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Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees

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EFFECTIVE HOURLY RATES OF CONTINGENCY-FEE LAWYERS: COMPETING DATA AND NON-COMPETITIVE FEES

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I. INTRODUCTION

One of the foremost civil justice issues commanding attention at both federal and state levels is reform of the tort system. Central to the ongoing tort reform debate is data cited by both proponents and opponents in support of their respective positions. No set of data more critically informs the debate than the yields realized by lawyers engaged in contingent-fee-financed tort claiming.

Most cited as authoritative is a set of data indicating that the yields of contingent-fee claiming approximate the returns realized by hourly rate lawyers. This data—central to contentions that tort reform efforts are not only unnecessary but also counterproductive in that they would deny claimants access to justice—is unreliable and invalid. More reliable data, which I present, demonstrates that the yields from contingency-fee practice have become inordinately high; indeed, they have increased enormously in recent decades, often amounting today to thousands of dollars an hour. In theory, these yields implicate ethical rules purporting to limit fees to "reasonable" amounts. In fact, "reasonable fee" rules are

largely a shibboleth. The real role of ethical rules is to inhibit price competition so that tort lawyers can continue to extract substantial rents.

Successful efforts by the bar to hide the yields of contingent-fee claiming from public view have obscured the central role of empirical data on yields in the tort reform debate. Because the centrality of yield data may therefore not be immediately apparent, I begin my analysis with consideration of the importance of that data to consideration of reform of our civil justice system.

II. THE IMPORTANCE OF YIELDS FROM CONTINGENCY FEE PRACTICE

Over the past forty years, the scope of liability assessed under the aegis of the tort system has greatly expanded.[1] This expansion has not been a

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1. By expansion of the "scope of liability," I mean enlargement of the range of acts that give rise to tort liability. Many individual and corporate acts that took place during the 1950s and 1960s were not considered tortious at the time but came to be so considered after the enlargement of the scope of liability of the tort system that began in the 1970s and quickened in the 1980s. Indeed, thousands of tort claims brought in the 1980s and thereafter resulted in defendants' retroactive inculpation for (nontortious) acts occurring in the 1940s and 1950s. *See generally* Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755 (1994) [hereinafter Brickman, *Tort System*]. *See also* Adam F. Scales, *Against Settlement Factoring? The Market in Tort Claims Has Arrived*, 2002 WIS. L. REV. 859, 874, 875 n.56 (2002) [hereinafter Scales, *Market in Tort Claims*] (referring to the "profound expansion in tort liability that has occurred during the past few decades" and conjuring up a Rip Van Winkle-like "individual from the 1950s" who time-travels to the present and is "amazed to learn that she had acquired obligations to protect criminal trespassers from harming themselves on her property, warn neighbors of the sexual predations of her spouse, or prevent people from misusing purchases so as to harm themselves"). A quintessential example of this expansion is asbestos liability. At the time of the production and sale of asbestos-containing products, most manufacturers of such products had no reasonable basis for knowing that installation or use of their products could produce injury. No tort liability attached to their actions. *See* Richard A. Epstein, *Manville: The Bankruptcy of Product Liability Law*, AEI J. GOV'T & SOC'Y REG., Sept./Oct. 1982, at 14, 17–18 ("[A]t the time that Manville and other corporations sold asbestos, right up to the 1960s, they were subject to no discernable risk of tort liability."). However, beginning in 1973, when *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973) was decided, tort liability began to be retroactively imposed on product producers for failure to warn users of harmful intrinsic characteristics of their products. The "failure to warn" strategy for inculpating asbestos-containing product manufacturers reached its zenith in the "property damage" cases brought by building owners against the manufacturers of asbestos-containing products used in building construction. The building owners successfully argued that the manufacturers failed to warn purchasers that their products were sufficiently dangerous that they should not have been purchased for use. *See* Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1850–52 nn.131–36 (1992) [hereinafter Brickman, *Asbestos Litigation*]. The increase in the scope of liability has not been confined to the United States. A justice of the high court of Queensland, Australia, recently opined:

> The generous application of [negligence] rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community both economic and social.

function of increasing rates of injury in society.[2] Rather, it has been driven by the substantially increasing yield from contingent fees realized by plaintiff lawyers.[3] Since 1960, the effective hourly rates[4] of tort lawyers have increased 1000% to 1400% (in inflation-adjusted dollars)[5] while the overall risk of nonrecovery has remained essentially constant—though it has decreased materially for such high-end tort categories as products liability and medical malpractice.[6]

These enormous increases in contingency fees have occurred despite the existence of regulatory regimes that ostensibly apply to such fees. Under both ethical codes and fiduciary principles, fees must be "reasonable."[7] Contingency fees are designed to—and do—yield higher

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    . . . [I]n recent times its development has been all in one direction—more liability and more damages.

Lisle v. Brice [2002] 2 Qd. R. 168 paras. 4–5 (Thomas, J., concurring). For further discussion of the expansion in the scope of liability of the tort system, popularly known as "the litigation explosion," see sources cited in Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739, 739 n.1 (2002) [hereinafter Kritzer, *Seven Myths*].

    2. Indeed, injury rates have decreased in this time period. *See* Brickman, *Tort System*, *supra* note 1, at 1785–90.

    3. *See* Brickman, *Tort System*, *supra* note 1, at 1774–90.

    4. By "effective hourly rates," I mean the result of dividing the amounts received by plaintiff lawyers under contingency fee agreements in personal injury litigation by the number of hours they devoted to those representations. I also refer to these "effective hourly rates" as the "rates of return" realized by contingency fee lawyers for their efforts. For purposes of calculating an effective hourly rate in auto accident litigation, I take into account hours spent on cases that do not yield a recovery. *See infra* note 126.

    5. The average verdict in personal injury cases increased 1000% in inflation-adjusted dollars from 1960 to 2001. This increase may be seen to roughly parallel the inflation-adjusted increase in effective hourly rates realized by tort lawyers. Moreover, the data understates the actual increase in effective hourly rates because it omits punitive damages and mass tort class actions—both of which have added enormously to the yields from contingent-fee claiming. Taking these factors into account, I estimate that effective hourly rates of contingent-fee lawyers have increased at least 1400% in inflation-adjusted dollars in the past forty years. For the derivation of the increase in average verdicts as a proxy for increases in contingent-fee incomes and consideration of how the data understates the actual increase, see *infra* Appendix A: The Increase in the Effective Hourly Rates of Contingent Fee Lawyers.

    6. While plaintiff win rates in personal injury cases have remained essentially consistent in the past 40 years, win rates for product liability and medical malpractice litigation have increased substantially in that period. Moreover, the comparative win rate data available understates actual win rates because it omits cases of admitted or directed liability and the effects of class action claiming. For the derivation of the win rate increases and consideration of how that data understates the actual win rates, see *infra* Appendix B: Plaintiff Win Rates in Personal Injury Litigation, 1960 Compared to 2001.

    7. *See* Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 44 n.65 (1989) [hereinafter Brickman, *Contingent Fees*]; *see also* LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O'CONNELL, RETHINKING CONTINGENCY FEES 15–19 (1994) [hereinafter BRICKMAN ET AL., RETHINKING CONTINGENCY FEES]; Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 270–75 (1996) [hereinafter Brickman, *Money Talks*]; Lester Brickman, *Contingency Fee Abuses, Ethical*

effective hourly rates than do hourly rate fees to reflect the risks that lawyers bear. These higher rates of return, however, are justified under ethical codes and fiduciary principles only if they are commensurate with the risks assumed by lawyers of nonrecovery or low recovery.[8] The need for such doctrinal protection has long been manifest because clients being charged contingency fees in personal injury cases are highly susceptible to lawyers' overreaching.[9]

Mandates, and the Disciplinary System, The Case Against Case-by-Case Enforcement, 53 WASH. & LEE L. REV. 1339, 1346–47 (1996) [hereinafter Brickman, *Disciplinary Enforcement*]; Lester Brickman, *The Continuing Assault on the Citadel of Fiduciary Protection: Ethics 2000's Revision of Model Rule 1.5*, 2003 ILL. L. REV. 1181 (2003) [hereinafter Brickman, *Assault on Fiduciary Protection*].

    8. For example, in *In re* Quantum Health Res., Inc., 962 F. Supp. 1254 (E.D. Cal. 1997), the court stated as follows:

> The rationale behind awarding a percentage of the fund to counsel in common fund cases is the same that justifies permitting contingency fee arrangements in general. . . The underlying premise is the existence of risk—the contingent risk of non-payment. . . . For a contingent fee to be appropriate, therefore, there must be a realistic risk of nonrecovery. . . . However, experience is showing there is no inherent risk in the large majority of securities class actions suits.

Id. at 1257-58 (citations omitted); *see also In re* Combustion, Inc., 968 F. Supp. 1116, 1132 (W.D. La. 1997); Alderman v. Pan Am World Airways, 169 F.3d 99, 104 (2d Cir. 1999) ("[A] risk premium as reflected in the contingent fee percentage must be proportionate to the risk being borne by the lawyer"); *In re* Orthopedic Bone Screw Prod. Liab. Litig., 176 F.R.D. 158 (E.D. Pa. 1997) (invalidating contingent-fee agreements entered into after settlement of class action because the "settlement plainly removes the contingency in those cases settled under the agreement. Once a settlement is reached and approved there is no longer a risk of nonrecovery."). In *Usipuik v. Jensen, Mitchell & Co*. [1986] 3 B.C.L.R. 2d 283 para. 49, the Supreme Court of British Columbia voided a contingent-fee contract providing for 25% of recovery where the passenger in a car was rendered quadriplegic. The court stated:

> [T]he notion has developed in British Columbia that the purpose of s. 99 [Barristers and Solicitors Act allowing lawyer to contract with client for a contingent fee but requiring that the fee be "fair and reasonable" s. 99n.(2)] was to enable lawyers to bargain for fees which are not truly reasonable but are out of all proportion to the skill and labour required in a particular case. A lawyer who takes a great risk for a client deserves to be handsomely rewarded if successful because, in another case, he may take a great risk but fail. By a great risk, I mean not only investing weeks, perhaps months, of work, but also putting up substantial disbursements in a case that is fought hard by the other side. This does not justify the practice in ordinary motor vehicle cases of a contingency contract of 25 per cent or 30 per cent or 40 per cent, at least when the amount at issue is substantial. Such a practice is to turn the Act of 1870 and its successors upside down. A part of the profession has brainwashed itself and the public into accepting a morally indefensible system of fees, thereby in many cases imposing unnecessary costs on the motoring public.

Id. at paras. 74–75. *See also* BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 13–16; Brickman, *Contingent Fees*, *supra* note 7, at 70–84. The risk referred to here has two components: (1) the risk the lawyer will not prevail (the "liability risk") and (2) the risk that the investment of time (and other resources) that will actually be required will greatly exceed projections at the time of undertaking the representation, thus reducing the effective hourly rate of return to below the lawyer's opportunity cost.

    9*. See* Brickman, *Contingent Fees*, *supra* note 7, at 65.

Ethical and fiducial[10] protections for personal injury clients have failed to accomplish their essential purpose. By pursuing anticompetitive strategies including erecting barriers to competition from outside the profession and promulgating ethical rules restricting price competition within the profession, contingent-fee lawyers have not only flouted ethical rules and fiducial protections but have also imposed substantial rents on tort claimants as the price for tort claiming. These rents are the product of lawyers' collusive efforts in maintaining uniform pricing: standard contingent fees in *all* personal injury litigation ranging from 33% to 50% in various jurisdictions.[11] By use of a zero-based accounting system under

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10. Fiduciary obligations imposed on lawyers may be said to create correlative fiduciary rights for clients. I refer to these rights as "fiducial."

11. *See* WILLIAM W. JACOBS ET AL., REPORT OF THE STAFF OF THE FED. TRADE COMM'N, IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING 100 (NOV. 1984) (indicating that contingent fee rates in 17 surveyed cities ranged from 30% to 37% with a median and mean of 33%; these contingency fees were the amounts charged if the case settled before trial). In some jurisdictions, standard contingency fee rates are 33% if the case settles before trial, 40% if a trial commences, and 50% if the trial is completed. *See* Miss. State Bar v. Blackmon, 600 So. 2d 166, 176 (Miss. 1992) (Banks, J., dissenting on other grounds) ("We might judicially note a once prevailing standard contract of one-third if the claim is settled without suit, forty percent where suit is filed and fifty percent where the case actually goes to trial. It is more typically stated now as forty percent through trial and fifty percent if an appeal is taken."); 1 AM. JUR. TRIALS, *Setting the Fee* § 16 (1964) (indicating that a 50% contingency fee is not unusual in some states, even in cases which are settled before trial). A plaintiff's lawyer in Georgia stated in court:

> Slip and fall cases where it's raining and snowing and there's ice on the sidewalk and somebody walks in off of ice [sic] into the front door of a shop and slips and falls, where we're going to have a hard time proving negligence, if we take this case, we charge them 50 percent.

Walther v. Multicraft Constr., 423 S.E.2d 725, 727 (Ga. Ct. App. 1992). *See also* Brickman, *Contingent Fees*, *supra* note 7, at 100 n.280; Kevin M. Clearmont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 594 (1978); Murray L. Schwartz & Daniel J.B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1144 (1970). Contingency fees in asbestos litigation range from 25% to 50%, see Brickman, *Asbestos Litigation*, *supra* note 1, at 1834 n.60, with most falling in the 33% to 45% range. *See In re* Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 867 (Bankr. E. & S.D.N.Y. 1991); *but cf.* Kritzer, *Seven Myths*, *supra* note 1, at 757–61 (presenting empirical data to support his thesis that there is substantial variation in the contingency fees that lawyers charge). Some contingent fee lawyers have maintained that they sometimes reduce their standard fees in cases where there are substantial medical expenses and a client's net recovery is, by comparison, inadequate if not paltry. I have found anecdotal evidence to support this but note that these reductions usually involve modest amounts.

Other contingent fee lawyers have maintained that they frequently charge less than the standard fee prevalent in their jurisdiction and that, in fact, contingent fees in their jurisdictions are competitively derived. In response to a recent filing before the Utah Supreme Court to petition the court to revise Rule 1.5 of the Utah Rules of Professional Conduct, see Memorandum In Support of Petition For Rulemaking To Revise The Ethical Standards Relating To Contingency Fees, May 6, 2003; Adam Liptak, *In 13 States, A United Push To Limit Fees of Lawyers*, N.Y. TIMES, May 26, 2003, at A10, The Utah Trial Lawyers' Association filed a Memorandum In Opposition To Petition For Rulemaking To Revise The Ethical Standards Relating To Contingency Fees, July 15, 2003.

Exhibit 1 to the Memorandum in Opposition consists of fourteen affidavits of Utah attorneys variously contending that there is considerable variation in the contingency fee percentages they charge. Included are such assertions as: in the "unusual" event a medical malpractice case settles before significant work is done, we reduce our fee from 33.3% to 25% or less, Affidavit of Francis J. Carney; *see also* to the same effect, Affidavit of Thomas A. Schaffer; clients increasingly shop around for lower contingent fee percentages, and "[c]ompetition among law firms helps keep the fees in a reasonable range. I have seen fees range from 10% to 40%," Affidavit of Ralph Dewsnup; "the market of attorneys willing to handle contingency fee litigation is highly competitive, with hundreds of attorneys competing for business," Affidavit of Jeffrey Eisenberg; contingent fees are negotiable, Affidavits of Edward Havas, L. Rich Humphreys, Colin King, Clark Newhall, and Craig Snyder; and where insurance companies have made offers of settlement, I have agreed to represent claimants and "charge a contingent fee only on the amount I secure for them that exceeds what they have already been offered," Affidavit of Ralph Dewsnup.

The affidavits referred to above—at least with respect to Utah—contradict the proposition I am asserting that contingent fees in a jurisdiction are standard. For a variety of reasons, set forth below, I believe the affidavits should not be accepted at face value.

(1) The affidavits are being tendered by lawyers strongly opposed to the proposed rule for adoption by the Utah Supreme Court that would limit the fees of contingent fee lawyers in cases where early settlement offers had been tendered and accepted. If the proposal is adopted, the affiants, contingency fee lawyers, presumably anticipate that their incomes will be adversely affected. Their affidavits should therefore be considered in light of their considerable financial stake in the outcome.

(2) Over the past decade, I have received several dozen letters from plaintiff lawyers taking issue with positions I have advocated with regard to contingency fees, *see infra* note 13. In many of these letters, the lawyers have made similar assertions with regard to contingency fee rates. On occasion, I have responded to these lawyers, requesting additional information with regard to specific cases where the attorneys agreed to charge lower than standard contingent fees. I have never received a response to these inquiries.

(3) I have also received numerous letters from tort claimants directly contradicting the claim by the affiants that contingent fees are negotiable. *See infra* note 14. In addtition, testimony by a former insurance adjuster directly contradicts the positions expressed by the Utah tort lawyers. *See id.*

(4) There is no way to ascertain the accuracy of the statements by the Utah attorneys. Indeed, the statements can neither be corroborated nor realistically subjected to inquiry. Affiants are certainly aware that these assertedly factual statements they offer in support of their positions cannot be contradicted.

(5) The self-serving nature of the statements may account for the inconsistency between the assertions of these attorneys and the available empirical data, cited above, to the effect that contingent fees are standard and fall mostly into the 31-33% range.

(6) Additional empirical evidence will be forthcoming in the publication, INSURANCE RESEARCH COUNCIL, PAYING FOR AUTO INJURIES (forthcoming 2004). The data that will be included is consistent with previous empirical data on contingency fees. It indicates that in a study of contingent fees in automobile accident cases involving 705 claimants, the median contingency fee was 33% and the mean, 31%. *Id.* Moreover, the fees did not vary at all on the basis of how quickly a settlement was achieved (contrary to the contentions of several of the Utah attorneys). *Id.* One exception was noted, however. If a settlement with the other insurer took *less* than three months, then the mean contingency fee was *higher*, 34%, not 31%. *Id.* The size of the contingency fee also did not vary with whether the claim was paid by one's own insurance company or the opposing party's insurance company. *Id.* The fee did vary slightly if the size of the economic loss was $2,500 or less; there the mean was 30%. *Id.* For higher amounts, it was the same 31% mean and 33% median. *Id.*

(7) The assertions by the Utah attorneys would appear to be inconsistent with the data I have considered above that the effective hourly rates of contingent fee lawyers have increased at least 1400% in inflation-adjusted dollars in the past 40 years. *See supra* note 5 and *infra* Appendix A: The Increase in the Effective Hourly Rates of Contingent Fee Lawyers.

(8) The anecdotal evidence I have examined over the past decade or more is that, effectively,

which tort lawyers apply standard contingent-fee rates to the entire recovery obtained in tort cases rather than just to the component of the recovery that represents the value that they have added to claims,[12]

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standard contingency fees have risen, not fallen as is inferentially contended by the Utah attorneys. The increase has been accomplished by a change from the general practice prevalent up to the 1980s of lawyers deducting litigation expenses from gross recoveries before calculating their contingent fees. In thus applying their contingent fees to net recoveries, attorneys are charging against their own recoveries, approximately one third of litigation expenses advanced by them. More recently, the practice, as I observe it, is that lawyers apply their contingency fee percentages to the gross recovery, thereby charging all litigation expenses to the client's share. *See generally* W. William Hodes, *Cheating Clients With the Percentage-of-the-Gross Contingent Fee Scam*, 30 HOFSTRA L. REV. 767 (2002). I estimate that this raises actual contingency fee percentages by approximately one percent.

(9) Finally, it should be noted that the Utah attorneys, while conceding that their contingent fees amount to overcharges in some cases—those in which they cut their fees—are nonetheless objecting to adoption of court rules that would essentially make mandatory the very fee reductions the attorneys indicate they already make in cases where failure to do so would result in charging unreasonable fees. Though they concede that contingent fees can and do become unreasonable in some instances, they strenuously object to regulatory oversight because, in all such instances, they comply with "reasonable fee" limitations by reducing their fees. While the Utah attorneys may face well in seeking exemption from regulatory oversight where the regulators are judges, in other contexts, e.g., corporate compliance with securities regulation, or manufacturers' compliance with product safety rules, such requests from exemption from regulation have generally met with little success.

12. The hallmark of the gross overcharging that permeates contingency fee practice is the zero-based accounting system that plaintiff lawyers use. When a client hires a lawyer to process a tort claim, the lawyer assigns the initial value of the claim as zero even if the case is, from the get-go, a "no brainer" and a multi-million dollar settlement is a virtual absolute certainty. For example, if a doctor amputates the wrong limb or operates on the wrong side of the patient's brain, or engages in other equally egregious acts of medical malpractice, a standard contingency fee is charged and it applies not only to the value added to the claim by the lawyer but to the value of the entire claim—irrespective of the fact that the claim already had substantial value at the time the client hired the lawyer. As one leading ethics expert has explained:

> We permit contingent fees to be larger than what would constitute a reasonable hourly fee because if the contingency does not occur, the lawyer will go unpaid. But most personal injury cases have some value. Prospective defendants are often willing to pay something to resolve them. Why should the plaintiff's lawyer get a full contingent fee for "recovering" this amount?

STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 180 (6th ed. 2002). *See also* Kenseth v. Comm'r of Internal Revenue, 114 T.C. 399, 413 (2000) (stating that the fact that a contingency fee attorney agrees to represent a client on a contingent basis indicates that the cause of action "had value in the very beginning."); Brickman, *Contingent Fees*, *supra* note 7, at 32–33; *cf. id.* at 94–99 (for discussion of an alternative to such ethically challenged zero-based accounting).

Consider by way of contrast, the practice in condemnation cases where the state makes an offer to a homeowner whose property it has condemned. If the homeowner finds the offer insufficient and hires a lawyer, the fee charged—also typically a standard contingency fee—applies only to the value the lawyer is able to add to the amount of the offer already on the table. *See* 8A PATRICK J. ROHAN & MELVIN A. RESKIN, NICHOLS ON EMINENT DOMAIN § 15.06[3] (3d ed. 2003) ("[T]he [contingent] fee is determined by a percentage of the total recovery (usually between three percent and ten percent) or a percentage of the difference between the final award and the initial offer to the client (usually between twenty percent and thirty-three and a third percent."); *see also* DeKalb County v. Trs., 243 S.E.2d 284, 285 (Ga. Ct. App. 1978), *rev'd on other grounds*, 251 S.E.2d 243 (Ga. 1979); State Dep't of Trans. & Dev. v. Frabbiele, 391 So. 2d 1364 (La. Ct. App. 1980); Mulhern v. Roach, 494 N.E.2d 1327 (Mass. 1986); Milwaukee Rescue Mission, Inc. v. Redevelopment Auth., 468 N.W.2d 663, 672–75 (Wis.

contingent-fee lawyers generate substantial rents and obtain inordinately high rates of return, not infrequently amounting to thousands and even tens of thousands of dollars an hour.[13] Often, these enormous fees are obtained in cases where lawyers bear no meaningful risk of low or no recovery.[14]

1991). This same "value added" concept applies in many worker's compensation cases where the fee is a percentage of the recovery in excess of the initial offer, see, e.g., LESLIE I. BODEN, WORKERS COMP. RESEARCH INST., REDUCING LITIGATION: EVIDENCE FROM WISCONSIN (1988); LESLIE I. BODEN ET AL., WORKER COMP. RESEARCH INST., REDUCING LITIGATION: USING DISABILITY GUIDELINES AND STATE EVALUATORS IN OREGON (1991), and in tax certiorari litigation where the contingency fee is typically based upon a percentage of the property tax that the lawyer saves the client by successfully arguing for a reduction in the assessed value of the property, see, e.g., Citicorp Real Estate, Inc. v. Buchbinder & Elegant, 503 So. 2d 385, 387 (Fla. Dist. Ct. App. 1987); Dunham v. Bentley, 72 N.W. 437, 439 (Iowa 1897); Sedbrook v. McCue, 180 P. 787, 788 (Kan. 1919); Raphael v. N.Y. State Realty & Terminal Co., 50 N.E.2d 656 (N.Y. 1943). Finally, courts have recognized in other contexts that standard contingency fees do not properly apply to portions of recoveries to which clients are entitled and which amounts are not in dispute. See, e.g., Anderson v. SAM Airlines, 939 F. Supp. 167, 170 (E.D.N.Y. 1996) (holding that lawyer had no basis "to claim a contingency fee on the first $75,000 of the settlement [because]. . . the estate would automatically have been entitled" to that amount under the Warsaw Convention regulating damages in airline crashes).

   13. See Brickman, *Contingent Fees*, *supra* note 7, at 73–74, 92–93; Brickman, *Money Talks*, *supra* note 7, at 280–83; Brickman, *Tort System*, *supra* note 1, at 1772–73; David E. Rosenbaum, *Senate Fails Again to Curb Lawsuit Fees*, N.Y. TIMES, June 12, 1998, at A17 (relating expert findings that some of the fees in the tobacco litigation settlements would amount to $92,000 per hour); *see also In re* Cendant Corp. Litig., 264 F.3d 201, 285 (3d Cir. 2001) (vacating a $262 million fee award because "on the basis of the evidence in the record, [the fee] may represent compensation at an astonishing hourly rate"); State v. American Tobacco Co., No. CL95-1466 (Fla. Cir. Ct. Nov. 12, 1997), *rev'd on other grounds sub. nom.* Kerrigan, Estess, Rankin & McLeod v. State, No. 97–4008, 1998 WL 246325 (Fla. Dist. Ct. App. May 18, 1998) (using trial judge's hourly fee computation for the Florida tobacco attorneys of $7,716 per hour for each of twelve private lawyers, slip op., *id*. at 4, but substituting a more realistic estimate of hours per day per attorney yields a per hour rate for each lawyer easily in excess of $100,000 per hour); Michael Horowitz, *Can Tort Law Be Ethical?*, WKLY. STANDARD, Mar. 19, 2001, at 16, 18 (indicating that some of the fees in the tobacco litigation settlements would amount to $200,000 per hour). For examples of multi-million dollar fees, see *infra* note 311.

   14. The thesis that very high fees are being routinely obtained in contingency fee cases without meaningful risk, yielding "windfall fees," is one that I have previously advanced. *See* Brickman, *Contingent Fees*, *supra* note 7, at 92–93; Brickman, *Money Talks*, *supra* note 7, at 280 n.112 and accompanying text; *see also* DEREK BOK, THE COST OF TALENT: HOW EXECUTIVES AND PROFESSIONALS ARE PAID AND HOW IT AFFECTS AMERICA 140 (1993) [hereinafter BOK, THE COST OF TALENT].

   Gross overcharging in contingency fee practice is commonplace. A frequent abuse in personal injury representation occurs when lawyers routinely charge standard contingency fees of one-third or more even though the insurance company has either already offered to pay policy limits to the injured party or claimant before the lawyer was retained or would have offered to do so, if approached, and in fact did do so after the claimant retained counsel. For example, a former insurance adjuster in Missouri has stated under oath:

   From 1962 until January 1, 2002, I was employed by State Farm Insurance Company. . . . as an adjuster. . . . [and] supervised other adjusters.

   Over the years I witnessed many examples of attorneys charging their clients (people with a claim against State Farm) a contingency fee of one-third or more when State Farm had

already or would have offered to pay that client all that State Farm was obligated to pay under
the policy of insurance in force.

Affidavit of William B. Graham, Bond v. Maynard, No. 03CV165925 (13th Jud. Cir. Ct., Callaway
County, Mo. filed May 6, 2003).

I have become personally aware of many such instances. Each year, I am contacted by five to ten
personal injury claimants who have seen my name in print media and who call or email requesting
assistance, stating that they have a substantial damage claim, and even though there is no issue of
liability, they cannot find a lawyer willing to accept the case for less than the standard contingent fee.
Or they contact me after the fact, complaining that their lawyers charged them standard contingency
fees that generated huge fees even though the liability risk was virtually zero, and the likelihood of a
substantial settlement at or near insurance policy limits was both exceedingly high and evident at the
time the lawyer was retained. In response, I explain that though they are about to be or may have been
mulcted by their attorneys, they have no recourse. Indeed, the American Bar Association Standing
Committee on Ethics and Professional Responsibility has opined that lawyers' behavior alleged by the
callers is not unethical. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 389 (1994)
[hereinafter ABA Op. 389]; *see also In re* Sulzer Hip Prosthesis and Knee Prosthesis Liability
Litigation, 2003 WL22570152 at *11 n.15 (N.D. Ohio) (implicitly if not explicitly rejecting ABA Op.
389 for reasons set forth in Brickman, *Money Talks*, *supra* note 7). Nor is it grist for disciplinary mills.
Most disciplinary bodies do not regard lawyers' charging standard contingency fees in personal injury
cases devoid of risk as raising an issue of discipline. *See* Brickman, *Disciplinary Enforcement*, *supra*
note 7. A state supreme court has also given its imprimatur to this type of gross overcharging in
Gagnon v. Shoblom, 565 N.E.2d 775 (Mass. 1991). *See* Lester Brickman, *A Massachusetts Debacle:*
Gagnon v. Shoblom, 12 CARDOZO L. REV. 1417 (1991) [hereinafter Brickman, *A Massachusetts
Debacle*] (offering a critique of this case).

A not untypical example of a "before the fact" email, states:

On March 2nd this year [2003] my family was hit head on by a snow plow pickup truck that
crossed into our lane. My daughter and myself were injured [sic] but my wife is paralyzed
from the waist down and is still in rehabilitation at [a New Jersey hospital]. There is no issue
of the other drivers [sic] culpability, [sic] there was a witness [sic] and he pleaded guilty to
the summons for failure to keep to the right. He is well insured with a commercial policy.
How do I find an attorney that will work for time and expenses. [sic] I have resources to pay.
All attorneys that I have contacted to date will only work on a contingency basis.

E-mail from a claimant to Lester Brickman (June 22, 2003, 10:45:43 EST) (on file with author).

A not untypical example of the content of the phone calls and emails I receive of the "after the
fact" variety is set forth in a letter from Dr. Antonio Falcon, a Texas physician, to a congressional
committee which became part of the record of the U.S. Senate Judiciary Committee's Hearing on
"Contingency Fee Abuses," Nov. 7, 1995 (quoted in WASH. LEGAL FOUND., PETITION OF THE
WASHINGTON LEGAL FOUNDATION TO THE FEDERAL TRADE COMMISSION CONCERNING
CONTINGENCY AGREEMENTS, Aug. 14, 2001, at 22 [hereinafter WLF PETITION]). Dr. Falcon said he
was writing on behalf of his friends, Gilberto and Rosario Alvarez, who did not speak or write English
very well and whose daughter was involved in a medical malpractice action, which the defendant
doctor did not contest. According to Dr. Falcon, "[n]egligence was never an issue in the case and
therefore there was no risk or contingency on behalf of the plaintiff lawyer—but the lawyer
nevertheless treated it on a contingency fee basis and reaped a huge award." WLF PETITION, *supra*, at
22. Dr. Falcon further stated that the attorney handling the case "did virtually no work, yet still
managed to receive 40 percent of the Alvarez' damage award" of $400,000. *Id.* "For writing three
letters, [the attorney] was paid a lump sum of $160,846.07." *Id.* "Dr. Falcon concluded his letter by
stating that "the Alvarez' [sic] . . . were victimized twice. But the system doesn't officially recognize
the second victimization by their own lawyer." *Id.*

A story reported several years ago in the *Miami Herald* describes a similarly disturbing event. *See*
Joe Starita, *Lawyer's Big Fee Raises Questions*, MIAMI HERALD, Apr. 10, 1988, at A1. The story
reported that a learning disabled Miami man was in his car when he was plowed into from behind by a
sleepy truck driver and rendered paraplegic for life. Of the $1 million settlement he received from an

In the course of formulating and advancing this thesis, I have been struck by the dearth of empirical data on the yields of contingency-fee practice even though contingent-fee financing is critical to the operation of the tort system, which is itself a principal component of our civil justice system. Opponents of tort reform have seized upon this lack of data to argue against tort reform and in favor of maintenance of the status quo.[15] But it is not simply happenstance that we know far less about the incomes of contingency-fee lawyers than we do about the earnings of all other professionals, whether doctors, teachers, corporate executives, or athletes.[16]

The leading researcher who has attempted to fill this void is Professor Herbert Kritzer ("Kritzer"). On the basis of his research, he has challenged the thesis, which I have advanced, that contingency fees yield inordinately high rates of return.[17] Indeed, Kritzer is the leading proponent of the

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insurer, he "ended up with $80,000 cash" and $35,000 per year for life while his attorney "ended up with more than $800,000 [cash]." *Id.* The attorney himself reportedly stated that "[t]his is not a case that anyone has to feel badly about." *Id.* The Florida Bar concluded that the attorney "had not acted unethically or in violation of the Code of Professional Conduct." *Id.* The position of the Florida Bar is entirely consistent with ABA Op. 389, *supra.*

For a discussion of the general absence of meaningful risk in much of contingency fee practice, see *infra* notes 151–53 and accompanying text.

15. For example, Barry Nace, president of The American Trial Lawyers Association, has argued that the underlying arguments used to support a particular tort reform proposal are defective:

[N]o hard data are offered to show how usual or unusual are the "horror stories" involving attorneys who collect that allegedly approximate $25,000 an hour. Nor is there any indication of how often a "standard" one third contingent fee would overcompensate an attorney. Without any of this information, it is impossible to know whether significant problems exist that merit imposing a new fee regime.

Barry J. Nace, *The Contingency Fee*, TRIAL, Oct. 1994, at 59, 60.

16. The tort bar goes to great lengths to hide information about the yields from contingent-fee practice from public view and to obscure the connection between the inordinately high rates of return they realize and its effects on the tort system. As a society, we know far more about the incomes of the "private" business sector and its leading actors and—far more closely regulate that sector—than we know about the incomes derived from the largely unregulated (by comparison) tort system that is a part of the "public" sector. *See* WALTER K. OLSON, THE RULE OF LAWYERS 300–05 (2003). For detailed consideration of the success of the tort bar in hiding information from the public about the yields from tort claiming and the potential effects of those yields on the tort system, see *infra* Appendix C: The Hidden Ball Trick: A Comparison of Baseball and the Tort System.

17. *See Contingent Fee Abuses: Hearings Before the S. Judiciary Comm.*, 104th Cong. 35–65 (1995) (statement of Herbert M. Kritzer) [hereinafter Kritzer Statement]; HERBERT M. KRITZER, RHETORIC AND REALITY ... USES AND ABUSES ... CONTINGENCIES AND CERTAINTIES: THE POLITICAL ECONOMY OF THE AMERICAN CONTINGENT FEE (Wis. Inst. for Legal Studies, Working Paper No. 11–8, 1995) [hereinafter KRITZER, RHETORIC AND REALITY]. *See also* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998) [hereinafter Kritzer, *The Wages of Risk*]. I have previously responded to Kritzer's challenge. *See The Current Structure of Legal Fees: Hearings Before the Subcomm. on Telecomms., Trade and Consumer Prot. of the House Commerce Comm.*, 105th Cong. (1997) (statement of Lester Brickman) [hereinafter *Hearings*, statement of Lester Brickman]; *see also* Brickman, *Contingent Fees*, *supra* note 7, at app. b

position that the effective hourly rates of return of plaintiff attorneys are substantially the same as those realized by hourly rate lawyers in similar matters and is widely cited for that proposition.[18] Kritzer and other opponents of reform of the civil justice system argue that on the basis of Kritzer's data and conclusion, attempts to enforce ethical and fiduciary principles regarding contingency fees through measures designed to protect consumers from significant overcharging by plaintiff lawyers[19] are at least unnecessary if not wrongly based.[20] By denying that plaintiff attorneys obtain inordinately high rates of return, Kritzer provides an important protection for both plaintiff attorneys and all those who benefit from the growth of tort litigation.[21] Thus, he plays an important, if not critical, role in the tort reform wars that are being waged at the state and federal level.[22]

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at 132–34.

18. *See, e.g.*, Charles Silver & Frank B. Cross, *What's Not To Like About Being a Lawyer?: A Life of Counsel and Controversy*, 109 YALE L.J. 1443, 1444 n.5 (2000) (book review) ("Brickman's assertions have been convincingly refuted by Herbert Kritzer, the leading empirical researcher."); Ted Schneyer, *Empirical Research with a Policy Payoff: Market Dynamics for Lawyers Who Represent Plaintiffs for a Contingent Fee*, 80 TEX. L. REV. 1829, 1830–31 (2002) [hereinafter Schneyer]; Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 206–07 (2001). *See also* Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964 & n.38 (2000); Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L. L. & BUS. 272, 298 n.87 & 301 n.96 (1999); Jeffrey O'Connell et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs' Personal Injury Bar—and a Proposed Solution*, 6 CONN. INS. L.J. 423, 428 n.7 (1999–2000) [hereinafter O'Connell et al., *Yellow Page Ads*]; Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 650 (1995); Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 295–96 (2002).

19. Along with others, I have advanced proposals to implement dormant ethical rules and fiducial principles applicable to contingent fees which are also designed to protect consumers against rampant price gouging that permeates contingent-fee practice. These proposals have been attacked by Kritzer and other opponents of tort reform. For a discussion of these proposals, their coverage in professional responsibility casebooks and the media, and examples of how these proposals have been mischaracterized by critics, see *infra* Appendix D: Proposals to Reform Contingent Fees To Implement Dormant Ethical Principals and To Protect Consumers.

20. Kritzer Statement, *supra* note 17, at 39. ("[T]he data I have been able to locate fail to support the claims of the critics of current contingent fee practice that there are wide spread abuses. . . . [t]hose considering major reforms need to obtain reliable, systematic information on . . . contingent fee[s] . . . before instituting significant changes.").

21. *Cf.* Brickman, *Money Talks*, *supra* note 7, at 258-59 (discussing how the ABA "insulat[es] these fees from ethical restraints" and thereby "favor[s] the financial interests of both plaintiff and defense lawyers") (citing ABA Op. 389, *supra* note 14).

22. While recent events have highlighted the federal role in class-action, punitive-damage, and medical-malpractice reform, the major locus of the tort reform wars is at the state level. At least forty states have enacted changes in tort law and procedure in an attempt to deal with perceived failures and excesses of the tort system. However, a number of state supreme courts have invalidated such reforms, in some instances dispossessing their state legislatures of constitutional authority to regulate the tort system. For a discussion of the tort reform wars and state supreme court invalidations of state tort

In this Article, I rebut Kritzer's challenge by demonstrating that while his efforts to obtain empirical data on the yields of contingency practice are highly commendable, much of his data is either trivial, unrepresentative, or unreliable, and conclusions based on this data are therefore unsubstantiated. I additionally rebut Kritzer's challenge by presenting data which indicates that the effective hourly rate of plaintiffs' lawyers in auto accident litigation is approximately two-and-one-half times that of defense lawyers. Other data I present supports the conclusion that there is a top tier of contingent-fee lawyers—comprising approximately 25%-33% of that bar—which is distinguishable from the general run of tort lawyers by virtue of its focus on high-end tort litigation that generates average verdicts far in excess of those realized in the majority of auto accident claimings. This top tier obtains effective hourly rates which often amount to thousands of dollars an hour—multiples of those realized in the average auto accident claim. Moreover, in aggregated litigations, such as mass consolidations and class actions, effective hourly rates of tens of thousands of dollars an hour are not uncommon. I argue that these rates of return often violate ethical rules and fiducial rights of clients—subjects which are beyond the scope of Kritzer's thesis.

Finally, I conclude that the market for contingent-fee-financed tort claims is not competitive and that the uniform pricing which prevails is a product of collusive behavior by contingency-fee lawyers to generate rents. I list and briefly discuss as reasons for the absence of a competitive market: barriers to entry to the tort claiming market; prohibitions against the outright purchase of tort claims; ethical rules precluding price competition including rules prohibiting the provision of financial assistance to tort claimants and brokerage of lawyers' services; the stealthiness of contingent fees in obscuring the public's awareness of the effective hourly rates being obtained; asymmetrical knowledge of the value of claims; the futility of tort claimants searching for discounted prices; use of standard contingent fee pricing to misrepresent the degree of risk born by most contingent-fee lawyers; and failure of the judiciary and disciplinary system to enforce ethical rules limiting contingent fees to reasonable amounts.

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reforms using the discredited reasoning of *Lochner v. New York*, 198 U.S. 45 (1905), see *infra* Appendix E: The Role of State Supreme Courts in the Tort Reform Wars.

III. KRITZER'S ARGUMENTS

Kritzer has made two arguments: (1) that contingency fees in personal injury cases generate hourly rates of return that are substantially the same as hourly based rates,[23] contrary to my thesis that effective hourly rates of contingency fee lawyers far exceed those of hourly rate lawyers and yield inordinately high rates of return; and (2) that disproving the proposition I have advanced obviates the need for consideration of proposed solutions to contingency fee abuses—in particular, those which I and others have advanced.[24]

Kritzer's second proposition, that reform is unneeded, is not only unsubstantiated but also untenable. Even if Kritzer's conclusion that hourly rates earned by contingency-fee lawyers are comparable to those received by hourly rate attorneys were true, the financial incentives that drive plaintiffs' lawyers and also make it profitable for defendants to adopt intransigent settlement postures lead to intolerably high transaction costs[25] and a dysfunctional[26]—and sometimes extortionate[27]—tort system. One

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23. Kritzer Statement, *supra* note 17, at 39 ("On average, however, the contingent fee, and the hourly fee differ relatively little.")

24. *See infra* Appendix D: Proposals to Reform Contingent Fees To Implement Dormant Ethical Principles and To Protect Consumers.

25. *See* BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 44. Transactional costs—most specifically, legal fees—account for almost half of settlements and damage awards actually paid. *See* DEBORAH HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 25–29 (1991). In asbestos litigation, the fees and expenses average 61% of the total payments of defendants and insurers—plaintiffs receive only 39%. *See* JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xvii (1984). *See also* ECON. COMM., 105th CONG., AUTO CHOICE: IMPACT ON CITIES AND THE POOR 4–5 (Comm. Print 1998) (Dan Miller, primary author) [hereinafter AUTO CHOICE IMPACT] (finding that "less than 15 percent of each premium dollar paid for bodily injury . . . liability actually goes to cover legitimate medical costs and wage loss," and another "16.9 percent of the premium dollar" goes to pay for pain and suffering), *available at* http://www.house.gov/jec/tort/cities/cities.htm.

26. There is considerable evidence that our modern tort system neither deters unsafe conduct nor promotes injury avoidance. *See* JEFFREY O'CONNELL, THE LAWSUIT LOTTERY 23–25 (1979); Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 54 (1994) ("The American tort law and jury system, with its unexplained verdicts, loosely structured law of damages, and cumbersome methods of decision making, is an extraordinarily costly, inconsistent, and unpredictable way of compensating accident victims."); George L. Priest, *Products Liability and the Accident Rate*, *in* LIABILITY: PERSPECTIVES AND POLICY 221 (Robert E. Litany & Clifford Winston eds., 1988) ("Aggregate statistics show no substantial reduction in product-related accidents since 1970 despite the enormous expansion of products liability"). Prof. Alfred E. Conard states:

> In practice, some of the resource allocations produced by tort liability seem to be the opposite of what anyone would approve. The malpractice liability of physicians has made health care more expensive, not only by increasing the amounts that physicians must be paid in order to cover their insurance premiums, but also by inducing them to undertake excessive testing in order to ward off liability. By making health care more expensive, liability has contributed to

a reduction in the number of persons covered by health insurance because former buyers can no longer afford the premiums.

But higher health care prices have not induced people to suffer less accidents or diseases, as allocation theory would require. By making health care less available, liability has aggravated rather than alleviated problems of sickness and injury.

Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283, 303–04 (1993) (internal citation omitted). Indeed, "*[t]here is no ready evidence that the distribution of the economic burden* [of medical malpractice premiums] *is rationally related to the objective of the tort system to deter negligent practice.*" SPECIAL ADVISORY PANEL ON MEDICAL MALPRACTICE, STATE OF NEW YORK, REPORT 19 (1976), *quoted in* O'CONNELL, *supra*, at 25 (alteration in original). More evidence that the personal injury tort system is dysfunctional is contained in other analyses of medical malpractice litigation. One study indicates that only one in eight potentially valid claims ever reaches the courts, and only half of those result in any payment to the victim. HAVR. MED. PRACTICE STUDY GROUP, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION IN NEW YORK 7-1 (1990) [hereinafter THE HARVARD STUDY]; *but cf.* Richard E. Anderson, *An "Epidemic" of Medical Malpractice? A Commentary on the Harvard Medical Practice Study*, 27 CIV. J. MEMO (Manhattan Inst., New York, N.Y.) (July 1996) (criticizing THE HARVARD STUDY on methodological grounds and concluding that the study considerably overstates the incidence of medical malpractice and that as a consequence, when the findings were interpreted by "organized advocates of the tort system, they were badly distorted and sometimes patently false"). However, THE HARVARD STUDY's ratio of one claim for every eight instances of malpractice includes claims that were filed where no malpractice occurred. If only claims resulting from adverse events due to negligence are considered, only one out of approximately sixty-five (1.53%) adverse events led to a claim. *Id.*; *see also* PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 12–14 (1991) (discussing THE HARVARD STUDY's findings). Most malpractice claims filed, moreover, occur in the absence of negligence—and sometimes in the absence of injury. *See* PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE 71 (1993). For example, a study of claims against anesthesiologists filed as lawsuits found nearly half to be without merit and that payments were nonetheless made in 42% of cases in which the care provided was determined to be appropriate. Frederick W. Cheney et al., *Standard of Care and Anesthesia Liability*, 261 JAMA 1599, 1601 (1989). Dr. Troyen Brennan of the Harvard Medical School estimates that there are seven to eight false claims of medical malpractice for every genuine claim. He notes, "It's like a traffic cop giving out lots of tickets to people not speeding and lots of speeders are not getting tickets." INT'L MED. NEWS, Oct. 15, 1992 (reporting on speech by Dr. Troyen A. Brennan at conference sponsored by the American Society on Law and Medicine in Kuaii, Hawaii), *cited and quoted in* Samuel J. Brakel, *Using What We Know About Our Civil Litigation System: A Critique of "Base-Rate" Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77, 106 nn.64–65 (1996) [hereinafter Brakel, *Critique*]; *but see* Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS OF INTERNAL MED. 780, 780 (1992) (reporting results of a study of 12,829 New Jersey physicians involved in 8,231 closed malpractice cases and concluding that "unjustified payments are probably uncommon").

27. Under the impetus of the contingency fee engine, aggregative litigation such as consolidations, class actions, and combinations of the two, serves to coerce defendants to transfer millions and even billions of dollars in settlements not only in the absence of any clear indication of responsibility on the part of defendants but also in the absence of actual injury. *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 252–58 (2001) [hereinafter Brickman, *Aggregative Litigation*].

The extortionate nature of aspects of the tort litigation system is exemplified by breast implant litigation. Researchers at the Mayo Clinic, Harvard, and other leading institutions found no causal link between silicone-gel breast implants and autoimmune or connective-tissue diseases such as scleroderma, rheumatoid arthritis, and lupus. Nonetheless, contingent-fee-financed tort litigation on behalf of women with implants claiming such diseases, as well as asymptomatic variants, resulted in

significant factor contributing to high transaction costs is the substantial escalation of medical care costs when claimants are represented by contingency-fee lawyers—as compared to medical costs when claimants suffer identical injuries but do not hire lawyers.[28] These increased costs are a product of contingent-fee "math." Each $1 of medical care costs generates approximately $1 in fee income for the contingent-fee lawyer.[29] Hence, contingent-fee lawyers have a strong financial incentive to have their claimants run up higher medical bills irrespective of medical needs.[30] In the aggregate, this run-up amounts to billions of dollars in excess medical costs.[31]

Thus, irrespective of whether Kritzer's thesis—that the effective hourly rates of contingency-fee lawyers are substantially the same as those obtained by hourly rate lawyers—is supported by his data, reforms of contingency fee practice and the civil justice system are independently mandated.

Finally, Kritzer's first and primary proposition, that effective hourly rates charged by contingency-fee lawyers are substantially the same as the rates charged by their hourly rate counterparts, is simply wrong. Kritzer's

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hundreds of millions of dollars in jury awards. Despite the clear scientific evidence indicating the absence of causation, the threat posed by tort litigation as perceived by the leading implant manufacturers caused them to agree to pay up to $7 billion to settle all such claims. *See generally* WALTER K. OLSON, THE RULE OF LAWYERS 129–52 (2003).

Asbestos litigation is an even more dramatic illustration of the extortionate aspects of the tort litigation system. Asbestos litigation has already bankrupted sixty companies, resulting in the loss of over 50,000 jobs and causing the average employee of a bankrupted company with a 401(k) plan to sustain over $8,000 in pension losses. *See* Joseph E. Stiglitz, Jonathan M. Orszag & Peter R. Orszag, The Impact of Asbestos Liability on Workers in Bankrupt Firms 3 (Dec. 2002) (report by Sebago Assocs. commissioned by the Am. Ins. Ass'n), *at* http://www.aiadc.org/dochandler.asp?file=/File/Public/StiglitzReport.pdf. According to one estimate, "direct costs associated with asbestos-related bankrupt companies total between $325 and $650 million." *Id.* And yet, the vast majority of those being compensated today have no injury, and there is no credible medical evidence indicating that workers suing today on the basis of x-ray evidence of exposure to asbestos-containing products many years ago have any greater likelihood of contracting an asbestos-related disease than other workers similarly exposed. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. ___ (forthcoming 2004); *see also* Lester Brickman, *Asbestos Litigation: Malignancy in the Courts?* 40 CIV. JUST. F. 3, 7 (Manhattan Inst., New York, N.Y.) (Aug. 2002). Indeed, most asbestos litigation today consists of claimants: (1) who have suffered no injury and who cannot demonstrate any significant likelihood of contracting an asbestos-related disease in the future; (2) suing primarily in jurisdictions where asbestos litigation is a mainstay of the local economy; (3) often testifying according to scripts prepared by their lawyers; (4) and often supported by bogus medical evidence. *See id.*; *see also* Roger Parloff, *Mass Tort Medicine Men*, AM. LAW., Jan. 3, 2003, at 98; Brickman, *Aggregative Litigation*, *supra*, at 272–98.

28. For discussion of medical cost "build up," see *infra* notes 57, 59.
29. Contingent fee "math" is explained at *infra* notes 57–59.
30. *See infra* notes 57–59.
31. *See infra* note 57.

conclusion that plaintiffs' lawyers' earnings are substantially comparable to defense lawyers' is based upon the following: analysis of two published studies;[32] economic surveys published by state bar associations;[33] raw, unpublished annual-income and effort data from bar surveys;[34] his own assertedly "unscientific study"[35] ("The Wisconsin Contingency Fee Study"); and unpublished data obtained from a RAND study of the operation of the Civil Justice Reform Act.[36] I previously critiqued the published studies as overboard and unreliable[37] and further responded to Kritzer's challenge.[38] In this article, I will largely confine my analysis to new data relied upon or set forth by Kritzer.

IV. KRITZER'S SUPPORTIVE STUDIES

A. Published State Bar Association Economic Surveys

Kritzer relies upon annual income data from state bar association survey reports conducted in nine states[39] and concludes from his "best estimate" that the effective hourly rate for plaintiff lawyers "is in the same ball park as the hourly rates quoted by defense lawyers."[40] The data,

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32. Stephen C. Dietz, Bruce Baird & Lawrence Berul, *The Medical Malpractice Legal System*, *in* DEP'T OF HEALTH, EDUC., AND WELFARE, PUB. NO. (OS) 73–89, APPENDIX: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 87–167 (1973), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 18; Kritzer et al., *Winners and Losers in Litigation: Does Anyone Come Out Ahead?*, *in* DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT FINAL REPORT, pt. C, at 29, 59 (1987), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 18–19. The former study looked only at medical malpractice cases, and indicated that the mean hourly rate earned by plaintiffs' lawyers was $61–$84, compared to $47 for defense lawyers. The latter study is from the Civil Litigation Research Project—conducted in the period 1979–1981—which indicated that the median effective hourly rate for contingency-fee lawyers was $42. The median hourly rate reported by hourly rate lawyers was $50. *See* Kritzer, *The Wages of Risk*, *supra* note 17, at 272–76; *see also* Kritzer et al., *Understanding the Costs of Litigation: The Case of the Hourly Fee Lawyer*, ABA BAR FOUNDATION RESEARCH JOURNAL (1984), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 19.

33. *See* Kritzer, *The Wages of Risk*, *supra* note 17, at 276–81.

34. *See id*. at 281–83.

35. *Id.* at 302, 284–303.

36. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996), *cited in* Kritzer, *Seven Myths*, *supra* note 1, at 743–44.

37. *See* Lester Brickman, *Contingent Fees*, *supra* note 7, at app. B, at 132–34. For Kritzer's response to my critique, see KRITZER, RHETORIC AND REALITY, *supra* note 17, at 41–43, and Kritzer Statement, *supra* note 17. For an additional critique of Kritzer's studies, see *Hearings*, statement of Lester Brickman, *supra* note 17.

38. *See Hearings*, statement of Lester Brickman, *supra* note 17.

39. The surveys were conducted in Colorado (1993), Florida (1984), Iowa (1990), Michigan (1991, 1994), Nebraska (1994), New Hampshire (1990), Ohio (1990, 1994), Texas (1992), and Wisconsin (1986, 1992). *See* Kritzer, *The Wages of Risk*, *supra* note 17, at 276–81.

40. *See id.* at 280. For Kritzer's estimates of median hourly rates of plaintiff and defense lawyers

however, is unreliable because it excludes the bulk of lawyers who derive substantial amounts of income from contingent-fee practice. Many of those surveyed and categorized as contingency-fee lawyers derived a significant percentage of income from non-contingency work. Kritzer himself acknowledges that there is a problem with the surveys because "there is no common definition of who is a personal injury specialist."[41] But he understates the problem. Most plaintiff lawyers who generate multi-thousand dollar hourly rates of return in tort litigation generally restrict their practices to contingency-fee representation and only infrequently, if not rarely, venture into other areas of practice.[42] Therefore, most of the respondents surveyed who indicated that their incomes arose only partly from contingency fees do not restrict their practices primarily to tort claims, unlike most successful tort lawyers. Measures of income and of effective hourly rates that include lawyers in general practice with only a smattering of tort cases yield significantly lower amounts than do measures of income and effective hourly rates of lawyers who largely confine their practices to contingency-fee representation.[43] Accordingly, the state bar association surveys relied on by Kritzer as a measure of plaintiff lawyers' earnings are badly flawed and do not provide even a modest approximation of contingency-fee lawyers' earnings or of their effective hourly rates.[44]

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based upon the state economic surveys, see *id.* at 278 tbl. 2.

41. *Id.* at 277. In fact, "[i]n some states, as low as twenty-five percent of the practice is devoted to personal injury work, for others it is as high as eighty percent, and for still others it is simply the area with the largest proportion of the respondent's practice regardless of percentage." *Id.*

42. In a recent survey of plaintiff lawyers in Texas, the researchers recognized the need to restrict their inquiry to "lawyers for whom plaintiffs' work done on a contingency-fee basis accounts for the substantial part of their business." Stephen Daniels & 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, 1784 (2002) [hereinafter Daniels & Martin, *Plaintiffs' Practice in Texas*]. The largest percentage of the 552 lawyers surveyed, 131 or 23.7%, did plaintiffs' work exclusively, "and only one quarter of them ha[d] more than 50% of their business in something other than plaintiffs' work." *Id.*; *see also* Marc A. Franklin et al., *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 22 n.103 (1961) [hereinafter, Franklin et al., *Study*] (pointing out that of a sample of 29 attorneys who were experienced plaintiffs' lawyers, sampled as part of a study of contingency fees, "26 had not accepted any noncontingent fee retainers in personal injury cases in 1958, and the remaining three handled cases on [a noncontingent fee] basis only rarely").

43. Lawyers' incomes correlate with the percentage of their practices restricted to contingent fee pricing. In the Texas survey, the highest earning group of attorneys mostly restricted its practice to contingent fee representation from which it derived at least 95% of its income. Daniels & Martin, *Plaintiffs' Practice in Texas*, *supra* note 42, at 1789 tbl. 4 (% Plaintiffs' Work); *see also* Kritzer, *Seven Myths*, *supra* note 1, at 782 ("[L]awyers in firms specializing in personal injury plaintiffs' work produce higher returns.").

44. The accuracy of the hourly rate calculations are further undermined because they are based upon estimates by Kritzer of the number of hours worked annually by those lawyers reporting their annual incomes. *See* Kritzer, *The Wages of Risk*, *supra* note 17, at 277–78, 277 tbl. 2, app. 2, at 314.

B. Raw, Unpublished Annual-Income and Effort Data from Bar Surveys

Apparently realizing the fundamental flaw in the survey data, Kritzer obtained raw, unpublished annual-income data from economic surveys conducted by the state bar associations in Wisconsin (1992), Ohio (1994), and Michigan (1994).[45] Kritzer then recalculated the hourly earnings—this time attempting to limit the data only to plaintiff lawyers whose practices "consist mostly or solely of contingency fee work."[46] Kritzer estimated the median effective hourly rates for Wisconsin, Ohio, and Michigan as $113, $88, and $81, respectively, and concluded that the results "fall right in the general range of figures I found working from published data."[47] However, this survey data is flawed by the trivial number of lawyers who responded to the surveys. The Wisconsin data is based upon only 39 respondents, while the Ohio and Michigan data are based upon only 34 and 41 respondents, respectively.[48] Moreover, there is an additional and compelling reason to reject the validity of the data.

1. The Unexplained Anomaly in the Data

The finding that the median Wisconsin effective hourly contingency-fee rate is 40 percent higher that the median Michigan hourly contingency-fee rate and 28 percent higher than the median for Ohio should have been treated with some initial suspicion, requiring comment if not a detailed explanation. Ohio and Michigan are considerably more urban than Wisconsin—a predominately rural state.[49] Because contingency fees are

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45. *Id*. at 282–83.
46. *Id*. at 283.
47. *Id*.
48. *Id*. at 282–83. Kritzer acknowledges that his samples are "small." *Id*.
49. The two most common measures of the degree of urbanization of a state are: the state's population density (persons per square mile) and percent of the state's population that lives in rural areas. Data from the 2000 census reveals the following population densities: Ohio (277.3), Michigan (175.0), and Wisconsin (98.8). *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PHC–1–37, OHIO: 2000, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 416 tbl. 15 (2002); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PHC–1–24, MICHIGAN: 2000, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 426 tbl. 15 (2002); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, PHC–1–51, WISCONSIN: 2000, SUMMARY POPULATION AND HOUSING CHARACTERISTICS 438 tbl. 15 (2002), *available at* http://www.census.gov/sensus2000/pubs/phc-1.htm. Data from the 1990 census indicates that rural areas in Michigan and Ohio were inhabited by 29.5 percent and 25.9 percent of their residents, respectively, whereas rural areas in Wisconsin were inhabited by 34.3 percent of its residents. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CPH–2–24, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS, MICHIGAN 1 tbl. 1 (1992); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CPH–2–37, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS, OHIO 1 tbl. 1 (1992); U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CPH–2–51, 1990 CENSUS OF

generally higher in urban areas, contingency-fee lawyers tend to congregate there more than in rural areas.[50] The relationship between contingency fees and demography is further demonstrated by comparing the number of bodily injury claims per auto accident in urban and rural jurisdictions.[51] Contrary to what one would predict given (1) increased

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POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS, WISCONSIN 1 tbl. 1 (1992), *available at* http://www.census.gov/prod/cen1990/cph2/unit-cou.htm. The national average of the population living in rural areas is 24.8 percent. *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 1990 CPH–2–1, 1990 CENSUS OF POPULATION AND HOUSING, POPULATION AND HOUSING UNIT COUNTS, UNITED STATES 5 tbl. 4 (1993). The Census Bureau defines rural areas as open areas or places with fewer than 2,500 inhabitants. *See id.* app. A, at A11 to A12.

    50. Since contingency fees are a standard percentage of recoveries, higher recoveries generate higher contingent fees. *See* Kritzer, *Seven Myths*, *supra* note 1, at 781 ("Overall returns [from contingent fee practice] tend to improve as stakes go up, and this is true regardless of whether one looks at the mean effective hourly rate, the median effective hourly rate, or the mean hourly return."). Higher contingency fees result in higher effective hourly rates since the level of effort is often a constant for purposes of these comparisons. *See id.* at 783 ("[H]igher [contingent fee] incomes produce higher [effective hourly] returns."). It is an anomaly of the contingent fee-financed tort system that a lawyer obtains a considerably higher effective hourly rate fee if the injury that is the basis of the suit is more severe (e.g., total disability as in quadriplegia) than if it is less severe (e.g., partial disability as in loss of a limb) even though in such cases there is likely no appreciable difference in the level of effort required (and, for purposes of this comparison, no difference in the degree of risk assumed). Therefore, while data comparing contingency fee incomes of rural and urban lawyers is not directly available, median and mean jury verdicts in various types of tort cases and liability insurance rate differentials, see *infra* text accompanying notes 88–100, can serve as surrogates. Moreover, there is a greater tendency among big city juries to grant extraordinarily large awards. *See* MARK A. PETERSON, CIVIL JURIES IN THE 1980S 44–45 (1987) [hereinafter PETERSON, CIVIL JURIES]. In a study of jury verdicts in California in the mid 1980s, "[j]ury awards, both medians and averages, were smallest in rural counties and in those counties with smaller cities." *Id.* at xi–xii. Thus, for example, the average payment received in auto accident claims by claimants in central cities was $11,638 in 1992, whereas the average payment in rural areas was $7,108. INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES 50 tbl. 3-20 (1994) [hereinafter PAYING FOR AUTO INJURIES–1994]; *see* Jane-Ellen Robinet, *Malpractice Awards More Than Double in Philly*, PITT. BUS. TIMES, Oct. 10, 2001 (reporting that the median verdict for medical malpractice cases in Philadelphia was almost $973,000, which was more than twice as high as the median verdict for the rest of the state: $410,000); *see also Auto Choice Reform Act of 1999: Hearing on H.R. 1475 Before the Joint Econ. Comm.*, 105th Cong. (1997) (statement of Jeffrey O'Connell) (reporting that the 1994 average cost for minimum auto insurance liability coverage by one California insurer was $811 in Los Angeles compared with only $578 for the same insurer in Northridge, California, and that in Wisconsin, the 1994 average cost was $367 in Milwaukee, 72% higher than in Waukesha, Wisconsin ($213)), *available at* http://www.house.gov/ jec/hearings/03-19-7h.htm.

    51. Each auto accident gives rise to one or more (potential) claims including property damage (PD) claims and bodily injury (BI) claims. While virtually every auto accident gives rise to a PD claim, accidents do not necessarily result in bodily injury to one or more of the occupants of the vehicles involved. When accidents do occur, a BI claim may result. It may be thought that BI claims are simply a function of the number and severity of auto accidents. That is, over a large enough body of PD claims, we would expect the proportion of BI claims to vary modestly. In fact, however, BI claiming, that is, the ratio of BI claims to 100 PD claims, varies substantially, not according to severity of accident but according to such other variables as population density, i.e., urban versus rural, and the level of lawyer representation of BI claims. *See* AUTO CHOICE IMPACT, *supra* note 25, at 7–15. That is why the ratio of BI to PD claims is often used as a measure of litigiousness—because it is a measure of the propensity to engage in tort claiming activity largely independent of the severity of the accident.

safety standards for cars resulting in fewer accidents[52] and, presumably, decreased severity of bodily injuries when accidents do occur and given (2) higher driving speeds in rural versus urban areas and the relationship between the severity of accidents and driving speed, there is a much higher incidence of bodily injury claiming in urban areas than in rural areas.[53] Moreover, the incidence of bodily injury claiming has been increasing significantly, with the increases in urban areas far outpacing those in rural areas.[54] Higher bodily injury claiming rates result in higher total insurance payments for accident claims,[55] higher settlements, higher contingency fees, and therefore higher effective hourly rates.[56]

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52. Increased safety standards probably account for the significant declines that have been experienced in the rates of auto accidents. *See* INS. RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS 1 (2000) [hereinafter TRENDS 2000]. The IRC survey found that the number of auto accidents resulting in PD claims has been dropping over the eighteen-year period from 1980 to 1998. *Id*. at 8. In 1980 there were 4.94 PD claims per 100 insured cars, in 1988 that number had decreased to 4.42, and in 1998 there was a further decrease to 4.09 PD claims per 100 insured cars. *Id.*

53. While we would expect auto accidents in rural and low population density areas to be more severe than in urban areas because drivers operate at higher speeds in rural areas, which would therefore give rise to greater numbers of BI claims per accident, the rise of 64% in bodily injury claims per auto accident between 1980 and 1992, *id*. at 10, was largely concentrated in major urban areas. *Id.* at 7 & tbls. B–1 to B–13–51. "Accidents in urban areas typically occur when vehicles are driven at low speeds, so they should result in fewer bodily injury claims than those in less urbanized areas. Yet, urbanized areas have some of the highest numbers of bodily injury claims per 100 accidents." *Id.* at 7. For example, while the 1989 ratio of BI claims to PD was less then 13 per 100 in Harrisburg, Pennsylvania, and less than 16 per 100 in Pittsburgh, it was 75 per 100 in Philadelphia. IRC, TRENDS IN BODILY INJURY CLAIMS 17–18 (1990). For 1995, 1996, and 1997 combined, in Pennsylvania, the ratios were 14.9 in Lancaster, 16.0 in Pittsburgh and 55.7 in Philadelphia. TRENDS 2000, *supra* note 52, at 42. Thus, accident victims in Philadelphia filed bodily injury claims at a rate more than 3.5 times that of Pittsburgh, the state's second largest city. *See also* AUTO CHOICE IMPACT, *supra* note 25, at tbl. 1 (the ratio of bodily injury claims to property damage claims (BI:PD) in Los Angeles, CA is 98.8, 2.22 times more than the rest of the state where the ratio is 44.5; likewise, the BI:PD ratio in Milwaukee, WI is 43.9, 1.49 times more than the rest of the state where the ratio is 29.4). The higher claiming activity for urban areas with regard to bodily injury claims is also replicated with regard to property damage claims as measured by Average Property Damage Loss Costs. The "average property damage loss cost" is the average amount of property damage loss, per year, per insured car including those insured cars not in accidents. *See* TRENDS 2000, *supra* note 52, at 2. The countrywide average property damage loss cost is $79.94. There are only six states that are $20 or more below the countrywide average: Wisconsin, Maine, Montana, Idaho, South Dakota, Wyoming. *See id*. at 49 fig. 26. These states are among the most rural in the U.S. THE RURAL INSTITUTE, STATES' RURAL RANK AND 1988 SELF-EMPLOYMENT RATE, *at* http://rtc.ruralinstitute.umt.edu/Sc/Em/Monograph/ RuRankTable.htm (last visited Nov. 29, 2003).

In 1988, Milwaukee, WI had 43.9 BI claims per 100 PD claims, while the rest of Wisconsin's ratio was 29.4. *See* AUTO CHOICE IMPACT, *supra* note 25, at tbl. 1. The ratios of Los Angeles, CA and the rest of California were 98.8 and 44.5 respectively, Newark, NJ and the rest of New Jersey, 79.6 and 32.8 respectively, Philadelphia, PA and the rest of Pennsylvania, 78.5 and 22.4 respectively, Baltimore, MD and the rest of Maryland, 62.1 and 36.6 respectively, and Charlotte, NC and the rest of North Carolina, 58.1 and 41.8 respectively. *Id.*

54. *See* TRENDS 2000, *supra* note 52, at 10, 12–13.

55. The principal reason for the higher auto insurance rates in urban areas is the higher claiming rate in urban areas, that is, there is a higher percentage of bodily injury claims per auto accident in

Another related reason why contingency-fee incomes tend to be significantly higher in urban areas is that when auto accident claimants hire lawyers, there is an increased incidence of medical care cost "buildup," that is, inflated and fraudulent medical claiming,[57] which is

urban areas than in rural areas. The higher claiming rate is itself a function of increased lawyer representation of claimants. *See infra* note 84 et seq. *See also* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 62 (1999) comparing the percentage of represented claimants in the "central city" to "rural" areas in BI and PIP claims. In the central city, BI claimants were represented by attorneys 58% of the time and PIP claimants were represented 39% of the time. In rural areas, BI claimants were represented 44% of the time, and PIP claimants were represented only 15% of the time.

   56. *See supra* note 50.
   57. Medical cost "build up" is the phenomenon of a highly increased incidence of inflated and fraudulent incurrence of medical expenses, orchestrated by contingent fee lawyers to increase fees. *See* Jeffrey O'Connell, *Blending Reform of Tort Liability and Health Insurance: A Necessary Mix*, 79 CORNELL L. REV. 1303, 1306–07 (1994); BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 31–34. Under contingent fee "math," every $1 of increased medical care costs generates an additional $1 of fee. *See infra* text accompanying note 60. As a consequence of medical cost build-up, auto accident claimants represented by lawyers incur far higher medical care costs than do claimants who do not hire lawyers; however, while that results in substantially higher settlements, net payments to claimants are usually lower for those represented by lawyers than for those who represent themselves. In a recent year, auto accident claimants who hired lawyers received $1.32 for every dollar of loss as a result of the injury whereas unrepresented claimants received on average, $0.97. PAYING FOR AUTO INJURIES–1994, *supra* note 50, at 29. However, after deducting attorney fees, litigation expenses, the substantially higher medical care costs, and the resultant higher amounts of lost wages, the net payment to represented claimants was $0.88 per dollar of loss. *Id.* at 30. Thus, the average auto accident claimant who was represented by a lawyer paid $1,665 of his own money (beyond reimbursement from benefit sources) to cover the expenses associated with his auto injury. *Id.* One study found that for the most common types of auto injuries, neck and back sprains and strains, the average represented claimant receives a lower net payment from auto insurance after deducting out-of-pocket expenses and legal fees than the average claimant without a lawyer. *See* INS. RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS 60–62 (1994). Sufferers of back sprain or strain, for example, who hire attorneys netted an average of $1,051 after expenses; nonrepresented claimants with comparable injuries netted $1,533. *Id.* at 61 fig. 6–6. A more recent study of auto accident claiming indicates that the incidence of medical cost build-up is increasing. In 1999, claimants who hired lawyers received $1.40 for every dollar of injury related loss. *See* INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES 50 (1999) [hereinafter PAYING FOR AUTO INJURIES–1999]. Economic losses, consisting primarily of medical care costs (and also lost wages, which are usually a function of medical care costs), averaged $14,165 for represented claimants but only $5,228 for claimants who handled their own claims. *Id.* at 51. *See also* ALL INDUS. RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTO. INJURIES IN THE U.S. 103–05 (1989) [hereinafter COMP. FOR AUTO.] (reporting that the ratio of the average economic loss claimed for represented claimants to claimants unrepresented by lawyers was 4.26:1; the average economic loss for a claimant with a weight-bearing bone fracture who was represented was $13,275 versus $8,464 for unrepresented claimants, a 1.56:1 ratio, and the average economic loss for a claimant with a back sprain or strain who was represented was $7,534 versus $2,198 for one who was not represented, a 3.43:1 ratio). The RAND's Institute for Civil Justice has estimated that 35–42% of medical care costs generated by automobile accidents "appear to be excess"—a product, in part, of contingency fee math. STEPHEN CARROLL ET AL., THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 3 (1995).
   The consequences of medical cost build-up on a societal level are considerable. In the aggregate, auto accident claimants generated an estimated $4 billion in excess or fraudulent claims in 1993. This, in turn, generated $9 to $13 billion in additional costs to auto insurers for compensation for

concentrated in urban areas.[58] Contingent-fee "math" explains the relationship between medical care cost "buildup" and contingent fees. Pain-and-suffering damages are generally valued for settlement purposes as a two- to three-times multiple of medical costs.[59] Thus, the higher the medical costs incurred, the higher the pain and suffering value and, therefore, the higher the total settlement value of the claim. This, in turn, generates a higher contingent fee. Indeed, according to the data relating pain and suffering damages to medical care costs, each $1 in additional medical care cost generates an additional $1 of contingent-fee income.[60] The implications for tort claiming and our civil justice systems are clear.[61]

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noneconomic damages and other costs. *Id.* "If insurers pass[ed] these increased costs on to consumers in the form of proportional increases in premiums, then in 1993 excess medical claims cost auto insurance purchasers across the country anywhere from $13 to $18 billion." *Id.*

Medical cost build-up is especially prevalent when contingency fee lawyers select the doctor or chiropractor to treat the claimant. *See* PAYING FOR AUTO INJURIES–1994, *supra* note 50, at 29 (indicating that 18% were advised by their lawyer which doctor, chiropractor or clinic to use for treatment, up from 13% in 1986); *see also* Martin J. Phipps, *Attorney Referral for Medical Treatment: A Wolf in Disguise?*, 32 ST. MARY'S L.J. 423, 426–31 (2001) (explaining how contingency fee attorneys who refer their clients to physicians and chiropractors do so in some cases not only to escalate medical bills but also to provide critical but otherwise nonexistent evidence of liability).

58.   The more urban an environment, the higher the incidence of fraudulent medical claiming. *See* AUTO CHOICE IMPACT, *supra* note 25, at 12–15. Moreover, the number of claimants who are referred to a specific doctor, chiropractor or clinic by their attorney, a key element in medical cost build-up, is far higher in urban areas than in rural areas. *See* PAYING FOR AUTO INJURIES–1994, *supra* note 50, at 56 tbl. 4-13 (30.8% for central city and suburb versus 19% for small town and rural).

59.   *See* CHARLES WOLFRAM, MODERN LEGAL ETHICS 528 n.21 (1986) ("Pain and suffering and similar nonmonetary damages probably average three times the monetary damages in personal injury claims."). In auto accident cases, the operative ratios are $2.11 in pain and suffering recoveries for every dollar of medical and wage loss costs. *See* COMP. FOR AUTO, *supra* note 57, at 65–66 & tbl. 5–5. A weighted average of payments to unemployed claimants and payments to claimants who received no lost wage payments reveals a 2.998:1 dollar ratio of total payments to economic loss. *Id.* at 48 tbl. 4–17. Medical expense payments represent 69.2% of all economic losses, thus converting the 2.11:1 pain-and-suffering to medical-and-wage cost ratio to a 3.05:1 total payments to medical payment dollar ratio. *Id.* at 34 tbl. 4–5. For the purpose of these calculations, medical expenses have been defined as economic loss less wage loss, a definition which only modestly overstates medical expenses since only 3.6% of all economic losses were neither for medical nor wage loss expenses. *Id.* at 34 tbl. 4–5.

60.   *See supra* note 59.

61.   Kritzer's lack of awareness of the incidence of medical cost build-up as a function of contingent-fee claiming may partly account for his failure to realize the anomaly posed by his data comparing the effective hourly rates of contingent-fee lawyers in Wisconsin to those in Ohio and Michigan. In his most recent work on contingent fees, he states:

Turning . . . to the data on closed automobile accident injury claims, I isolated all cases in which the most serious injury was a fracture of a weight-bearing bone. There is no obvious reason to assume that there are systematic differences in these cases based on whether there was or was not attorney representation. However, with lawyer representation, the insurer paid the limits of the policy in significantly more cases: 43% compared to only 31% when there was no lawyer representation (chi square=7.297, p=0.026).

Kritzer, *Seven Myths*, *supra* note 1, at 778. His statement that "[t]here is no obvious reason to assume

For all of these reasons, it is virtually certain that, contrary to raw, unpublished annual-income data relied on by Kritzer, contingency-fee lawyers' effective hourly rates are significantly higher in Michigan[62] and Ohio than in Wisconsin. Thus, Kritzer's data is not only flawed by the trivial number of responses to the income surveys but is almost certainly highly inaccurate.[63]

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that there are systematic differences in these cases based on whether there was or was not attorney representation," *id*., is incorrect and is contradicted by the data set forth in note 57, *supra*, and in this footnote. To show that hiring a lawyer to press an auto accident claim is in the client's interest, Kritzer indicates that when there is attorney representation, the insurer paid policy limits "in significantly more cases." *Id.* The statement is, of course, true because as noted above, for the injury category of weight-bearing bone fracture, the represented client's economic losses, consisting primarily of medical care costs, were $13,275 versus only $8,464 for the unrepresented claimant with the same injury. *See* COMP. FOR AUTO., *supra* note 57. Given the substantially higher settlement value of the represented claim, Kritzer's calculation that the represented weight-bearing bone fracture claimant will obtain a policy limits settlement significantly more often than the unrepresented claimant is consistent with the data presented in this footnote. However, after the represented client has: (1) paid the higher medical bills; (2) reimbursed himself for the higher wage losses he incurred because he "required" more visits to medical care providers in order to run up 57% higher medical care costs ($13,275 is 57% greater than $8,464); and (3) paid the contingent-fee lawyer the standard contingent fee prevailing in the community; the represented claimant realizes a lower net amount than does the unrepresented claimant with the identical injury.

This can be illustrated by using, as an example, the average weight-bearing bone fracture claimant. Under contingent fee "math," and using Professor Wolfram's estimate of the ratio of pain and suffering to monetary damages of 3:1, see *supra* note 59, the settlement value of the represented weight-bearing bone fracture claim is $53,100 (($13,275 x 3) + $13,275), whereas the settlement value of the unrepresented claim is approximately $33,850 (($8464 x 3) + $8464). Out of the $53,100 settlement, the client pays his lawyer approximately one third or $17,700 and $13,275 to the doctor, thus leaving the claimant with a net recovery of approximately $22,125 (omitting other litigation expenses). The unrepresented claimant pays his doctor $8,464 and thus nets approximately 15% more: $25,400. Moreover, the disparity in favor of the unrepresented claimant is even greater in that for purposes of properly calculating the represented claimant's net recovery, it should be reduced to reflect the amount of wage loss realized. (Reimbursing himself from his recovery for wage loss is a net neutral transaction.) While the unrepresented claimant also has suffered wage loss, the represented claimant has undoubtedly realized substantially greater wage losses because they are often a function of medical care costs. It is apparent that the longer the hospital stay and the more frequent the visits to doctors, chiropractors and radiology labs, etc., the greater the time lost from work.

62.   Another reason for doubting the accuracy of the data is that Michigan's medical malpractice rates, which are a function of litigation activity, exceed Wisconsin's by a huge margin. For example, the rates for orthopedic surgeons are more than 13 times higher in Michigan than Wisconsin. *See infra* note 97.

63.   It may be thought that my critique of Kritzer's data on effective hourly contingency fee rates for Michigan and Wisconsin is supported by a comparison of Michigan's average BI claim payment, $24,481, with Wisconsin's—$11,286. Indeed, Michigan's average payment is not only twice that of Wisconsin but more than 2.5 times that of the country. *See* TRENDS 2000, *supra* note 52, at 31 fig. 12. Higher average BI claim payments generate higher contingency fees and therefore higher effective hourly rates. Upon closer analysis, however, this particular comparative data is not as supportive of my critique as it appears on its face. A large measure of the difference in average claim payments is accounted for by Michigan's no-fault auto insurance law which is the most rigorous in the country in limiting the ability of claimants to escape no-fault limits to bring suit for bodily injury. In order to sue for bodily injury in Michigan, the claimant must have "suffered death, serious impairment of body

C. The Wisconsin Contingency-Fee Study

Kritzer's "primary source of original data is [his] study of contingency fee practice in Wisconsin."[64] Kritzer has referred to his "Wisconsin Contingency Fee Study" done in 1995-1996 as an "unscientific survey"[65] and an attempt to obtain information on the amount of time spent on cases and the effective hourly rate earned by Wisconsin plaintiff lawyers.[66] From data contained in 989 cases provided by 1192 Wisconsin lawyers,[67] Kritzer estimated that the median effective hourly rate of plaintiff lawyers was $132, which he claims "is almost the same as the mean/median hourly rate that these *same* lawyers report charging for their hourly fee work."[68] Once again, however, Kritzer based conclusions on data obtained from lawyers who do both hourly rate and contingency-fee representation. As previously indicated, the higher the percentage of "pure" contingency-fee representation, the higher the contingency-fee income.[69] If Kritzer had restricted the data upon which he based his calculation of effective hourly rates to lawyers who represented tort claimants exclusively on a

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function, or permanent serious disfigurement." MICH. COMP. LAWS § 500.3135(1) (2002). Because the threshold for BI suits in Michigan is so high, the fewer cases that are litigated involve more serious injuries. This explains why, as noted above, Michigan's average BI payment is more than 2.5 times the national average; in fact, it is the second highest average BI claim payment in the country. TRENDS 2000, *supra* note 52, at 31 fig.12.

   For analysis of the three types of state laws governing the bringing of claims based upon auto injury, including "no fault," see *infra* Appendix G: Types of State Automobile Insurance Laws.

   64.   *See* Kritzer, *Seven Myths*, *supra* note 1, at 741.

   65.   Kritzer, *The Wages of Risk*, *supra* note 17, at 301.

   66.   *See* Kritzer, *The Wages of* Risk, *supra* note 17 at 284–302; KRITZER, RHETORIC AND REALITY, *supra* note 17, at 25; Kritzer, *Seven Myths*, *supra* note 1, at 741–43.

   67.   Kritzer, *The Wages of Risk*, *supra* note 17, at 284 & n.73. Of the 989 cases, 332 were unfiled, 390 were filed but not tried, and 267 went to trial. *Id.* at 284–85. For information on Kritzer's data collection methods, see *id.* Kritzer sampled lawyers within the Litigation Section of the State Bar of Wisconsin and mailed them surveys asking about recent contingency-fee work. *Id.* at 284. He also obtained "data" through direct observation and interviews of a limited number of contingency fee practitioners. *Id.* at 285. Apparently, all of the information collected was supplied by the attorneys, and Kritzer did not personally examine any files, time sheets or financial records of the surveyed attorneys. The data is therefore subject to critique because it consists of self-reporting of cases chosen by largely self-selected participants. Kritzer states that 51% or less of the contingency fee lawyers who had been sent the questionnaire, responded. While that is a high response rate, it also indicates a high degree of self-selection. Here, the target population knew the purpose of the study (to counter contingency-fee "myths"), had a stake in the outcome, decided whether to participate and, if they did, selected the case examples to fit the categories of information requested. For further critique of the Wisconsin study, see http://blogs.law.harvard.edu/ethicalesq/ (last accessed July 30, 2003).

   68.   *Id.* at 292 (emphasis added); *see also* Kritzer, *Seven Myths*, *supra* note 1, at 765 ("[M]ost of the lawyers (85%) had done at least some work on an hourly basis during the previous year").

   69.   *See supra* note 43 and accompanying text.

contingent-fee basis or, at least, very nearly so, the comparative data elicited would likely have been far different.

Even so, on the basis of the actual data used, Kritzer noted that the mean effective hourly rate over the same set of cases was $242, which is more than 80% higher than the median hourly rate.[70] Indeed, Kritzer acknowledged that "across a set of cases the [contingency-fee] lawyer will do much better."[71] Upon revisiting the data subsequently, Kritzer refined his calculations based on the data and recalculated the median effective hourly rate as $167 and the mean, $345.[72] On the basis of this recalculation, the mean is more than 106% higher than the median.[73] While Kritzer attempted to explain away the significant differentials between the median and mean and to emphasize the lower median hourly rate as the more meaningful piece of data,[74] it is the mean effective hourly rate which is the critical number for evaluating the fee income received by the contingency-fee lawyer. This is so because it is the portfolio of cases and not the individual case which provides the lawyer's income.

Even as Kritzer's data demonstrably understates the effective hourly rates of "pure" contingency-fee lawyers and yet, even so, demonstrates that the average effective hourly rate for contingency-fee lawyers is substantially higher than the adjusted mean that he comes up with, the data are still so beset with inaccuracies as to render them unreliable.

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70.   Kritzer, *The Wages of Risk*, *supra* note 17, at 293.

71.   Kritzer, *The Wages of Risk*, *supra* note 17, at 293; *see also* Kritzer, *Seven Myths*, *supra* note 1, at 767.

72.   *See* Kritzer, *Seven Myths*, *supra* note 1, at 768. This recalculation, called a "refinement," was published in a recent article in which Kritzer also presents effective hourly rate data based upon a RAND study of the effectiveness of the Civil Justice Reform Act. *See infra* note 105. Some of the RAND data indicates a substantially higher mean effective hourly rate than calculated by Kritzer from his Wisconsin data. *See infra* text accompanying note 107. By upwardly refining his Wisconsin data, Kritzer is able to reduce this from 75% to 23%.

73.   Kritzer, *Seven Myths*, *supra* note 1, at 768.

74.   To combat the apparently unexpected result of a high mean, Kritzer excluded the highest 10% of contingency fees presumably in order to obtain a result consistent with his thesis and obtained a revised mean of $136 using the original calculation, see Kritzer, *The Wages of Risk*, *supra* note 17, at 293, and $181 on the basis of the revised calculation. *See* Kritzer, *Seven Myths*, *supra* note 1, at 768. He offered no explanation for such an exclusion beyond that his estimates are otherwise "greatly influenced by relatively small numbers of extremely profitable cases." Kritzer, *Seven Myths*, *supra* note 1, at 768. However, branding the top 10% of contingency-fee incomes as outliers in order to exclude the data is especially questionable given the relatively small sample size. Based upon that sample size, it is no more probable that the highest 10% are unrepresentative of the total population of contingent-fee lawyers than that they are *more* representative of the total relevant population than the bottom 10%. Moreover, it is notable that windfall fees, unearned by either effort or risk, are more likely to appear at the high end of the effective hourly fee scale. Finally, it is a mathematical certainty that none of the attorneys that Kritzer surveyed reported high-end contingency fees. For elaboration of this point, see *infra* text accompanying notes 75–77, notes 141–44 and accompanying text.

D. Inadequacy of the Income Data

It is highly likely that both the unpublished state bar surveys, fundamentally flawed, as indicated above, by the failure to limit the data to contingency-fee practitioners, and the unpublished annual income data, fundamentally flawed for the same reasons but also by the trivial number of respondents, are further flawed by financially self-interested behavior on the part of potential respondents to the bar surveys. Stated simply, it is at least extremely improbable that higher-earning contingency-fee lawyers respond to state bar association income surveys. Contingency-fee lawyers fully understand that public awareness of multi-thousand dollar an hour and higher rates of return could lead to public pressure for contingency fee reform.[75] Accordingly, they do not act against their own self-interest by disclosing the size of their fees or their gross incomes.[76] Indeed, in some cases, contingency-fee lawyers would rather forgo a fee than disclose their actual fees, let alone their effective hourly rates.[77] Finally, it is clear from the data that Kritzer used that not a single responding attorney reported a multi-million dollar fee or even multi-hundred-thousand dollar fees despite the fact that such fees in tort cases are not infrequent.[78]

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75. Consider the following response of a leading contingency-fee lawyer to a proposal for contingency-fee reform offered by a prominent group of scholars and practitioners to counteract abusive fee practices: "It's none of their business how much clients pay me." Peter Passell, *Contingency-Fee Windfalls Under Attack*, N.Y. TIMES, Feb. 11, 1994, at B18 (quoting Philip Corboy); *see also infra* Appendix C: The Hidden Ball Trick: A Comparison of Baseball and the Tort System.

76. *See* James W. Michaels, *Side Lines*, FORBES, Nov. 6, 1995, at 10 (Editor-in-Chief of Forbes discussing the magazine's efforts to publish an article about lawyers' incomes, describing trial lawyers as "less than forthcoming" about the income they earned; also discussing how Forbes' reporters gathered information about the income of well-known lawyers by talking with ex-wives, clients, accountants, adversaries, and filing Freedom of Information Act requests, and examining court settlements).

77. *See* Conway v. Asbestos Corp., No. 81 C 3220, 1991 WL 195800 (N.D. Ill. Sept. 23, 1991). The *Conway* court stated:

> [T]his Court has been much troubled by the fact that it has been given no information at all about the relationship between the *total* fees received and the *total* time expended by plaintiffs' lawyers in the numerous asbestos cases that they are handling, . . . this Court has been entirely frustrated in its several requests for such information. Even though the plaintiffs' lawyers with a large portfolio of such cases surely have the information readily retrievable from their time records, they have never been forthcoming with the facts—instead their submissions in response to this Court's inquiries regularly talk about everything except what this Court has asked.

Id. at *1. *See also* Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227 (2001) (acknowledging that the top contingency fee performers are "getting so big as to represent a different world entirely").

78. A considerable volume of data now exists indicating that multi-hundred-thousand and even multi-million dollar fees in personal injury litigation are no longer infrequent. For a compilation of

Thus, the surveys relied on by Kritzer are not a reliable measure of contingency-fee income. Kritzer's calculations of effective hourly rates, which are based upon the survey data of total plaintiff lawyer income, therefore, lack accuracy.

E. The Representativeness of Wisconsin Contingency-Fee Data

Much of the data that Kritzer relies on for his conclusion that effective hourly rates of contingent-fee lawyers are substantially identical to those of hourly rate lawyers are based on surveys of Wisconsin lawyers. Irrespective of the accuracy of the data, this reliance is misplaced. Despite Kritzer's contentions that his Wisconsin-lawyer-fee data is representative of national lawyers' fees,[79] quite the opposite is the case. Stated simply, Wisconsin-contingent-fee and tort data are not representative of fees elsewhere nor indicative of dominant trends in contingent-fee-driven tort litigation in the rest of the nation. Indeed, by numerous indicators, Wisconsin has far lower average levels of contingent-fee financed tort litigation than many other states and, on that basis, ranks at the low end of the contingent-fee income scale. While we do not have contingency-fee income data that would enable a direct comparison of effective hourly rates in Wisconsin with those of lawyers in other states, measures of litigiousness are available as surrogates for contingency-fee income data. Such measures include state-by-state variations in levels of contingency-fee-financed tort litigation, differences in the number of bodily injury claims generated per fixed number of auto accidents,[80] and differences in mean and median verdicts for various categories of tort claiming. Generally, the higher a state's litigiousness ranking, the greater the amount of contingent-fee-financed tort litigation; more tort litigation not only means more verdicts and settlements but also higher verdicts and

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some such data, see *infra* Appendix F: The Increasing Frequency of Million Dollar Fees in Personal Injury Litigation.

79. *See* Kritzer, *Wages of Risk*, *supra* note 17, at 276 ("Therefore, there is a high probability that the general picture the Wisconsin data provides is applicable to many, if not most, areas of the country."); *see also id.* at 298 ("Some skeptics might wonder whether the figures for Wisconsin lawyers are lower than what would be true nationally. A 1991 national survey of members of the ATLA produces figures consistent with what I found in Wisconsin.").

80. To properly comprehend the significance of data presented in this article with regard to auto accident claiming rates, and in particular how claiming rates in Wisconsin differ from other states, it is important to have a basic understanding of the various types of state laws governing the bringing of claims based upon injuries sustained in auto accidents. There are three broad categories of such state laws: no-fault, add-on, and tort liability. For discussion of these categories, see Appendix G: Types of State Automobile Insurance Laws.

settlements and that, in turn, yields higher contingency-fee incomes and therefore higher effective hourly rates.[81]

On the basis of most measures of litigiousness, Wisconsin ranks as one of the least litigious states in the country.[82] One such measure is the incidence of automobile accident litigation, which accounts for approximately 60% of all tort litigation.[83] Automobile accident claimants may or may not secure lawyer representation in pressing their claims.[84] The greater the percentage of lawyer representation of auto accident claims, the greater the frequency of claims[85] and the higher the size of settlements, and therefore the higher the level of contingency-fee income.[86] Additionally, the greater the frequency and the higher the

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81. Kritzer acknowledges the relationship between cases involving "higher monetary stakes" and higher effective hourly rates of return. *See* Kritzer, *Seven Myths*, *supra* note 1, at 770, 783. In comparing the RAND data based on the CJRA study to Wisconsin data, Kritzer contemplates limiting his Wisconsin data to cases with $50,000 or more at stake which he acknowledges would substantially increase the effective hourly rates computed for Wisconsin. *Id.* at 771.

82. *See, e.g.*, U.S. CHAMBER OF COMMERCE, STATE LIABILITY SYSTEMS RANKING STUDY, at 14 tbl. 3 (2002) (reporting that Wisconsin is ranked 15th out of the 50 states as "evaluated by corporate America at doing the best job at creating a fair and reasonable litigation environment"). Effectively, the survey ranks Wisconsin as the 15th least litigious state in the nation.

83. *See* STEVEN K. SMITH ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ–153177, TORT CASES IN LARGE COUNTIES, at 2, tbl. 1 (1995) (reporting that a study of 378,314 tort cases disposed of by state courts in a one-year period ending in 1992 in the nation's 75 most populous counties indicates that auto torts accounted for 60.1% of the tort cases); AUTO CHOICE IMPACT, *supra* note 25; *see also* PAYING FOR AUTO INJURIES–1994, *supra* note 50, at app. 1, tbl. 4–4 (showing that the majority of tort claims filed in state courts are automobile claims).

84. Attorney involvement in BI claiming in 1997 ranged from 91% in New York City (a no-fault state with a verbal threshold) to 42% in Chicago. Attorney involvement in PIP claiming in 1997 was 12% in suburban Denver and suburban Detroit. *See* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE 63, 64 fig. 6–10 (1999). In several states, large differences occur between major cities. Thus, in Florida, 34% of PIP claimants occurring in Tampa were represented by lawyers compared with 51% in Miami; in Los Angeles, the figure was 72% of BI claimants represented compared with 49% for San Francisco and 48% for San Diego. In Pennsylvania, 84% of BI claimants in Philadelphia were represented compared to 44% in Pittsburgh. *Id.*

85. *See* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 70–73 (1999); *infra* note 94. The effect of lawyers on claiming activity is, of course, not limited to automobile accident litigation. For example, far higher claiming rates under the federal Longshore and Harbor Workers Compensation Act are realized in the Ports of Los Angeles and Long Beach, California than for essentially identical stevedoring operations in the Ports of Oakland and San Francisco. The reason for the differences in claiming activity is attributed to aggressive entrepreneurial behavior by lawyers in the Los Angeles and Long Beach ports. *See* Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 L. & SOC. INQUIRY 1, 40 n.136 (1994). Higher levels of workers compensation claiming in Southern California, where lawyers represented 55% of 1991 claims, up from 44% in 1985, than in Northern California, where lawyers represented 29% of 1991 claims, down from 34% in 1985, are similarly explained. *Id.*

86. One causal element accounting for higher settlement costs where there is lawyer representation of claimants is that the higher the frequency of lawyer representation, the greater the amount of medical cost build-up which results in higher settlements and therefore higher contingency fees. *See supra* notes 57, 59.

settlement value of claims, the more insurance companies pay out[87] and, therefore, the higher the cost of auto insurance.[88]

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87. In this footnote and several subsequent ones, reference is made to "r-squared" values as indicating high degrees of correlation between two sets of variables. The definition of r-squared is the square of r; r is often referred to as the "coefficient of correlation," and is a widely used statistic for describing the relationship between two variables. *See* THE ECONOMIST NUMBERS GUIDE: THE ESSENTIALS OF BUSINESS NUMERACY 111 (John Wiley & Sons, Inc. 1997). The value of r ranges from -1.00 to 1.00; an r measurement of 1.00 indicates a perfect positive relationship whereas 0.00 indicates the complete absence of a relationship. *Id*. The square of r, "r-squared," also known as the "coefficient of determination," ranges from 0 to 1.00 and indicates how much of the change in a dependent variable is explained by the change in a second, independent variable. *Id*. However, r-squared does not necessarily indicate a causal relationship between the two variables. Both variables may themselves be linked to a third, unknown variable which influences changes in both. *Id*.

An r value of 0.5 is generally regarded as a moderate indicator of a relationship between two variables, whereas an r value of 0.75 or higher is generally regarded as a strong indicator of a relationship. *See* FRED PYRCZAK, MAKING SENSE OF STATISTICS 55 (2001). An r of 0.5 equals an r-squared of 0.25; expressed as a percent, the r-squared value is 25%. That is, 25% of the variance in one variable is accounted for by the variance of the other variable. An r of 0.75, which equals an r-squared of 0.5625, indicates that 56.25% of the variance of one variable is accounted for by the variance of another variable. While there is no simple method of determining how high r-squared must be for the fit to be satisfactory, an r-squared of .50 (i.e., an r of .71) or higher may generally be considered a good indicator of a relationship between two variables. *See* A. H. STUDENMUND, USING ECONOMETRICS: A PRACTICAL GUIDE 47 (2d ed. 1992). By way of comparison, the predictive value of LSAT scores on first-year law school grades is .41, yielding an r-squared of .168; adding undergraduate GPA to the model yields median r of .49, r-squared = .24. LAW SCHOOL ADMISSION COUNSEL, LSAT & LSDAS REGISTRATION AND INFORMATION BOOK 121 (2003) (listing median correlation in 2001 at 181 law schools). When comparing variables in data sets collected from various states over a single period of time, as set forth *infra*, r-squared values of 50% or higher are, in fact, seen to indicate strong explanatory relationships. *See* PYRCZAK, *supra*, at 55. A regression analysis and "best fit" graph (on file with author) using data from INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 65–70 (1999) and TRENDS 2000, *supra* note 52, at apps. A & C (2000), shows a high correlation between the Average Loss Cost on BI claims and attorney involvement. The Average Loss Cost is the average amount of loss to the insurance company per year, per insured car, including those insured cars not in accidents. The data indicates that the higher the degree of attorney involvement, especially with BI claims, the more expensive the average claim will be to the insurance company. The equation generated for the best fit line is: $y=242.35x+3.5681$, and an r-squared of 0.642. A smaller, yet still substantial, correlation exists between attorney involvement and Average Lost Cost for both BI and PD claims. There, the best fit line is: $y=32.69x+55.094$, with an r-squared of 0.5411. The data used is for the years 1992 and 1997 and is for tort and add-on states**.** (Data for New Jersey and Pennsylvania are not included; these are "choice" states where the full-tort option might be considered a version of add-on and the limited-tort options, a form of no-fault. However, since the BI average-loss-cost data do not make a distinction between the two types of drivers, inclusion of New Jersey and Pennsylvania data would not be appropriate). For explanation of the terms "tort" and "add-on", see *infra* Appendix G: Types of State Automobile Insurance Laws.

88. The level of auto insurance premiums by state is a function of numerous variables. However, the variable that most accounts for variations in premiums is the percent of automobile accident claims for which there is lawyer representation. Forty percent of every premium dollar paid for bodily injury liability and uninsured motorist coverage goes to attorneys, see STAFF OF JOINT ECON. COMM., THE BENEFITS AND SAVINGS OF AUTO-CHOICE 3 (Comm. Print 1997) (citing CAL. DEP'T OF INS., AUTOMOBILE CLAIMS: A STUDY OF CLOSED CLAIM PAYMENT PATTERNS IN CALIFORNIA (1990)). A regression analysis to determine the correlation between the level of auto insurance premiums and the percentage of attorney representation, yields a best fit equation of: $y=635.92 \ x +177.52$, and an r-

In Wisconsin, the percentage frequency of lawyer representation of auto accident claims in 1997 was 31% compared to a national average of 38.8% and percentages ranging from 59-86% for the five highest jurisdictions;[89] for lawyer representation of bodily injury claims, the Wisconsin frequency was 38% compared to New Jersey[90] with 86%, the District of Columbia with 70%, and Maryland with 61%.[91]

Wisconsin's low frequency of lawyer representation in auto accident claims has many consequences—all of which point to lower contingency-fee incomes and therefore lower effective hourly rates of contingency-fee lawyers. One consequence is a lower incidence of bodily injury claims as a percentage of property damage claims (the BI:PD ratio).[92] Typically, depending at least in theory upon severity, auto accidents differentially give rise to claims for bodily injury. Significant variations in the ratios, however, occur between different cities and states, ranging from a low of 6% to a high of well over 90%. That is, in some areas, for every 100 auto accidents (PD claims), there are fewer than 10 BI claims, whereas in other

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squared of 0.574. The 1997 data for the regression analysis is for Tort and Add-on states and was drawn from INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS 65–70 (1999) and TRENDS 2000, *supra* note 52, at apps. A & C (2000). A regression analysis using 1992 and 1997 data combined provides a "best fit" equation of y=567.7x + 164 and an r-squared of 0.513. (Connecticut is included in the 1997 data but not 1992 because it switched from a no-fault state to a tort state in 1994. Also, New Jersey and Pennsylvania are excluded, as was the case in the correlation between Average Loss Cost on BI claims and attorney involvement, *see supra* note 87, because many drivers (about 40% in NJ and 44% in PA) have limited their right to pursue litigation.).

89. INS. RESEARCH COUNCIL, INJURIES FOR AUTO ACCIDENTS 69–70 (June 1999).

90. The high cost of auto insurance in New Jersey, see *infra* text at note 99, often wrongly attributed to the density of auto traffic in New Jersey, see, e.g., Steve Raynor, *Auto Insurance 'Reform' Really Isn't*, N.Y. TIMES, Apr. 22, 1990, at Sec. 12 NJ, p. 24 (stating that "the root problem of [New Jersey] insurance costs [is] road congestion"), has had significant political consequences in state elections. *See*, *e.g.*, Jennifer Preston, *New Jersey Tackles Geographical Limits For Auto Insurance*, N.Y. TIMES, Mar. 27, 1998, at B9 (stating that "voter anger over paying the highest auto insurance rates in the nation nearly cost . . . [the incumbent New Jersey governor] a second term."); Joseph B. Treaster, *An Escalating Blame Game Ensues Over the High Price of Auto Insurance*, N.Y. TIMES, June 1, 2001, at B2 ("Just across the Hudson River, [auto insurance] prices in New Jersey have been the highest in the country for several years and have been a big factor in recent gubernatorial elections."). However, it is not the density of drivers or driving that drives New Jersey's auto insurance rates but the density of lawyers and lawyer claiming.

91. INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 65–66 (1999). Attorney involvement tends to be higher for individuals who are able to pursue BI claims in no-fault states than in tort and add-on states. This is accounted for by the fact that no-fault laws prohibit some claimants with minor injuries from pursuing BI claims, *see infra* Appendix G: Types of State Automobile Insurance Laws; hence, those claims that are pursued tend to involve more serious injury and higher degrees of attorney participation occur for more serious injuries. Percentages for no-fault states range from a high of 91% in Michigan to a low of 54% in Kentucky. *Id*. at 68 fig. 6–13. For a discussion of Michigan's no-fault laws and its impact on BI claiming rates, see *supra* note 63.

92. For an explanation of the significance of the BI:PD ratio, see *supra* note 51.

localities, there are 99 BI claims per 100 PD claims.[93] The ratios are themselves a function of the frequency of lawyer representation of auto accident claims: the higher the frequency, the greater the quantum of auto accident claiming and the number of BI claims per 100 PD claims.[94]

Wisconsin's BI:PD ratio ranks well below the median for all of the states.[95] Moreover, far fewer Wisconsin auto accident victims file lawsuits than do those in many other states.[96]

Not only is Wisconsin's litigiousness rate well below the national median by various measures of states' litigiousness,[97] Wisconsin's

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93. *See supra* note 84; *see also* AUTO CHOICE IMPACT, *supra* note 25, at 8 tbl. 1 (noting that the BI to PD ratio in Los Angeles, CA is 98.8 per 100)*;* TRENDS 2000, *supra* note 52, at 21 fig. 7.

94. *See* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 70–73 (1999). The best fit equation for the relationship between the frequency of attorney representation of auto accident claims and the number of BI claims per hundred cars for tort and add-on states in 1997 is y=2.4357x+0.1988, and the r² value is 0.4968. A more meaningful measure of the effect of attorney representation is to relate it to the BI-PD ratio since this screens out extraneous influences such as higher accident rates in metropolitan areas. For tort and add-on states in 1997, the best fit equation is y=36.536x+14.843 and the r² value is 0.3131. The data for the frequency of attorney representation comes from INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 72–73 (1999) and INS. RESEARCH COUNCIL, AUTO INJURIES: CLAIMING BEHAVIOR AND ITS IMPACT ON INSURANCE COSTS 49 (1994). Data on claiming rates comes from TRENDS 2000, *supra* note 52, at app. A.

95. Wisconsin's ratio in 1998 was 26.5, compared to the nationwide average of 28.7, ranking Wisconsin 26th out of 51 jurisdictions (50 states plus the District of Columbia). TRENDS 2000, *supra* note 52, at 21.

96. In Wisconsin, only 7% of bodily injury claimants file lawsuits compared to 20% in California and 26% in Pennsylvania. INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 72–73 fig. 6–15 (1999). For this category, Wisconsin ranked 7th lowest of 40 tort and add-on jurisdictions studied. *Id*. Over a recent ten-year period, auto-accident-generated bodily injury claim losses increased 96% in Wisconsin compared to a national average increase of 146% and such high-end increases as 357% in Massachusetts and 325% in Delaware. *See* ALL-INDUSTRY RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTOMOBILE INJURIES IN THE UNITED STATES 55–56, tbl. 5–2 (1989) (data on bodily injury loss costs for the period 1977–1987). The average loss from bodily injury per insured car is another measure of litigiousness. "Average Injury Loss Costs" is a measure of the average amount of loss (to the insurance companies) from bodily injury per year, per insured car—including those that are not involved in accidents. *See* TRENDS 2000, *supra* note 52, at 2. In 1997, Wisconsin had the 14th lowest average injury loss costs in the country. *See id.* at 53 fig. 28. Another measure is "average property damage loss cost." *See supra* note 53. As indicated, Wisconsin is one of six states that is furthest below the national average.

97. *See, e.g.*, David Frum & Frank Wolfe, *If you gotta get sued, get sued in Utah*, FORBES, Jan. 17, 1994, at 70, in which Wisconsin ranked 40th of 51 jurisdictions (50 states plus Washington, D.C.) in measures of litigiousness. One measure was the average malpractice premium for orthopedic surgeons; in Wisconsin, it was $8,111 (40th of 51 jurisdictions), compared to the three highest jurisdictions: Michigan ($108,762), Florida ($73,788), and New York ($65,451). *Id*. at 72–73. By another measure, the amount spent by the chief justice to win a recent re-election, Wisconsin candidates spent $1,914 and caused the state to rank 17th of 34 jurisdictions, compared to the five highest jurisdictions: Texas ($2,646,389), Ohio ($967,953), Alabama ($670,687), Louisiana ($540,933), and Florida ($375,983). *Id*. Of the 34 jurisdictions, 10 were listed as $0 and three at less than $500. See *infra* Appendix E: The Role of State Supreme Courts in Tort Reform Wars for a discussion of the significance of state supreme court election contests in the tort wars. Another measure was the number of members of a state's trial lawyers association per 100,000 population;

claiming behavior has been decreasing over the past 18 years even as the BI:PD claiming rate for most states has been increasing.[98]

Because of Wisconsin's low-end claiming rates, we would expect Wisconsin's auto insurance rates to be well below national averages; and indeed, that is true. In 1997, Wisconsin's estimated average automobile insurance premium was $573, the fifth lowest of the 50 states, compared to a national average of $785; the four highest states were New Jersey ($1,171), New York ($1,146), Hawaii ($1,090), and Rhode Island ($1,020).[99]

An additional surrogate for lawyers' contingency-fee incomes is personal injury verdicts and settlements. For the period 1995-2001, while the median national compensatory award was $41,380, the median for Wisconsin was $11,943.[100]

Attitudinal differences between Wisconsin residents and those of more urbanized areas of the country account for some of Wisconsin's low rankings on scales of litigiousness. In a survey of the appropriateness of lawyers providing referrals to their clients to medical providers,[101] respondents from the geographical area that included Wisconsin expressed

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Wisconsin with 21.4 was ranked 48th of 51 jurisdictions. Frum & Wolfe, *supra*, at 72–73. Wisconsin also has fewer accidents overall, relative to the population of drivers, as measured by the ratio of the number of PD claims to insured cars in the state. In Wisconsin this ratio (per 100 insured cars) is 3.14, which is second only to Wyoming for the lowest in the country. *See* TRENDS 2000, *supra* note 52, at 5, 12, 13 fig. 3. Another measure of litigiousness not considered in the FORBES article is the proportion of million-dollar awards to the total number of awards rendered in each state for tortious injury. In the period 1995–2001, the national average was 12%, whereas Wisconsin's percentage was 7%. *See* JURY VERDICT RESEARCH, CURRENT AWARD TRENDS IN PERSONAL INJURY 40–41 (Catherine Thomas ed., 2002) [hereinafter JVR, CURRENT AWARD TRENDS 2002] (Jury Verdict Research maintains a nationwide database, to which verdicts are furnished by court clerks, attorneys, and independent contractors, and then verified). At the high end of the scale were: New York (27%), Pennsylvania (20%), Louisiana (19%), Nevada (19%), New Jersey (19%), Massachusetts (18%), Texas (17%), Utah (16%), and West Virginia (16%).

98. From 1980 to 1998 there was, on average, a 33% increase in BI claims per 100 insured cars, with 4 states' increases in triple digits. Only four states experienced decreases during the same period, and the largest decrease, 16%, was experienced by Wisconsin. *See* TRENDS 2000, *supra* note 52, at 19 fig. 6.

99. *See* STAFF OF JOINT ECON. COMM., 105TH CONG., THE BENEFITS AND SAVINGS OF AUTO CHOICE 9–10 tbl. 2 (Comm. Print 1997) (Dan Miller). The four states with estimated average automobile insurance premiums for 1997 lower than Wisconsin are Idaho ($559), Maine ($529), North Dakota ($517), and Iowa ($512). *Id*. All estimates are based on a 1997 study which appears in STEPHEN CARROLL & ALLAN F. ABRAHAMSE, THE EFFECTS OF A CHOICE AUTOMOBILE INSURANCE PLAN ON INSURANCE COSTS AND COMPENSATION (1997).

100. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 35–36. The figures for other states were much higher: New York ($300,000), South Dakota ($122,957), New Jersey ($150,000), Minnesota ($110,000), Louisiana ($105,589), and Pennsylvania ($100,000).

101. For a discussion of the incidence and significance of lawyer selection of clients' doctors or chiropractors, see *supra* note 57.

the least tolerance for such activity.[102] Another finding of that survey is that rural residents, such as those who populate much of Wisconsin,[103] are far more likely to reject padding an auto accident claim in order to make up for the payment of past premiums than are residents of large cities.[104]

In view of these measures of litigiousness, one would no more seek out Wisconsin data as indicative of tort-system trends as one would for trends in illegal immigration, air pollution, or women's fashion. To paraphrase a political slogan that was *au courant* during the 1940s and 1950s, "As goes Wisconsin, so goes . . . Wisconsin." The focus of tort litigation in the United States is in jurisdictions such as the District of Columbia, Texas, Alabama, Florida, Mississippi, West Virginia, California, Rhode Island, and Hawaii, along with parts of New Jersey, Massachusetts, Pennsylvania, New York, Delaware, and elsewhere; these are areas which have litigiousness measures that are multiples of those for Wisconsin. Since lawyers' contingency-fee incomes are a function of tort-claiming activity, even accurate Wisconsin contingency-fee data would not be representative of lawyers' contingency-fee incomes elsewhere.

F. The RAND Data

In addition to his Wisconsin data, Kritzer also presents effective hourly rate data for a sample of cases litigated in federal district courts in the early 1990s which is based upon unpublished data extracted from a RAND Corporation study of the operation of the Civil Justice Reform Act.[105] The RAND study included a follow-up survey of lawyers involved in the sample cases enabling identification of those lawyers who reported being

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102. *See* INS. RESEARCH COUNCIL, PUBLIC ATTITUDE MONITOR 1995 52–53 (1995) [hereinafter PUBLIC ATTITUDE MONITOR 1995]; *see also id*. at app. 2 (indicating that the East North Central region is comprised of the states of Illinois, Indiana, Michigan, Ohio, and Wisconsin).

103. See *supra* notes 49–58 for a discussion of the correlation between degree of urbanization and higher verdicts.

104. Whereas 19% of rural area residents surveyed approved claim padding and 77% disapproved, 31% of large city residents approved and 49% disapproved. PUBLIC ATTITUDE MONITOR 1995, *supra* note 102, at 59.

105. See Kritzer, *Seven Myths*, *supra* note 1, at 743 for a discussion of the RAND study. *See also* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996) [hereinafter KAKALIK ET AL.]. The RAND data omits asbestos cases. No reason is given for that omission. Because asbestos cases are especially lucrative and were quite numerous in the early 1990s in federal courts, the effect of this omission is to substantially understate both median and average effective hourly rates. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, Bulletin NCJ 172855, FEDERAL TORT TRIALS AND VERDICTS, 1996–97, at 2 (1999) (stating that tort cases terminated in U.S. district courts increased significantly in 1991 because of "a rise in asbestos filings during 1990 that were terminating in 1991"). For a brief discussion of asbestos litigation, see *supra* notes 1, 27.

paid on a contingent-fee basis and capturing information from the lawyers of the estimated time they had spent on the sampled cases and the fees they received.[106] Based upon that unpublished data, Kritzer calculated the following effective hourly rates for lawyers being paid on a contingent fee basis:[107]

	Mean Effective Hourly Rate	Median Effective Hourly Rate
1991	$425	$127
1992-1993	$236	$108

Thus, the mean effective hourly rate calculation based on 1991 RAND data is more than 75% higher than Kritzer's original Wisconsin data calculation.[108] In presenting the RAND data, Kritzer revised upward the mean effective hourly rate that he had previously calculated based upon his Wisconsin data,[109] and thus reduced the disparity to 23%. These refinements allowed him to conclude that "the Wisconsin survey [data] are not significantly out of line" with the RAND data.[110]

In the following section, I analyze other data from which effective hourly rates can be calculated and conclude that there is a substantial disparity between the effective hourly rates of contingent-fee lawyers and their hourly rate counterparts.

V. A COMPARISON OF HOURLY RATES OF CONTINGENCY FEE AND DEFENSE LAWYERS

Kritzer's conclusion that the effective hourly rates of contingency-fee lawyers is approximately equal to defense-attorney rates is contradicted by other data indicating far higher effective hourly rates for contingency-fee lawyers in tort litigation than for their hourly rate counterparts on the defense side.

The richest and most well mined data source with regard to tort litigation and attorneys' fees are studies of auto accident litigation and

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106. Kritzer, *Seven Myths*, *supra* note 1, at 743–53. Kritzer suggests that the RAND data overestimates the effective hourly rates he calculated. *Id*. at 770.

107. *Id.* at 771. The 1991 sample is of cases terminated in 1991 while the 1992–1993 data is of cases terminated by January 1996. *Id.* at 770. No ready explanation exists for the substantial disparity between the 1991 and the 1993 data. Apparently, there were simply an abundance of high value cases terminated in 1991 as compared to the cases filed in 1992–1993 and terminated by January 1996.

108. *See supra* note 70 and accompanying text.

109. *See supra* note 72 and accompanying text.

110. Kritzer, *Seven Myths*, *supra* note 1, at 771–72.

insurance payments. Though the availability of this data makes it possible to estimate the effective hourly rates of contingency-fee and defense attorneys in auto accident litigation with reasonable reliability, there is considerable reason to believe that these rates are far below effective hourly rates generated by contingency-fee lawyers in other, more lucrative, areas of tort claiming. Indeed, there are data indicating that the higher the percentage that auto accident representation represents of contingency-fee lawyers' caseloads, the lower the income compared to lawyers with lower percentages of auto accident claims in their portfolios.[111] The latter constitute a distinctly separate tier of contingent-fee lawyers, probably amounting to 25-33% of those who substantially limit their practice to tort claiming,[112] and who are the most frequent

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111. *See* Daniels & Martin, *Plaintiffs' Practice in Texas*, *supra* note 42, at 1789 tbl. 4 (finding that contingency-fee lawyers' incomes were inversely proportional to the percentage of their caseload that consisted of auto accident representation). Of the highest income quartile of lawyers surveyed, "over 40% . . . handle no automobile cases." *Id.* at 1794.

112. Empirical data supporting the existence of a substantial upper income tier of contingency-fee lawyers which is realizing increasing incomes, even as lower income tiers have experienced negative impacts on their income, is included in Daniels & Martin, *Plaintiffs' Practice in Texas*, *supra* note 42. In that study, the authors divided the 552 Texas contingency-fee lawyers surveyed into four roughly equal quartiles based upon the "reported average case value" of the lawyers' case portfolios 12 months prior to the survey. *Id.* at 1786. For the lowest quartile, the authors concluded that tort reform and changes in public perception in Texas with regard to abuses in the tort system had significantly impacted their incomes; their median case values declined from $10,000 to $7,500 over a five-year interval in the late 1990s, *id.* at 1823, and their net income declined by about 20%. *See id.* at 1824. For the top-income quartile, however, "the situation was quite different. Their average case value increased from a median of $400,000 five years before the survey to $700,000 at the time of the survey." *Id.*; *see also* Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 207 (2001) (stating that "there is a top tier of the torts bar"). Kritzer also has come to recognize the existence of a top tier of contingent-fee lawyers earning substantially higher effective hourly rates than the rest of the pack. He states that "contingency fee work can be very lucrative, particularly for those lawyers who develop expertise and processes for handling large numbers of cases. The high profitability comes from locating a small segment of the cases that produce extremely good returns on the lawyer's investment of time." Kritzer, *Seven Myths*, *supra* note 1, at 772; *see also* Kritzer, *The Wages of Risk*, *supra* note 17, at 304 ("A very small group of firms are able to establish reputations that permit them to be extremely selective in the cases they pursue. They can choose either cases that are virtual sure things or cases that have very high potential payoffs."). In another place, Kritzer states:

> While the vast majority of claims handled by lawyers are well below six figures, today we are seeing cases that can involve nine, ten, or eleven, or in the case of the tobacco litigation, twelve figures . . . . While these are extreme, they do epitomize the gap that has developed between routine and even very significant litigation . . . and extraordinary cases. What is significant here is that the biggest are getting so big as to represent a different world entirely. . . .

Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227 (2001). For my effective rejection of Kritzer's position that this top tier is limited to a "very small group of firms," see *supra* note 14 and Appendix F: The Increasing Frequency of Million Dollar Fees in Personal Injury Litigation.

recipients of windfall fees.[113] Calculating effective hourly rates of contingency-fee lawyers based exclusively on auto accident claiming data specialities will therefore considerably understate the incomes of lawyers with other practice specialties. If one were seeking to find the effective hourly rates of the top tier of contingency-fee lawyers, one would focus on the relatively small segment of high-end auto accident claiming as well as such practice areas as products liability,[114] airline crash litigation,[115] and medical malpractice,[116] where tort awards and settlements tend to be the

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113. For discussion of windfall fees, see *supra* note 14.

114. In a study of litigation in San Francisco, California (SF), and Cook County, Illinois (CC), the expected verdict in some types of civil trials rose as much as five-fold from the early 1960s to the early 1980s. The "expected verdict" measures the outcomes across all civil trials and is calculated by multiplying the average award, including those where the plaintiff lost, by the percent of cases in which an award was made. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 25–26. The jury awards tables are adjusted for inflation and stated in terms of 1984 dollars:

Case Type	Place	1960s	1980s
Product Liability	SF	$ 56,000	$ 575,000
	CC	76,000	414,000
Medical Malpractice	SF	34,000	616,000
	CC	13,000	566,000
Work Injury	SF	96,000	221,000
	CC	91,000	278,000
Auto Accident	SF	28,000	91,000
	CC	19,000	59,000
Injury on Property	SF	29,000	206,000
	CC	25,000	168,000

Id. at 26 tbl. 3.5. Thus, product liability verdicts were the second highest of the personal injury practice areas listed. *See id.*

115. *See* Brickman, *Contingent Fees*, *supra* note 7, at 76 n.186 (describing contingency fees generated by a 1979 airline crash).

116. The average jury verdict in medical malpractice claims is the highest for any category of personal injury case. In 1984, it was $1,162,000 in San Francisco and $1,179,000 in Cook County, Illinois. PETERSON, CIVIL JURIES, *supra* note 50, at 21–22. The average automobile accident recovery in Cook County in 1984 was $88,000 and the median was $7,000. *Id.* Thus, the average medical malpractice verdict was more than ten times the average automobile injury verdict. *See id.* The median medical malpractice award climbed 60% between 1993 and 1999 from $500,000 to $800,000, and the median medical malpractice settlement climbed 63% between 1993 and 1999 from $400,000 to $650,000. Tanya Albert, *Malpractice Awards Pushing Insurance Premiums Higher*, AM. MED. NEWS, Mar. 5, 2001. Further, the proportion of million-dollar jury awards increased six percentage points from 39% in 1997 to 45% in 1998–1999. St. Paul Companies, a nationwide insurer of physicians, reported that the number of claims in the $1 million range ("catastrophic claims") doubled, rising from 27 in 1999 to 54 in 2000. *Id.* "While the number of malpractice suits ha[d] been holding steady," the average jury award for medical malpractice had risen 79% to $3.49 million in 1991 from $1.95 million in 1993. Joseph B. Treaster, *Malpractice Rates Are Rising Sharply; Health Costs Follow*, N.Y. TIMES, Sept. 10, 2001, at A1. Further, according to Medical Underwriters of California, California juries awarded more than $1 million in 39 malpractice suits in 2000, which was an increase from the 28 awarded in 1993. *Id.* The average award in California rose to $2.9 million in 2000 from $2 million in 1993. *Id.* Nationwide, the median medical malpractice award has more than doubled over the last five years, increasing from $474,536 to $1 million. *See* Steven Malanga, *Tort Turns Toxic*, CITY J., Oct.

highest, thus yielding the highest effective hourly rates.[117] The practice areas where one would expect to find the lowest effective hourly rates are the more mundane tort actions such as slip-and-fall cases and the general run of the mill auto accident cases—the latter constitute the largest share of auto accident claiming, which itself accounts for 60% of all tort claims.[118]

2002, at 77 (citing to Jury Verdict Research). *See also* National Association of the State Jury Verdict Publishers, *Jury Verdict Summaries*, *at* http://www.juryverdicts.com/articles/jvnw2.html (reporting that of the 272 verdicts reported in the state of Washington in 1997, the average medical malpractice verdict was $974,918 whereas the average verdict in transportation cases was $45,944; thus, the average medical malpractice verdict was more than twenty times higher than the average auto injury verdict). For additional data on medical malpractice verdicts, see *infra* notes 201–08.

    To be sure, average verdicts are not a precise surrogate for lawyers' hourly rates of return. Medical malpractice litigation generates a lower win rate than does other tort litigation. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 45–47 (indicating that while the frequency of plaintiffs' recoveries in tort litigation was 57% in 2001, it was 68% in vehicular liability litigation, 56% in products liability litigation, 51% in premises liability litigation and 39% in medical malpractice litigation). In addition, medical malpractice cases are more complex than most automobile accident cases and require considerably more time per case. Nonetheless, it is readily apparent based upon the San Francisco and Cook County data, that the difference between standard medical malpractice contingency fees approximately averaging $375,000 versus $26,700 for auto accident cases, is not entirely accounted for by the increased amounts of time required for medical malpractice cases and the lower win rates. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 21 tbl. 3.2. As indicated above, see *supra* note 116, average medical malpractice verdicts have been rising at a substantial rate and thus the difference in comparative contingency fees has also been rising. However, any calculation of effective hourly rates in medical malpractice litigation would have to be adjusted to reflect the higher loss ratio in trials as compared to other personal injury litigation. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97. Substituting product liability litigation where plaintiff lawyers have a better win/loss ratio at trial, see *id.*, yields substantial differences between average contingency fees in such litigation versus automobile accident litigation.

    117. As indicated in the chart set forth in *supra* note 114, the average expected verdict, which takes plaintiff losses into account, in auto accident cases in San Francisco and Cook County in 1984 dollars was approximately $75,000, whereas for product liability it was approximately $495,000. *See supra* note 114. As discussed in *supra* notes 114 and 116, the higher verdicts awarded in medical malpractice and product liability cases do not translate, commensurately, into higher lawyers' effective hourly rates of return. Increased times expenditures in product liability claiming versus auto accident litigation limits any direct translation of the 6.6 times higher expected verdict in product liability than in auto accident cases, into comparable effective hourly rate ratios. Nonetheless, it is reasonably apparent that the differences in the expected verdicts are not entirely offset by the time expenditure differences.

    118. While auto accident litigation accounts for approximately 60% of all tort litigation, see *supra* note 83 and accompanying text, some auto accident claims generate substantial judgments. The available data indicates that the average recovery far exceeds the median recovery. A relatively small number of auto accident claims generate judgments which far exceed both the average and median judgments of the very large remaining portion of accident claims. The latter involve relatively modest amounts of recovery. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 11 (stating that between 1995 and 2001, 60% of the verdicts reported were from cases of vehicular negligence, the median verdict was $17,500, but the mean award was $231,587). *Id.*; *see also* PETERSON, CIVIL JURIES, *supra* note 50, at 21–22 (reporting that the average auto accident recovery in Cook County, Illinois in 1984 was $88,000 but the median was $7,000; that is, half of all contingency fee cases in Cook County in 1984 involved gross recoveries of less than $7,000, and a substantial portion of the

Accordingly, searching out income data for the higher yielding areas of contingency-fee practices and then estimating how this translates into effective hourly rates of return would be the most effective strategy for assessing whether the effective hourly rates thus determined are inordinately high. However, little such data is available.[119] Consequently, we know very little about income generated by contingency fees.[120] Instead, we are largely relegated to the one area of lawyer practice which, though generating the lowest effective hourly rates, is the most studied and offers the most data: auto accident claiming.[121]

One study of lawyers' fees generated by auto accident claiming, published by the Joint Economic Committee of the Congress, calculated total dollars paid to auto accident claimants and then used available data to estimate the percentage paid to plaintiff and defendant attorneys.[122] The study concluded that in 2001, attorneys' fees in auto injury cases totaled $16.74 billion. The respective total fees gained by plaintiff and defense attorneys were:

Plaintiff Attorneys: $11.93 billion
Defense Attorneys: $4.82 billion[123]

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recoveries above the median did not exceed the median by a wide margin).

119. *See infra* Appendix F: The Increasing Frequency of Million Dollar Fees in Personal Injury Litigation for discussion of high end contingency fee incomes, and see text accompanying *infra* note 314, describing I.R.C. § 6045(f) (2000) and how it may be used to generate data on contingency fee incomes.

120. *See supra* notes 75–78; *infra* Appendix C: The Hidden Ball Trick: A Comparison of Baseball and the Tort System. I previously estimated that gross annual income from contingency fee financed tort litigation exceeded $10 billion in 1989. *See* Brickman, *Contingent Fees*, *supra* note 7, at 76 n.186. Given the continued expansion of the scope of liability assessed under the tort system, as well as the huge increases since then in asbestos litigation, the fees in the tobacco litigation settlements, see *infra* note 312, the growth of mass tort litigation, see Brickman, *Aggregative Litigation*, *supra* note 27, at 244–46; Lester Brickman, *Anatomy of a Madison County (Illinois) Class Action: A Study of Pathology*, 6 CIV. JUST. REP. 4 (Manhattan Inst., New York, N.Y.) (Aug. 2002) [hereinafter Brickman, *Class Action*]; and other tort-based class action litigation, see *infra* note 311 (giving examples of class action fees), I would raise that estimate today to in excess of $22 billion per year.

121. This data is available because the insurance industry and several government agencies collect and publish substantial amounts of data regarding auto accidents and insurance costs.

122. *See* STAFF OF JOINT ECON. COMM., 108th CONG., CHOICE IN AUTO INSURANCE: UPDATED SAVINGS ESTIMATES FOR AUTO CHOICE (Comm. Print 2003) (Dan Miller) app. A, at 14–19. The methodology used was as follows:

The basic approach for plaintiff attorneys is to calculate total dollars paid to claimants, and then to estimate what percentage ends up going to pay attorneys' fees. For defense attorneys, published data on defense costs are broken down to identify the portion related to personal injury cases. The results . . . are a rough approximation only. . . . [T]hese calculations draw on data from different sources and sometimes from different years, depending on data availability.

Id. at 14.

123. *Id.* at 14 tbl. A–1.

According to Kritzer and others, contingency-fee plaintiff lawyers and hourly rate defense lawyers devote roughly equal amounts of time to the same tort cases.[124] Accordingly, on the basis of the calculation of plaintiff and defendant lawyer total fees in auto accident litigation, contingency-fee lawyers' effective hourly rates of return in auto accident cases are approximately two-and-one-half times that of (hourly rate) defense lawyers. Given that hourly rates of lawyers retained by auto insurance companies to represent insureds approximate $145,[125] plaintiff lawyers' estimated effective rates in auto accident litigation average $325 an hour.[126]

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124. "[T]he median hourly [rate] lawyer spent slightly more time on a case than the median non-hourly [i.e., contingency-fee] lawyer, but the difference is not statistically significant." David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, & Joel B. Grossman, *The Cost of Ordinary Litigation*, 31 UCLA L. REV. 72, 108 (1983) [hereinafter Trubek et al., *Cost of Litigation*]. In another study, Kritzer and others tested the hypothesis that hourly rate lawyers will overinvest in tort litigation while the contingent-fee lawyer will underinvest. *See* Herbert Kritzer et al., Economic Incentives and Lawyer Behavior: The Impact of Fee Arrangement on Lawyer Effort (1983) (University of Wisconsin, Dep't of Political Science), *cited in* Trubek et al., *Cost of Litigation*, *supra*, at 109 n.68.

> That analysis found that for the relatively modest case (i.e., involving $6,000 or less) the contingent fee lawyer spends significantly less time than the hourly fee lawyer, though neither lawyer would spend very much time on a case of this size; the differential ranges between seven and twelve hours. In the balance of the range we examined ($7,000 through $100,000), we found no statistically significant differences in the amount of time lawyers paid on contingent and hourly fee bases devote to cases.

Trubek et al., *Cost of Litigation*, *supra*, at 109.

125. I am basing my estimate of the average hourly rates paid to lawyers retained by auto insurance companies to defend insureds on confidential information provided by two major insurance companies. Representatives of both companies estimated that the hourly rates they were paying ranged from $140 to $150. (These estimates were a blend of the actual average hourly rate being paid, taking into account geographical differences in case volumes and amounts of time required). Averages for other insurance defense work were higher. For example, one company estimated that hourly rates for professional malpractice defense ranged from $150 to $600 and averaged "just under $200." That estimate was influenced by the fact that more professional malpractice insurance is written in high population areas, where professionals congregate, e.g., California, Florida, Texas and New York. For Directors and Officers (D&O) insurance, the hourly rates were the highest being paid and depended upon whether, per the policy, the insurance company selected the lawyer or the insured. For the former, rates ranged from $200 to $450 an hour; where the insured selected counsel, rates were higher, ranging up to $600 an hour. *See* Kritzer, *Seven Myths*, *supra* note 1, at 764 (indicating that "[a]n examination of the hourly rates reported by insurance defense lawyers in the economic surveys of state bars during the mid-1990s showed that these rates tended to be in the $80- to $100-per-hour range"). Kritzer also computed an hourly rate of $144 for lawyers working on an hourly basis in 1992–93 by using data compiled by the RAND Institute for Civil Justice. *See id.* at 765 (citing Kakalik et al., *supra* note 105, at 283).

126. This estimated effective hourly rate is calculated by multiplying $145 by 2.475 (the ratio calculated by the study) yielding approximately $359 per hour. On the assumption that 10% of the total time spent by plaintiff lawyers on auto accident representation does not generate fee income, see *infra* Appendix H: Tort Lawyers' Frequency of Prevailing in Litigation, then the effective hourly rate in all auto accident litigation is approximately $325.

Other more lucrative tort actions such as product liability, medical malpractice, and aggregated litigations in which contingency fees, instead of being a few thousand to tens of thousands of dollars as in most auto torts, often range from hundreds of thousands to millions and even tens of millions of dollars,[127] generate effective hourly rates that are multiples of $325 an hour.

VI. THE FUNDAMENTAL MISPERCEPTION OF THE ETHICAL AND FIDUCIARY RULES REGULATING CONTINGENCY FEES

Quite apart from the flawed data, Kritzer's contention that effective hourly rates of contingency-fee practitioners are not inordinately high fails to take into account the ethical underpinnings for contingency fees and the fiduciary duties that apply to lawyers. Fiduciary law and ethical codes limit lawyers' fees to reasonable amounts. Contingency fees, which are intended to and do generate higher fees than hourly rate fees, are justified only if the lawyer bears a commensurate risk of no or low recovery in light of the estimated measure of investment.[128] If contingency-fee lawyers' effective hourly rates far exceed amounts commensurate with the risks being undertaken by the lawyer—as they often do—then the fees fail the test of reasonableness. Kritzer acknowledges that some contingency fees amount to very high effective hourly rates and cites as an example the reputed $420 million fee earned by Joe Jamail from the *Pennzoil v. Texaco* case.[129] Kritzer's choice of this example as a counter to my argument that effective hourly rates have become inordinately high, suggests a lack of familiarity with the ethical regime that governs the charging of contingency fees.[130] It is not the size of the fee but whether the fee is justified by the risk assumed. The *Pennzoil* litigation involved a high

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127. *See supra* notes 114–17.

128. For a discussion of the ethical issues, see *supra* notes 7–8; *see also* Brickman, *Contingent Fees*, *supra* note 7, at 94.

129. Pennzoil, Co. v. Texaco, Inc., No. 84–05905 (151st Dist. Ct., Harris County, Tex. 1985) (awarding Pennzoil $7.53 billion in compensatory damages and $3 billion punitive damages for Texaco's tortious interference with a merger agreement between Pennzoil and Getty), *cited in* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 1 n.1; *see also* Andrew Blum, *The $400 Million Man?*, NAT'L L.J., Sept. 26, 1988, at 2 ("[A]ttorneys involved . . . will say Mr. Jamail got $290 million to $300 million. But some Texas lawyers venture to say it was more like $400 million.").

130. For a fuller discussion of ethical rules and fiducial rights pertaining to contingent fees, see Brickman, *Contingent Fees*, *supra* note 7, at 44–74; *see also* Brickman, *Money Talks*, *supra* note 7, at 270–75. A similar lack of comprehension of the ethical and fiducial regimes governing the charging of contingent fees is exhibited in Lynn A. Baker, *Facts About Fees: Lessons for Legal Ethics*, 80 TEX. L. REV. 1985 (2002).

degree of risk;[131] indeed, few lawyers expected Pennzoil to prevail and fewer still foresaw even the remote possibility of so enormous an award of damages.[132] Though Jamail's fee likely generated effective hourly rates of return of tens of thousands of dollars, it was ethically justified by the substantial risk he faced when he undertook the case and the amount of effort he reasonably anticipated at that time that he would have to expend. Accordingly, the Jamail fee does not appear to violate the ethical rule or the fiduciary principle limiting fees to reasonable sums and is not an example of the inordinately high effective hourly rate fees that I have criticized as violating both ethical and fiducial standards.[133]

An example of an unjustifiable risk premium which does violate those standards is the 1989 Alton, Texas school bus tragedy in which a $122 million partial settlement yielded attorney fees of more than $40 million despite the complete absence of any meaningful litigation risk.[134]

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131. Under Texas's conflict of law principles, it is apparent that New York law should have governed. Under New York law, the critical question affecting the validity of the alleged contract between Pennzoil and Getty depended upon the intent of parties: did the parties intend to enter into a contract at the time of the agreement without awaiting the formal signing of a final document or did they intend to wait until every "i" was dotted and every "t" was crossed and the document was reduced to its final form. *See* Schwartz v. Greenberg, 107 N.E.2d 65 (N.Y. 1952). Since no formal contract had been signed, Pennzoil, in order to prevail, would have to surmount what appeared to be a formidable legal hurdle. On an *ex ante* basis, the likelihood of prevailing appeared quite improbable. Pennzoil, of course, did prevail, its lawyers successfully arguing that whatever the case in New York, in Texas a handshake was as good as a signed contract. But this did not accord with New York law which should have governed. Accordingly, the legal nuances are unclear. Perhaps the core legal issue was not resolved on the basis of New York law. For example, it has often been brooded about that extraneous factors affected the outcome. One such factor mentioned was the evidence of campaign contributions to Texas judges at a time when they were sitting on cases in which one or both parties were represented by contributing lawyers. In 1984, Joe Jamail, Pennzoil's lead attorney, contributed $10,000 to State District Judge Anthony Farris' campaign at about the same time the Texaco case was assigned to Farris' court. *See* David Warsh, *Judicial Politics in Houston*, BOSTON GLOBE, Mar. 25, 1987, at 65. The $10,000 contribution was the largest given Farris in 1984. *Id.* A study indicates that between January 1990 and June 1994, sitting State Supreme Court Judges in Texas and plaintiffs' lawyer-backed candidates for the state courts received in excess of $4 million from plaintiffs' lawyers. *See* AM. TORT REFORM ASS'N, "AMERICA'S THIRD POLITICAL PARTY": A STUDY OF POLITICAL CONTRIBUTIONS BY THE PLAINTIFF'S LAWYER INDUSTRY 7 (1994); *see also Attorneys Gave Millions to Politicians, Study Says*, FT. WORTH STAR-TELEGRAM, Sept. 14, 1994, at 24 (describing the study above). For criticism of this practice, see Darrell Keith, *Texas' Faulty Judicial Selection System: A Call for Reform*, FORT WORTH STAR-TELEGRAM, July 24, 1994, at 5; *Sixty Minutes: Justice For Sale* (CBS television broadcast, Dec. 6, 1987).

132. *See, e.g.*, J. Michael Kennedy, *Texaco Ordered to Pay Pennzoil $10.5 Billion Over Getty Oil Dispute*, L.A. TIMES, Nov. 20, 1985, at A1 (reporting that a Texaco lawyer reacting to the verdict stated "I think you could say we were surprised, shocked and astounded").

133. I am, of course, not condoning the acts described in *supra* note 131.

134. *See generally* BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 55 n.24. The final settlement total was more than $150 million. *See* Tony McAdams, *Blame and The Sweet Hereafter*, 24 LEGAL STUD. F. 599, 607 (2000). Contingency fee percentages ranged from 30% to 45%. *See* James Pinkerton and Glen Golightly, *The Spoils of Tragedy; Profiting on Disaster*,

Seventeen of the twenty-one claims involving the death of a child were settled for $4.5 million each; the reported 40% contingency fee yielded attorney fees of at least $1.8 million per client.[135] Since most of the attorneys did not participate in the settlement negotiations, and only limited preparatory work was undertaken because liability was clear, and, in addition, the likelihood of a trial was remote,[136] a liberal estimate of the time expended by most of the attorneys would be fifty to seventy-five hours.[137] Accordingly, a conservative estimate of the hourly rate of attorney compensation would be $25,000-$30,000.[138] The attorney fees charged in this case were ethically improper,[139] but not because of the

HOUSTON CRON., Aug. 2, 1992, at A1 (reporting rates of 30% to 40%) [hereinafter Pinkerton & Golightly]; Lisa Belkin, *Where 21 Youths Died, Lawyers Wage a War*, N.Y. TIMES, Jan. 18, 1990, at A1 (reporting rates as high as 45%) [hereinafter Belkin]. For commentary on charging such high contingency fees in cases without meaningful risk or requiring significant effort, see *supra* note 14.

135. BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 55 n.24; *see also* Pinkerton & Golightly, *supra* note 134, at A1 (reporting that at least one attorney represented "a number of families").

136. The bus collided with a Coca-Cola Bottling Company truck. Consider how Coca-Cola's advertising campaign that "things go better with Coke," undoubtedly costing hundreds of millions of dollars, would have contrasted with the national publicity attendant at a trial involving claims of wrongful death of twenty-one school children; that would have been disastrous to the company's image. Thus, even if the company could have reasonably contested liability, it almost certainly would not have done so.

137. *See* BRICKMAN ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7, at 55 n.24.

138. *Id.*

139. In addition to charging contingency fee rates that were grossly excessive by any conceivable measure of ethical validity, and thereby taking advantage of the Hispanic parents, there were allegations that some of the attorneys who descended on the community to sign up clients knowing that million dollar plus fees were available without risk and with little effort, paid or promised to pay signing bonuses to the parents. *See* Paul Marcotte, *Barratry Indictments: DA Claims Four Texas Lawyers Solicited Bus-crash Clients.* A.B.A. J., July 1990, at 21 (stating that a client was offered $5000 cash and a new house by one attorney and a new GMC Suburban van by another); *see also* Belkin, *supra* note 134, at A1 (reporting the investigation of "more than 15 lawyers for the possibility that they gained cases by misleading or bribing families"). Of course, the attorneys were motivated to take these actions because of the prospect of million dollar plus fees being obtained without undertaking meaningful risk or significant effort. Functionally, though not literally, the lawyers were engaged in a form of ambulance chasing, an activity which itself belies Kritzer's thesis. Unlike firehouse dogs who may chase fire engines because of a genetic predisposition, plaintiff lawyers' chase ambulances, that is, pay ambulance drivers, emergency medical personnel, nurses and other hospital personnel, and agents who come in contact with injured persons to assist them in obtaining clients because representing tort clients in mostly risk-free undertakings is extremely lucrative—far more so than the hourly rates that such lawyers could obtain, for example, by representing defendant insurance companies. Moreover, ambulance chasing lawyers "actively turn injuries into legal claims, which incrementally adds to the wider culture's acceptance of litigation as an appropriate social response." Robert A. Kagan, *Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry*, 19 LAW & SOC. INQUIRY 1, 40 (1994). While the frequency of ambulance chasing may be thought to have declined in recent decades, the contrary is probably true. "[I]n serious injury cases, contemporary ambulance chasers almost certainly far overshadow the efforts of their counterparts earlier in [the 20th] century." *Id.*

Modern day examples of such inordinately high fee-inspired activity abound:

extremely high rates of return themselves. They were improper because the contingency fee percentages charged were reasonably anticipated to generate total fees and effective hourly rates of return that grossly exceeded a reasonable fee in light of the virtual absence of any risk being borne by the lawyers and the low level of investment that they reasonably anticipated would be required at the outset of the representation.[140] Moreover, it is a matter of mathematical certainty that the 1992 Texas data relied upon by Kritzer for substantiating his estimates of effective hourly

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> While nine year-old Ren Glass was in intensive care recovering from being hit by an automobile, a man posing as a hospital chaplain came into his hospital room and asked Ren's mother, Molly Glass, if he could pray with her. Molly Glass later learned that the "chaplain" was "hustling business" for an attorney, and received $200 for each client he recruited.

See Prime Time Live: On the Hunt: Ambulance Chasers Harassing Accident Victims (ABC television broadcast, Jan. 4, 2001).

In Louisiana, an entire industry has grown out of lawyers' practice of paying "runners" to recruit injured plaintiffs. Some runners have received these illegal payments in amounts totaling over $450,000 per year. *See* Bruce Schultz, *"Runners" Fill Legal Coffers, Negative Image of Lawyers*, BATON ROUGE ADVOCATE, Nov. 20, 2000, at 1A.

At the scene of a 1993 collision between two commuter trains in Gary, Indiana, witnesses reported seeing lawyers' business cards being passed around, and the injured were being videotaped as they were removed on stretchers. *See* William Grady, Bill Crawford & John O'Brien, *Injury Lawyer's Ad Stirs Ire in Indiana*, CHI. TRIB., Jan. 26, 1993, at C3; *see also* Scott R. Bickford & Paula Hamilton Lee, *Restricting Lawyers' Solicitation of Victims*, THE BRIEF, Fall 1995, at 8, 26–27 (reporting several similar incidents).

In 1993, after a passenger train derailment, which killed forty-seven people at a bayou north of Mobile, Alabama, a Louisiana attorney reportedly signed up a Mexican train passenger, who spoke no English, at his hospital bedside. *See* Garry Mitchell, *Bar Scrutinizing Lawyer Ads, Solicitations*, MOBILE PRESS REGISTER, Dec. 18, 1993 at A1.

After the August 1987, crash of a commercial airlines flight in Detroit, a man posing as a Roman Catholic priest, Father John Irish, appeared at the scene to console the families of the victims. Father Irish "didn't offer Mass or give a priestly blessing." Christopher Scanlan, *Preying on disasters—Priest-Imposter Sought after Detroit Crash*, ST. PETERSBURG TIMES, Sept. 19, 1987, at 1A. Instead, he "hugged crying mothers and talked with grieving fathers of God's rewards in the hereafter. . . . Then he would hand them the business card of [a] Florida attorney . . . urge them to call the lawyer, and disappear." Matt Beer, *"Priest" at Crash Site Recommends Lawyer*, NAT'L L.J., Oct. 5, 1987, at 3 (quoted in WLF PETITION, *supra* note 14, at 33).

140. *See supra* notes 8 and 14. In criticizing my calculation of the effective hourly rates of plaintiff lawyers in the Manville Trust asbestos litigation, see Brickman, *Asbestos Litigation*, *supra* note 1, at 1834–35 & n.61, Kritzer once again misperceives the ethical argument I am advancing as well the nature of certain forms of contingency-fee practice. *See* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 12 n.15. I estimated lawyers' effective hourly rates in the Manville Trust litigation as just short of $5,000, a sum inconsistent with the virtual absence of risk that attended that claiming process. Kritzer criticizes the estimates I used of the amounts of time required for processing Manville Trust Fund claims (which I used to calculate effective hourly rates), stating that the figures I used "seem extremely low from what I have seen of the time required for the preliminary stages of routine litigation." *Id.* However, the Manville Trust Fund claims that I was analyzing were not routine litigations; rather, as indicated, they were in reality, administrative proceedings, in which lawyers came with hundreds and even thousands of claims and settled them in wholesale lots, while charging full retail rates.

rates of contingency-fee lawyers[141] did not include those $1.8 million fees or the multiples thereof because some of the attorneys represented more than one claimant.[142] Nor will the bar surveys which are relied on by Kritzer ever capture the million dollar fees that have become prevalent in tort litigation, let alone the multi- and centi-million dollar fees generated by the settlement of the state lawsuits against tobacco companies[143] as well as most class action and common fund litigations.[144]

Though failing to address the relevance or content of ethical rules and the fiduciary obligation of the lawyer,[145] Kritzer does conclude that contingency-fee lawyers face substantial risk.[146] Risk is the core architectural structure underpinning ethical and fiduciary regimes which both constrict and justify the use of contingency fees.[147] Kritzer's conclusions about risk in contingency-fee practice are consistent with the objectives of both justifying the fee-setting practices of plaintiff lawyers and obviating the need for reform of such practices.[148] His conclusion, however, is simply wrong. Not only does Kritzer significantly overestimate the risks borne by contingency-fee lawyers, his declarative statement that contingency-fee lawyers "face substantial risk"[149] is belied

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141. *See supra* note 39 and accompanying text.

142. *See supra* note 135.

143. *See* Daniel J. Capra et al., *Panel Discussion: The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827 (1999); Lester Brickman, *Want to Be A Billionaire? Sue A Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A10; *see also infra* note 312.

144. *See infra* note 311.

145. For discussion of the origin and nature of the fiduciary obligation of the lawyer, see Brickman, *Assault on Fiduciary Protection*, *supra* note 7. While I term Kritzer's non-application of ethical rules and fiduciary obligation to contingency fees a "failure," that omission may simply reflect the different academic backgrounds that each of us bring to the table. Kritzer is a professor of political science and law who does empirical research on the judicial process (both in the U.S. and comparative) and on research methodologies. *See* http://polisci.wisc.edu/~kritzer/. I am a law professor who teaches courses and seminars on legal ethics and have published a body of work on ethical and fiducial issues relevant to legal fees.

146. *See* KRITZER, RHETORIC AND REALITY, *supra* note 17, at 37.

147. *See supra* text accompanying notes 7–9.

148. *See supra* notes 15, 19–22.

149. KRITZER, RHETORIC AND REALITY, *supra* note 17, at 37. In his most recent article on contingent fees, Kritzer recedes from his prior statements about the risk of nonrecovery in contingency-fee practice, acknowledging that "most contingency fee cases do yield some recovery and hence some fee." *See* Kritzer, *Seven Myths*, *supra* note 1, at 748. He maintains, however, that "real contingencies" nonetheless abound, including "uncertainty about the amount that will be recovered. . . 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." *Id.* Kritzer's fallback from litigation risk to the "uncertainties" of contingency-fee practice, which I have previously considered, see Brickman, *Contingent Fees*, *supra* note 7, at 97–98, does not remotely justify the level of risk premium that lawyers are charging, a.k.a. the standard contingent fee. To be sure, these "uncertainties" are inherent in contingent fee practice, but their effects are moderated considerably by careful screening techniques, *see infra* note 151, and the use of portfolio management techniques such as

by his own research.[150] Contingent-fee lawyers carefully screen potential claimants and reject approximately two-thirds of those seeking representation.[151] Careful case selection and diversification enables

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diversification to limit the risk level of their portfolios of cases. *See infra* note 152. Consider further the uncertainty that may exist in an auto case involving serious injury where the victim has underinsured motorist coverage of $100,000 and there is no initial knowledge about the coverage of the other driver, who was operating a vehicle owned by a small business. Even though liability is clear and it is virtually certain at the time of retention that the claim will be settled for policy limits without the need for any substantial expenditure of time, the lawyer cannot, at that time, be reasonably certain that his fee will be limited to $33,333. If the tortfeasor's coverage is $250,000 (or more), then the fee may be, instead, $83,333 (or more). This "uncertainty," however, does not justify charging a standard one third contingent fee. If it did, then a lawyer who anticipated receiving a substantial fee upon retention, translating into a substantial effective hourly rate, but who could foresee a small probability of obtaining a windfall fee far in excess of that substantial fee, would be able to justify charging the substantial standard contingent fee as a consequence of that uncertainty. Moreover, by that reasoning, the greater the potential windfall, the higher the uncertainty and therefore the greater the justification for charging a substantial and standard contingent fee. If, on the other hand, the lawyer, at retention, believes there is insurance coverage, and discovers shortly thereafter that no coverage exists, he will likely terminate all further activity with, or without, the client's concurrence. Thus, in actual practice, the "uncertainty" works to the lawyer's advantage. If the lawyer accepts a case where there is little meaningful liability risk and significant upside potential if it turns out that there is substantial insurance coverage and that liability will not be contested, he puts himself in position to gain a windfall. If, however, after retention, it turns out that there is little insurance or that liability is in serious dispute, he duly notifies the client that the case is not worth pursuing. This typical heads-I-win-tails-you-lose fee agreement with the client violates both ethical and fiduciary obligations. That is why the Supreme Court of British Columbia invalidated a 25% contingent fee contract entered into by a passenger rendered a quadriplegic in an auto accident, when there was a policy limits settlement of $524,900 after very little effort by the attorney. Usipuik v. Jensen, Mitchell & Co. [1986] 3 B.C.L.R.2d 283 para. 65. The Court stated:

> When the [retainer] contract was made, Mr. Fischer [the lawyer] did not know what the position of the insurer was on liability. It does not seem right to me that a lawyer should permit a would-be client to enter into this sort of contract when neither he nor the client has any idea what position the Insurance Corporation . . . is going to take on liability. If the practice were adopted of postponing the contract until an enquiry was made of the Insurance Corporation . . . as to its position on liability and if the Insurance Corporation . . . were to reply promptly and sensibly to such an enquiry, a proper assessment of risk on liability could be made. The contact could then be founded on the risks so disclosed. I do not see how it can be fair for a contract such as this to be made when both parties to it are in a state of unnecessary ignorance.

Id.

The make-weight argument that Kritzer is advancing in order to justify the substantial (and unearned) risk premiums being charged bears some similarity to the arguments advanced by the ABA Standing Committee on Ethics and Professional Responsibility in an advisory opinion seeking to justify charging standard contingent fees in the absence of litigation risk because of the ubiquity of other types of risk. *See* ABA Op. 389, *supra* note 14. For a critique of the ABA's risk analysis, see Brickman, *Money Talks*, *supra* note 7, at 275–89.

150. *See, e.g.*, Herbert M. Kritzer, *Holding Back the Floodtide: The Role of Contingent Fee Lawyers*, WIS. LAW., Mar. 1997, at 10.

151. The principal reason why contingency fee lawyers infrequently fail to obtain recoveries is because they carefully screen prospective clients' claims and typically reject more than two thirds of the matters brought to them for representation. *See infra* Appendix H: Tort Lawyers' Frequency of Prevailing in Litigation. In a study of Wisconsin attorneys, Kritzer found that across the entire sample,

contingent-fee lawyers to considerably limit the risk level of their portfolio of cases.[152] While they do undertake cases involving substantial risk as, for example, when they seek to develop a new area of liability or where the substantiality of the potential reward justifies the risk, such cases represent comparatively small percentages of accepted cases. Indeed, because most contingency-fee lawyers considerably limit the number of cases they accept with meaningful liability risk, they are able to prevail in 70-90% of the cases they accept and recover close to 100% of their out-of-pocket advances for litigation costs including costs advanced in cases in which they did not prevail.[153]

The contingent fees being obtained in many personal injury cases are frequently unmerited by any remotely commensurate level of risk. Indeed, it is apparent today that contingency fees have become inversely proportional to the enforcement of ethical and fiducial principles: the higher the fees, the lower the level of enforcement of ethical and fiducial principles.[154] Additionally, the windfall fees that are grist for an assault on the contingent fee mill, are a product of anticompetitive behavior creating

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53,584 contacts with clients resulted in only 31% of the cases (16,519) being accepted, a rejection rate of 69%. *See* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 24 (1997). Upon further refinement of this data, Kritzer reports an acceptance rate of 34% and notes "a fairly clear linkage between volume and selectivity." *See* Kritzer, *Seven Myths*, *supra* note 1, at 755. For high volume practices, the acceptance drops off sharply, to 8%. *Id.* at 756. For example, Stephen Z. Meyers, co-founder of the law firm, Jacoby & Meyers, which has "all but abandoned" a practice oriented towards middle-class needs in favor of a "more lucrative" contingency-fee practice, stated that their storefront offices reject more than 80% of personal injury claims and other types of contingency-fee cases. Randy Kennedy, *Groundbreaking Law Firm Shifts its Focus to Personal-Injury Cases*, N.Y. TIMES, May 12, 1995, at A29.

152. *See* James H. Stock & David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 CLASS ACTION REP. 584, 597–98 (1993) (discussing portfolio management techniques used by plaintiffs' firms); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 705 (1986) (noting that a typical plaintiffs' attorney "has a portfolio of investments in litigation").

153. While contingent-fee lawyers justify their fees by proclaiming that critics of high fees fail to take into account losing cases which do not yield a fee, none have ever quantified their statements. Indeed, none have ever opened their case records for analysis of the number of cases lost let alone as a basis for estimating the number of hours devoted to losing cases. It would seem apparent that our lack of information with respect to the percentage of cases in which tort lawyers prevail is part and parcel of that bar's quite successful efforts to hide fee income information from the public. *See infra* Appendix C: The Hidden Ball Trick: A Comparison of Baseball and the Tort System. Nonetheless, it is possible to glean information about success rates from certain records, in particular, federal tax cases involving law firm incomes. On the basis of that information, contingent fee lawyers prevail in 70–90% of their cases and recover virtually all of the litigation expenses they advance including expenses advanced in cases in which they do not prevail. For analysis of these cases and the data, see *infra* Appendix H: Tort Lawyers' Frequency of Prevailing in Litigation.

154. *See* Brickman, *Money Talks*, *supra* note 7, at 292–94; Brickman, *Disciplinary Enforcement*, *supra* note 7, at 1353–57.

substantial rents. The inordinately high effective hourly rates that are being generated are being carefully screened from public view. The self-regulatory regime that the bar maintains serves mostly to fend off other regulatory regimes. Not only does the bar's self-regulatory scheme do little to protect the public from lawyers' price gouging, but it serves to actually promote price gouging by creating and enforcing ethical rules to prohibit competitive behavior that would drive down contingent fee rates.

VII. THE ROLE OF MARKETS IN CONTINGENT-FEE PRICE SETTING: THE CONTINGENT-FEE MARKET IS NONCOMPETITIVE

In several of his most recent publications on the subject, Kritzer has come to acknowledge that a top tier of contingency-fee lawyers has evolved which is able to obtain very high and potentially unreasonable fees.[155] Nonetheless, he argues, reform of the rules regulating contingent fees as well as enactment of consumer protection laws directed at contingent fee abuses are unnecessary because the market system is adequate to bring down fees by the "obvious mechanism" of "price advertising" so that clients could obtain relevant information "about fees... [to] make more informed choices."[156] His implicit argument that contingent fee abuses can be controlled by the market system is echoed by others who contend, contrary to arguments that I have previously advanced with regard to the noncompetitive nature of contingent fee pricing,[157] that the contingency fee market "is highly competitive.... [and] empirical evidence shows that plaintiffs' attorneys compete for business... [and] strive to cut costs and risks."[158] Such statements do not parry the thrust of my argument that contingency-fee *pricing* is noncompetitive. Lawyers, including contingent-fee lawyers, compete with each other for business and strive to become more efficient by reducing both risk and costs. Contingent-fee lawyers do not, however, compete on the basis of price.[159]

Even the bar recognizes that reliance on competitive forces to drive down inordinately high contingent fees is not an effective regulatory

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155. *See* Kritzer, *Seven Myths*, *supra* note 1, at 772; Kritzer, *The Wages of Risk*, *supra* note 17, at 304; *see also supra* note 112.

156. Kritzer, *The Wages of Risk*, *supra* note 17, at 307–09.

157. *See* Brickman, *Contingent Fees*, *supra* note 7, at 127–28.

158. *See* Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2088–89 (2002) [hereinafter Silver, *Civil Justice*].

159. *See infra* notes 161–63.

strategy.[160] One clear indicator of the inadequacy of reliance on market competition to exert downward pressure on contingent fees is the fact that contingency-fee lawyers do not engage in competitive fee advertising.[161] Moreover, even if a claimant were to obtain "more information about fees,"[162] he would simply discover that fees are standard and not subject to bargaining.[163] Though some claimants do shop around for lower pricing, they quickly find out that lawyers are unwilling to bargain over the fee percentage.[164] As a consequence of these lawyers' practices, claimants are discouraged from seeking lower prices by shopping and bargaining because they have learned what lawyers have intended for them to perceive: that there is a standard industry practice of maintaining uniform pricing, and price shopping is therefore futile.

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160. *See* The Florida Bar *re* Amendment to the Code of Professional Responsibility (Contingent Fees), 494 So. 2d 960, 961 (Fla. 1986) ("[T]his Court expressed its belief (possibly, its hope) that lawyer advertising would create greater public awareness regarding attorneys' fees and services and that competition would provide a self-regulator on fees. . . . [S]uch does not appear to be the case."); Franklin et al., *Study*, *supra* note 42, at 22 (because the assumption that competition would prevent abuses in setting contingent fees was not borne out, New York's Appellate Division, by rule, found it necessary to set limits on contingent fees).

161. *See* O'Connell et al., *Yellow Page Ads*, *supra* note 18, at 426-27, 430 (reporting a survey of yellow page phone advertisements which indicates that virtually no price competition exists among attorneys who charge contingency fees; just a single ad out of the 1,425 studied, or 0.07%, gave any indication whatsoever that the advertising attorney would be willing to bargain with potential clients with regard to the fee which would be charged; *see also* Judyth Pendell, *On My Mind: Price Colluder, Esq.*, FORBES, July 23, 2001, at 34 (reporting the results of an informal poll conducted by the Manhattan Institute; of six lawyer referral services contacted, which receive approximately 400,000 calls per year, none provide written information about fees).

162. Kritzer, *The Wages of Risk*, *supra* note 17, at 308.

163. *See supra* note 11. Indeed, the fact that fees are standard has been cited by a state supreme court as the basis for concluding that a particular contingency fee was fair because it was what all other plaintiff lawyers in the community charged. *See* Brickman, *A Massachusetts Debacle*, *supra* note 14, at 1429–30 (describing how in Gagnon v. Shoblom, No. 88-2105 (Super. Ct. Hampden County Feb. 20, 1990), *rev'd* 409 Mass. 63 (1991), a state supreme court used the fact of standard pricing and the consequent futility of searching for competitive pricing, to justify the fairness of a standard contingent fee). Thus, according to the Massachusetts Supreme Court, the fact that contingency fees are standard means that they are fair and, presumably, the conclusion that they are fair justifies their uniformity. *Id.*

164. It is a common practice among contingent-fee lawyers to have the contingent-fee percentage included on a pre-printed standard retainer agreement used by that lawyer and to then fill in the client's name, address and a brief description of the nature of the claim on blank lines in the agreement before having the claimant sign it. *See, e.g.*, DAVID CRUMP & JEFFREY B. BREMAN, THE STORY OF A CIVIL CASE: DOMINGUEZ V. SCOTT'S FOOD STORES, INC. 8 (3d ed. 2001) (a law school text listing a model contingency fee agreement in a tort claim, which includes a preprinted portion in which the contingent fee is: "ONE THIRD (1/3) . . . [of] amounts received in settlement . . . and FORTY (40 percent) per cent . . . if . . . collected . . . after suit is filed"). Most consumer organizations that might be expected to represent consumers' interests in the tort claiming process by focusing public attention on lawyers' price gouging and to take the lead in seeking redress in the political arena, e.g., Consumers Union which publishes CONSUMER REPORTS, do not do so because of their close ties to plaintiff lawyers.

The asserted reliance on free market competition to drive down excessive contingency fees is misplaced.[165] The inordinately high effective hourly rates of return routinely obtained by the top tier of the contingency-fee bar is a function of an inefficient and noncompetitive market for tort-claiming services.[166] A full and complete analysis of the basis for such a conclusion is beyond the scope of this Article. In a companion article,[167] I have developed the thesis that the maintenance of standard contingent fees, that is, uniform pricing of tort-claiming services, is not market driven but rather a form of rent-seeking behavior by the contingency-fee bar.[168]

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165. Marc Galanter, another notable critic of proposals to reform contingency fee abuses, *see generally infra* note 286, has also contended that market forces can work to lower contingency fee rates. *See* Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457 (1998) [hereinafter Galanter, *Contingency Fee and Its Discontents*] (hypothesizing that a drop in contingency fees in New York City from 50% to 33% was a result of "the increase in the supply of lawyers serving individual clients, the increased competition ushered in by the demise of fee schedules, the appearance of advertising, and a gradual increase in the sophistication of clients"). This is patently false. The reason for the drop in contingency fees was not a result of market forces but rather the adoption of a rule by the Appellate Division essentially limiting contingency fees in tort cases to 33%, promulgated at a time when most such fees were 50%, and would have been even higher but for a judicial practice limiting contingency fees to a maximum of 50%. N.Y. SUP. CT. R. § 806.13 (West Group, 1999); *see also* Gair v. Peck, 160 N.E.2d 43 (N.Y. 1959) (upholding the appellate division fee-limiting rule as within the power of the court); Brickman, *Contingent Fees*, *supra* note 7, at 106–07. But for the 50% cap, contingency fees in most jurisdictions would, in my judgment, likely have averaged at least 10–25% higher, i.e., in the 60–75% range. One solution for excessive fees that Kritzer argues for is "permitting non-lawyer specialists to handle cases within some defined specialties. . . . [such as] retaining private insurance adjusters to negotiate . . . . with an insurer," as a way of opening competition and driving down "excessive charges." Kritzer, *The Wages of Risk*, *supra* note 17, at 308. This is a valid point but "unauthorized practice of law" laws are maintained for the specific purpose of precluding such competitive behavior.

166. *See In re* Synthroid Marketing Litigation, 201 F. Supp. 2d 861, 875, 877 (2002) ("[T]he actual market for legal services departs rather sharply from the ideal conditions under which markets are efficient, and therefore in theory conducive to consumer welfare. . . . [T]he market for contingent legal services especially among consumers, is highly uncompetitive . . . ."). Similarly, Prof. Hadfield states:

> The market for lawyers is fundamentally noncompetitive. As a consequence of the complexity of legal reasoning and procedure, the profession's derived monopoly on the legitimate use of coercion, and the unification of the profession to serve the diverse needs for access to law, the price of law that emerges from the free market for lawyers is too high.

Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 999 (2000); *see also* Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty*? 71 CHI. KENT L. REV. 625, 656–59 (1995) (the predominance of uniform contingent fee rates indicates the relevant market is not competitive).

167. *See* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003) [hereinafter Brickman, *Price Competitive*] (discussing whether the market for contingent fee financed tort claiming services is competitive, listing indicia of a noncompetitive market, the reasons for the persistence of noncompetitive pricing of tort claiming services, and impediments imposed by the bar to preclude price competition from emerging).

168. Rents or monopoly rents are the earnings yielded by restrictions on competition. *See* ARMEN ALCHIAN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION 189, 293–94 (3d ed. 1983) (monopoly rents, also called supernormal profits or monopoly profits, are the pure profits yielded as a result of the

There I argue that the tort bar's effectiveness in administering a uniform price is a function of the following factors: contingent-fee lawyers' recognition that collusive efforts are required to generate the rents yielded by uniform pricing;[169] control over the practice of law which courts have reposed in themselves[170] and employed to inhibit if not prohibit competitive behavior; the promulgation of ethical rules to inhibit price competition between contingent-fee lawyers;[171] the stealthiness of contingent fees—a function of the concerted effort by contingency-fee practitioners to conceal knowledge of the effective hourly rates being generated;[172] lawyers' advantageous use of their superior knowledge of the value of claims especially as contrasted with most contingent-fee claimants' lack of knowledge of the value of their claims[173] as well as their lack of sophistication in negotiating prices with lawyers;[174] the futility

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non-competitive nature of monopolies). Whereas the competitive firm maximizes profits at the equilibrium price determined by supply and demand, the monopolist is able to decrease quantity and increase price to a quantity that exceeds its output costs without the threat of losing business to competitors. *See* DAVID BEGG, STANLEY FISCHER & RUDIGER DORNBUSCH, ECONOMICS 146–48 (4th ed. 1994) [hereinafter BEGG ET AL., ECONOMICS]. Monopoly rents equal the residual earnings after deducting the monopoly's output costs from its increased revenue. *Id.*

169. By "collusive efforts," I do not mean that contingent-fee lawyers actively assemble and collude with each other to fix prices. I do mean "collude" in the same sense as gasoline station owners located on adjacent corners act to maintain near-uniform pricing out of recognition that if one of them reduces the price to attract additional market share, the other owners will react by dropping their prices below that of the first price dropper. The ensuing "price war" will negatively affect each gas station owner in the area. Thus, the owners act collusively to maintain near uniform pricing. In a similar fashion, contingent-fee lawyers' maintenance of uniform rates flows from recognition that if one contingent fee lawyer successfully undercuts the uniform price, other firms will likely follow suit and that the consequence will be lower earnings for the entire bar. The rational lawyer is not concerned with how much fee income the bar obtains in the aggregate but how much she can obtain individually. The recognition that drives the collusion is that if she lowers her rates other lawyers will do the same and most all of them will then earn less for the same efforts. There are, of course, considerable differences between the incentives of a few gasoline station owners operating in plain sight of each other and that of thousands of contingent-fee lawyers operating in the privacy of their offices. The fact that extremely few contingent-fee lawyers cheat by undercutting the standard price appears contrary to standard economic theory. That theory would predict that some lawyers would undercut the standard price in order to increase sales sufficiently to generate higher profits. In the companion piece, I offer several explanations for why this does not occur. *See* Brickman, *Price Competitive*, *supra* note 167, at 93-101, 112-26. These explanations are summarized in the text accompanying *infra* notes 170–78.

170. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2 (1986); Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1 (1989).

171. *See* Brickman, *Price Competitive*, *supra* note 167, at 118.

172. *See* Appendix C: The Hidden Ball Trick: A Comparison of Baseball and the Tort System.

173. *See* Brickman, *Contingent Fees*, *supra* note 7, at 56, 66, 68–71; *see also* James D. Dana, Jr., & Kathryn E. Spier, *Expertise and Contingent Fees: The Role of Asymmetric Information in Attorney Compensation*, 9 J.L. ECON. & ORG. 349 (1993) (examining the use of contingent fees when the lawyer has better information than the client about the quality of the client's case).

174. The Federal Trade Commission has recently issued guidelines for consumers needing to hire a lawyer. *See* FED. TRADE COMM'N, NEED A LAWYER? JUDGE FOR YOURSELF, BUREAU OF

clients face in searching for competitive pricing;[175] the use of standard contingency fees to signal to consumers that lawyers who deviate from the uniform rate are of inferior quality and will therefore generate lower settlements;[176] the efficiencies realized by charging uniform rates which include conveying to claimants that *all* contingent-fee claiming is risky, obviating the need for lawyers in individual cases where liability is clear and damages substantial to misrepresent the risk in order to justify the substantial risk premium while allowing the lawyer to decline to accept risky cases;[177] and the judiciary's abdication of its self-proclaimed responsibility to superintend contingent fees and the concomitant failure of the disciplinary system to enforce ethical rules limiting contingent fees to reasonable amounts.[178]

CONSUMER PROT. (2002), *available at* http://www.ftc.gov (last accessed Nov. 19, 2002). In discussing payment arrangements, the FTC indicates that "before agreeing to a contingent fee," *id.*, the consumer should consider:

> The size of a contingency fee, usually a percentage of any money you receive to resolve the case, is always negotiable. Sometimes you can negotiate a sliding scale fee (for example, 30 percent of any recovery up to $10,000; 20 percent of any recovery up to $50,000, etc.). Remember that there's no particular percentage of a consumer's recovery that constitutes a "standard" or "official" fee.
>
> The size of the contingency fee should reflect the amount of work that will be required by the attorney. Some cases are straightforward; others can be novel or uncertain. You may want to ask whether the case is likely to settle quickly and whether government agencies will gather significant amounts of evidence. A fee arrangement sometimes can be negotiated with a lower percentage for a quick settlement and a higher percentage if it goes to trial. Be sure you know exactly what is covered in your agreement. Your state also may have rules about maximum contingency fees; check with your state's bar association.

Id. This attempt by the FTC to insinuate bargaining into the fee transaction between client and contingent-fee lawyer is laudable but utterly naive and hardly likely to have any impact on "take it or leave it" uniform contingent-fee pricing. *See* Gisbrecht v. Barnhart, 535 U.S. 789 (2002) (Scalia, J. dissenting) ("It is uncontested that the specialized Social-Security bar charges uniform contingent fees . . . which are presumably presented to the typically unsophisticated client on a take-it-or-leave-it basis."); Kenseth v. Comm'r, 114 T.C. 399, 399, 444 (2000) (Beghe, J. dissenting) ("The contingent fee agreement was a standardized form contract prepared by [the law firm]. [The law firm] would have declined to represent [the client] if he had not entered into the contingent fee agreement . . . . a contingent fee agreement in all significant respects amounts to a 'contract of adhesion'. . . ."); Silver, *Civil Justice*, *supra* note 158, at 2088 ("Unsophisticated lay-persons cannot shop for legal services intelligently . . . ."); *see also supra* note 11.

   175. *See supra* notes 161–63.
   176. *See* Rudy Santore & Alan D. Viard, *Legal Fee Restrictions, Moral Hazard, and Attorney Rents*, 44 J.L. & ECON. 549, 550 (2001).
   177. *See supra* notes 146–50 and Appendix G: Types of State Automobile Insurance Laws.
   178. The abject failure of lawyers' ethical regimes in imposing restraint on lawyer pricing and in disciplining lawyers for clear violations of ethical rules regarding fees constitutes no less than an indictment of lawyer self-regulation. *See* Brickman, *Money Talks*, *supra* note 7, at 292–94; Brickman, *Disciplinary Enforcement*, *supra* note 7, at 1353–57; Brickman, *Contingent Fees*, *supra* note 7, at 127–28.

VI. CONCLUSION

The yields realized from contingent fee financed tort claiming are a critical component of the tort reform debate. The leading data, compiled and put forth by Professor Herbert Kritzer, provides that contingent-fee lawyers' effective hourly rates of return are substantially similar to their hourly rate counterparts on the defense side. He is widely cited for that proposition by opponents of tort reform who, relying on his data, reject claims that there are substantial rents in contingent-fee claiming and that windfall fees abound which violate both ethical rules and fiducial obligations. Moreover, reliance on that data is central to contentions that tort reform efforts are not only unnecessary but also counterproductive in that they deny claimants access to justice.

In this Article, I have vigorously contested the validity of that data, arguing that it is inaccurate, unreliable, trivial and, to the extent that it relies on Wisconsin data, is unreflective of national trends. In deference to the sign above the barroom piano,[179] I offer alternative data indicating that plaintiff lawyers in auto accident cases charge average contingency fees of $325 per hour, 2 1/2 times higher than that of their hourly rate counterparts. I also present data which indicates that a top tier of contingency-fee lawyers, comprising approximately 25-33% of that bar, generate hourly rates that far exceed those obtained in auto accident claiming. Indeed, for lawyers engaged in more lucrative claiming including products liability, medical practice, high-end auto accidents, and mass tort litigation, effective hourly rates are many multiples of the $325 per hour obtained in run-of-the-mill auto accident claiming. Indeed, in these more lucrative litigations, I have presented data from which it can be concluded that effective hourly rates are several thousand dollars an hour. In addition, I have presented a wide variety of anecdotal evidence that in many windfall fee cases where lawyers face no meaningful litigation risk and anticipate obtaining near-policy-limit settlements without the need for substantial effort, effective hourly rates can amount to $10,000-$25,000 an hour. In mass tort litigation, effective hourly rates can exceed $50,000 an hour.

I argue that contingent-fee pricing is not competitive. The use of a uniform pricing structure is a "heads-I-win-tails-you-lose" fee-setting practice. If a case is too risky, it is rejected. If it is lucrative, it is accepted, and a standard contingency fee is charged irrespective of whether there is

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179.   "Please don't shoot the piano player . . . unless you can play the piano."

any meaningful litigation risk and even though the cost of production of the service in no way justifies the enormous projected return on investment. The maintenance of a uniform pricing structure enables the tort bar to collect substantial rents from tort claimants seeking to invoke the tort claiming process. These rents are a product of collusive efforts by contingent-fee lawyers to maintain uniform pricing. Lawyers are induced not to undercut standard pricing out of concern that they will attain pariah status within the bar and will be seen as of inferior quality by claimants who have been led to believe that all qualified lawyers change the standard one-third (or higher) fee. Maintenance of uniform pricing is further facilitated by: (1) asymmetric knowledge—clients are usually unaware of the value of their claims or the degree of risk that the lawyer is assuming; (2) clients' lack of sophistication in bargaining with lawyers over fees; (3) the utility of standard pricing in negating the incentive of claimants to search for lower priced lawyers; and (4) efficiencies realized by the contingent-fee bar in deceiving tort claimants with regard to the degree of risk assumed by the lawyer—instead of having to deceive clients on a retail level by repeatedly overstating the degree of risk to justify the high contingent percentage, lawyers impose a uniform price and thereby avoid the need to justify the fee in any given instance.

I have further demonstrated that the yields from contingent-fee claiming routinely violate ethical rules and fiducial rights of clients. Rather than treat this failure as a motivation for improving the regulatory system, the bar imposes rigid restraints on price competition in order to protect the rents yielded by contingent-fee claiming. These restraints include barriers to entry to the tort claiming market, prohibitions against the brokerage of lawyers' services for profit, and prohibitions against lawyers bidding against each other for tort clients on the basis of price or its equivalents.

Demonstrating the unreliability and invalidity of the leading empirical data on the effective hourly rates of contingent-fee lawyers as well as presenting competing data to show the level of rents being extracted poses a challenge to the broader scholarly effort to maintain the huge profits realized from tort claiming.[180] It also renders unsubstantiated the conclusion that Kritzer and others derive from his data that there is no need to implement structural changes in contingent-fee practice to enforce ethical and fiduciary obligations of lawyers through measures designed to protect consumers from significant overcharging by contingency-fee

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180.   *See infra* note 286.

lawyers. Hereafter, the continued reliance on that data in the tort-reform wars[181] can only be for the purpose of minimizing, if not obscuring, the fact that standard contingency-fee pricing often generates multi-thousand dollar effective hourly rates for lawyers in cases devoid of meaningful risk.[182]

With regard to the latter, the use of Kritzer's data as well as the efforts of the ABA[183] and of others to at least maintain the status quo with regard to the financing of tort litigation may be seen as part of the political dimension of contingency fees.[184] While contingency fees play a central role in providing most accident victims with access to the courts, the substantial rents being realized have operated in a dynamic fashion to further expand the scope of liability imposed by the tort system,[185] which in turn further generates substantial fees for plaintiff lawyers and, by increasing the volume of tort litigation, benefits defendant lawyers by driving up demand for their services.[186] These fees underwrite substantial funding for political and judicial candidates who support the status quo and use their positions of authority to expand the scope of liability imposed under the tort system and oppose meaningful tort reform.

Demonstrating the many failures of the leading data also facilitates consideration of the merits of tort reform proposals, particularly those that seek to protect consumers from price-gouging by what amounts to a cartelized industry, and to implement ethical and fiducial principles that have fallen victim to the profits generated by abusive contingency-fee practices.[187]

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181. *See* Brakel, *Critique*, *supra* note 26, at 198 ("[Tort reform efforts] have been opposed by entrenched forces who, operating from a poorly founded but apparently unshakable conviction that the reforms are needless . . . and wrong-headed, *want* to see them fail."). By opining that lawyers are acting ethically when they charge standard contingency fees generating windfall fees in cases devoid of meaningful risk, the ABA Standing Committee on Ethics and Professional Responsibility has also lent its support to lawyers' efforts to maintain standard contingency-fee pricing and the resultant windfall fees. *See* ABA Op. 389, *supra* note 14. For a critique of this opinion, see Brickman, *Money Talks*, *supra* note 7. The opposition of the defense bar to tort reform is described in Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L. REV. 173, 184–88 (1995).

182. *See supra* notes 13-15 and accompanying text; *infra* notes 250 and 314.

183. *See supra* note 181.

184. *See* Brickman, *Money Talks*, *supra* note 7, at 260–67.

185. *See supra* note 1.

186. *See* Brickman, *Money Talks*, *supra* note 7, at 258 n.31, 264. Increasing the scope of liability imposed by the tort system, that is, the level of liability risk, also generates increased revenues for insurance companies. This calculus helps to explain why insurance companies often oppose some tort reforms that would have the effect of reducing the level of liability risk in society.

187. *See supra* note 19.

APPENDIX A: THE INCREASE IN THE EFFECTIVE HOURLY RATES OF
CONTINGENT-FEE LAWYERS

The most direct way of calculating the increase in the effective hourly
rate of tort lawyers would be to assemble total contingent-fee income data
realized by plaintiff lawyers in personal injury litigation in each of the
years 1960 and 2001 and divide that by the number of hours contingent-
fee lawyers devoted to all representations in those years. That data is not
available. Other data is available, however, which can be used as a
surrogate for effective hourly rates. For present purposes, since the task at
hand is to determine the inflation-adjusted *increase* in the effective hourly
rates of tort lawyers over the past 40 years and since tort lawyers charge
standard contingent fees, we can look to changes in inflation-adjusted
average tort verdicts over time as a surrogate for changes in both total
income and effective hourly rates. This is so because while the vast
majority of tort claims are settled, settlements are informed by and reflect
trial verdicts.[188] Since the overall win rates in tort litigation in 1960 and
2001 are substantially the same,[189] increases in average verdicts, adjusted
for inflation, translate into proportionately higher annual incomes and
proportionately higher effective hourly rates,[190] assuming as seems
reasonable, that tort lawyers' annual hours spent on tort cases has not
appreciably changed in the past 40 years.

To be sure, verdicts, especially larger verdicts, are sometimes reduced
by courts. A 1987 RAND Study of jury verdicts in Illinois and California
indicated that while about 80% of verdicts remained unchanged by post-
trial proceedings or settlement, the verdicts that were reduced tended to be
those in which the jury award was very large. For verdicts under $100,000,
the ratio of payment to the award was 93%. Where the verdict was in the
range of $100,000 to $1 million, this ratio was 82%. In the range of $1
million to $10 million it was 68%, and in verdicts over $10 million it was
57%. For all trials included in the study, the actual payments by
defendants were 71% of the aggregate jury verdicts.[191] Assuming a rough
consistency between the ratios of verdict amounts to judgments in 1960

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188. *See* Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic
Behavior*, 11 J. LEGAL STUD. 225 (1982); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury
Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 4 (1996).
189. *See infra* Appendix B: Plaintiff Win Rates in Personal Injury Litigation.
190. *See supra* note 50.
191. *See* DEBORAH R. HENSLER, TRENDS IN TORT LITIGATION: THE STORY BEHIND THE
STATISTICS 22–24 & tbl. 3.1 (1987).

and 2001, then the utility of the use of average verdicts as a surrogate for contingent-fee lawyers' effective hourly rates remains unaffected.

In 1960, the average verdict in personal injury tort cases, stated in year 2001 dollars, was computed to be $123,998, using data set forth in CURRENT AWARD TRENDS IN PERSONAL INJURY.[192] This figure rose to $1,365,110 in 2001,[193] an increase of 1000%. Additional evidence indicating a substantially higher impact on effective hourly rates will be considered below following discussion of how the data yielding the 1000% increase was calculated.

To compute the average verdict in tort cases in 1960 from the JVR data, it is necessary to begin with the average verdict for 1987, $448,317, which is indicated in 1989 dollars.[194] The 1989 edition does not list average tort verdicts for 1960, but it does provide what it terms the "annual deviation" in award size from 1960 to 1988. The annual deviation "measures the percent by which the overall size of personal injury verdicts has increased or decreased annually since 1961 . . . . Because the analysis is cumulative, deviations are not skewed by awards that may be outliers (atypically large or small) in a single year."[195] From the 1987 average verdict of $448,317, the average verdict for 1960 can be derived by the following calculation:

1960 average verdict = $448,317/(1.0627^{27})$ = $86,799$.

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192. Data for average verdicts awarded in personal injury tort cases was obtained from JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, and JURY VERDICT RESEARCH, CURRENT AWARD TRENDS IN PERSONAL INJURY (1989) [hereinafter JVR, CURRENT AWARD TRENDS 1989]. Both sets of data omit punitive damages. Jury Verdict Research (JVR) has maintained a nationwide database of personal injury plaintiff and defense verdicts since 1960. *See* JVR, CURRENT AWARD TRENDS 1989, *supra*, at 3. The 1989 edition of CURRENT AWARD TRENDS contains data from 1960 through 1988. That data "includes original, plaintiff verdicts, but does not include punitive damages, special damages, defense verdicts, additurs, remittiturs, post-trial settlements, or appeals." *Id.* at 4–5. The 2002 edition also states that the personal injury verdict data excludes "special damages." *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at i. In common parlance among attorneys, "specials" or "special damages" are economic damages which are mostly medical expenses and lost wages. However, according to information obtained in a telephone conversation with LRP Publications, which publishes the JVR series, "special damages" as used in the JVR publication means any compensatory damages awarded in a personal injury action which are *not* medical expenses, lost wages or pain and suffering (non-economic damages). As used by JVR, "special damages" includes interest damages, delay damages, hedonic damages, and other damages not included in the categories of medical expenses, lost wages, and pain and suffering. *See* notes of phone conversation with "Daniella" of JVR, Feb. 12, 2003 (on file with author). Finally, the 2002 edition omits jury verdicts resulting in billion dollar awards. *See id.* at 2.

193. JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 4.

194. *See* JVR, CURRENT AWARD TRENDS 1989, *supra* note 192 at 7.

195. *Id*. at 9.

1.0627 is the annual deviation for 1987, and 27 is the number of years that elapsed from 1960 to 1987.[196] Since the 1987 average verdict was in 1989 dollars, the calculated average of $86,799 is adjusted for inflation to year 2001 dollars. Using a table of inflation conversion factors,[197] the average verdict in 1960 was $123,998 (in year 2001 dollars).

The 1989 edition also provides average verdict data for medical malpractice and products liability litigation. However, data for those two categories is available starting only in 1986 for medical malpractice and only in 1980 for products liability. The 1989 edition does not provide separate data on average verdicts for automobile injuries. More recent data on average personal injury tort verdicts is available in a current JVR publication.[198] The data includes overall averages and averages by categories, including auto accident, medical malpractice, and products liability litigation. The data presented is from 1994 to 2001 and includes "only original, compensatory jury awards rendered to individual plaintiffs for specific claims of physical or emotional injuries . . . . Awards rendered strictly for financial loss were excluded . . . . For purposes of this analysis, plaintiff awards included any case in which the jury awarded at least $1 in damages."[199]

The JVR data does not give average verdicts for specific categories of torts for the 1960s. There is such data from a study conducted by RAND on tort litigation trends from 1960 to 1984 in Cook County, Illinois and San Francisco, California (the "Peterson study").[200] Obviously, this data, derived from only two jurisdictions, is not directly comparable to data based on a national sample, but since it is all that is available, and since it can be considered of some limited utility for comparative purposes, at least as to orders of magnitude, it is set forth below.

The Peterson study provides average verdicts for Cook County and San Francisco, separately. This has been converted into an overall average based on the averages for each locality and the number of cases. For purposes of the following analysis, all average verdict data has been adjusted for inflation to year 2001 dollars. This data shows very substantial increases in the categories of medical malpractice and products liability, as well as a moderate increase in average auto injury verdicts.

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196. *See id.* at 7–8.
197. This table was compiled by Robert Sahr of Oregon State University. *See* Robert Sahr, *Inflation Conversion Factors for Dollars 1965 to Estimated 2013*, http://oregonstate.edu/dept/pol_sci/ fac/sahr/sahr.htm (last accessed Feb. 25, 2003).
198. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97.
199. *Id.* at 2.
200. *See* PETERSON, CIVIL JURIES, *supra* note 50.

The calculated average verdict for medical malpractice in Cook County and San Francisco, combined, during the period 1960–64 was $169,676 (in year 2001 dollars).[201] In 1984, the average verdict for medical malpractice on a national basis was $906,119,[202] which increased 330% to $3,902,058 in 2001.[203] Using this not-directly-comparable data for the purpose of getting a sense of the order of magnitude of the increase in average verdicts, we see that the average medical malpractice verdict increased approximately 2200% over the last 40 years. However, based on other data, the use of the Peterson study in this manner probably overstates the actual rate of increase in average medical malpractice verdicts for the 1960–2001 period. A recent study by Tillinghast-Towers Perrin of U.S. total insured and self-insured tort system costs measured, among other things, total medical malpractice tort costs from 1975 to 2001.[204] Total medical malpractice cost estimates are based on a internal database of state-by-state medical malpractice costs.[205] Insured tort costs are defined by the study to include "first-party benefits (the cost of legal defense and claims handling), benefits paid to third parties (claimants and plaintiffs) or their attorneys, and an administrative, or overhead, component . . . . [and] includes costs associated with all claims, not just those that reach the courthouse."[206] Medical malpractice tort costs have grown at a rate of 11.6% per year since 1975.[207] In 1975, total medical malpractice tort costs were $3,983,113,722 (adjusted for inflation to year 2001 dollars); in 1980 they were $7,563,925,616; and in 2001 they reached $21,025,033,000.[208] Using this data, the increase in medical malpractice tort costs from 1975 to 2001 was 428%. Increases in medical malpractice tort costs obviously do not directly translate into similar increases in average medical malpractice verdicts. Nonetheless, the data adds an additional measure of relevant information.

The average products liability verdict for San Francisco and Cook County combined in the 1960-64 period was calculated to be $283,285.[209] Products liability average verdicts remained almost constant from 1984 to

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201.   *See id.* at 11, 17, 21–22.
202.   *See* JVR, CURRENT AWARD TRENDS 1989, *supra* note 192, at 31.
203.   *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 18.
204.   *See* U.S. TORT COSTS: 2002 UPDATE 16 (Tillinghast-Towers Perrin, 2002).
205.   *See id.* at 16.
206.   *Id.* at 17.
207.   *See id.* at 16.
208.   *See id.* at app. 6.
209.   *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17, 21–22.

1994. In 1984, the average products liability verdict was $2,096,814,[210] and in 1994 the average products liability verdict was $2,084,183.[211] However, from 1994 to 2001, the average products liability verdict increased at a rapid rate. In 2001, the average products liability verdict was $9,113,218,[212] an approximately 337% increase over the 1994 average. Thus, this not-directly-comparable data which is used for the purpose of obtaining a sense of the order of magnitude of the increases in the average products liability verdict, indicates an increase from the early 1960s to 2001 of approximately 3117%.

Automobile injury verdicts have also increased over the past 40 years, though not nearly at the rate of medical malpractice and products liability verdicts. The average verdict for San Francisco and Cook County in the early 1960s was calculated to be $68,117.[213] Data for the average automobile injury verdict was not available from JVR before 1994. In 1994, the average verdict for auto injuries was $223,626,[214] and in 2001, it was $323,236.[215] Thus, the average verdict for auto injuries increased 44% from 1994 to 2001 and using the not-directly-comparable data, it increased 374% over the last 40 years.

While the data showing very substantial increases in average medical malpractice and product liability verdicts over a 40-year period may be overstated (or understated) by the use of combined San Francisco and Cook County data for the 1960-64 period, even substantial discounting of the amount of increase still yields quite substantial increases in average verdicts, adjusted for inflation, in that time period.

Moreover, it is a virtual certainty that the increase in average verdicts of 1000% significantly understates the actual increase in average verdicts and, as well the increases in effective hourly rates, for at least four reasons. First, both the 1960 and 2001 data exclude punitive damages. The effect of this omission is to significantly understate the constant dollar rate of increase in average tort verdicts over the past 40 years. This is so because in 1960, punitive damages were both insubstantial and rarely awarded, but by 2001, punitive damages awards, though infrequent, had dramatically increased in frequency and added significantly to average tort verdicts.[216]

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210. *See* JVR, CURRENT AWARD TRENDS 1989, *supra* note 192, at 35.
211. *See* JURY VERDICT RESEARCH, CURRENT AWARD TRENDS IN PERSONAL INJURY 18 (2001) [hereinafter JVR, CURRENT AWARD TRENDS 2001].
212. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 22.
213. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17, 21–22.
214. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 9.
215. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 11.
216. *See* Joni Hirsch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform* 10–

Mega punitive damage verdicts, a phenomenon unknown in the 1960s, are occurring with increasing frequency.[217] While these awards are subject to a high reversal rate,[218] many lead to out-of-court settlements,[219] producing substantial payments and therefore yielding substantial contingent fees not captured by average tort verdict data.

A second reason that the increase in average verdicts significantly understates the increase in effective hourly rates is that it fails to capture a significant subset of tort claiming that has generated enormous fees and that has emerged since 1960: mass tort class actions and class actions alleging financial or consumer fraud. Class actions of the modern variety did not originate until well after Rule 23 of the Federal Rules of Civil Procedure was amended in 1966.[220] Both the mass tort phenomenon and the fraud claims have manifested only in recent decades.[221] Most of these tort claims are aggregated, typically into class actions. In recent years, class action litigation has burgeoned. At least 10,000 actions seeking certification of a class are filed each year.[222] A survey done by the Federalist Society found that between 1988 and 1998, class action filings increased by 338% in federal courts while the increase in state courts was more than 1,000%.[223] While individual claims in a mass tort context are litigated and result in jury verdicts, the more successful these individual litigations, the greater the likelihood that the claims will be aggregated into a class action. Mass tort class actions are almost always settled and generate enormous fees for lawyers.[224] However, while the fees generated by the individual litigations are captured in average-verdict data, the fees generated in the class action settlements are not. A useful illustrative example is breast implant litigation. Litigation of individual claims

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12 (May 2002) (unpublished manuscript available at http://www.law.harvard.edu/programs/olin_center/) (last accessed Feb. 5, 2003) (reporting that in a survey of tort, contract, and real property rights cases disposed of by trial in 1996, punitive damages were awarded in 4% of the trials in which the plaintiff won. Generally, punitive damages are not allowable in breach of contract claims.) [hereinafter Hirsch & Viscusi].

217. *See id.* at 6 (listing over 50 punitive damages verdicts of $100 million or more since 1985).

218. *See* William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, REG., Sept.–Oct. 1986, at 33 (a 1986 sampling of federal appellate courts reported reversals or sharply reduced awards in 9 of 13 cases in which punitive damages were awarded).

219. Hirsch & Viscusi, *supra* note 216, at 8.

220. *See* Brickman, *Aggregative Litigation*, *supra* note 27, at app. (providing an historical analysis of the 1966 amendment and its aftermath).

221. *See id.* at 243–44.

222. Lynnley Browning, *Class-Action Suits Mean Delays and, Maybe, Cash*, N.Y. TIMES, Jan. 12, 2003, Bus. Sec., at 9.

223. *See Analysis: Class Action Litigation—A Federalist Society Survey*, CLASS ACTION WATCH (The Federalist Society for Law & Public Policy Studies, Wash., D.C.), Vol. 1, No. 1, 1999, at 3.

224. *See* Brickman, *Aggregative Litigation*, *supra* note 27, at 245–46.

generated compensatory awards totaling a few hundred million dollars. Punitive damage awards in these litigations, which as noted above, are not included in average verdict data, added additional millions to this total. However, as class actions, breast implant litigation generated up to $7 billion in settlements,[225] none of it captured in average verdict data.

A third reason why average verdict data does not fully capture increases in contingent-fee income is that standard contingent fees have increased in the past 40 years—albeit surreptitiously. Whereas lawyers typically applied their contingent-fee percentages to the clients' gross recoveries, thereby bearing approximately 1/3 of litigation costs, today many and perhaps most tort lawyers apply the contingent-fee percentage to the net recovery, leaving clients to bear all litigation expenses.[226] Other ways in which real contingent-fee rates have been increased while maintaining identical percentages include breaking out expenses to be separately billed to the client which were formerly absorbed by the lawyer. Another related way is the setting up by some tort lawyers specializing in product liability litigation of ancillary businesses that provide paralegal-type services to their clients. The tort lawyers' standard retainer agreements disclose their ownership and allow them to hire their ancillary offshoots to provide support services on an hourly basis. In this manner, lawyers are able to, in effect, separately bill for services that were previously provided as part of the services for which they were compensated by the contingent fee.

A fourth reason why average verdict data significantly understates the increase in effective hourly rates is because the 2001 average verdict data, for the first time, excluded billion dollar jury verdicts.[227] Billion dollar verdicts were presumably excluded because such large awards significantly skew the average verdict data. Because JVR does not indicate that billion dollar verdicts were excluded in previous years, it may be concluded that, previously, there were none to exclude. While billion dollar jury verdicts are unlikely to result in billion dollar judgments,[228] nonetheless, the resultant judgments do inure to the benefit of plaintiff lawyers in the form of higher effective hourly rates which are not captured by the JVR data.

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225. *See supra* note 27.
226. I am basing this assertion upon my own impressions gained from conversations with lawyers and from reading hundreds of contingent fee agreements.
227. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 2.
228. *See supra* note 191 and accompanying text.

Finally, the relationship between average verdicts and effective hourly rates is based upon an assumption that win rates in tort litigation were the same in 2001 as they were in 1960. While this is essentially true in the aggregate, for certain individual categories of tort litigation which generate the highest awards and therefore, the highest fees, in particular medical malpractice and products liability, win rates have increased appreciably over the past 40 years.

For all of these reasons, effective hourly rates on an inflation-adjusted basis have actually increased far more than the 1000% that average verdict data would indicate. Albeit somewhat arbitrary, I estimate the actual increase in effective hourly rates to be at least 1400%.

APPENDIX B: PLAINTIFF WIN RATES IN PERSONAL INJURY LITIGATION,
1960 COMPARED TO 2001

JVR has tracked plaintiff win rates in personal injury cases over the past 40 years.[229] JVR's 1989 publication provides an overall win rate in personal injury cases as well as win rates for specific tort categories. Its 2002 publication provides an overall win rate as well as win rates from 1995 to 2001 for specific categories of personal injury litigation: auto accident, medical malpractice, and products liability. On the basis of the win rate data in the JVR publications, there has been little change in the overall plaintiff win rates from 1960 to 2001. In the early 1960s, the plaintiff win rate was 61%[230] compared with 57% in 2001.[231] However, the data for such high-end categories as medical malpractice and products liability, as well as auto injuries, indicates significant upward trends in plaintiff win rates.

Because win rates for medical malpractice, products liability and auto injury litigation are not available from JVR for the early 1960s, other data was obtained from a RAND study of tort litigation trends from 1960 to 1984 in Cook County, Illinois and San Francisco, California.[232] The RAND study measured plaintiff win rates, defined as the percentage of trials which resulted in a verdict for the plaintiff, for all torts and for three major categories of tort litigation: medical malpractice, products liability, and auto accidents.[233] While the data in the RAND study are not directly comparable to the JVR data—the former is derived solely from two jurisdictions while the latter is based on a national sample—there is still some utility afforded by the comparison—at least as to orders of magnitude. For these purposes, a combined plaintiff win rate for San Francisco and Cook County was calculated from data provided in the RAND study for the total number of cases and the percent of those cases won by plaintiffs.[234] The overall plaintiff win rate for San Francisco and Cook County, combined, during the 1960-64 period was 48%,[235] considerably less than the national win rate provided by JVR. On the basis

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    229. Data from 1960 to 1988 can be found in JURY VERDICT RESEARCH, CURRENT LIABILITY TRENDS IN PERSONAL INJURY (1989) [hereinafter JVR, LIABILITY TRENDS 1989]. Data from 1967 to 2001 is available in JVR, CURRENT AWARD TRENDS 2002, *supra* note 97.
    230. *See* JVR, LIABILITY TRENDS 1989, *supra* note 229, at 5.
    231. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 45.
    232. *See* PETERSON, CIVIL JURIES, *supra* note 50.
    233. *See id.* at 17, 35.
    234. *See id.* at 35.
    235. *See id.*

of this comparison, the JVR national plaintiff win rate for the year 2001 of 57% was a 19% increase over the win rate calculated for the early 1960s from the RAND data.[236]

During the 1960-1964 period, plaintiffs in San Francisco and Cook County combined won 26.5% of medical malpractice cases.[237] In 1994, the national win rate for plaintiffs in medical malpractice cases was 34%, a 28% increase over the calculated win rate of plaintiffs in the early 1960s,[238] though the 1994 win rate was a decrease from the 1984 combined win rate of San Francisco and Cook County of 50%.[239] Since 1994, the plaintiff win rate for medical malpractice cases has continued to increase, reaching 39% in 2001, an increase of 47% over the early 1960s win rate for medical malpractice cases in San Francisco and Cook County combined.[240] The plaintiff win rate for products liability cases in San Francisco and Cook County combined from 1960-1964 was 41%, and by 1984 reached 52%, an increase of 27%.[241] The plaintiff win rate for products liability cases dropped off after the peak in the mid 1980s, but is increasing once again. In 1994, plaintiffs won 39% of products liability cases[242] and in 2001 plaintiffs won 56% of products liability cases, an increase of over 43% in just six years, and an increase of 36.5% since the early 1960s.[243]

Based upon the RAND data, the plaintiff win rate for automobile injuries has also increased since the early 1960s. The auto injury plaintiff win rate in San Francisco and Cook County combined during the 1960-1964 period was 52.5%.[244] In 1994, the national win rate for auto injuries was 58%,[245] and in 2001, it reached 68%,[246] an increase of 29.5% since the early 1960s.

While the comparability of some of the data is far less than desired, it is reasonably clear that win rates in personal injury litigation have at least not declined over the 40 year period from 1960 to 2001 and that in such high-end areas as products liability and medical malpractice, win rates have significantly increased over that period.

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236. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 45.
237. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17.
238. *See supra* note 211.
239. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17.
240. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 46.
241. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17.
242. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 41.
243. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 46.
244. *See* PETERSON, CIVIL JURIES, *supra* note 50, at 11, 17.
245. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 42.
246. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 47.

Finally, the win rates relied upon understate actual win rates or at least the effect of win rates, when combined with average verdict data, on contingent-fee incomes, for at least two reasons. First, the JVR data omits "cases of admitted or directed liability,"[247] thus omitting cases where liability is conceded and the only issue is the amount of damages. Such cases can involve substantial damages.[248] Second, for reasons similar to those discussed above with regard to the inherent understatement of average verdict data,[249] win-rate data omits the effect of class action claiming on tort litigation. Since few class actions are ever tried,[250] the enormous effects of class action claiming on tort litigation and therefore on contingent-fee incomes and effective hourly rates, is not captured in comparative win rate data for the years 1960 and 2001.

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247. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 40; *see also* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 45.

248. *See*, *e.g.*, Reed v. City of New York, 757 N.Y.S.2d 244 (2003) (affirming a $5.8 million dollar verdict in a case where the defendant City of New York had admitted liability).

249. *See supra* note 5.

250. *See* Brickman, *Class Action*, *supra* note 120, at 2 (stating that no class action in recent memory had ever gone to a jury trial in Madison County, Illinois, the leading forum in the United States for filing class actions).

APPENDIX C: THE HIDDEN BALL TRICK: A COMPARISON OF
BASEBALL AND THE TORT SYSTEM

Consider a comparison of baseball and the tort system. The former is a private enterprise; the latter a governmental function. Yet we know far more about the earnings of baseball players than we do about the earnings of tort lawyers who play a central role in the tort system—itself a core component of our civil justice system. Indeed, the tort system has been referred in an American Bar Association report as a "mirror of morals and a legal vehicle for helping to define them."[251] Since society pays for the direct costs of the tort system (and arguably, for the indirect costs as well in the form of higher insurance costs and product prices), and has an abiding interest in the efficient and effective operation of that system, it is virtually axiomatic that society is entitled to the full panoply of information about the operation of the tort system including the quantum of contingency fees yielded by that system. Whether or not a baseball player is worth $18 million a year for the next seven years may be a cause for concern among those who follow baseball, but no one seriously argues that the public has a right to intercede in salary-setting or even a right to know the salary information. However, if a top tier of contingency-fee lawyers' incomes derived from the tort system were found to range from $2,500 to $5,000 per hour or more, it may legitimately be concluded that, irrespective of ethical requirements, a public interest is implicated because these effective hourly rates of return may not only be regarded as a form of price gouging at the expense of tort claimants but also as generating excessive levels of tort litigation and as having other adverse effects on the operation of the tort system.[252]

Numerous statutory schemes evidence a public policy strongly favoring the public's right to have access to critical information about the functioning of government. For example, a number of states have enacted laws that require governmental bodies to hold their meetings in a forum open to the public.[253] These "sunshine" laws reflect the premise that public knowledge of agency decisionmaking is "vital to the enhancement and proper functioning of the democratic process and that secrecy in public

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251. ABA SPECIAL COMM. ON THE TORT LIAB. SYS., TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, 12–1, 12–5 (1984).

252. *See generally* Brickman, *Tort System*, *supra* note 1; Brickman, *Aggregative Litigation*, *supra* note 27.

253. *See, e.g.*, N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 2002); OHIO REV. CODE ANN. § 121.22 (West 2002); 65 PA. CONS. STAT. §§ 701–716 (2001).

affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society."[254] Public access to information about fees charged by lawyers is regarded as vital to the proper functioning of markets. Thus, the Securities and Exchange Commission (SEC) has mandated that any company making a public offering of securities "[f]urnish a reasonably itemized statement of all expenses in connection with the issuance and distribution of the securities to be registered."[255] The SEC explains on its Website that the purpose of these disclosure provisions "is to require companies making a public offering of securities to disclose material business and financial information in order that investors may make informed investment decisions."[256]

Contingency fees provide a type of stealth sheathing that not only hides income information from view but also obscures the connection between inordinately high rates of return and the effect of such rates of return on the tort system. In this regard, it is useful to understand how effective contingency-fee practitioners have been in keeping such vital information from public scrutiny. With respect to lawyer incomes and hourly rates of return, contingency fees fly below societal radar screens. In my view, the fact that we know less about the earnings of contingency-fee lawyers than we do for baseball players is not mere accident. Contingency-fee lawyers rightfully perceive that if their earnings in hourly rate equivalents were known, demands would be raised for reform of the tort system. Accordingly, higher earning contingency-fee lawyers do not participate in bar-sponsored surveys of lawyers' incomes or otherwise cooperate in efforts to produce reliable information about hourly rates of return.[257] In addition, they oppose efforts to generate knowledge about income that would be available for public scrutiny. This was evident when plaintiff lawyers objected to proposals to require insurance companies and other payers of settlements and judgments to attorneys to notify the Internal Revenue Service of the amounts of checks sent to lawyers (on IRS Form 1099).[258] This data would provide the IRS with the same income information provided for all other occupational groups as well as generate

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254. 65 PA. CONS. STAT. § 702 (2001).

255. SEC Registration Statement and Prospectus Provisions, 17 C.F.R. § 229.511 (2002). The instructions included in § 229.511 indicate that legal fees "shall be itemized separately." *See id.*

256. *See* U.S. Sec. & Exch. Comm'n, *Descriptions of SEC Forms*, *at* http://www.sec.gov/info/edgar/forms.htm (last modified May 29, 2001).

257. *See supra* text accompanying notes 75–78.

258. *See* I.R.C. § 6045(f) (2000).

information that could be used to estimate lawyers' gross contingency-fee income.[259]

A rare glimpse into lawyers' efforts to limit the public's knowledge of the extent of contingency-fee income is provided by the tobacco litigation settlements entered into by states' attorneys general. The contingent-fee agreements entered into between states' attorneys general and the private lawyers provided for payments ranging from approximately 10% to 33%.[260] When it became clear that public opinion would be resoundingly opposed to payment of approximately $50 billion of a $246 billion settlement to lawyers who were, for the most part, political cronies of the attorneys general and that the attorneys general would bear the brunt of that resentment,[261] a stealth strategy was substituted. In lieu of the very "public" contingent fees, the fee payments would be made through a secret "arbitration" process from which the public would be excluded.[262] Calling the process an "arbitration" was itself part of the subterfuge. The tobacco industry and the plaintiffs' lawyers each picked their own arbitrators but instead of the two arbitrators picking a third "neutral" arbitrator, the third arbitrator, John Calhoun Wells, was selected, with the approval of the tobacco companies, by a committee consisting of representatives of the private counsel, the state attorneys general, and the tobacco companies, but which had a majority of private counsel.[263] Hence, the private counsel selected two of the three "arbitrators." Wells had been a director of the Federal Mediation and Conciliation Service.[264] More importantly, he was a friend of Wayne Reaud and Walter Umphrey, two Texas lawyers involved in the tobacco litigations who sat on the committee that selected Wells.[265] Wells became the deciding vote in awarding the Texas tobacco lawyers a fee of $3.3 billion, which, at 19% of the state's recovery, was in excess of the 15% provided for the contingent-fee contract.[266]

Another part of the subterfuge was the provision that payments to the lawyers would not come out of the states' shares of the settlement but

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259. *See* Philip Buchan, *Tax Reporting Requirement Causes Confusion*, TRIAL, Mar. 1998, at 10; *see also supra* note 78, *infra* note 314, and accompanying text.

260. *See Attorney's Fees and the Tobacco Settlement: Hearings Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 105th Cong. 36 (1997) (statement of Lester Brickman, Professor of Law, Cardozo School of Law).

261. *See* Editorial, Billion-Dollar Legal Fees, N.Y. TIMES, Feb. 11, 1998, at A28 ("Unanticipated multibillion-dollar fees in [tobacco] cases based on public suffering are bound to create a backlash.").

262. *See* Susan Beck, *The Fee Giver*, THE AMERICAN LAWYER, Dec. 2, 2002, at 66.

263. *Id*. at 69.

264. *Id.*

265. *Id.*

266. *Id.* at 71.

would, instead, be paid directly by the tobacco companies.[267] While that "would, of course, reduce the amount the states could negotiate. . . the existence of a trade-off would not be as apparent. Instead, there would be the illusion that it is only the industry [that is] bearing the costs."[268] By shielding the process from public view, the tobacco lawyers were not only successful in transferring enormous wealth to themselves—upwards of $15 billion over a 25 year period with payments continuing at the rate of $500,000,000 a year for at least an additional 20 years—but also avoiding public focus on a process of transferring state funds to the lawyers which were extracted from the tobacco companies through the exercise of states' law enforcement powers.[269] According to prevailing doctrine, attorney's fees awarded in litigation belong to the party, not the attorney.[270] Moreover, since the very earliest days of the American republic, no governmental entity, federal or state, can enter into a contract to pay, authorize, or make a payment unless there is a legislative appropriation.[271] This rule applies equally to all state funds and not just funds raised through taxation.[272]

Finally, the tobacco fee payments demonstrate that the emperor wears no clothes. Under the terms of lawyers' self-regulatory schemes, a.k.a., codes of ethics, fees must be "reasonable" and "not excessive." If the tobacco fees, which in some cases have been estimated to amount to $100,000 to $200,000 per hour,[273] were "reasonable" and "not excessive,"

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267. W. KIP VISCUSI, SMOKE-FILLED ROOMS 50-51 (2002).

268. *Id*. at 17.

269. *See* Margaret A. Little, *Legal Fees Awarded in the State Tobacco Suits and Other Mass Tort and Class Actions Cases Face New Ethics and Legal Challenges*, 3 ENGAGE, Oct. 2002, at 119 [hereinafter Little].

270. *See* Venegas v. Mitchell, 495 U.S. 82, 87–88 (1990); Erickson v. Foote, 153 A. 853, 854 (1931) ("The costs allowed in an action belong to the party in whose favor they are taxed, and not to his attorney."); *see also* Brown v. General Motors Corp., Chevrolet Div., 722 F.2d 1009, 1011 (2d Cir. 1983) (stating that the award of attorneys' fees is to the prevailing party, not the attorney).

271. AM. JUR. 2D states:

> The power of the legislature with respect to the public funds raised by general taxation is supreme, and no state official, not even the highest, has any power to create an obligation of the state, either legal or moral, unless there has first been a specific appropriation of funds to meet the obligation.
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> . . . The object of such provisions is to secure regularity . . . in the disbursement of public money and to prohibit expenditures of public funds at the mere will and caprice of those having the funds in custody, without direct legislative sanction therefor.

63 AM. JUR.3D *Public Funds* § 34 (1997).

272. *See, e.g.*, 81A C.J.S. *States* § 233 (1977) ("General funds, available for general state purposes, which are deposited in the state treasury, are subject to constitutional requirements as to appropriations with respect to their disbursement, and this is true regardless of the source from which such funds are derived.").

273. *See supra* note 13.

then those terms are utterly vacuous and devoid of content. No ethics regime can be seen to be in place to regulate lawyers when, for example, Maryland's outside contingent-fee counsel, Peter Angelos, bartered half of his 25% contingent fee in exchange for the Maryland legislature enacting a law which operated retroactively to assure that the state's litigation against the tobacco companies would prevail in court.[274] Angelos "essentially purchased the law that would be applied to his case—with the state's own money."[275]

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274. Little, *supra* note 269, at 120.
275. Little, *supra* note 269, at 120.

APPENDIX D: PROPOSALS TO REFORM CONTINGENT FEES TO IMPLEMENT DORMANT ETHICAL PRINCIPLES AND TO PROTECT CONSUMERS

Contingency fee abuses have generated a number of proposals for reform. Many seek to limit litigation by, for example, reducing the time limits for bringing suit, capping non-economic damages, limiting punitive damages, limiting the effect of joint and several liability rules, or repealing the collateral source rule.

Some, however, focus mainly on consumer protection and implementing ethical rules.[276] One such proposal, referred to as the "early offer" proposal, has received extensive coverage in both the media and professional responsibility casebooks.[277] It would prohibit plaintiff lawyers in personal injury cases from charging standard contingency fees where allegedly responsible parties made early settlement offers before the lawyer added any significant value to the claim.[278] Instead, the lawyer would be restricted to charging an hourly rate fee for the effort required to notify the allegedly responsible party of the relevant details of the claim. If an early settlement offer were rejected and a subsequent settlement or judgment were obtained, the lawyer would apply a contingent percentage to the amount in excess of the early offer. Critics of the proposal, who have frequently mischaracterized it,[279] have failed to comprehend how it

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276. *See* Michael J. Horowitz, *The Road to Reform*, NAT'L REV., Aug. 20, 2001, at 30 (advocating "new agenda" tort reform proposals that "increase rather than diminish consumer rights . . . and require lawyers to comply with ethics rules . . . . [and] alter[] . . . perverse incentives that encourage lawsuits rather than settlements").

277. For media coverage, see, e.g., Editorial, *Capping Contingency Fees*, SACRAMENTO BEE, Mar. 8, 1994, at B6; Brent Larkin, *Reformers Target Lawyers' Fees*, CLEVELAND PLAIN-DEALER, Feb. 27, 1994, at 1C; Margot Norman, *Thin Cases, Fat Fees: Why Are We Importing the Worst of US Justice?*, LONDON TIMES, May 17, 1994; Peter Passell, *Windfall Fees in Injury Cases Under Assault*, N.Y. TIMES, Feb. 11, 1994, at A1, B18; Editorial, *Place Some Limits on Contingency Fees*, HARTFORD COURANT, Mar. 8, 1994, at B10; Editorial, *Windfall Lawyers' Fees*, HONOLULU STAR-BULL., Feb. 23, 1994. For coverage in professional responsibility casebooks, see, e.g., NATHAN CRYSTAL, PROFESSIONAL RESPONSIBILITY 268–69 (1996); STEPHEN GILLERS, REGULATION OF LAWYERS 180–81 (6th ed. 2002); GEOFFREY HAZARD, SUSAN KONIAK & ROGER CRAMTON, THE LAW AND ETHICS OF LAWYERING 517 (3d ed. 1999); TOM MORGAN & RONALD ROTUNDA, PROFESSIONAL RESPONSIBILITY 143 (7th ed. 2000); JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 70 (2d ed. 2001); DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY 855 (1994); ROY SIMON & MURRAY SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION 588–89 (3d ed. 1994); DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 689 (3d ed. 2001).

278. For a description of the proposal, see Brickman ET AL., RETHINKING CONTINGENCY FEES, *supra* note 7; Michael Horowitz, *Making Ethics Real*, *Making Ethics Work: A Proposal for Contingency Fee Reform*, 44 EMORY L.J. 173, 207 (1995).

279. *See, e.g.*, John C. Coffee, Jr., *Securities Class Actions: Myth, Reality and Reform*, N.Y.L.J.,

counteracts the ethically challenged zero-based accounting system used by contingent-fee lawyers and described earlier in footnote 11. In fact, by confining application of the contingent fee to the value that a lawyer has added to a claim, the proposal implements the ethical requirements set forth in Rule 1.5(a)(8) of the Model Rules of Professional Conduct and DR2-106 (B)(8) of the Model Rules of Professional Responsibility, both of which require that contingent fees be commensurate with risk.[280]

Another proposal of this genre, which has specific application to medical malpractice litigation, provides that a defendant in a personal injury lawsuit who, within 60 days of the claim, concedes liability and offers to compensate the injured claimant for his economic loss (which consists mainly of medical expenses and lost wages) is relieved of liability for any non-economic loss.[281] Thus, there is an inducement for defendants to concede liability and pay economic damages early in the process in

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July, 28, 1994, at 5 (misstating the terms of the proposal and misapplying it in an illustrative fee computation), *but see* Lester Brickman, *Limiting Lawyers' Unearned, Windfall Fees*, N.Y.L.J., Aug. 4, 1994, at 5 (correcting Coffee's misstatements); *see also* Kritzer, *The Wages of Risk*, *supra* note 17, at 307, 309 (criticizing the proposal as antithetical to "market solutions to [contingent-fee] pricing" because it is a "[l]egislative limitation on fees"). The proposal does not limit contingency fees; rather, it seeks to implement the ethical requirement that commensurate risk is required in order to justify the higher effective hourly rates of return generated by contingent fees. *See* Brickman, *Disciplinary Enforcement*, *supra* note 7, at 1346–49. Moreover, contrary to Kritzer's position, the proposal does not reject a "market solution" but rather seeks to create the very market bargain that would be reached if the market for contingency-fee services were competitive and clients could bargain with their lawyers over contingency-fee rates. *See* Michael Horowitz, *Making Ethics Real, Making Ethics Work: A Proposal dor Contingency Fee Reform*, 44 EMORY L.J. 173, 191–92 (1995); Kritzer, *Seven Myths*, *supra* note 1, at 777–78 (misinterpreting the intent of the proposal, which is to create a self-effectuating mechanism for determination of the value of a claim before a lawyer has added any substantial value to the claim, and erroneously concluding that lawyers in routine cases have to "put in a nontrivial amount of time" in order to prepare the letter notifying the allegedly responsible party of the existence of the claim). Under the proposal, plaintiff lawyers need not wait until all medical testing or treatment has been completed; they can send the notification required before "nontrivial" amounts of time have been expended). For other misperceptions of the proposal, see Susan P. Koniak, *Principled Opinions: Response to Brickman*, 65 FORDHAM L. REV. 337, 351 (1996) (misperceiving the underlying basis for the proposal by arguing that early settlement offers are misleading because they do not provide accurate information about the amount of recovery a plaintiff has a right to expect). The proposal designates early settlement offers as a marker of the absence of contingent risk as to amount of the offer—not as an indicator of the value of a claim. That is, early settlement offers are a way of countering the zero-based accounting system that contingency fee lawyers use to mulct clients. *See* *supra* note 12; Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2090 (2002) (erroneously indicating that the proposal caps contingency fees); Schneyer, *supra* note 18, at 1831 n.12 (erroneously indicating that the proposal "would require plaintiffs' lawyers to solicit 'early' settlement offers from potentially responsible parties"). The proposal requires that plaintiff lawyers provide a notice of claim to all allegedly responsible parties as soon as practicable, including all relevant information available to the attorney required to evaluate the claim.

280. *See supra* notes 7–9.

281. *See* Jeffrey O'Connell, *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses*, 77 NW. U. L. REV. 589 (1982).

order to avoid medical cost buildup and before significant litigation costs have been incurred.[282]

A third such proposal is the Auto Choice Reform Act of 2001.[283] The Auto Choice Reform Act would allow consumers to purchase unbundled auto insurance, instead of current bundled coverage whereby motorists are required to purchase economic loss and pain and suffering coverage. Specifically, it would allow motorists to purchase only "personal injury protection" (PIP) insurance. With PIP coverage, an injured motorist would be compensated for medical bills and lost wages up to his policy limit without having to prove fault. Injured persons could also sue a driver at fault in an accident to recover the cost of any medical bills and lost wages beyond their policy limits. However, by purchasing only PIP coverage, a motorist with bodily injury could not sue for pain and suffering. While the motorist could also purchase pain and suffering coverage and thus replicate his current insurance, he would not be compelled to do so. If he chose not to do so, thereby eliminating his ability to sue for pain and suffering, the average family would save up to $400 a year in premium costs. Given the choice of whether to put the pieces back together by also purchasing pain and suffering coverage, most motorists would likely not do so because the chance of collecting a major pain and suffering award would be in the range of lottery odds. It has been estimated that if 100% of insured motorists switched to PIP, annual premium savings in 1996 would have exceeded $40 billion.[284] In addition, substantial savings would be realized by the avoidance of medical cost "build-up" which occurs when bodily injury claimants retain contingent-fee lawyers.[285] Finally, since under the current system, part of the premium cost for (bundled) pain and suffering coverage subsidizes contingency-fee lawyers' fees, allowing consumers to forgo such coverage would be at the expense of lawyers' income.

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282. *Id.* For an explanation of "medical cost build-up," see *supra* note 57.

283. H.R. 1704, 107th Cong. (2001).

284. *See Auto Choice Reform Act of 1999: Hearing on H.R. 1475 Before the Joint Econ. Comm.*, 105th Cong. (1997) (statement of Jeffrey O'Connell).

285. *See supra* note 57.

APPENDIX E: THE ROLE OF STATE SUPREME COURTS IN THE TORT
REFORM WARS

There has been much scholarly commentary on the tort reform wars,[286] as well as widespread coverage in the news media.[287] The major locus of these wars is at the state level.[288] Over the past fifteen years, 32 states have modified punitive damages, 35 have abolished or limited joint and several liability, 22 have amended collateral source rules, 11 have limited compensatory damages, and 3 have enacted laws relating to class actions.[289] A number of state supreme courts have invalidated some or all of these legislative reforms, in some instances, dispossessing their state legislatures of authority to regulate the tort system.[290] The gauntlet has

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[286]. *See, e.g.*, WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991); Brakel, *Critique*, *supra* note 26, at 77, 104 nn.60-64; Galanter, *Contingency Fee and Its Discontents*, *supra* note 165; Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); George L. Priest, *Understanding the Liability Crisis*, *in* NEW DIRECTIONS IN LIABILITY LAW: PROCEEDINGS OF THE ACADEMY OF POLITICAL SCIENCE 196 (Walter Olson ed., 1988); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147 (1992); Garry T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992); W. Kip Viscusi & Patricia Born, *The National Implications of Liability Reforms for General Liability and Medical Malpractice Insurance*, 24 SETON HALL L. REV. 1743 (1994).

[287]. *See, e.g.*, Stephen Budiansky, Ted Gest, & David Fischer, *How Lawyers Abuse The Law*, U.S. NEWS, Jan. 30, 1995, at 50; Linda Ransom, *Lawyers May Kill My Daughter*, WALL ST. J., Mar. 20, 1996, at A14. For coverage of the tort reform debate in California that manifested itself in propositions 200, 201, and 202, see Editorial, *Who Loses From Tort Reform?*, INV. BUS. DAILY, Mar. 22, 1996, at A2; Matthew Robinson, *A Falling Out on Lawsuit Front*, INV. BUS. DAILY, Mar. 11, 1996, at A1; Stuart Taylor, Jr., *Tort Lawyers vs. Consumers*, LEGAL TIMES, Jan. 29, 1996, at 23. For proposals for reform that focus on consumer protection and are thus impervious to the critique leveled by the Ohio Supreme Court in *infra* note 291 of those "who seek to limit their liability and financial exposure for civil wrongs," see *supra* note 276. For the role of the American Bar Association in the tort reform wars, *see* Brickman, *Money Talks*, *supra* note 7, at 257–67.

[288]. For accounts of the steps being taken nationally and on a state-by state basis to effect tort reform, *see, e.g.*, Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 56 (examining the steps states have taken to change tort laws in the absence of action from Congress); Richard B. Schmitt, *While Congress Debates, States Limit Civil Lawsuits*, WALL ST. J., Jun. 16, 1995, at B1; Richard B. Schmitt, *Senate Clears Way for Likely Approval of Curbs on Product-Liability Lawsuits*, WALL ST. J., May 10, 1995, at A3.

[289]. *See* American Tort Reform Association, June 2001 Tort Reform Record, *at* http://www.atra.org/record/2001_record.pdf.

[290]. *See generally* Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 SETON HALL L. REV. 688 (2001); *see also* Paul D. Carrington & Adam R. Long, *The Independence And Democratic Accountability Of The Supreme Court of Ohio*, 30 CAPITAL U.L. REV. 455, 476 n.107 (2002). For an example of an invalidation of a

been laid down by the Ohio Supreme Court in invalidating a comprehensive reform of Ohio tort law:

> For more than a decade, Ohio has been home to an ongoing conflict over the necessity and propriety of transforming the civil justice system. In its most elementary form, this conflict reflects a power struggle between those who seek to limit their liability and financial exposure for civil wrongs and those who seek compensation for their injuries.[291]

In enacting tort-reform legislation, the Ohio Legislature determined that large tort awards were driving up the cost of malpractice insurance for doctors and liability insurance for businesses, to the detriment of the state's interest.[292] The Ohio Supreme Court rejected the Legislature's determination, holding that a cap on damages was not rationally related to the goal of reducing liability costs.[293] In rejecting the legislative finding, the Ohio Supreme Court was acting much like the U.S. Supreme Court in *Lochner v. New York*,[294] when it invalidated a statute establishing a maximum 60-hour workweek in bakeries.[295] *Lochner* was, of course, later repudiated.[296]

Moreover, the Ohio Supreme Court's statement that the conflict is between business interests and insurance companies on the one hand and injured claimants on the other[297] is belied by the fact that the lawsuit

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major legislative tort reform package that amounts to the court's effectively seizing control of the tort system and dispossessing the legislature of authority to legislate in the area, see *Best v. Taylor Machine Works*, 689 N.E.2d. 1057 (Ill. 1997).

291. State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 715 N.E. 2d 1062, 1071 (Ohio 1999).

292. *See* Morris v. Savoy, 576 N.E.2d 765, 768 (Ohio 1991).

293. *Id*. at 770-71; *see also* Sheward, *supra* note 291, at 1095.

294. 198 U.S. 45 (1905).

295. *Compare* Lochner, 198 U.S. at 62 (stating that it is "unreasonable and entirely arbitrary" to conclude that there is a relationship between health and hours worked), *with* Morris, 576 N.E.2d at 770–71 (finding no "rational connection" between high jury verdicts and malpractice insurance rates); *see also* Matthew W. Light, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315, 350–52 (2001); George L. Priest, *The Constitutionality of State Tort Reform Legislation and* Lochner, 31 SETON HALL L. REV. 683, 683 (2000).

296. In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Supreme Court held that:

> The doctrine that prevailed in *Lochner* . . . and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.

Id. at 730.

297. *See supra* note 291.

contesting the constitutionality of the legislative act was not initiated by an injured claimant arguing that he had been deprived of his constitutionally protected compensation interest but by Ohio's tort lawyers as the party in interest. This "injury" was the projected outcome of the following chain of causation: implementation of the legislative tort-reform package would yield less litigation; that would, in turn, reduce tort lawyers' incomes; this would reduce the ranks of tort lawyers, thereby injuring the Ohio Academy of Trial Lawyers.[298]

A major consequence of the invalidation of legislative reforms of the tort system by state supreme courts on pretextual state constitutional grounds has been a transformation of state judicial elections, particularly at the supreme court level, into full fledged political battles, pitting business interests against trial lawyers.[299]

One way in which the opponents of tort reform have sought to maintain control over the tort system is to prohibit the kinds of political campaigns that proponents of tort reform have to wage in order to defeat pro-plaintiff-lawyer state supreme court justices running for reelection.[300] In a little heralded but critically important decision in the tort reform wars, the U.S. Supreme Court in *Republican Party v. White*, aligning along the conservative/liberal split on the Court, effectively held such an attempt

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298. A similar argument was endorsed in *Richard F. Mallen & Assocs. v. MYINJURYCLAIM.COM Corp.*, 769 N.E.2d 74 (Ill. App. Ct. 2002) (finding that a law firm specializing in personal injury law had standing to bring a class action on behalf of all personal injury lawyers in Illinois, alleging injury to the lawyers' property rights, against an Internet web site advising individuals injured in automobile accidents with regard to their claims). *See also* William v. Wilson, 972 S.W.2d 260 (Ky. 1998) (declaring a legislative act raising the burden of proof in punitive damages to clear and convincing evidence and from "gross negligence" to acting with "flagrant indifference to the rights of plaintiff," unconstitutional because it violated an obscure provision of the Kentucky Constitution). On this point, see *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 n.11 (1991) ("There is much to be said in favor of a State's requiring, as many do, a standard of 'clear and convincing evidence' [for punitive damages] . . . .")

299. *See* Michael L. Rustad & Thomas H. Koenig, *Taming The Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 54 (2002) ("[T]he most active battles over tort theory are being fought in state judicial elections."). A 1993 Alabama Supreme Court decision striking down tort reform legislation precipitated a monumental battle over control of the court between "businesses and those who sue them." Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656 (1999). Between 1986 and 1996, the cost of running for a seat on the Alabama Supreme Court rose from $237,281 to $2,080,000 million per candidate. *See* ABA TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS OF THE TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, pt. 2, at 15, 81 tbl. 1 (1998). "[I]n Ohio, five candidates [for two supreme court positions] raised almost $3.3 million and interest groups on both sides of the tort reform issue spent at least $8 million more on 'issue' advertising." Thomas A. Gottschalk, *Justice Reform—To What End? By What Means?*, METROPOLITAN CORP. COUNS., Nov. 2001, at 1.

300. For a listing of statutes and rules regulating the speech of candidates for judicial office, see *Republican Party of Minn. v. Kelly*, 247 F.3d 854, 880 nn.21–22 (8th Cir. 2001).

unconstitutional by striking down a Minnesota provision designed to depoliticize judicial elections.[301] This Minnesota "announce" clause prohibited a judicial candidate from "'announcing his or her views on disputed legal or political issues.'"[302] While striking down the use of this clause did not directly implicate tort reform issues, it was undoubtedly viewed by both the conservative and liberal camps on the Court as standing in for the constitutionality of other states' rules limiting political speech in the course of state judicial elections. These latter rules have the effect of making the unseating of incumbent (typically pro-trial lawyer) justices more difficult. Indeed, *White* was a basis for the Eleventh Circuit Court of Appeals striking down Canon 7(B) of the Georgia Code of Judicial Conduct, adopted by the Georgia Supreme Court.[303] Canon 7(B)(1)(d) provided that candidates running for judicial office

> shall not use. . . public communication which. . . is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve.[304]

This and other parts of Canon 7 were struck down because it "chill[ed] . . . core political speech."[305]

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301. *See* Republican Party v. White, 536 U.S. 765 (2002).
302. 536 U.S. at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000))
303. Weaver v. Bonner, 309 F.3d 1312, 1319–23 (11th Cir. 2002).
304. *Id*. at 1314.
305. *Id*. at 1320.

APPENDIX F: THE INCREASING FREQUENCY OF MILLION DOLLAR FEES
IN PERSONAL INJURY LITIGATION

JVR publications indicate that in the 1994-2000 period, 8% of tort verdicts were between $250,000 and $499,999, 2% were between $750,000-$999,999, and 10% were $1,000,000 or more.[306] Of the verdicts that were $1,000,000 and higher, 2%, one in every 50 verdicts, were over $5,000,000,[307] thus generating contingent fees in excess of $1 million. In federal district courts in the period 1994-1997, awards of $1 million or more were made in 17%-18% of all tort cases terminated in that time period.[308] There is considerable other evidence that million-dollar-plus fees are not uncommon.[309] Moreover, the JVR data understates the percent of high-end verdicts and therefore the number of multi-hundred-thousand and million dollar contingent fees for at least two reasons: (1) the data does not include cases where the defendant admitted liability and the only issue being litigated was the quantum of damages;[310] (2) many thousands of substantial jury verdicts that would otherwise have occurred were obviated by resort to class actions to resolve mass tort and other tort claims, thus generating multi-million and even multi-hundred-million dollar fees untracked by the JVR data.[311] Nor do the data incorporate the fees in the tobacco cases—

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306. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 3.

307. *Id.* In the period, 1995-2001, verdicts over $5,000,000 had increased from 2% to 3%. *See* JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 4.

308. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN NJC 172855, FEDERAL TORT TRIALS AND VERDICTS, 1996-97, at 1.

309. *See, e.g.*, National Jury Verdict Review & Analysis, vol. 16, no. 1 (May 2002) (reporting in one issue a sample of nine jury verdicts with a mean of $10.9 million and a median of $12.6 million); *see also* Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219, 227 (2001) (noting that "[i]n its 2001 survey of the largest jury verdicts for the year 2000, the *National Law Journal* listed sixteen verdicts, not including the Florida tobacco case, ranging from a low of $32.9 million to $122.59 million) (citations omitted); *The Top Trial Lawyers*, FORBES, Nov. 6, 1995, at 160 (reporting that a contingency fee attorney in Texas earned $90 million in 1995, another earned $40 million, and several others earned more than $10 million in a single year); Peter Brimlow & Leslie Spencer, *The Plaintiff Attorneys' Great Honey Rush*, FORBES, Oct. 16, 1989, at 197; Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6 (describing a $65 million dollar fee in settlement of a Phillips Petroleum plant explosion; based upon the amount of the settlement of the entire litigation and applying standard contingent fees, total fees in that case almost certainly exceeded $300 million).

310. *See* JVR, CURRENT AWARD TRENDS 2001, *supra* note 211, at 2; JVR, CURRENT AWARD TRENDS 2002, *supra* note 97, at 2.

311. *See generally* Brickman, *Aggregative Litigation*, *supra* note 27, at 243–52. With regard to the latter, see, e.g., Sulzer, *MDL Committee Proposes $768 Million Settlement; Objections Abound*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, Sept. 6, 2001, at 1 (reporting the preliminary approval of a product liability class action settlement for $768 million; although attorney fees were not specified in the settlement, one defense attorney expects to make a $20 million dollar bonus if the

payable possibly in perpetuity though subject to an annual cap of $500 million—that have surpassed all previous high-water marks.[312]

None of the bar survey data that Kritzer has relied on includes or ever will include these fees or the many others of this magnitude.[313] One possible source of data that will include meaningful contingency-fee data may emanate from the newly instituted federal requirement that businesses and insurance companies paying settlements to lawyers and clients jointly report those payments to the Internal Revenue Service by issuing Form 1099's.[314]

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settlement is approved.); *3rd Circuit Upholds $3.2 Billion Settlement, Sharply Reduces Fees*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, Sept. 6, 2001, at 20 (reporting that the original attorney fees of $262 million were reduced to a maximum of $187 million; if it had been upheld the $262 million in fees would "reward counsel with a multiplier of 45 times their normal rate"); *Federal Judge Approves $192.5M Settlement in Racial Discrimination Action*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, July 5, 2001, at 4 (reporting attorney fees of $20.7 million provided under the $192.5 million settlement); *Health Care Giant Agrees To $860M Settlement*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, Apr. 19, 2001, at 1 (reporting that the fund set aside for the attorney fees from the $860 million settlement provided up to $20 million). *See also* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1262 (2001–2002) ("Even in relatively routine cases, class attorneys earn hundreds of thousands, and frequently millions, of dollars in fees."); *$90 Million In Fees Granted In Prudential Suit*, MEALEY'S ATTORNEY FEES, Aug. 2000, at 17; *U.S. Supreme Court Upholds $13 Million Fee Award*, MEALEY'S ATTORNEY FEES, June 2000, at 16; *Pa. Judge Awards Fee In Excess Of $32 Million*, MEALEY'S ATTORNEY FEES (May 2000); *$175 Million Awarded in Drug Price-Fix Case*, MEALEY'S ATTORNEY FEES, Feb. 2000, at 12; *$37.1 Million in Fees Ok'd in Securities Case*, MEALEY'S ATTORNEY FEES, Dec. 1999, at 16; *Humana RICO Settlement Approved; $11.8 Million In Attorneys' Fees Awarded*, MEALEY'S ATTORNEY FEES, Dec. 1999, at 17; *$32 Million Awarded In Commodities Case*, MEALEY'S ATTORNEY FEES, Dec. 1999, at 18; *$3.75 Billion Settlement Covers Medmon, Injury; Excludes PPH, Revives Claim*, MEALEY'S LITIGATION REPORT: FEN-PHEN / REDUX, Nov. 11, 1999, at 2 (reporting that the settlement provided up to $429 million for attorneys' fees); *$15 Million Awarded in Consumer Class*, MEALEY'S ATTORNEY FEES, Sept. 1999, at 15; *Ahearn Class Counsel Paid $25 Million In Agreement With Fibreboard, Insurers*, MEALEY'S LITIGATION REPORT: INSURANCE, Sept. 8, 1999, at 11; *Illinois Court Approves $200 Million Class Action Settlement Against State Farm*, MEALEY'S INSURANCE LAW WEEKLY, Feb. 16, 1999, at 2 (reporting that the settlement provided up to $24 million for attorneys' fees).

312. *See, e.g.*, *N.Y. Lawyers Awarded $625 Million in Fees by Tobacco Arbitration Panel; Settlement: Attorneys representing 18 states in the landmark case have received $12.4 billion*, L.A. TIMES, Oct. 24, 2001, at Bus., pt. 3, at 4. *See also Tobacco Litigation Resources*, Overlawyered.com, *at* http://www.overlawyered.com/topics/tobacco.html (last visited Sept. 15, 2003), for a comprehensive list of the current tobacco fee settlements. *See also Arbitration Panel Awards Calif. Attorneys $637 Million*, MEALEY'S LITIGATION REPORT: CLASS ACTIONS, Mar. 22, 2001, at 14 (reporting that the Tobacco Fee Arbitration Panel awarded California outside counsel $637.5 million in attorney fees). Other tobacco fees reported include: $450 Million to Michigan Tobacco Attorneys, $625 Million to New York Tobacco Attorneys, $64.85 Million to Utah Tobacco Attorneys, $82.5 Million to South Carolina Tobacco Attorneys, $3.4 Billion to Florida Attorneys, and $3.3 Billion to Texas Attorneys. *See Tobacco Litigation Resources*, *supra*; *see also* Tobacco: Lawyer Fees Actually $566M?, May 18, 1998, *at* http://www.channel4000.com/news/stories/news-980601-112820.html (last visited Oct. 3, 2003) (reporting that the fee received by the Minnesota tobacco attorneys was $566 Million).

313. *See supra* notes 141–44.

314. *See* I.R.C. § 6045(f) (2000); *see also* Terry Carter, *Keeping 'Em Honest*, A.B.A. J., Aug.

APPENDIX G: TYPES OF STATE AUTOMOBILE INSURANCE LAWS[315]

No-Fault State—As of 1997 . . . 13 states had laws that restrict the right to sue for minor auto injuries, and which provide auto injury victims with substitute personal injury protection [PIP] benefits [collectible from their own insurers, that is, first party insurance,] regardless of who was at fault. These laws contain "tort thresholds," defined in terms of the amount of medical expense, days of disability or severity of injury, that determine when an injury qualifies for a liability claim or lawsuit against the at-fault driver.

. . . .

Three of the no-fault states (Kentucky, New Jersey and Pennsylvania) have what are called "choice no-fault" laws. Vehicle owners can choose to operate under no-fault, in which case they collect benefits from their own auto insurer without regard to fault. Only if the injury is serious are they permitted to file a bodily injury liability claim or lawsuit against the other driver. When policyholders choose to limit their right to file a liability claim or lawsuit, their premiums are reduced. If a vehicle owner chooses to reject the no-fault option and operate under the tort liability system, that vehicle owner is free to sue other drivers in the event of an accident.

. . . .

Add-On State—Ten states [including Wisconsin] and the District of Columbia had laws in 1997 that require auto insurers to offer PIP benefits but which do not restrict the right to pursue a liability claim or lawsuit as well. Thus, the no-fault benefits are simply "added on" to the existing tort liability system, sometimes in the form of separate packages of PIP coverages similar to those sold in no-fault states, and sometimes by simply offering to add some wage replacement benefits to the MedPay medical and funeral coverage. In some add-on states the purchase of PIP coverage is optional, in others the coverage must be included in all auto insurance policies

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1997, at 28; Peter Passell, *Economic Scene: Washington May Tighten up* on *Reporting of Fees By Trial Lawyers*, N.Y. TIMES, Jan. 25, 1996, at D2.

    315.   The text of this Appendix is taken from INSURANCE RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS 13–14 (1999).

sold. In most respects, add-on states are indistinguishable from other tort liability states.

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Tort Liability State—Twenty-seven states remained under traditional tort liability systems, or had reverted to that status, as of 1997. Injury victims generally are expected to collect payment from the at-fault driver, if any, and must be able to prove negligence. Some vehicle owners purchase medical payments coverage to provide non-fault medical and funeral benefits for occupants of the insured vehicle and for pedestrians struck by the insured vehicle.

APPENDIX H: TORT LAWYERS' FREQUENCY OF PREVAILING IN
LITIGATION

Contingency-fee lawyers infrequently fail to obtain a recovery in cases they undertake. Even as early as 1957, when it was still appropriate to criticize "fault rules [in the tort system for] bar[ring] too many [accident] victims from receiving compensation,"[316] contingency-fee lawyers obtained recoveries in 90% of the matters in which they appeared.[317] In fact, even though 39,000 of 193,000 estimated tort claims raised in New York in 1957 did not have lawyer representation, the amounts obtained for the represented claims accounted for 97% of the total amount of compensation paid.[318] The effectiveness of contingency-fee lawyers' case-screening procedures[319] in insuring high recovery rates is carefully examined in a series of federal tax cases determining the deductibility of expenses and costs of litigation advanced by contingency lawyers to clients under fee agreements in which the client bears litigation costs. Despite the apparent contingent nature of the repayment of litigation expenses advanced by plaintiff lawyers, the Internal Revenue Service (IRS) treated these expenses as nondeductible loans which the lawyer could deduct as bad debts if not repaid, rather than as ordinary and necessary business expenses which would be deductible in the year the money was advanced. The IRS position was based upon data it assembled from lawyers' records indicating that though the lawyers prevailed in 70% of their cases, they were eventually repaid between 80% and 90% of the total amount advanced from settlements and judgments obtained in the 70% of the cases in which they prevailed.[320] In *Burnett v. Commissioner*,[321] a contingency-fee lawyer sought to deduct advances made to clients for living expenses which were to be repaid only if the lawyer was successful in recovering on the clients' claims.[322] In determining whether the expenditures were deductible business expenses or nondeductible loans, the Fifth Circuit rejected the taxpayer's contention that contingency of recovery, in and of itself, qualified the expenditures to be deducted as business expenses, and proceeded to examine the

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316. *See* Franklin et al., *Study*, *supra* note 42, at 33.
317. *Id*. at 31.
318. *Id.* at 21.
319. *See supra* note 151.
320. *See* Boccardo v. United States, 12 Cl. Ct. 184, 186–98 (1987), *rev'd on other grounds sub nom.*, 56 F.3d 1016 (9th Cir. 1995).
321. 42 T.C. 9 (1964), *remanded*, 356 F.2d 755 (5th Cir.).
322. *Id*. at 12.

circumstances and conditions under which the payments were made.[323] The record revealed that the lawyer exercised a "high degree of selectivity" by carefully evaluating the strength of a client's claim before advancing litigation expenses and that he limited the amount of each advance to under the expected recovery.[324] The court noted that "although reimbursement was tied to the recovery of a client's claim, assistance was granted only to those whose claims would in all probability be successfully concluded."[325] Although the client was generally obligated to repay the advances, no reimbursement occurred if the client was impecunious. Indeed, many firms make no effort to seek reimbursement of expenses if there is no recovery. Moreover, the record revealed that the lawyer recovered over 98% of these expenditures.[326] The *Burnett* court concluded that the lawyer's expenditures for his clients "were virtually certain to be repaid,"[327] and thus held them to be nondeductible loans rather than deductible business expenses.[328] It is interesting to note that the *Burnett* case and the cases cited in this footnote were decided in the 1960s—before the major expansion of tort liability took place.[329] Thus, there is a strong likelihood that today, the percentage of cases in which plaintiff lawyers succeed is above 70%, perhaps as high as 90%. This is supported by a survey of plaintiff lawyers which reported "very high success rates . . . [in the range of] 91% . . . [a rate which] exceed[ed] the respondents' reported ex ante appraisal of success [which was mostly in the 70-90% range]. . . ."[330] These high percentages are attained by careful case-selection techniques.[331]

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323. *Burnett*, 356 F.2d at 758–59.

324. *Id.* at 760. There is additional evidence in support of the proposition that lawyers differentially invest in cases based on the perceived likelihood of success. *See, e.g.*, website of Advocate Capital, Inc., *available at* http://www.AdvocateCapital.com (Advocate Capital provides loans to lawyers to cover litigation expenses, using the "case as collateral."). Advocate Capital requires lawyers to repay loans even if the case is lost; however, the website implies that this should not be overly burdensome on attorneys, citing their "experience that a minimal amount of money is invested in cases that are ultimately abandoned." *Id.*

325. *Id*.

326. *Id*. at 758. The Tax Court found that $4,417 out of approximately $290,000 advanced by the taxpayer-lawyer had become worthless. *Id*. at 760. The rate of recovery is $290,000 minus $4,417, which equals $285,584; $285,583 divided by $290,000 equals 98.5%. For cases adopting the same approach and reaching the same result as Burnett, see Monek v. Comm'r, 25 T.C.M. (CCH) 582, 584 (1966) (noting that the lawyer eventually recovered approximately 98% of expenditures to clients); Canelo v. Comm'r, 53 T.C. 217, 218 (1969) (90% recovery of expenditures within two years).

327. *Burnett*, 356 F.2d at 759.

328. *Id*. at 761.

329. *See supra* note 1.

330. James H. Stock & David A. Wise, *Market Compensation in Class Action Suits: A Summary of Basic Ideas and Results*, 16 CLASS ACTION REP. 584, 588, 590 fig. 2 (1993); *see also* Paul D.

In summary, the available data supports the conclusion that tort lawyers prevail in approximately 90% of the cases they accept and obtain repayment of substantially all litigation expenses they advance, including expenses advanced in the cases where they do not prevail.[332]

Freeman, *The World of Shareholder Litigation According to Bill Lerach*, CAL. LAW., Apr. 1989, at 47, 48–49 (quoting William S. Lerach of Milberg Weiss as stating his firm "achieves a significant settlement, although not always a big legal fee, in 90 percent of the cases we file").

331. *See supra* notes 14 and 151; *see also* Kenneth R. Shaw, Editorial, *The Right Kind of Case*, N.Y. TIMES, Feb. 25, 1994, at A28 ("[A] lawyer who takes contingent fee cases where liability is in doubt will soon go bankrupt. An astute lawyer will take only one type of case on contingency: where liability is nearly certain and the amount of damage depends on the amount of money available for trial."). This view has been echoed by another contingency-fee attorney who stated that "[t]he success of a firm depends not so much on the cases taken but upon the cases turned down." Andrew Blum, *Big Bucks, But . . .*, NAT'L L.J., Apr. 3, 1989, at 1, 46; *see also id.* at 47 ("[T]here are the good [personal injury] cases—with clear liability and high return."). New York Judge Bernard Botein stated that "[t]here is very little that is contingent about the contingent fee. Recoveries are obtained, mostly through the medium of settlements, in over 90 per cent. [sic] of the claims handled by lawyers, so that the dread contingency of no recovery and therefore no fee is pretty remote." Presiding Justice Bernard Botein, Address at the New York State Ass'n of Plaintiffs' Trial Lawyers Annual Luncheon (Sept. 16, 1961), *reprinted in* Bernard Botein, *Co-operation of Bench and Bar in the Regulation of Negligence Litigation*, N.Y.L.J., Sept. 21, 1961, at 4; JEFFREY O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 49 (1971) (arguing that lawyers rarely accept cases on a contingent fee basis that do not result in recovery); Grant P. Dubois, *Modify The Contingent Fee System*, A.B.A. J., Dec. 1985, at 38 ("The fact is that the risk of loss to the personal injury plaintiff has faded away. . . ."); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 528 n.19 (1986) ("[E]xperienced lawyers can make a prediction about the success of a representation and can refuse to accept cases that are too risky or settle them quickly at any available figure and thus avoid risking much lawyer capital.").

332. Experience in England with "conditional fee agreements," a highly modified form of contingency fee, indicates similar success rates. *See* Michael Zander, *Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*, 52 DEPAUL L. REV. 259, 278–79 (indicating that while in the vast majority of English "conditional fee agreement" cases where attorneys contract to "uplift" their fee by up to 100% if they prevail and a corresponding decline if they do not, "[93%] were successful in the sense either of achieving a settlement or a judgment wholly or partly in favor of the client"). However, lawyers charged a substantially higher success premium than was warranted by the small risk reflected in the actual success rate. *Id.* at 278–80.