

# Focus Litigation

## The Contingency Option: A New Choice for Corporate Litigation

BY BEN D. WHITWELL  
AND JEFFREY B. VALLE

There is a significant trend afoot concerning business contingency litigation. Formerly an option enjoyed only by a handful of litigants, this alternative—which is highly successful in class action disputes and personal injury cases—is now a topic of legitimate conversation within the corporate boardroom and among the nation's most skilled attorneys. These developments are part of a broader series of events dealing with supply, demand, and tradition.

From a supply perspective, there exists a reluctance among established law firms toward contingency litigation. These firms, which typically have an aversion toward any use of "unconventional" fees, are particularly conservative, despite the creative and skilled nature of their own attorneys. In fact, many of these same firms take this attitude a step further: They not only consider contingency litigation risky; they view the whole enterprise as unseemly, resulting in a clear separation between lawyers who charge an hourly rate and those who—like the "notorious" plaintiffs' bar—have a more flexible approach toward certain cases.

### High Rates vs. Quality

Similar pressures exert themselves on the demand side. In the past, many businesses have drawn an erroneous connection between the quality of legal representation and the hourly rate these firms charge. This attitude contributes to the false

perception that the best lawyers and the most resourceful law firms eschew any mention of contingency litigation. Yet, even this mutual tradition between large law firms and established businesses is no longer as resilient as it once was.

### Old-Fashioned Practice

As former members of large corporate law firms, we recognize that traditions do not die easily. But we also realize that these old-fashioned fee arrangements are part of an undeniable business weakness, influencing companies and individual litigators. For example: In a potential lawsuit with significant legal work, one nonetheless containing the prospect of recovery of between \$2 million and \$10 million, a company's corporate counsel has to decide whether to invest \$500,000 to \$1 million or more in legal fees. That decision symbolizes the tension between hiring a traditional law firm and using a more innovative approach.

---

**As the cost of legal services increases, the contingency option will become even more attractive.**

---

Notwithstanding the limited options a defendant has, which include paying the plaintiff or paying for legal representation, the decision to initiate a lawsuit has an entirely different framework. On the one hand, a

company may spend a considerable amount of money—possibly hundreds of thousands of dollars or more—litigating a lawsuit of choice, only to lose the case on summary judgment or at trial (or recover less than the costs of prosecuting the case). A wise attorney knows that such a scenario will cause a company to review why this lawsuit was even initiated. These substantial costs, namely the upfront legal fees, typically cause companies to avoid bringing a number of meritorious cases.

From our perspective, the use of business contingency litigation offers an ideal solution for these kinds of disputes. The costs are significantly lower for a company with a legitimate claim, while the upside for the attorneys presents the reward of a significant recovery or settlement. This option still must confront the factors addressed at the outset of this discussion, which are demand, supply, and tradition.

### Budget Constraints

Please bear in mind that as the cost of legal services increases, and as the hourly rates charged by large law firms become even more expensive, the contingency option will become even more attractive. And, since corporate general counsel face a number of budgetary constraints, this newly popular alternative—which avoids the price of monthly legal bills—has the power of economic logic on its side, provided there is an ample supply of capable attorneys to handle this litigation.

The rise of boutique law firms now allows companies to more aggressively use the contingency model, particularly for cases where \$2 million to \$10 million is in dispute. The prospect of recovery, which presupposes the merits of the case are evidently strong, thus justifies the personal and professional investment made by enterprising attorneys. And

(continued on page 247)

*Ben D. Whitwell is a founding member of the Los Angeles firm of Whitwell Jacoby Emhoff, LLP. He began his legal career at Skadden, Arps, Slate, Meagher & Flom and later became a partner at the litigation boutique firm of Belin Rawlings & Badal. He may be reached at (310) 887-4424 or bwhitwell@wjelaw.com. Jeffrey B. Valle, a former senior partner at Skadden, is the founder of Valle & Associates, a Santa Monica, Calif.-based boutique law firm comprised of former Skadden attorneys. He may be reached at (310) 260-8600 or jvalle@valleassociates.com.*