

By Ben Whitwell and Jeffrey Valle

## A Fee-For-All

**A**S LAW FIRMS' HOURLY rates continue to climb, in-house legal departments could use more relief than just tort reform legislation. Measures like the recently passed Class Action Fairness Act take aim at the high cost of defending lawsuits [see "Ms. Rabiteau Goes to Washington," page 82].

General counsel should consider taking a page from plaintiffs lawyers. Using contingency fee arrangements for handling business litigation can help control the costs of prosecuting lawsuits as a plaintiff.

**For cases too small to fight at hourly rates but too big to drop, consider the contingent fee option.**

Contingent fee arrangements are not new. Lawyers have been doing contingent fee work in securities class actions, consumer class actions, toxic tort, and personal injury cases for years. But hiring counsel on a contingent fee basis to handle a complex business case has historically been almost unthinkable. The reasons for this are simple: supply, demand, and tradition.

As a general rule, the supply of highly skilled business litigators willing to take cases on a contingent fee basis has not been very large. Business litigators with elite credentials have gone to established corporate law firms. Conservative and traditional, these firms will rarely take a case on a contingent fee basis. Indeed, contingent fee arrangements are often viewed by business litigators and corporate law firms as not only risky but even unseemly. This has resulted in a perceived bright-line separation between hourly attorneys and firms, on one side, and the plaintiffs contingency bar on the other.

PETER HOEY

On the demand side, businesses have historically been most comfortable retaining counsel from traditional corporate law firms and paying for representation on an hourly basis. This stems in part from the (inaccurate) view that the best lawyers and law firms work on an hourly rather than contingent fee basis. Moreover, the same perception that there is a bright-line division between hourly attorneys and the plaintiffs contingency bar has pushed companies away from even considering retaining attorneys on a contingent fee basis.

We are well aware of these attitudes because we both worked at large corporate law firms. But we also realize that these traditional fee arrangements have often forced in-house counsel to make very difficult choices about whether to file litigation on behalf of their company.

**Here's a typical dilemma.** Suppose a business identifies a potential lawsuit that, if successful, could result in the recovery of \$2–10 million. But the case is complex and will require substantial time and effort. The result is, at best, uncertain. Corporate counsel is thus faced with a difficult decision. Should it invest \$500,000–\$1 million or more in legal fees to pursue the case?

When it's the defendant, a company has two choices—pay the plaintiff or pay for legal representation. In deciding whether to initiate a lawsuit, however, the calculus is very different. The company might well spend hundreds of thousands of dollars litigating and then lose on summary judgment or at trial. The prudent general counsel knows that, if this happens, someone is going to demand to know who decided to file the



case in the first place. As a result, companies often talk themselves out of filing potentially meritorious cases.

In our view, the business contingency approach offers a good solution. If the company can find qualified business litigators willing to work on a contingent fee basis, it can reduce the downside risk inherent in suing, while preserving the upside potential of a large recovery or settlement. From the attorneys' perspective, taking the case offers an opportunity to share in the upside potential.

The contingent fee is negotiable. But under a typical agreement, the attorneys would receive one-third of the recovery if the case settles before trial and 40 percent of the recovery if the case proceeds to trial. If there is less than \$2 million at stake, outside counsel are not likely to be interested, because the risk will not be worth the reward. Where substantially more than \$10 million is at stake, you may not want to share such a large upside.

A middle ground approach is the blended contingent fee arrangement. In this scenario, the client pays a reduced hourly fee in exchange for a reduced contingent fee. For example, the company might agree to pay the attorney \$200 per hour and 20 percent of any recovery.



With hourly rates continuing to rise, we believe the demand for the contingency option is likely to grow. Corporate legal departments are under continued pressure to control legal expenses. The contingent fee structure permits a company to take on a substantial litigation without adding another set of big monthly legal bills to the expense ledger. And when the fee is ultimately paid, it comes out of a greater recovery and thus is immediately offset by a higher revenue line item.

The supply side is changing too. There is a small but growing roster of entrepreneurial business litigation firms that offer clients a contingent fee option. These include Bird, Marella, Boxer & Wolpert; Brown & Woods; and Sussman Godfrey. Although the model works in virtually all business sectors, there is a natural fit in the high-tech and start-up sectors, which are more open to innovation.

There are a few guidelines to keep in

---

**Companies should not  
lower their standards  
just because the fee  
structure changes.**

---

mind, however, when negotiating these fee arrangements:

■ First and foremost, companies should not compromise their standards just because the fee structure is different. Ask yourself: "Would I hire this attorney or firm if I had to pay by the hour?" Although the company is not paying hourly fees, it will still be investing management and employee time as well as "psychic energy" in the litigation. If your

contingent attorneys lack the skill, sophistication, and ethics you are accustomed to, you will surely find the representation disappointing and frustrating, and probably unsuccessful as well.

■ Second, be prepared to engage in a brutally honest, rigorous, and thorough pre-retention assessment of your case with potential contingency counsel. Qualified business attorneys presented with a potential contingency case are going to take a long, critical look at the merits and the potential recovery before agreeing to handle the case. This can be difficult and stressful. Business litigation, like any litigation, can be very emotional. Plaintiffs, even business plaintiffs, often come to a lawyer with a very one-sided view of their case colored by anger and the desire to exact retribution. Hourly lawyers learn the details of the case as the representation progresses. Contingent fee lawyers need to make a reliable assessment and valuation before beginning.

The client can also learn from this intensive pre-retention assessment. The contingent fee lawyer is likely to be much more candid about the strengths and weaknesses of the case than an hourly attorney who is paid regardless of the outcome. If a firm that regularly handles business contingency cases rejects your company's proposed case, you should rethink the wisdom of pursuing it too.

■ Third, remember that the dynamics of the attorney-client relationship are quite different in a contingent fee case. Lawyer and client are, in a very real sense, joint venturers. They both have a direct financial interest in every strategic decision. This is fine when lawyer and client agree, but can be tricky when they do not. Whether, when, and at what level to settle the case is a classic area where such conflicts can arise. Determining settlement value can be particularly difficult in business litigation where the legal and factual issues tend to be more complex.

---

*Ben Whitwell is a name partner at Whitwell Jacoby Emhoff. Jeffrey Valle is the founder of Valle & Associates.*

*"We use Syngence to begin analysis and plan our strategy much earlier in the litigation timetable.*

*With Synthetix,® we gain the knowledge to help us settle matters quickly and cost-effectively."*

**SYNGENCE**  
www.syngence.com

© Syngence LLC 2005

Effective Technology for Efficient Litigation