

LITIGATION A Special Report

The Risky Litigation

Business lawyers reconsider the highs and lows of contingent-fee cases.



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Lawyers in the United States have been taking cases on contingency since the early 1800s. Historically, the contingent fee has been viewed as a way to provide access to the legal system to those who otherwise could not afford it.

It is not surprising, therefore, that the contingent-fee arrangement has flourished in fields such as personal injury, products liability, and consumer fraud, where people without the resources to retain hourly counsel can nonetheless suffer enormous harm.

Lawyers and law firms specializing in contingent-fee cases logically coalesced around these fields, resulting in the now-famous “plaintiffs bar.” The contingent-fee arrangement has always been controversial and subject to abuses. Indeed, many plaintiffs firms have become, essentially, contingency mills, where the idea is to take in as many cases as possible and settle them out as quickly as possible. Since such a model is based on quick turnover of cases, serious questions can be raised about the quality and care that each case receives.

This whole history, of course, has made many in-house counsel extremely wary, if not downright hostile, to hiring attorneys on contingency.

A NEW APPROACH

But all that is changing. A growing cadre of business litigators are offering business clients the option of retaining counsel on a full, or partial, contingent-fee basis. Unlike the typical contingency mills, these firms have taken the opposite approach. Their primary work remains hourly business litigation. But they are willing to take on contingency a limited number of carefully selected cases. The new cadre of business contingent-fee lawyers view these as cases that will pay off at a greater rate than the standard hourly case, but which will require the skills and aggressiveness of experienced business litigators. It is, in a sense, the opposite of a contingency mill.

Why hasn't the contingent-fee approach traditionally been a viable option for complex business cases? There seems to be three key reasons: supply, demand, and tradition.

SUPPLY AND DEMAND

On the supply side, skilled business litigators have historically gravitated to the established corporate law firms. These firms are conservative by nature and will rarely take a case on contingency. Indeed, contingent-fee arrangements are often viewed by business litigators and corporate law firms not only as risky but also as unseemly. Contingent-fee lawyers bring to mind the image of a desperate lawyer with a business card chasing an ambulance. As a result, many people imagine a huge difference between hourly attorneys, on one side of the line, and the plaintiffs contingency bar, the notorious plaintiffs trial lawyers, on the other.

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 best law firms work on an hourly basis. Moreover, the same perception that there is a dividing line between hourly attorneys and the plaintiffs contingency bar has steered companies away from even thinking about retaining attorneys on contingency.

TRADITION

And then there's the final reason: tradition. Traditions die hard. And there is a long tradition of companies retaining business litigators on an hourly basis.

We are well aware of these attitudes because we both worked for many years at large corporate law firms. But we also realize that these traditional fee arrangements have created a significant market failure—to the detriment of both businesses and business litigators.

A TYPICAL DILEMMA

Here is a typical example of the dilemma. Suppose a com-

pany has a potential lawsuit that, if successful, could result in a recovery to the company of between \$2 million and \$10 million. But the case is complex, will require substantial legal time and effort, and, at best, the result is uncertain. The company's corporate counsel is thus faced with a tough decision. Should the company invest \$500,000 to \$1 million—or even more—in legal fees to pursue the case? As a defendant, a company only has two choices—pay the plaintiff or pay for legal representation.

Yet if the company's decision is about whether to initiate the lawsuit, the calculus is very different. The company might well spend hundreds of thousands of dollars or more in the litigation, and then lose the entire case 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 because of the substantial upfront investment in legal fees.

In our view, the business contingency approach offers the perfect solution to this kind of dilemma. If the company can find qualified business litigators willing to take such a case on contingency, the company can greatly reduce the risk in filing the lawsuit, while still preserving the possibility of a large recovery or settlement. From the attorneys' perspective, the representation can provide an opportunity to share in the positive potential of the case. Simply put, the right business contingent-fee case, handled well, can generate much more money to the law firm than a straight hourly case.

But in order for this option to work, clients will have to realize that they can pursue litigation without incurring large monthly legal bills. Our firms, Whitwell Jacoby Emhoff and Valle & Associates, along with some other boutique business litigation firms, have begun offering clients a contingent-fee option in business cases.

We have found that this option works best in a business case with \$2 million to \$10 million at stake. The potential recovery in such a case, assuming the merits are sufficiently strong, has justified the investment in attorney time and resources. And, we have found, the ability to avoid substantial upfront legal fees has justified the client's willingness to pay a potentially larger legal fee if the matter is resolved successfully.

A FEW WARNINGS

Although we think the contingent fee in business cases is a good idea, there are certain things to keep in mind before a company enters this largely uncharted territory.

First, companies should not compromise their standards just because the fee structure is on contingency rather than hourly. The company general counsel should ask: "Would I hire this attorney or firm if had to pay by the hour?"

Even if the company is not paying upfront hourly fees, it will still be investing substantial management and employee time and "psychic energy" into the litigation. If the contin-

gent-fee attorneys lack the skill, sophistication, and ethics that most business clients are accustomed to, the clients will surely find the representation disappointing, frustrating, and probably unsuccessful as well. The goal should be to find highly qualified legal counsel—in other words, lawyers a client would retain on an hourly basis—who see the potential value of the case and are willing and capable of litigating the case properly and aggressively.

Second, clients should be prepared to engage in an honest and thorough pre-retention assessment of the case with potential contingent-fee counsel. Qualified business attorneys presented with a potential contingent-fee case are going to take a long, hard, critical look at the merits of the case and the size of the potential recovery before agreeing to handle the case on contingency.

This can be difficult and stressful. Business litigation, like any litigation, can bring in an emotional element. 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. While the hourly lawyer may be willing to learn the details of the case as the representation progresses, the contingent-fee lawyer needs to make a reliable assessment and valuation before beginning the representation.

The client, however, can learn from this intensive early 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 and will usually be happy to take on a new matter regardless of its merits. If the client knows that a firm regularly handles business cases on contingency, but is rejecting the client's proposed case, the client should consider whether the company actually wants to invest the legal fees in the case.

It is also important to 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 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 could all cause conflicts. Determining settlement value can be particularly difficult in business litigation where the legal and factual issues tend to be more complex.

We have found that these issues are all manageable. But it's important to choose contingent-fee counsel carefully, and conduct a thorough pre-retention case assessment.

The contingent-fee option is not for everyone. Carefully chosen litigation attorneys willing to "invest" in the case by working on contingency can be the perfect approach to achieve the best results while minimizing the risk.

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