Litigation,” 64 *Alabama L. Rev.* 335 (2012), <http://ssrn.com/abstract=1990651>.

<sup>5</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.

<sup>6</sup> Joanna Shepherd, “Justice in Crisis: Victim Access to the American Medical Liability System,” Emory Legal Studies Research Paper, Paper No. 12-222 (2012), <http://ssrn.com/abstract=2147915> (citing David A. Hyman and Charles Silver, “Medical Malpractice Litigation and Tort Reform: It’s the Incentives, Stupid,” 59 *Vand. L. Rev.* 1085 (2006)).

<sup>7</sup> Stephen Daniels and Joanne Martin, “Plaintiffs Lawyers: Dealing with the Possible but Not Certain,” 60 *DePaul L. Rev.* 337 (2011)

<sup>8</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001.), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/> (citing ABA Comm. On Ethics and Professional Responsibility, Formal Op. 94-389 (1994)).

<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 1.5 (as a matter of public policy, contingency fees are generally not allowed in criminal or domestic relations cases).

<sup>10</sup> *Id.* (discusses factors to help determine a reasonable fee and the prohibition of charging a contingent fee in domestic relations or criminal matters).

<sup>11</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.*, 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.

<sup>12</sup> American Bar Association, Formal Op. 93-373.

<sup>13</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.

<sup>14</sup> Herbert M. Kritzer, “Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman,” 82 *Wash. U. L. Q.* 477 (2004), <http://ssrn.com/abstract=907864>.

<sup>15</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf> (citing ABA Formal Opinion 94-389 (December 5, 1994)).

<sup>21</sup> David L. Schwartz, “The Rise of Contingent Fees in Patent Litigation,” 64 *Alabama L. Rev.* 335 (2012), <http://ssrn.com/abstract=1990651>.

<sup>22</sup> *Ibid.*

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- <sup>23</sup> See Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863> (discussing Myth 1: Contingency Fees are a Uniquely American Phenomenon). Contrary to popular belief, percentage-based contingency fees are used throughout the world. Scotland, Northern Ireland, New Zealand, Australia, Japan, France, England, Greece, the Dominican Republic and all but the province of Ontario in Canada permit the use of the contingency fee in some cases. Italy, Luxembourg, Portugal and Brazil allow for some elements of contingency.
- <sup>24</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>25</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>26</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.
- <sup>27</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>28</sup> Deborah L. Rhode, “Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution,” 54 *Duke L.J.* 447 (2004), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1235&context=dlj>.
- <sup>29</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.
- <sup>30</sup> Joanne Martin and Stephen Daniels, “‘The Juice Simply Isn’t Worth the Squeeze in Those Cases Anymore’: Damage Caps, ‘Hidden Victims,’ and the Declining Interest in Medical Malpractice Cases,” American Bar Foundation Research Paper No. 09-01 (March 10, 2009), <http://ssrn.com/abstract=1357092>.
- <sup>31</sup> Center for Media and Democracy, “R.J. Reynolds Son-of-a-Bitch memo” (viewed January 24, 2013), [http://www.sourcewatch.org/index.php?title=R.J.\\_Reynolds\\_Son-of-a-Bitch\\_memo](http://www.sourcewatch.org/index.php?title=R.J._Reynolds_Son-of-a-Bitch_memo).
- <sup>32</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>33</sup> ABA Formal Opinion 94-389 (December 5, 1994), [http://www.americanbar.org/content/dam/aba/publications/YourABA/201203\\_94-389.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/YourABA/201203_94-389.authcheckdam.pdf).
- <sup>34</sup> *Ibid.*
- <sup>35</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>36</sup> *Ibid.*
- <sup>37</sup> *Ibid.*
- <sup>38</sup> The Legal Services Corporation programs prohibit representing clients in these kinds of cases. See discussion of British system in Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>; Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>39</sup> Stephen Daniels and Joanne Martin, “Plaintiffs Lawyers: Dealing with the Possible but Not Certain,” 60 *DePaul L. Rev.* 337 (2011).
- <sup>40</sup> Adam Shajnfeld, “A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements,” 54 *N.Y.L. Sch. L. Rev.* 773 (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1465164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465164) (discussing the history of the contingent fee).
- <sup>41</sup> Joanna Shepherd, “Justice in Crisis: Victim Access to the American Medical Liability System,” Emory Legal Studies Research Paper 12-222 (2012), <http://ssrn.com/abstract=2147915>.
- <sup>42</sup> *Id.* (citing *Bayard v. McLane*, 3 Del. (1 Harr.) 139, 207, 219-20 (1840)).
- <sup>43</sup> *Id.* (citing *Christie v. Sawyer*, 44 N.H. 298, 303 (1862), quoting and paraphrasing *Shapley v. Bellows*, 4 N.H. 347, 355 (1808)).
- <sup>44</sup> *Id.* (citing *Duke v. Harper*, 2 Mo. App. 1, 10-11 (1876)).

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- <sup>45</sup> Robert S. Peck and John Vail, "Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice," 51 *N.Y.L. Sch. L. Rev.* 323 (2006-2007), [http://a.nyls.edu/user\\_files/1/3/4/17/49/nlr206.pdf](http://a.nyls.edu/user_files/1/3/4/17/49/nlr206.pdf) (citing *Richette v. Solomon*, 187 A.2d 910 (Pa. 1963)).
- <sup>46</sup> Elihu Inselbuch, "Contingent Fees and Tort Reform: A Reassessment and Reality Check," 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>47</sup> Herbert M. Kritzer, "Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate Over Contingency Fees: A Reply to Professor Brickman," 82 *Wash. U. L.Q.* 477 (2004), <http://ssrn.com/abstract=907864>.
- <sup>48</sup> Lester Brickman, "ABA Regulation of Contingency Fees: Money Talks, Ethics Walks," 65 *Fordham L. Rev.* 247 (1996).
- <sup>49</sup> Alexander Tabarrok and Eric Helland, *Two Cheers for Contingent Fees*. Washington, D.C.: AEI Press, 2005, [www.aei.org/files/2005/08/22/20050817\\_book827text.pdf](http://www.aei.org/files/2005/08/22/20050817_book827text.pdf).
- <sup>50</sup> *Ibid.*
- <sup>51</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>52</sup> Alexander Tabarrok and Eric Helland, *Two Cheers for Contingent Fees*. Washington, D.C.: AEI Press, 2005, [www.aei.org/files/2005/08/22/20050817\\_book827text.pdf](http://www.aei.org/files/2005/08/22/20050817_book827text.pdf).
- <sup>53</sup> James L. Gattuso, "Don't Rush to Condemn Contingency Fees," *Wall Street Journal*, May 15, 1986.
- <sup>54</sup> See Herbert M. Kritzer, "Seven Dogged Myths Concerning Contingency Fees," 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>; Elihu Inselbuch, "Contingent Fees and Tort Reform: A Reassessment and Reality Check," 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>55</sup> *Business Insurance*, April 20, 1998.
- <sup>56</sup> *Business Insurance*, October 27, 1998.
- <sup>57</sup> *Ibid.*
- <sup>58</sup> Herbert M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the American Civil Justice System," 81 *Judicature* 22 (July-August 1997), <http://users.polisci.wisc.edu/kritzer/research/contfee/gatekeep.htm>.
- <sup>59</sup> Stephen Daniels and Joanne Martin, *Plaintiffs Lawyers: Dealing with the Possible but Not Certain*, 60 *DePaul L. Rev.* 337, 369 (2011.)
- <sup>60</sup> Joanna Shepherd, "Justice in Crisis: Victim Access to the American Medical Liability System," Emory Legal Studies Research Paper 12-222 (2012), <http://ssrn.com/abstract=2147915>.
- <sup>61</sup> Herbert M. Kritzer, "Contingency Fee Lawyers as Gatekeepers in the American Civil Justice System," 81 *Judicature* 22 (July-August 1997), <http://users.polisci.wisc.edu/kritzer/research/contfee/gatekeep.htm>.
- <sup>62</sup> *Ibid.*
- <sup>63</sup> Robert C. LaFountain and Cynthia G. Lee, "Medical Malpractice Litigation in State Courts" (April 2011), [www.courtstatistics.org/FlashMicrosites/CSP/images/ch-18-1.pdf](http://www.courtstatistics.org/FlashMicrosites/CSP/images/ch-18-1.pdf).
- <sup>64</sup> Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (National Center for State Courts 2012), [www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/Home Page/csp\\_2012.ashx](http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/Home%20Page/csp_2012.ashx).
- <sup>65</sup> Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2009 State Court Caseloads* (National Center for State Courts 2011), [www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf](http://www.courtstatistics.org/FlashMicrosites/CSP/images/CSP2009.pdf).
- <sup>66</sup> Robert C. LaFountain et al., *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (National Center for State Courts 2010), [www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx](http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx).
- <sup>67</sup> *Ibid.*
- <sup>68</sup> Deborah L. Rhode, "Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution," 54 *Duke L.J.* 447 (2004), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1235&context=dlj>.
- <sup>69</sup> Herbert M. Kritzer, "Seven Dogged Myths Concerning Contingency Fees," 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.

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- <sup>70</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>71</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>72</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.
- <sup>73</sup> *Ibid.*
- <sup>74</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/>.
- <sup>75</sup> Elihu Inselbuch, “Contingent Fees and Tort Reform: A Reassessment and Reality Check,” 64 *Law & Contemp. Probs.* 175 (Spring 2001), <http://scholarship.law.duke.edu/lcp/vol64/iss2/9/> (citing *City of Burlington v. Dagu*, 505 U.S. 557, 566 (1992), discussing fee awards to prevailing counsel under federal fee-shifting statutes).
- <sup>76</sup> See, e.g., MICH. CT. R. 8.121 (B).
- <sup>77</sup> IND. CODE § 34-18-18-1.
- <sup>78</sup> NY JUD. LAW §474-a.
- <sup>79</sup> Monique Garcia, “Medical malpractice lawyers could see pay rise under new state law,” *Chicago Tribune*, January 30, 2013.
- <sup>80</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>81</sup> *Ibid.*
- <sup>82</sup> Herbert M. Kritzer, “Seven Dogged Myths Concerning Contingency Fees,” 80 *Wash. U. L. Q.* 739 (2002), <http://ssrn.com/abstract=907863>.
- <sup>83</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>84</sup> *Ibid.*
- <sup>85</sup> Steven Garber et al., “Do Noneconomic Damages Caps and Attorney Fee Limits Reduce Access to Justice for Victims of Medical Negligence?” 6 *J. Empirical Legal Stud.* 637 (December 2009).
- <sup>86</sup> See, e.g., Joanna Shepherd, “Justice in Crisis: Victim Access to the American Medical Liability System,” Emory Legal Studies Research Paper 12-222 (2012), <http://ssrn.com/abstract=2147915> (“Moreover, by limiting certain types of damages relative to other damages, tort reform disproportionately reduces both compensation and access to justice for specific segments of the population. For example, existing studies show that caps on noneconomic damages disproportionately reduce compensation to females, children, the elderly, and the poor because a much greater proportion of their damage awards are in the form of noneconomic damages. These demographic groups often have lower incomes than other groups and, as a result, they have correspondingly less economic loss and relatively more noneconomic loss. Thus, noneconomic damage caps act as a regressive tax on their recoveries because they reduce the recoveries of lower-income plaintiffs by a higher fraction than they reduce the recoveries of higher-income plaintiffs.”)(citing Lucinda M. Finley, “The Hidden Victims Of Tort Reform: Women, Children, and the Elderly,” 53 *Emory L.J.* 1263 (2004); Nicholas M. Pace et al., *Capping Non-Economic Awards in Medical Malpractice Trials: California Jury Verdicts Under MICRA*. RAND Corporation (2004); Eleanor D. Kinney et al., “Indiana’s Medical Malpractice Act: Results of a Three-Year Study,” 24 *Ind. L. Rev.* 1275 (1991)).
- <sup>87</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf>.
- <sup>88</sup> *Ibid.*
- <sup>89</sup> *Ibid.*
- <sup>90</sup> *Ibid.*
- <sup>91</sup> *Ibid.*
- <sup>92</sup> *Ibid.*

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<sup>93</sup> *Ibid.*

<sup>94</sup> [FLA. CONST. ART. I §26.](#)

<sup>95</sup> American Bar Association Tort Trial & Insurance Practice Section, *Report on Contingent Fees in Medical Malpractice Litigation* (2004), <http://apps.americanbar.org/tips/contingent/MedMalReport092004DCW2.pdf> (citing *Advisory Opinion to the Attorney General re: The Medical Liability Claimant's Compensation Amendment*, July 15, 2004).

<sup>96</sup> *Ibid.*

<sup>97</sup> ALEC Model Bill “Legal Consumer’s Bill of Rights Act,” [http://www.alecexposed.org/w/images/b/bc/0K2-Legal\\_Consumer\\_s\\_Bill\\_Of\\_Rights\\_Act\\_Exposed.pdf](http://www.alecexposed.org/w/images/b/bc/0K2-Legal_Consumer_s_Bill_Of_Rights_Act_Exposed.pdf).

<sup>98</sup> ALEC Model Bill “The Honesty in Lawyering Act,” [http://www.alecexposed.org/w/images/3/34/0L2-The\\_Honesty\\_in\\_Lawyering\\_Act\\_Exposed.pdf](http://www.alecexposed.org/w/images/3/34/0L2-The_Honesty_in_Lawyering_Act_Exposed.pdf).

<sup>99</sup> Adam Shajnfeld, “A Critical Survey of the Law, Ethics, and Economics of Attorney Contingent Fee Arrangements,” 54 *N.Y.L. Sch. L. Rev.* 773 (2009), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1465164](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465164).

<sup>100</sup> Joanna Shepherd, “Justice in Crisis: Victim Access to the American Medical Liability System,” Emory Legal Studies Research Paper, Paper No. 12-222 (2012), <http://ssrn.com/abstract=2147915> (citing Peter Karsten, “Enabling the Poor to Have their Day in Court: The Sanctioning of Contingency Fee Contracts, a History to 1940,” 47 *DePaul L. Rev.* 231 (1998)).

<sup>101</sup> *Ibid.*

<sup>102</sup> *Ibid.*

<sup>103</sup> *See, e.g.*, American Tort Reform Association, “Contingent Fee Reform,” <http://www.atra.org/issues/contingent-fee-reform>.

<sup>104</sup> *In re Amendment to the Rules Regulating the Florida Bar/Rule 4-1.5(f)(4)(b) of the Rules of Professional Conduct*, 2006 WL 2771252 (Fla. Sept. 28, 2006).

<sup>105</sup> Robert S. Peck and John Vail, “Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice,” 51 *N.Y.L. Sch. L. Rev.* 323, [http://a.nyls.edu/user\\_files/1/3/4/17/49/nlr206.pdf](http://a.nyls.edu/user_files/1/3/4/17/49/nlr206.pdf) (citing *S.J. Bus. Enter., Inc. v. Colorall Tech., Inc.*, 755 So.2d 769 (Fla. Dist. Ct. App. 2000) (“The law has long recognized an individual’s right to waive statutory protections as well as constitutional or contractual rights.”)).

<sup>106</sup> *Id.*

<sup>107</sup> Alexander Tabarrok and Eric Helland, *Two Cheers for Contingent Fees*. Washington, D.C.: AEI Press, 2005, [www.aei.org/files/2005/08/22/20050817\\_book827text.pdf](http://www.aei.org/files/2005/08/22/20050817_book827text.pdf).

## APPENDIX

### CONTINGENCY FEE LIMITS BY STATE

State	Medical Malpractice ONLY	General Limit
Alabama	None	None
Alaska	None	Requires that contingent fees be calculated exclusive of punitive damages. <a href="#">ALASKA STAT. § 9.60.080</a>
Arizona	Allows a court to consider the reasonableness of attorneys' fees, taking into account factors such as "the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal skills properly." <a href="#">ARIZ. REV. STAT. § 12-568</a>	None
Arkansas	None	None
California	Sliding scale – not to exceed 40% of first \$50,000; 33% of next \$50,000; 25% of next \$500,000; 15% of anything above \$600,000. <a href="#">CAL. BUS. &amp; PROF. CODE § 6146</a>	None
Colorado	None	Limits attorney fees in class action litigation against public entities. <a href="#">COL. REV. STAT. §13-17-203</a>

State	Medical Malpractice ONLY	General Limit
Connecticut	None	<p>Applies to personal injury, wrongful death and property damage actions. Sliding scale – not to exceed 1/3 of first \$300,000; 25% of next \$300,000; 20% of next \$300,000; 15% of next \$300,000; 10% of anything above \$1.2 million.</p> <p><a href="#">CONN. GEN. STAT. §52.251C</a></p>
Delaware	<p>Sliding scale – not to exceed 35% of first \$100,000; 25% of next \$100,000; 10% of damages over \$200,000.</p> <p><a href="#">DEL. CODE TIT. 18, § 6865</a></p>	None
Florida	<p>Limits contingent fees to 30% of the first \$250,000 recovered and 10% of any amount exceeding \$250,000.</p> <p><a href="#">FLA. CONST. ART. I, § 26</a></p>	<p>Describes fee in personal injury cases that will be presumed excessive; determined by stage of lawsuit.</p> <p><a href="#">FLA. BAR REG. R. 4-1.5(f)(4)(B)(i)(b)</a></p>
Georgia	None	None
Hawaii	None	<p>In all tort actions in which a judgment is entered by a court of competent jurisdiction, attorneys' fees for both plaintiff and defendant shall be limited to a reasonable amount as approved by the court. Settlements may be reviewed at the request of either party.</p> <p><a href="#">HAW. REV. STAT. § 607-15.5</a></p>
Idaho	None	None

<b>State</b>	<b>Medical Malpractice ONLY</b>	<b>General Limit</b>
Illinois	Total fee for plaintiff's attorney or attorneys shall not exceed 33% of all sums recovered. <a href="#">PUBLIC ACT 97-1145</a>	None
Indiana	Plaintiff's attorney fees may not exceed 15% of any award made from Patient's Compensation Fund (covers portion of an award that exceeds \$100,000). <a href="#">IND. CODE § 34-18-18-1</a>	None
Iowa	Requires court to determine reasonableness of plaintiff's attorney fee. <a href="#">IOWA CODE § 147.138</a>	None
Kansas	Requires judicial approval of attorney compensation. <a href="#">KAN. STAT. ANN. § 7-121b</a>	None
Kentucky	None	None
Louisiana	None	None
Maine	Sliding scale – fees may not exceed 1/3 of first \$100,000; 25% of next \$100,000, and 20% of damages that exceed \$200,000. For purpose of rule, future damages are to be reduced to lump-sum value. <a href="#">ME. REV. STAT. TIT. 24, § 2961</a>	None
Maryland	None	None

State	Medical Malpractice ONLY	General Limit
Massachusetts	Sliding scale – fees may not exceed 40% of first \$150,000; 33.33% of next \$150,000; 30% of next \$200,000; and 25% of damages that exceed \$500,000. Further limits if claimants recovery insufficient to pay medical expenses. <a href="#">MASS. GEN. LAWS CH. 231 § 60I</a>	None
Michigan	None	Maximum contingency fee for a personal injury action is one third of the amount recovered. <a href="#">MICH. CT. R. 8.121(B)</a>
Minnesota	None	Requires that contingent fees be based on the award adjusted for collateral source benefits. <a href="#">MINN. STAT. § 548.251</a>
Mississippi	None	None
Missouri	None	None
Montana	None	None
Nebraska	Allows judicial review of reasonableness of attorney fees at the request of either party. <a href="#">NEB. REV. STAT. § 44-2834</a>	None

State	Medical Malpractice ONLY	General Limit
Nevada	Sliding scale – fee may not exceed 40% the first \$50,000 recovered; 33.33% of next \$50,000 recovered; 25% of the next \$500,000 recovered; and 15% of the amount recovered that exceeds \$600,000. <a href="#">NEV. REV. STAT. § 7.095</a> (Added by 2004 initiative petition, Ballot Question No. 3, effective November 23, 2004.)	None
New Hampshire	Sliding scale – not to exceed 50% of first \$1,000; 40% of next \$2,000; 1/3 of next \$97,000; 20% of excess of \$100,000. If settled out of court, fee limited to 25% of up to \$50,000. <a href="#">N.H. REV. STAT. ANN. §507-C:8</a>	Requires a court to approve contingent fees exceeding \$200,000. <a href="#">N.H. REV. STAT. ANN. § 508:4-e</a>
New Jersey	None	Limits attorney’s contingent fee in tort actions to 33 1/3% of the first \$500,000 recovered, 30% of the next \$500,000, 25% of the next \$500,000, 20% of the next \$500,000, and a reasonable percentage approved by the court for any amount exceeding \$2 million. Also imposes a 25% cap for a pretrial settlement on behalf of a minor or incompetent plaintiff. <a href="#">N.J. Ct. R. § 1:21-7</a>
New Mexico	None	None

State	Medical Malpractice ONLY	General Limit
New York	Sliding scale – fees may not exceed 30% of first \$250,000; 25% of second \$250,000; 20% of next \$500,000; 15% of next \$250,000; and 10% over \$ 1.25 million. <a href="#">NY JUD. LAW §474-A</a>	None
North Carolina	None	None
North Dakota	None	None
Ohio	Court must approve if fees exceed limits on damage award. <a href="#">OHIO REV. CODE TIT. 23, §2323.43(F)</a>	None
Oklahoma	None	Limits contingent fees to 50% of a plaintiff's recovery. <a href="#">OKLA. STAT. ANN. TIT. 5, § 7</a>
Oregon	None	No more than 20% of punitive damages to attorney; no limitation of percentage of economic damages. <a href="#">ORE. REV. STAT. § 31.735</a>
Pennsylvania	None	None
Rhode Island	None	None
South Carolina	None	None
South Dakota	None	None

State	Medical Malpractice ONLY	General Limit
Tennessee	Fees not to exceed 33.33% percent of all damages awarded to the claimant. <a href="#">TENN. CODE ANN. § 29-26-120</a>	None
Texas	None	None
Utah	Fees not to exceed 1/3 amount recovered. <a href="#">UTAH JUD. CODE § 78B-3-411</a>	None
Vermont	None	None
Virginia	None	None
Washington	None	Allows judicial review of reasonableness of attorney's fees at the request of either party in any tort action <a href="#">WASH. REV. CODE § 7.70.070</a>
West Virginia	None	None
Wisconsin	Sliding scale – may not exceed 1/3 of first \$1 million, or 25% of first \$1 million recovered if liability is stipulated within 180 days, and not later than 60 days before the first day of trial; and 20% of any amount exceeding \$1 million. But a court may approve a higher limit in exceptional circumstances. <a href="#">WIS. CODE §655. 013</a>	None

State	Medical Malpractice ONLY	General Limit
Wyoming	None	<p>Sliding scale for contingent fees where recovery is \$1 million or less – 33% of the recovery if the claim is settled prior to or within 60 days after suit is filed; 40% percent of the recovery if the claim is settled more than 60 days after filing suit or if a judgment is entered upon a verdict.</p> <p>Where recovery is in excess of \$1 million – 30% percent of such excess sum over \$1 million shall be presumed reasonable and not excessive. But parties may agree to pay more.</p> <p><a href="#">WYO. CT. RULES ANN., CONTINGENT FEE R. 5</a></p>