

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

LAWYER BARONS

This book is a broad and deep inquiry into how contingency fees distort our civil justice system, influence our political system, and endanger democratic governance. Contingency fees are the way personal injury lawyers finance access to the courts for those wrongfully injured. Although the public senses that lawyers manipulate the justice system to serve their own ends, few are aware of the high costs that come with contingency fees. This book sets out to change that, providing a window into the seamy underworld of contingency fees that the bar and the courts not only tolerate but even protect and nurture. Contrary to a broad academic consensus, this book argues that the financial incentives for lawyers to litigate are so inordinately high that they perversely impact our civil justice system and impose other unconscionable costs. It thus presents the intellectual architecture that underpins all tort reform efforts.

Lester Brickman is a professor of law and former acting dean at the Benjamin N. Cardozo School of Law at Yeshiva University, where he teaches contracts and legal ethics. He has written extensively on legal ethics, and his writings have been widely cited in treatises, casebooks, scholarly journals, and judicial opinions. Brickman is a leading authority on contingency fees, and his writings on that subject are the basis for a proposal – examined in this book – to realign the contingency fee system with its policy roots and ethical mandates.

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

Lawyer Barons

WHAT THEIR CONTINGENCY
FEES REALLY COST AMERICA

Lester Brickman

Benjamin N. Cardozo School of Law



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America
Lester Brickman

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521189491

© Lester Brickman 2011

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Brickman, Lester, 1940–

Lawyer barons: what their contingency fees really cost America / Lester Brickman.

p. cm.

ISBN 978-1-107-00122-0 (hardback) – ISBN 978-0-521-18949-1 (pbk.)

1. Lawyers – Fees – United States. 2. Torts – Economic aspects – United States. I. Title.

KF310.C6B75 2011

34773'77–dc22 2010043979

ISBN 978-1-107-00122-0 Hardback

ISBN 978-0-521-18949-1 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party Internet Web sites referred to in this publication and does not guarantee that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

In memory of Teddy. Twice taken from me before our time.

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

Contents

<i>Foreword: Sorting Out Our National Liability</i>	
<i>Crisis by Richard A. Epstein</i>	page xiii
<i>Acknowledgments</i>	xxv
Introduction	1
1. The Origin of the Contingency Fee	17
2. How Profitable Are Contingency Fees?	33
3. Are Contingency Fee Profits “Reasonable”?	47
4. How Tort Lawyers Have Increased Their Profits	
by Restraining Competition	57
A. How Competitive Is the Contingency Fee Market?	57
B. How Uniform Pricing Overcharges Clients	60
C. Price Rigidity in the Face of Highly Variable Production Costs	64
D. Referral Fees as Indicative of Rents: A Product of Uniform Pricing	65
5. Why the Market Has Failed to Correct the Absence	
of Price Competition	75
A. Lack of Transparency	75
B. Uniform Contingency Fees: A Product of Lawyers’ Concerted Actions	78
C. How the Standard Contingency Fee Became the Standard	79
D. The Political Dimension of the Tort System	80
	vii

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

viii

CONTENTS

6. Impediments Imposed by the Bar to Price Competition	91
A. Barriers to Tort Market Entry	92
B. The Prohibition Against the Outright Purchase of Tort Claims	93
C. The Use of Ethical Rules to Preclude Price Competition	93
1. Prohibitions Against Providing Financial Assistance to Clients	94
2. Prohibitions Against Brokerage of Lawyers' Services	94
D. The Use of Unauthorized Practice of Law Statutes	96
7. The Effects of Incentives Created by Contingency Fees	107
A. "Undesirable Practices"	108
B. Stock Options and Contingency Fees	109
C. The Prohibition of Contingency Fees in Criminal Representation	109
D. Fraudulent Practices	111
E. "Ambulance Chasing"	112
F. The Modern Form of Ambulance Chasing: Litigation Screenings	117
G. The Incidence of Frivolous Litigation	119
8. How the Quest for Profits Influenced the Development of the Tort System	135
A. The Deterrent Effect of the Tort System	135
B. Contingency Fees and the Development of the Modern Tort System	137
C. The Deterrent Effect of Medical Malpractice Litigation	139
9. Lawyers' Role in the Expansion of Tort Liability	153
10. The Role of the Judiciary in Tort System Expansion	169
11. Current and Future Expansions of Tort Liability	183
A. Dispensing with the Requirement of Injury	184
B. "Lawless" Economic Torts	185
1. The "Light" Cigarette Class Action	189

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

CONTENTS

ix

2. Medical Monitoring	192
3. Lead Paint as a “Public Nuisance”	194
4. Global Warming as a “Public Nuisance”	196
C. New Frontiers	199
D. “The Lawyers Are Coming ... The Lawyers Are Coming”	200
12. The “Litigation Explosion”: Fact or Fiction?	219
A. The Ineffectiveness of Case Filings as Measures of Changes in the Scope of Tort Liability	223
B. “Cases,” Consolidations, Class Actions, and Bankruptcy Trusts	225
13. Measures of the Rate of Expansion of Tort Liability	235
A. Tort System Costs	236
B. A Comparison of U.S. Tort Costs as a Percentage of GDP with Those of Other Industrialized Countries	238
C. Indirect Costs of the Tort System	240
14. The Relationship between Injury Rates and Tort System Costs	253
A. Propensity to Sue	253
B. Injury Rates and Tort Litigation	257
15. The Impacts of Substantial Increases in Tort Lawyers’ Effective Hourly Rates	263
A. The Relationship between Effective Hourly Rates and the Frequency of Tort Claims	263
B. Effects of Contingency Fees on Tort Claim Valuation	266
1. Noneconomic Damages (“Pain and Suffering”)	266
2. Medical Expense “Buildup”	270
3. The Ultimate Medical Expense “Buildup”: Whiplash	274
16. Class Actions	289
A. Social Benefits versus Costs	291
B. Regulation for Profit	294
C. The Unintended Consequence of Consumer Protection Laws	299

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

x

CONTENTS

17. Fees in Class Actions	311
A. How Fees Are Set	311
B. The Role of “Pay to Play” in Fee Setting	316
C. How Reasonable Are Class Action Fees?	320
18. How Class Action Lawyers Game Fee Setting	335
A. “Clear Sailing” Provisions	336
B. The Experts Who Bless the Fees	337
C. Time Records and the Lodestar Process	340
D. The Reversionary Settlement Ploy	345
E. Coupon Settlements and the Class Action Fairness Act	346
F. Inflated Settlement Values	349
G. The Irrelevance of Response Rates	350
H. Other Ways Lawyers Game Class Action Fees	356
I. The Rise and Fall of the Use of Auctions to Set Fees	356
19. Securities Class Actions	373
A. Milberg Weiss	375
B. Use of Contract Lawyers	378
1. Contract Lawyer Wages: Expenses or Billable Hours?	380
2. Which Billable Hour Rate: Paralegal, Contract Attorney, or Associate?	382
3. Subjective Coding by Contract Attorneys: Benefit to the Litigation or to the Lodestar?	384
4. Use of Contract Lawyers: A Summing Up	385
20. Regulation through Litigation	393
A. Conventional Tort Litigation	395
1. Cerebral Palsy Suits	395
2. Clergy Sexual Abuse Litigation	396
B. Seeking Contingency Fees by Effectuating a Regulatory Outcome	397
1. The State Farm Litigation: Seeking Profit by Banning the Use of Non-original Equipment Automobile Parts	397
a. Regulation of the Use of OEM Parts	398

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)**CONTENTS**

xi

b. The <i>Avery</i> Class Action	399
c. The Effect of the <i>Avery</i> Trial Court Decision	399
2. The HMO Litigation	401
21. A New Role for Punitive Damages: Policy Making as a Profit Center	409
A. The Impact of Punitive Damages on Policy Making	413
B. Regulating the Temperature of Coffee	414
C. The GM “Side Saddle” Truck Litigation	416
22. For-Profit Partnerships between State Attorneys General and Contingency Fee Lawyers	423
A. The Tobacco Litigation	423
1. The Appropriations Power	425
2. “Pay to Play”	426
3. The “Sale” of the States’ Legislative Authority	427
4. Fee “Arbitration”	427
5. The Nullification of Ethical Rules Limiting Fees to “Reasonable” Amounts	428
B. Regulation by Litigation versus Regulation by Legislation or Rule Making	429
1. The Effect of Policy Making for Profit	429
2. Institutional Differences between Courts and Legislatures	431
Conclusion	445
A. “Loser Pays”	448
B. Advancing a Consumer Protection Agenda	451
1. The “Early Offer” Proposal	451
2. The “Auto Choice” Proposal	455
3. The “Early Offer” in Medical Malpractice	459
C. A Proposed Exception to the American Rule for Entrepreneurial Class Actions	460
D. The Policy Favoring Settlement versus “Just Say No”	464
E. The Effects of the Legal Professions’ Self-Regulatory Power and How to Mount a Challenge	468

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xii

CONTENTS

<i>Appendix A: A Critique of Alex Tabarrok: The Problem of Contingent Fees for Waiters</i>	489
<i>Appendix B: Calculating Tort Lawyers' Effective Hourly Rates in 1960</i>	497
<i>Appendix C: Electronic Discovery and the Use of Contract Lawyers</i>	501
<i>Appendix D: The HMO Litigation</i>	507
<i>Appendix E: The GM "Side Saddle" Truck Litigation: The (Short-Lived) Triumph of Litigation Over the Regulatory Process</i>	511
<i>Appendix F: Modern Class Actions Undermine Democratic Precepts</i>	517
<i>Appendix G: Other Ways Lawyers Game Class Action Fees</i>	521
1. <i>The End Run Around the "No Multiplier" Rule in Fee-Shifting Cases</i>	521
2. <i>The Separately Paid Fee Ploy</i>	522
3. <i>The Fee-Shifting/Common-Fund Mix-and-Match Ploy</i>	525
<i>Appendix H: Nonrecourse Financing of Tort Litigation</i>	529
<i>Appendix I: Political Contributions by Tort Lawyers and the U.S. Chamber of Commerce</i>	533
<i>Appendix J: Special Rules Favoring Lawyers</i>	537
<i>Appendix K: The Ultimate Medical Expense "Buildup": Whiplash</i>	541
<i>Appendix L: The Effect of Punitive Damages on Compensatory Awards</i>	545
<i>Index</i>	549

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

Foreword: Sorting Out Our National Liability Crisis

Richard A. Epstein

The Liability Crisis

Lester Brickman is a man with a mission: to expose the waste and fraud that permeate the system of tort liability as it has grown over the past forty years in the United States. Brickman is not alone in this crusade. Philip Howard has also noted the powerful resistance that the trial bar has posed to any medical malpractice reform. But Brickman offers a broader critique that extends to all phases of the liability system and the procedural engines that drive it forward. Owing to its breadth and detail, Brickman's crusade strikes fear in the hearts of those who profit from the system. That crusade provokes a genuine sense of unease on the part of many Americans who like to believe that the principles of justice and institutions that administer them both work well in their country, as in many cases they do. Yet the signs of real doctrinal and institutional decay are everywhere, at least to those who care to look and who know where to look. Brickman both cares and knows. More unusually, he is prepared to break polite social conventions to speak out against the dominant social elites that are all too comfortable with the current overheated system of liability.

It should be evident from the briefest perusal of his work that Brickman is an indefatigable researcher who understands that the keys to unlocking the secrets of the tort system cannot be easily gleaned solely from the formal tort law that continues to speak, as it has always

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xiv

FOREWORD

spoken, in the traditional language of strict liability, negligence, proximate cause, assumption of risk, and contributory negligence. To analyze these conceptions, a large academic industry seeks to prove by a thousand theorems the efficiency of a tort law system crafted from these materials. After all, it is sensible, almost tautological, to insist that the purpose of the law is to minimize the sum of the costs of accidents, the cost of their avoidance, and the cost of administering the system. Although the legal precepts to do this are available, however, they are not easily put into a harmonious whole. As is said commonly about music, the notes may be the same, but the melodies are not. So too beneath the constancy in legal terminology lurk the enormous twists and turns in both tort doctrine and practice over the past forty years that have fueled a massive expansion of tort liability – which is, in terms of the dollars at stake, greater than any and all previous transformations of tort law during the previous thousand years.

At the global level, we sense this in our bones because the level of litigation has gone up in areas like product liability and medical malpractice by close to a thousand-fold relative to its sleepy days of the 1950s. By degrees, the law was quietly transformed during the 1960s, leading to a full-scale crisis by the 1970s. I became acquainted with this as a young law professor when I was summoned as a consultant to a meeting of the American Insurance Association in 1976 to address the various issues associated with this first iteration of the tort crisis. What was so astonishing for that neophyte to learn was that *no one* in the insurance industry had yet to develop any real expertise in product liability because the field had long been regarded as an underwriting backwater. I was told that the important lines of insurance had been in such areas as workers' compensation, automobile, and occupier's liability. Product liability was something of an orphan that no one chose to price separately – at least until the large verdicts in the early 1970s started to roll in. The source of perplexity was even greater because the expansion in tort liability took place at a time when technological advances in the workplace and elsewhere had started to drive accident rates downward, which should have

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)**FOREWORD****xv**

been reflected in a lower level of tort liability and lower premiums to reflect the decline in both the frequency and severity of accidents. Yet it was quite clear that the trend lines were moving in the opposite direction. It first happened with machine tools, but slowly it spread to other product lines like drugs, chemicals, and asbestos, the extensive use of which promised a long succession of high-risk, big-ticket tort suits that were being blessed ever more by the legal system.

My AIA job at that time was to see if I could isolate the source of the shift in legal rules and do something to propose statutory reforms that could do something to staunch the flow. It took a lot of talking and thinking to come up with the drivers of this transformation, which doctrinally seem easy to identify in retrospect. All of the elements of the plaintiff's basic case were expanded, and all the potential lines of defense were contracted. Oddly enough, the one point that did not seem to make all that much difference was the adoption of a strict liability standard for defective product, which was accomplished in the Restatement (Second) of Torts in the mid-1960s. Rather, the key changes were the new and expanded definitions of defect, which allowed virtually every choice in design and warning to be attacked after the fact as defective, and recalibration of defenses so that manufacturers were held to anticipate and guard against extensive forms of misconduct by product users.

In the fullness of time, these turned out to be anything but small shifts. In the area of machine tools, which started the progression to the modern view, the older view took the position that if a worker knew the equipment with which he worked, he took the risk of obvious conditions because of his ability to alter behavior to minimize their effects. But in the new iteration, the drumbeat was that even obvious conditions could be treated as defective so long as the jury could think of some design change that could – or could not – obviate the danger without impairing the operation of the equipment, which opens up litigation to the fevered enthusiasms of the plaintiff's expert witnesses. Similarly, this one-two punch took its toll in other kinds of litigation. Thus, the definition of a defective cigarette underwent a parallel transformation. In

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xvi

FOREWORD

the 1960 Restatement, the definition of “defect” covered cigarettes laced with cyanide or other impurities. Over the next generation, the new expanded definition treated all tobacco products as defective because of their potential to cause harm. Conversely, assumption of risk in tobacco could no longer be established by the common knowledge that cigarettes posed a threat to health (which I have known since I was nine years old in 1952, when our family in unison persuaded my late physician father to quit smoking).

We are not talking of small shifts. However, we need to get some explanation as to what drove this puzzling transformation. It should seem evident that advances in technology have raised safety to all-time highs, which has necessarily reduced the levels of injury far below what they were in earlier times. The two numbers just do not mesh. Better performance and fewer injuries should lead to a reduction in the size of the tort law, not to its massive expansion. We need to find an explanation for this inversion, and Brickman supplies it. The main driver is the contingent fee system, whose payment arrangements for lawyers are the fee tail that wags the tort dog. A second driver is the procedural class action. In many ways, Brickman runs against the grain. It is worth spelling out both arguments in some detail.

Contingent Fees

At first look, the initial response is to ask this question: What is there not to like about the contingent fee system? Individuals generally do well at business with which they have had some experience. Markets are generally rational. Public institutions are generally sensitive to the functions they discharge. The contingent fee offers the injured party a way to handle the risk that is associated with litigation. Quite simply, everyone needs an agent in navigating treacherous waters, which is what injured persons or the estates of dead persons are required to do.

On this sunny view, the contingent fee is simply a rational response to the vicissitudes of modern life. People are better at buying electronic

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

FOREWORD

xvii

equipment than new homes. And they are better at buying new homes than suing to recover damages for accidents. Human beings, as we all too well know, cannot function as infallible rational agents, especially in times of stress. They have cognitive limitations, and in times of pressure their decision-making capabilities are always compromised. So these people follow a rational strategy that dominates all other kinds of fee arrangements. They pay the lawyer out of the winnings of their lawsuit. That way, they are protected against a lawyer who runs up the bill without providing services of real value; they no longer have to make each and every strategic decision; and they retain some right to decide whether or not to settle the suit in question. So the parties gravitate to arrangements that outperform the ordinary fee-for-service contract, which leaves plaintiffs exposed to a lawyer running up a bill, and a lump-sum payment, which leaves the lawyer with little or no incentive to work a case hard. It is for reasons such as these that many, perhaps most, academics defend the contingent fee system that Brickman sets in his crosshairs.

It is critical for the skeptical reader to pay close attention to the massive amount of evidence that Brickman amasses to expose the soft underbelly of this story. To his great credit, Brickman does not go into rigid and futile denial about the potential benefits of the contingent fee arrangements, which continue to work well in small-stakes cases like routine traffic accidents. He chooses instead to show that the contingent fee contract is not immune to the types of deficiencies that influence all sorts of other contractual arrangements, only more so.

To put his point in perspective, it is useful to understand how the modern law and economics movement thinks (or at least should think) about contract arrangements. The original presumption is properly set in favor of contractual freedom. The explanation normally is that rational actors do not enter into agreements that leave them worse off than they were before, so that in the ordinary case voluntary agreements produce mutual gains between the parties. These gains are *augmented* in the usual case by the *positive* externalities in third parties who, quite

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xviii

FOREWORD

simply, have greater opportunities for advantageous exchange as other individuals increase their wealth. It is for this reason that the market in ordinary goods and services tends to outperform a whole variety of regulatory schemes that give the power to the government to set minimum terms and maximum prices, both of which drive reputable sellers from the marketplace and clear a path for fast operators to take over an impoverished marketplace.

Yet this set of observations does not clinch the case for contractual freedom. Rather, it only creates a rebuttable presumption that all is well in the land of free contract. There are three major threats to this grand synthesis, however, all of which have real bite in the law that governs contingent fee arrangements, even though they are in fact in tension with one another. The first of these is the question of whether one side to the contract is able to take advantage of the other because of differential knowledge or experience. In dealing with competent adults, the presumption is generally set against drawing that inference. The second is whether the contract takes place in an environment with limited entries that protect service providers from competition. The third is whether the contract enables the plaintiff and his or her lawyer to take unfair advantage of third persons who are not privy to their arrangements. In one sense, it is hard to see how the first of these concerns cohere with the second two. How is it that the clients who are exploited by their lawyers eagerly sign up to joint arrangements that allow them to exploit the vulnerable positions of third parties – in this instance businesses, governments, charities, and other organizations that the plaintiffs' bar targets. The answer to that question is this: All of these defects do not arise in all cases, but each of them is of sufficient importance in some fraction of cases that it requires some recounting.

Plaintiff Competence

Starting with the first of these concerns, Brickman's central point is that the success of a contingent fee depends on the choice of the correct

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)**FOREWORD**

xix

baseline against which it is measured. In those cases where the prospects are for zero recovery without hard work, taking a percentage of each dollar may make sense. But it is quite a different kettle of fish in a case where the defendant has already made a firm offer of settlement before the contingent fee arrangement is made. In these instances, taking a cut out of first dollars makes no sense to the client because she is worse off than with just taking the deal. Brickman leads with the example of Mary Corcoran whose husband was killed by the defendant's freight train. The railroad put an offer of \$1,400,000 on the table. With a 25 percent contingent fee offer, starting with first dollar would leave her worse off if the lawyer litigated a settlement at anything less than \$1,866,670, even if we ignore the risk of failure and the additional personal expenses needed to make the settlement work. He then relates that the lawyer who reviewed the case, Thomas Demetrio, took no fee when he found that the settlement was fair, but that the local small town lawyer Joseph B. Dowd, who referred the case to Demetrio, insisted that he get the 40 percent of the contingent fee that Demetrio had ceded to him. Dowd won in court, which only shows how the pitfalls of contingent litigation make it hard for a client to get legal advice as to which lawyer to see and why. One simple reform could stop this. Require all contingent fees to be a percentage of the take above the defendant's final firm offer. At this point, more plaintiffs will settle out quickly. Why pay a steep contingent fee on the overage when you could lose everything in litigation? This is precisely the driving force behind Brickman's "early offer" proposal, which is designed to protect plaintiffs from this form of advantage taking.

The Collusion Risk

Brickman's second concern with the contingent fee also harps at the theme of exploitation, that is, its excessive fees. In principle, contingent fee lawyers should earn more per hour in successful cases to make up for the cases that don't work out as well as they might. But that risk has to be properly calibrated to take into account the smallness of those risks

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xx

FOREWORD

in many cases. When Brickman reports average fees in key cases that are multiples of what good hourly lawyers earn – where the top of the distribution is around \$1,000, which ain't hay, as they say – someone has to look to see whether some barriers to entry block the ordinary operation of the market and, if so, what to do with them. Brickman thus enters into an extensive discussion of “effective hourly” rates that in toxic torts and airline crash litigation can hit between \$2,500 and \$5,000 per hour, and in mass torts between \$20,000 and \$30,000 per hour.

Where are the barriers to entry that prevent competitive forces from bringing figures down? Brickman then identifies the various prohibitions on alternative fee arrangements, such as selling claims outright to third persons, including nonlawyers, and limitations on bar admissions in certain states that could help account for the difference. He also notes the price rigidity in contingent fees, which counts as some evidence of a less-than-open market under standard antitrust doctrine. Moreover, for all we know there may be other restrictions in, for example, the selection of class action lawyers that could influence the process. Brickman also goes at great length to dissect the evidence put forward by others to show the competitive nature of this market. It is extremely difficult to quantify all the relevant variables, but with time I have become persuaded that the persistence of high fees in the face of low risks suggest that the system is indeed out of whack in some serious way. The high rates do not seem to be necessary for making a proper risk adjustment, given that most cases settle out in these areas. A larger market should perhaps bring some form of relief. Maximum limitations on contingent fees might help as well, but as usual the issue is difficult because those limitations could easily reach the routine automobile cases where the system seems to work fairly well. Reform prospects on this front today seem uncertain at best, however.

Litigation as Aggression

The most powerful and urgent portion of this book, however, does not deal with client relations or with market structures. Rather, it deals with

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

FOREWORD

xxi

the use of litigation to achieve private ends. It is too easily forgotten today that litigation is a form of aggression, as is the resistance to litigation. In these circumstances, the contingent fee lawyer does his client a great service by pushing hard on whatever would allow the case to settle for its maximum value. Part of that package is taking advantage of every legal advantage that the law gives to the plaintiff on matters of principle or proof. On this issue, the key insight is that the contingent fee system *magnifies* both the strengths and weaknesses of the tort system. If the substantive claims were correct, and the evidence sufficient unto the case, the contingent fee would force the defendants to recognize the costs that their errors inflict on others, which in turn would satisfy the twin goals of compensation and deterrence. But if questions of doctrine and proof are not well handled by the legal system – and emphatically they are not – neither the loyal nor the greedy contingent fee lawyers should be expected to surrender any of the advantages that the legal system gives them. Their job is to play the game under the rules, not to redesign them during the course of play.

On the state of the legal rules, the evidence is disturbing. In general, I think that too many modern judges have all sorts of theories as to why defendants should be held liable and all too few reasons as to why they should not. To give perhaps the most egregious example of the doctrinal blunders, consider the tort doctrine of foreseeable misuse, which allows individuals who have acted in reckless disregard of their own safety to recover from manufacturers who did not protect them sufficiently against their own foolishness. The same can happen with third-person misconduct, in which a drug company can be held responsible when its product has been maladministered by a physician's assistant in ways that manifestly contravene the detailed warnings provided. Too often, product liability law seems to assume that there is always some, any, stronger warning that would have done the trick. Too many eminent courts never ask the question whether a little downstream prudence would have helped.

The most conspicuous version of this unfortunate situation is the recent case of *Wyeth, Inc. v. Levine*, a 2009 decision of the U.S. Supreme

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xxii

FOREWORD

Court. One difficulty in the case was that the court refused to give conclusive effect in state tort actions to the FDA-approved warnings that had been used without incident for more than fifty years. The significant back story, however, is that the underlying tort action arose because a physician's assistant disregarded every safety warning given with the drug Phenergan. The drug injection had to be in a vein and at low pressures. The physician's assistant injected into an artery at high pressure and didn't stop to notice her blunder. So the plaintiff musician lost her arm to gangrene, exactly what the warning noted would happen. A cheap settlement with the doctor and his assistant enabled them to testify against Wyeth, which was saddled with a \$6 million verdict.

It is upside-down law for which the blame should be placed not only on the plaintiff's lawyer who won the case, but on the Vermont Supreme Court that bought into such dangerous tort law reasoning. Yet when courts think that risk sharing is the dominant end of the tort law system, it is very hard to conjure up the backbone to throw any plaintiff out of court. It is ironic that whereas excessive medical malpractice liability contributes between \$50 billion and \$75 billion in costs to the health care system, we have instances in which obvious cases of malpractice are not deterred because of the ability of health care providers to enter into strategic settlements to stick drug companies with the bill for the manifest incompetence of the doctors and other health care providers.

The second problem that is exacerbated by the contingent fee is, if anything, more reprehensible. Lots of the claims that are filed are fraudulent, which requires the cooperation not only between lawyers and their clients but the assistance of a large cast of characters that includes physicians, crew bosses, and street runners, each in for a piece of the take. In some instances, judges like Janis Jack come down tough on a slew of bogus claims that are brought by a single law firm. Often these firms rely on all-too-eager experts who fabricate scientific evidence at startling rates. Dealing with this problem is no small task to say the least. And the sad part is that for every judge, like Janis Jack, who is tough on these cases, there are others who are all too lenient. There is little question

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)**FOREWORD**

xxiii

that the contingent fee makes it easier for lawyers to bring fabricated suits. So in the second-best world in which we live, it is much harder to be comfortable with a system that produces such egregious results in mass tort situations, even if it works admirably in other less-charged cases.

Class Actions

The same analysis can be made of the second great driver of modern tort litigation, which is the class action aggregation device. As a matter of principle, there is much to commend class actions in a variety of contexts. These are strictly needed to prevent the improper diversion of funds from corporations and other voluntary organizations. The shareholder that mounts the successful attack on the transfer sees the transaction unwound and the misappropriated property restored to the corporation. He gets his fees from the corporation itself, that is, from the other shareholders that benefited from the transfer. Unless that coercive mechanism were in place, only a few crusaders would be prepared to foot the entire bill to vindicate the interests of the group.

But the class action aggregation plays out entirely differently when the issue turns to various kinds of tort actions, including many suits brought for consumer fraud under state consumer protection and unfair trade statutes. At this point, the astute plaintiff's lawyer is able to bring countless individuals' claims together in a single action. The commonality of the cases, however, would be impossible to achieve if each individual plaintiff had to show how he or she were injured by the improper practice of the defendant. So many courts just remove the requirement of individual reliance, often by using weird theories that provide plaintiffs refunds of the purchase price for products that they say were improperly sold, even if they were successfully used. Refund actions for all cigarettes or drugs sold can easily add up to billions of dollars. Some courts have stopped the game, but others have been willing to let it go forward. Guess which courts get the business? As Brickman points out, the passage of the Class Action Fairness Act in 2005 has been instrumental in

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

xxiv

FOREWORD

cutting back on these abuses in national class actions. But even single-state classes can easily mount to large dollars if allowed to go forward on exotic legal theories. Once again the judges who are too easy on liability matters are often too easy on the critical class action rulings as well.

Conclusion

Even this brief introduction should give some indication of the serious nature of the various problems that currently beset our tort system. What is truly striking about Brickman's book is the tenacity with which he tracks down just about every scrap of available evidence on a particular problem and melds it all into a compelling narrative that reads as a coherent whole. But there is no reason to take my word for it. All that is necessary is for the curious reader to dive in on page one and read through to the grim finale. Anyone who finishes the journey will quickly conclude that tort reform belongs back on the national agenda.

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

Acknowledgments

I am indebted to my colleagues Alex Stein and Stewart Sterk, who provided invaluable assistance with technical economics issues. My colleague, Arthur Jacobson, played a critical role in the publication process, and I am especially indebted to him for his generous assistance and support.

Over a period of two decades during which the themes of this book were being honed, I have greatly benefited from the efforts of at least a score of research assistants. Among these, Alan Blutstein, Mellissa Steedle Bogad, Amy Gilday, William Hanes, Sara Klein, Alex McTague, Andrew Pak, Tamir Pakin, Jonathan Rohr, Alyse Rosenberg, Evan Wilson, and Timothy Yip made substantial contributions.

The research librarians at the Cardozo Law School, Norma Feld, Beth Gordon, Kay Mackey, Kim Ronning, and Peter Walenta, have never failed to hunt down even the most obscure source material that I have requested. I have also benefited from the Project on Legal Ethics in the Tort System at the Cardozo Law School, which underwrote research and editing assistance, and from the considerable efforts of Erika Siu, program director for the project. I also wish to express my appreciation for the assistance of the Manhattan Institute, Larry Mone, president, and Jim Copland, director of its Center for Legal Policy, for their support during the editing process and marketing of this book. Finally, I would like to acknowledge the strong support I have received from John Berger, senior editor at Cambridge University Press.

Cambridge University Press

978-1-107-00122-0 - Lawyer Barons: What Their Contingency Fees Really Cost America

Lester Brickman

Frontmatter

[More information](#)

LAWYER BARONS