

Contingent Fees: An American Perspective

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What Are Contingent Fees?

- **A fee arrangement with a client in which the amount of the attorney's fee is dependent, in whole or in part, upon the success of the attorney's prosecution (or defense) of a claim.**
- **Contingent fee arrangements most commonly provide that the attorney will be paid a percentage of the client's recovery on a claim, if any.**
- **If the client recovers nothing, the attorney recovers nothing.**

Historical Perspective

- **In Roman times advocates were not entitled to compensation (but could accept “donations”).**
- **In England, attorneys fees were fixed by statute or judicial fiat.**
- **Contingency fees began in the U. S. in the mid-19th Century as a way to circumvent statutory limitations.**

Historical Perspective

- **The Field Code (New York 1848) abolished statutory fees and provided that fees were to be governed by agreement “which is not restrained by law.”**
- **The Industrial Revolution saw a dramatic rise in injuries from industrial accidents**
- **Contingent fee arrangements enabled working class plaintiffs with legitimate claims but no resources to pursue those claims**

The American View of Litigation

- **“Over the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith and on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy” - *Zauderer v. Office of Disciplinary Counsel*, 471 U. S. 626 (1985)**

The American View of Litigation

- **The courts have often led the way in enforcing “progressive” social policies protecting disadvantaged members of American society.**
- **Contingent fee arrangements allow persons without the means to pay a lawyer’s fee to have access to the courts to pursue legitimate legal claims.**

Pro's and Con's of Contingent Fees

- **Promote access to legal system**
 - Gives impecunious individual equal bargaining power with powerful entities
- **Align lawyer's interest with that of client**
 - Maximize recovery
 - Minimize expense
- **Promote the filing of suits that would not otherwise be brought**
- **May create divergent interests:**
 - Lawyer wants to settle early without doing much work
 - Client wants to maximize recovery even if it means going to trial

Pro's and Con's of Contingent Fees

- **Ensure that cases brought will be meritorious (or the lawyer would not take the case)**
- **Lawyer's interest in the outcome may create pressure to act improperly to "win."**
 - e.g., Allow witness to commit perjury
- **Lawyers make a lot of money from contingent fees**
- **Lawyers make too much money from contingent fees**

Factors Contributing to the Popularity of Contingent Fees

- **“American Rule”**: each side is responsible for its own attorneys’ fees (i.e., no rule that the loser pays the winner’s attorneys fees and litigation costs).
- **Availability of the “Class Action”** device that allows the aggregation of many claimants’ small claims into a single lawsuit against a defendant.

Typical Contingent Fee Cases

- **Personal Injury**
- **Bill Collection**
- **Mass Tort Cases**
 - Tobacco
 - Asbestos
- **Consumer Class Actions**
- **Securities Fraud Cases**
- **Antitrust Cases**

Prohibitions on Contingent Fees

- **Criminal Defense**
 - Danger of suborning perjury
 - No *res* from which to collect fee
- **Domestic Relations**
 - Discourages marital reconciliation
- **Legislative Work (“Lobbying”)**
 - Danger of encouraging bribery

Limitations on Contingent Fees

- **Overall limitation on lawyer’s fees: must not be “unconscionable” or “excessive.”**
- **Strict statutory rules on the content of contingent fee retainer agreements.**
- **Court review of contingent fees in cases brought on behalf of a guardian for an infant.**

Limitations on Contingent Fees in Medical Malpractice Cases

New York:

- 30% of the first \$250,000 recovered
- 25% of the next \$250,000
- 20% of the next \$500,000
- 15% of the next \$250,000
- 10% of any amount over \$1,250,000

NY CLS Jud sec. 474-a

California:

- 40% of the first \$50,000 recovered
- 33.3% of the next \$50,000
- 25% of the next \$500,000
- 15% of any amount over \$600,000.

Cal. Bus & Prof Code sec. 6146

Conclusions

- Contingent fee agreements are widely used by American trial lawyers.
- No hard evidence that lawyers who regularly take cases on contingent fees practice at a lower ethical standard than lawyers who charge by the hour.
- Contingent fees do encourage bringing cases that otherwise would not be brought.
- Contingent fees cases have had a significant impact on the development of American law.

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Thank You