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Samuel R. Gross

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WE COULD PASS A LAW . . . WHAT MIGHT HAPPEN IF CONTINGENT LEGAL FEES WERE BANNED

*Samuel R. Gross**

I. BACKGROUND

This is an exercise in fantasy. My task is to imagine what would happen if we simply abolished the institution of the contingent fee by statute. I cannot justify that task on grounds of urgency. Contingent fees are not about to be abolished, and they probably are not going to be seriously restricted. My hope is that the exercise will be amusing in itself, and that in the process we might learn something about contingent fees as we now use them.

I need to define my terms. The archetypal American contingent legal fee is a thirty-three percent commission that a plaintiffs' lawyer collects from the proceeds of the claims she handles.¹ Sometimes the percentage is higher or lower; often it varies depending on the stage at which recovery is obtained (e.g., thirty-three percent of a settlement before the pre-trial conference, forty percent of a judgment or a settlement after the pre-trial conference). Whatever the precise terms, this is almost the exclusive form of compensation for plaintiffs' lawyers in personal injury cases and the common form of compensation for lawyers for individual or small-business plaintiffs in other types of cases.² This fee structure has two major consequences, both of which are regularly described by plaintiffs' attorneys as major advantages to their clients: No win, No pay ("If I don't win, you don't owe me anything"), and the lawyer's fee is proportional to the client's recovery ("We're partners"). The out-of-pocket expenses of litigation—for investigation, depositions, expert witness fees, travel, exhibits, etc.—are handled somewhat differently. Under the usual contingent fee con-

* Professor of Law, University of Michigan. I would like to thank Kent Syverud, Karen Nicole Stitt, Brian Donadio and the participants at the Third Annual Clifford Seminar on Tort Law and Social Policy, addressing Contingency Fee Financing of Litigation in America, Chicago, Illinois, April 4-5, 1997, for help and suggestions at various stages in the preparation of this Article.

1. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 285-90 (1998).

2. HERBERT M. KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* 58-59 (1990); Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15-18 (1996).

tract, the client is responsible for these costs but the lawyer advances them.³ In practice, out-of-pocket costs are paid from the recovery or not at all; most lawyers do not attempt to collect them if they lose.⁴ This treatment of costs reduces the client's net recovery if there is a recovery, but leaves No Win, No Pay intact. Since American jurisdictions rarely require the loser to pay the winner's attorney's fees, this means that, as a practical matter, an American plaintiff can pursue a claim without risking any positive financial liability.

The central tenet of the American contingent fee is No Win, No Pay. If the idea is to end contingent fees as we know them, that feature would have to be prohibited. Liability for legal fees could not depend entirely on a favorable result; at least some portion of the fee would be owed regardless of the outcome of the case. Within that restriction, the rule could permit bonuses for favorable outcomes (partial contingencies), or prohibit bonuses and require fees to be set entirely by the hour, or by the nature of the claim, with no variation that depends on the result. If the new rule allowed sufficiently high bonuses, coupled with sufficiently low fixed or hourly fees, it would, of course, permit a fee structure that is not very different from the contingent fees we now use. For the moment, I will leave open the issue of performance bonuses, but assume that our hypothetical anti-contingent fee statute, whatever else it does, requires that the bulk of a lawyer's compensation be fixed without regard to the outcome of the case for which the lawyer is hired.

Contingent fees are popular among plaintiffs for two primary reasons: they provide financing to advance the costs of pursuing a claim; and they shift the risk of not recovering those costs, and of not obtaining a recovery that will pay the lawyer's fees, from the client to the lawyer. Some plaintiffs may also be motivated by the apparent convergence of the lawyers' interests and their own under a contingent fee arrangement, but I suspect that is a secondary consideration. Taking these as the main motivations for our use of contingent fees, I expect that the responses to the abolition of this arrangement would fall into three categories:

3. *E.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(e) (1996): "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter . . ." *Id.*

There is a limited exception to this rule: "(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." *Id.*

4. Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations, and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 349 n.71 (1991); Kritzer, *supra* note 1, at 270.

1. Finding other ways to shift the risks and costs of litigation away from individual plaintiffs.
2. Devising methods to reduce the overall costs and risks of obtaining compensation for injuries or losses.
3. Reducing the number of claims pursued by plaintiffs.

I will talk about these three categories of possible effects in turn, without systematically considering the relationships between them. In reality, if we ever got to that point, one response to the abolition of contingent fees might trump several others, or otherwise affect them in unpredictable ways.

II. WHAT MIGHT HAPPEN

A. *Financing and Risk Spreading*

1. *Cheating*

The single most likely response to a legislative attempt to abolish contingent fees would be resistance. The simplest form is outright law breaking: plaintiffs and lawyers could continue to enter into illegal contingent fee contracts on about the same terms as those now used. Perhaps there would be a cover contract for an hourly fee, but at the end of the day everybody would settle for a fee that equals one-third of the recovery—with costs paid from the recovery, if there is one, or by the lawyer, if there is not. If both parties were happy with the arrangement, the violation, like most victimless violations, would be hard to detect and harder to prevent. This would no doubt happen, just as lawyers now sometimes violate the rules in related ways that are equally unstoppable—for example, by lending money to tort plaintiffs to tide them over. The question is, how often would it happen?

The American legal system is capable of substantial hypocrisy. For decades judges said that plea bargaining was improper and illegal, and insisted that criminal defendants deny on the record that their guilty pleas were in fact the products of bargaining, while simultaneously they not only condoned plea bargaining but relied on it to run their courts.⁵ Perhaps the same could happen here—perhaps contingent fees could become illegal in theory but remain the rule in practice—but I do not think so, at least not in this simple direct form. Judges and prosecutors had direct incentives to collaborate with defense attorneys in protecting plea bargaining, and the only other participants

5. Jay Wishingrad, Comment, *The Plea Bargain in Historical Perspective*, 23 *BUFF. L. REV.* 499, 512-20 (1974) (discussing the history of hypocrisy in American plea bargaining, including the court's past habit of attacking plea bargaining in theory and permitting it in practice).

in the process were criminal defendants, an uncommonly powerless and vulnerable group. Complaints by disgruntled criminal defendants could be effectively disabled by requiring the defendants to deny in open court that any plea bargaining ever took place. But neither civil defense attorneys nor judges have a direct interest in civil plaintiffs' fee arrangements, and there is no comparable mechanism to insulate the plaintiffs' lawyers from complaints by unhappy clients with whom they contracted for illegal contingent fees. Given the risk that dissatisfied contingent fee plaintiffs would complain to courts, bar authorities, or public prosecutors, or that they would simply refuse to pay, I expect that outright law breaking would be relatively uncommon. At a minimum, any prohibition on contingent fees would stop most lawyers from openly advertising them.

Lawyers would find it easier to engage in a less overt form of cheating. They could retain the No Win, No Pay aspect of contingent fees by setting hourly or fixed fees, but refrain from collecting them if no recovery is obtained—as lawyers have long done in other countries that already prohibit contingent fees⁶ and as lawyers in this country have long done for out-of-pocket expenses.⁷ I doubt if much could be done to stop this practice, since it would only come into play in situations in which the client is not likely to complain. The risk of not collecting the fee is a constant in the practice of law; tort lawyers could hardly be condemned for simply failing to collect. But the evasion would be spotted, and could be stopped, if it became flagrant. Also, without the commission structure, No Pay, No Win is not necessarily an attractive fee arrangement for the lawyer, since it includes no premium to cover the risk of non-payment. That limitation would push lawyers in two directions. On the one hand, they would be more prone to turn away any case that is not a sure thing in order to minimize their risk. On the other hand, they would try to build a risk premium back into the fee, either explicitly through a performance bonus (if that is permitted) or, covertly, by setting fees high and then only collecting a fraction of those fees, the amount of which depends in part on the amount of the recovery. Needless to say, with a sufficiently high performance bonus and an accepted practice of not collecting the fee when there is no recovery, “non-contingent” fees would become functionally indistinguishable from contingent fees. I am go-

6. HERBERT M. KRITZER, RHETORIC AND REALITY . . . USES AND ABUSES . . . CONTINGENCIES AND CERTAINTIES: THE POLITICAL ECONOMY OF THE AMERICAN CONTINGENT FEE 3-4 (University of Wis. Inst. for Legal Studies, Dispute Processing Research Program Working Paper No. 11-8, 1995) (on file with the *DePaul Law Review*).

7. See *supra* note 4.

ing to assume that would not happen. If we summoned up the political will to outlaw contingent fees, I imagine we would police the system carefully enough to prevent widespread and transparent evasion, at least at first. Over time, if dissatisfaction grows, we might slide back into hypocritical tolerance of open law breaking, as an earlier generation did for prohibition.

2. *Selling Claims*

A contingent fee is, in effect, a contract by which a client sells a fraction of her interest in a claim to a lawyer in return for legal services in pursuing that claim. But why not sell it all? Why would an injured accident victim not sell her entire claim, and in return receive not merely legal services in obtaining damages, but a discounted payment of the damages themselves? For the accident victim, the advantages of prompt and certain compensation are enormous; she would no doubt pay quite a bit to get them if she were allowed to do so. But she is not. The common rule in American jurisdictions is that claims based on contractual rights or on interests in real property may be sold or assigned to third parties, but personal injury claims may not.⁸ "Reasonable" contingent fees are permitted, as an exception to the non-assignment rule, but lawyers may not do anything in return for that assignment other than provide legal services and advance the costs of litigation expenses.⁹

Several scholars have argued that a market for tort claims would provide major benefits to the plaintiffs.¹⁰ Under the current system, individual tort plaintiffs are at a severe disadvantage in negotiating with insurance companies or large institutional defendants. They

8. For a clear and succinct summary of the law on this issue, see Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 330-34 (1987), see also 6 AM. JUR. 2D *Assignments* §§ 27-30 (1963), Annotation, *Assignability of Claim for Personal Injury or Death*, 40 A.L.R.2d 500 (1955) [hereinafter *Assignability of Claim*]. There is one common quasi-exception to this general rule: a cause of action against an insurer for breach of its duty to settle—which may in part be characterized as a personal injury claim—is assignable. Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1120 (1990); Annotation, *Assignability of Insured's Right to Recover over Against Liability Insurer for Rejection of Settlement Offer*, 12 A.L.R.3d 1158, 1161-63 (1967 & Supp. 1996).

9. See *supra* note 3 and accompanying text. Contingent fees are permitted as assignments of a portion of the proceeds of a claim, rather than an assignment of the claim itself. CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 8.13, at 491 (1985); see generally F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 14-15 (1964) (discussing general acceptability of legal fees contingent upon the outcome of litigation).

10. Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *NEW DIRECTIONS IN LIABILITY LAW* 174, 175 (Walter Olson ed., 1988); Peter Charles Choharis, *A Comprehensive Market Strategy for Tort Reform*, 12 YALE J. ON REG. 435, 443, 474-525 (1995); Shukaitis, *supra* note 8, at 335-41.

often suffer greatly from delays in receiving compensation, and they cannot afford the risk of fighting and obtaining no recovery at all. To avoid the costs of delay and the risk of loss, they may accept settlements that are considerably lower than the value of their claims. But a well financed assignee could pay the plaintiff a fair market price for the claim and then negotiate with the defendant (or its insurer) in its own behalf, on equal terms. If the negotiations failed, the claims buyer would hire an attorney and sue. To do so successfully, the claims buyer would need the cooperation of the plaintiff, which could be guaranteed by a contractual obligation to cooperate, enforced by a payment schedule that specifies that a portion of the total payment would not be made until the conclusion of the case. The net result would be a transfer of power and money from defendants and their insurers to plaintiffs and their assignees.

Claims buyers would have other advantages over most individual tort plaintiffs. Economies of scale might permit them to obtain compensation more efficiently than plaintiffs' lawyers. As a result, they ought to be able to profitably handle smaller claims than contingent-fee lawyers are willing to take. Claims buyers might also be able to consolidate claims for particular types of accidents, or claims against particular defendants or particular insurance companies, especially if a secondary market in claims emerges. Consolidation could reduce the transactions costs of tort claims enormously. For example, if Global Claim Buyers has accumulated 2,000 tort claims for which Universal Insurance is financially responsible, the two companies will never have to bargain over each case separately. All they will need to do is negotiate over damage schedules, cost estimates, and discounts for factual uncertainty—and perhaps actually investigate a small sub-sample of cases to check on the reliability of the information the other side provides. Ultimately, even the most unpredictable disputes can be compromised when they are reduced to probabilistic estimates of the likely outcome and combined with a large number of other cases.

And who would these claims buyers be? The obvious candidates are those entities that provide services or compensation to accident victims: health care providers, disability insurers, large employers and labor unions. However, if such a market ever did develop, there might be a push to keep some of these entities from entering the claim-purchasing business. Consumers might argue, for example, that permitting health care providers to buy tort claims would tempt them to take advantage of vulnerable victims of crippling accidents, and that it would give them financial incentives that would conflict with their professional and ethical obligations to their patients.

There may be serious drawbacks to a market in legal claims. Absent other changes in the system, more claims would probably be brought, and the total compensation for injuries would probably be higher than under the present system. Whether that is good or bad is largely a matter of point of view. To the extent that these are meritorious claims which now receive insufficient compensation, or none at all, this would be an improvement. But if this shift is seen as adding new baseless claims, or additional compensation for claims that are already overcompensated, then it would be bad. Either way, it would create a new set of players in the litigation game, some of whom might accumulate a great deal of economic power. That would produce a variety of dangers. In the absence of sufficient competition for claims, or for particular types of claims, claim buyers might rake in exorbitant profits. Perhaps antitrust regulation could take care of that problem; perhaps not. In addition, there is the danger of collusion between mega plaintiffs and mega defendants. For example, secrecy agreements might be possible on an unprecedented scale.¹¹

Ultimately, if legal claims could be freely traded, our system for handling third-party claims would evolve to take on many of the features of first-party insurance. A typical accident victim would go to a claim-buying outfit—most likely, one with which she has some preexisting connection—and agree on a schedule of compensation. The claim buyer would gather information, bundle the case together with dozens or hundreds or others, and sell them all back to the defendant or its insurer. Litigation would continue to be an option in theory, but would atrophy in practice.

However persuasive the arguments for a market in tort claims, they have had no impact in practice. This is hardly surprising. While plaintiffs might well benefit from the change, plaintiffs' attorneys decidedly would not; there would be much less tort litigation and most of that would be handled by in-house counsel for large tort-claim purchasing conglomerates. Civil defense attorneys, the other side of the litigation

11. Secrecy as a condition of settlement has received a great deal of attention in the past decade, mostly in the context of medical malpractice and product liability litigations. Critics claim that confidentiality agreements enable defendants to hide information about dangerous products or negligent practices from their victims. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 25 U. ILL. L. REV. 457, 502-05 (1991); William Wagner, *Secrecy Betrays Justice*, NAT'L L.J., July 24, 1989, at 17, 22; Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues: Key GM Fuel Tank Memo Kept Hidden in Auto Crash Suits*, WASH. POST, Oct. 23, 1988, at A1; Benjamin Weiser & Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy; Records Reveal Story of Zomax Recall*, WASH. POST, Oct. 25, 1988, at A1; Benjamin Weiser & Elsa Walsh, *Hundreds of Cases Shrouded in Secrecy: Area Suits Often Sealed with Few Queries*, WASH. POST, Oct. 24, 1988, at A1; Benjamin Weiser & Elsa Walsh, *Secret Filing, Settlement Hide Surgeon's Record; Questions Raised over Patients' Deaths*, WASH. POST, Oct. 26, 1988, at A1.

coin, would suffer a comparable loss of business. And civil defendants would also suffer because they would end up paying higher damages and paying them in a higher proportion of cases. In other words, most of the stable long-term players in the field would suffer by the creation of a market for tort claims.¹² In order for the present system to function, of course, the needs of one-shot player plaintiffs must be taken care of to the extent necessary to provide them with access to the courts. Contingent fees do just that. Given the availability of contingent fees, no serious movement to make tort claims marketable has ever developed.

As usual, there are exceptions to the general rule that tort claims may not be assigned.¹³ A few states, conspicuously Texas, do permit the assignment of personal injury claims, at least under some circumstances.¹⁴ And yet, as far as I can tell, no practice of selling claims outright has developed in those states. Why not? Part of the answer is that even where assignment is not prohibited outright, state governments have taken steps to discourage it. In Texas, for example, the anti-barratry statute, which prohibits lawyers from soliciting legal clients, was extended to non-lawyers in 1917 for the specific purpose of closing down the business of one Frank McCloskey, a non-lawyer who made a living by buying up personal injury claims.¹⁵

12. I have not mentioned the effect of a market in tort claims on insurance companies because the impact of that structure on their interests is unpredictable. To the extent that such a change increases the total liability payments by tort defendants, it might increase the business and the profits of the companies that insure against such liability. However, to the extent that it makes damage payments more routine and predictable, it might lead to an increase in the proportion of damages that are paid through self-insurance or other modes of financing that bypass the insurance industry since liability insurance is marketed, in part, as a protection against uncertain and unpredictable risks. See Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1633-34 (1994).

13. As noted earlier, a claim by an insured against an insurer for breach of duty to settle may be assigned, even though it is in some respects, a tort claim. Syverud, *supra* note 8, at 1120. This is one of those exceptions that proves the rule: this type of assignment is designed to *facilitate* the existing system of representation in tort litigation. In the usual case, a defendant who was on the wrong end of a massive civil liability judgment that greatly exceeds the limits of her insurance policy, assigns her cause of action against her own insurance company to the winning plaintiff, in partial settlement of the judgment. In other words, assignment of the breach-of-duty-to-settle claim serves to augment the funds that are available from the insurance company to pay the original plaintiffs' damages and legal fees.

14. *Charles v. Tamez*, 878 S.W.2d 201, 206 (Tex. App. 1994); *McCloskey v. San Antonio Traction Co.*, 192 S.W. 1116 (Tex. Civ. App. 1917, writ denied); *Galveston, H. & S. A. Ry. Co. v. Ginther*, 72 S.W. 166 (Tex. 1903); *Assignability of Claim*, *supra* note 8, at 502.

15. Compare *McCloskey*, 192 S.W. at 1116 (reversing injunction against defendant for soliciting claims) with *Ex Parte McCloskey*, 199 S.W. 1101, 1104 (82 Tex. Crim. App. 1917), *aff'd sub nom.* *McCloskey v. Tobin*, 252 U.S. 107, 108 (1920) (holding that state statute prohibiting the soliciting and adjusting claims does not violate Fourteenth Amendment Rights). See generally Shukaitis, *supra* note 8, at 342-43 (discussing Frank McCloskey's checkered career).

But the Texas anti-barratry law cannot, by itself, explain the absence of a common practice of assignment of claims in that state. For one thing, it is the same law that restricts solicitation by lawyers. Just as accident victims now find their way to lawyers' offices in Houston—presumably without impermissible solicitation by the lawyers—so too could they find their way to the offices of professional claims buyers, with equally little solicitation if that became a common practice. Moreover, the range of permissible restrictions under an anti-barratry statute is narrower now than it was in 1917. In 1977, in *Bates v. State Bar of Arizona*,¹⁶ the Supreme Court held, under the First Amendment, that a state may not forbid lawyers to publish truthful advertisements that inform the public of their services. Since speech by lawyers may be regulated, if anything, to a greater extent than speech by non-lawyers,¹⁷ Texas' anti-barratry statute must now be interpreted to permit advertisements by non-lawyers that inform the general public that they are in the lawful business of buying tort claims. It has not happened.

My best guess is that no market for tort claims has developed in Texas in part because this is an isolated exception to the general rule. Since it is illegal almost everywhere, there is no accepted practice of trading in such claims, and no respectable businesses do it. With lawyers running the show, other potential market participants might simply have failed to notice that there are gaps in the wall. When Mr. McCloskey did notice, a new statute was passed to put him out of business, or at least to keep his business under control.¹⁸ Apparently it worked well enough to discourage others from following in his footsteps. If it had not, I expect that another law would have been passed to back it up, most likely a revision of the Texas Code adopting the majority rule that tort claims may not be assigned in the first place.

If contingent fees were abolished the notion of a market in legal claims might come into its own. It could develop from a couple of different directions. Tort plaintiffs in Texas would become much more interested in novel methods of financing litigation, and non-lawyer entrepreneurs might realize that there is money to be made by serving that demand. Texas lawyers would no doubt try to put a stop to this

16. *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

17. Because lawyers are essential to the system of justice, and serve as officers of the courts, states are recognized to have a special interest in regulating their professional behavior. See *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447, 460, 467 (1978) (holding that disciplinary rules could constitutionally prohibit solicitation by lawyers because of the state's particular interest in regulating commercial speech by the legal profession).

18. See *McCloskey*, 199 S.W. at 1101-04 (discussing Act of March 29, 1917, c. 133, amending Penal Code, art. 421).

practice—as they would if it happened under our present system—but in the absence of an alternative method of financing tort litigation, they might fail. Once this practice became widespread in Texas, it would spread to other states.

Alternatively, a market in legal claims could emerge directly in states which follow the majority rule. Recall that most contract claims *are* assignable even in those states that prohibit the assignment of tort claims. Most law suits for money damages in America are tort cases, primarily personal injury cases, but a sizeable minority are based on contractual claims. The plaintiffs in these contract cases are also usually represented on a contingent fee basis, especially if they are individuals, although the practice is less uniform than for personal injury claims.¹⁹ If contingent fees were outlawed, it would be possible, within the existing legal framework, to develop a market for those contract claims that are now represented on a contingency. The next step would be flight, whenever possible, from tort claims (e.g., product liability) to contract claims (e.g., breach of warranty) to facilitate assignment. Perhaps some courts could be persuaded that a tort claim may be assigned if it is closely related to an assignable contract claim. In any event, once a market in contract claims is well established, the final step would be to extend it openly to tort claims.

3. *Litigation Insurance*

If the major purposes of contingent fees are to provide financing for the extraordinary expenses of litigation and to protect plaintiffs against the risk that those expenses will not be recovered, then there is an obvious alternative method to serve the same purposes: insurance. Insurance to cover the costs of bringing tort suits is virtually unknown in the United States, but it is common in Germany, where contingent fees are prohibited. For example, in 1979, forty percent of all West German households carried insurance to cover at least some legal expenses. A minority of those insurance policies (about forty percent) were restricted to risks associated with automobile accidents, but most covered general legal services as well.²⁰ If contingent fees were abolished, one likely result would be the development of a similar market for first-party litigation insurance in America. How would it operate? And how extensive would it become?

Litigation insurance would probably emerge in two contexts: (1) as a line on other personal insurance policies, in particular automobile

19. Gross & Syverud, *supra* note 2, at 15-18.

20. Erhard Blankenburg, *Legal Insurance, Litigant Decisions, and the Rising Caseloads of the Courts: A West German Study*, 16 L. & Soc'y Rev. 601, 605 (1981-82).

and homeowners insurance, but potentially also life, health or disability—which is, apparently, the main form in which litigation insurance is sold in Germany; and (2) as a fringe benefit for employees of large organizations or as a benefit of labor union membership.²¹ This would mean that insurance for legal fees would provide some access to the courts by some middle-class plaintiffs who are in a position to buy it. Poor people, unemployed and underemployed workers, those in marginal and temporary positions, and most self-employed workers—most of these people would not buy litigation insurance under this new regime, just as many of them do not have health insurance now.

However it is organized, a system of litigation insurance might be susceptible to the related problems of adverse selection and moral hazard. Those who are disproportionately likely to sue may be correspondingly more likely than others to buy insurance to cover the costs of doing so, and those who are insured may be prone to sue even when they have no real cause to do so. A couple of studies from Germany are reassuring on this account.²² They found that insured plaintiffs are more likely to sue than those who are uninsured, but not by much.²³ The authors of these studies dispute charges by some German judges and lawyers that the availability of litigation insurance was a major cause of the steep increase in litigation in Germany in the 1970s and 1980s;²⁴ they argue instead that most people are reluctant to sue whether or not their legal fees are covered by insurance.²⁵ As a result, German litigation insurers rarely invoke their contractual rights to deny coverage to unfounded claims.²⁶ Perhaps the same would be true here.

21. Such plans are increasingly common. Linda Himmelstein, *Never Mind the 401(k)—How's the Legal Plan?*, BUS. WK., July 17, 1995, at 34; Myrna Oliver, *New Services Plans Ease Burdens of Legal System*, L.A. TIMES, Dec. 21, 1987, at 3; Stephanie Simon, *Opting for Cut-Rate Legal Eagles*, L.A. TIMES, June 7, 1996, at A1; see generally AMERICAN PREPAID LEGAL SERVICES INSTITUTE, PREPAID GROUP LEGAL SERVICE PLANS (1979) (describing pre-paid legal plans that are similar to health insurance programs). Perhaps the largest plan of this sort in the United States is the UAW-GM Legal Services Plan. Under the existing structure of litigation, however, that plan includes a telling exclusion: “[C]overage [under the plan] does not include . . . matters where representation on a contingent fee basis is available . . .” UAW-GM LEGAL SERVICES PLAN, SUMMARY PLAN DESCRIPTION 18 (Apr. 1983).

22. Erhard Blankenburg, *Changes in Political Regimes and Continuity of the Rule of Law in Germany*, in COURTS, LAW & POLITICS, IN COMPARATIVE PERSPECTIVE 249, 299 (Herbert Jacob et al. eds., 1996) [hereinafter Blankenburg, *Changes in Political Regimes*]; Blankenburg, *supra* note 20, at 603.

23. See *supra* note 22.

24. Blankenburg, *Changes in Political Regimes*, *supra* note 22, at 298-99.

25. Blankenburg, *Changes in Political Regimes*, *supra* note 22, at 298-99; Blankenburg, *supra* note 20, at 610-11.

26. Blankenburg, *supra* note 20, at 605.

Under Germany's investigatory civil law system of adjudication, lawyers play a smaller and less time consuming role in civil litigation than they do in America.²⁷ Also, legal fees in Germany are fixed by law and depend exclusively on the amount in dispute and the stage of the proceedings.²⁸ There is no similar schedule of compensation for American lawyers; in civil cases, if lawyers are not paid on a contingency, they are almost always paid by the hour.²⁹ The combined effect of hourly fees and of the larger role of lawyers in litigation could drive the legal fees that insurers are responsible for in America higher than they are in Germany, and make them more variable. Even if they have no need to restrict the cases which insured plaintiffs are allowed to bring, litigation insurers would need to limit the fees that lawyers are paid to handle those cases. If plaintiffs are allowed to choose their own lawyers, the insurance companies would face an insurmountable task if they tried to monitor the time those lawyers devote to their work. Instead, like health insurers, they would have to develop private fee schedules, with compensation set by type of case and by task. Most probably, like managed care health providers, insurers would restrict the plaintiffs' choice of lawyers to lists of those who agree in advance to work within this fee structure. One way or another, this arrangement would put new strains on the attorney-client relationship.

Consider three scenarios that might emerge. First, the plaintiff's attorney could receive a fixed fee for a case, whether it is settled or tried. In that situation, everybody will know that the attorney has a financial incentive to settle at any cost, and the defendant may be able to exploit that transparent conflict between the plaintiff and her lawyer. Second, the attorney could get paid an additional fee to proceed to trial, but only if the insurer approves—much the way managed care networks require pre-approval for many medical procedures. The main criteria for approval would be the reasonableness of the defendant's settlement offer, which means that litigation insurance companies would be in the business of telling plaintiffs when to settle and when to go on to court. Third, the litigation insurance company could address the problem of supervising the attorneys' time and effort directly by requiring plaintiffs to use its own staff of salaried attorneys, in the same way that patients in the Kaiser-Permanente health care

27. Peter Gottwald, *Simplified Civil Procedure in West Germany*, 31 AM. J. COMP. L. 687, 689-90 (1983); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 826 (1985).

28. Gottwald, *supra* note 27, at 701.

29. Gross & Syverud, *supra* note 2, at 15-18.

system must be treated by Kaiser-Permanente's employee physicians.³⁰

The first system (fixed fee per case) is a non-starter. It would come apart quickly under the strains of our lawyer dominated adversary system of litigation. The second system (trial requires insurer approval) might work, but it would be tricky. It would give defendants opportunities to exploit conflicts between plaintiffs, their attorneys, and their insurance companies; and it would be hard to calibrate a lawyer's compensation to the effort a case deserves. The third system, salaried insurance company lawyers, is the simplest, and would probably win out. Ultimately, it would become something like a vastly expanded and privately financed program of legal aid for the middle class. It might work, but in the process plaintiffs would lose the opportunity to choose their lawyers, and the lawyers that are chosen for them would become company employees.

How affordable would litigation insurance be? That would depend to a great extent on the ability of the insurance companies to control costs, which would probably favor companies that employ their own attorneys. Most likely, it would cost more in America than it does in Germany, since in America's privatized system of litigation lawyers do more and are paid more. One change that might significantly reduce the cost of litigation insurance would be a change to the German system of requiring the losing party to pay the winner's attorney's fees.

Under the current American system of litigation, there is no major constituency for fee shifting. Plaintiffs, who are typically risk averse, do not want it. A fee-shifting regime might increase their verdicts in cases in which they go to trial and win; it might even increase the value of settlements in the vast proportion of cases that do not go to trial. But the possibility of a somewhat higher return if they win is not

30. Under existing arrangements, civil defense lawyers—who rarely receive contingent fees—are hostile to attempts to change their terms of compensation from the traditional hourly fee. Occasionally, they get support from the courts. Thus, for example, the Supreme Court of Kentucky held in 1996 that it was unethical for an attorney to contract with a liability insurer to handle all the insurer's defense work for a fixed fee per case. *American Ins. Ass'n v. Kentucky State Bar*, 917 S.W.2d 568, 572-73 (Ky. 1996). In the process, the court also approved an earlier ruling by the Ethics Committee for the Kentucky State Bar that forbade insurance companies from using staff attorneys to defend liability suits against their insured. *Id.* at 571. This decision puts Kentucky in a small minority among states that have addressed the issue. Charles Silver, *Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers 5* (unpublished manuscript, on file with the *DePaul Law Review*). It is also indefensible. Both flat fees and representation by staff attorneys (public defenders) are common in the defense of indigent criminal defendants—a context in which the ethical obligations of the lawyers are, if anything, greater than in civil litigation—and they are universally accepted as proper.

worth the risk of an out-of-pocket liability if they do not win, especially since the victorious defendant might actually try to collect. Plaintiffs' attorneys do not want fee shifting. Admittedly, it would increase their recoveries at trial, and perhaps in pre-trial settlements, but under the usual contingent fee contract they would only receive a third of any net fee awards. To receive that additional sum, however, they would have to give up the rhetoric of "No Win, No Pay," which is the core of the pitch they use to recruit clients and to get those clients to agree to comparatively high contingent fees. And defendants do not want fee shifting. The threat of paying the defendants' fees may be scary to some plaintiffs, but in reality defendants and their insurance companies are not likely to collect much from losing plaintiffs, since most plaintiffs have little net worth or are absolutely judgment proof. On the other hand, defendants—or their insurers—are almost always solvent. They would be forced to actually pay almost every fee award in favor of plaintiffs. Moreover, to the extent that fee awards figure into settlements, defendants will end up paying the great majority of legal fees, since plaintiffs get monetary settlements in the great majority of cases.

In the brave new world of litigation insurance, however, there would be a powerful new constituency for fee shifting: the litigation insurers. A litigation insurer would be what is now a rare beast in American civil litigation: an institutional plaintiffs' litigation office. Like civil plaintiffs' representatives everywhere, it would usually get a recovery, in most cases, by settlement. Since the insurer would control the settlement negotiations, it could structure the agreements to explicitly segregate fees, which the insurer recovers, from damages, which go to the client. This could be a major boon to litigation insurers, even if the insurers (rather than their clients) were required to pay the defendants' fees in the small proportion of cases that produce no recovery, since the fees would usually flow in their direction.

Litigation insurers might be able to successfully promote this change. Fee shifting could enable the insurers to recover the great majority of their legal fees and litigation expenses, and to cut their premiums dramatically, by thirty, fifty, perhaps even eighty or ninety percent. If litigation insurance became a common middle-class method of obtaining representation, a rule that makes that insurance more affordable would be politically attractive—especially if it has a ring of fairness to it, and fee shifting does have that. The end result could be a form of litigation insurance that is reasonable in price and that includes protection against both liability and legal fees. That would mean that an insured accident victim could get a lawyer to han-

dle her case with no out-of-pocket payment and no risk of future liability for fees or costs. For an insured plaintiff, the process would look a lot like the present system, except that the lawyer she gets would be paid, monitored, and probably chosen (if not employed) by an insurance company.

For poor people, a similar state of affairs could be achieved by a vast expansion of legal aid. At the moment that sounds like a political pipe dream,³¹ but in the imaginary world of no contingent fees many things would be different. Poor accident victims would have no other access to recovery, and the cost of legal aid (in a fee-shifting regime) would be comparatively cheap: a public subsidy equivalent to the private litigation insurance premiums the rest of us would pay. The ABA and other established bar organizations, acting on the same combination of professional idealism and self interest that led them to oppose the dismemberment of the Legal Services Corporation,³² might lead a movement to expand legal aid to fill some of the vacuum left by abolishing contingent fees. Perhaps they would succeed, at least in part.

B. Cost and Risk Reduction

1. Controlling Lawyers' Hours and Fees

Contingent fees, as many scholars have pointed out, create a potential conflict between the interests of the lawyer and those of the client.³³ On the one hand, the marginal cost to the client of the lawyer's time is zero; therefore, it might be in the client's interest for the lawyer to spend vast amounts of time to increase the recovery in a case, even by a small sum. On the other hand, even a sensible investment of additional time might be uneconomical for the lawyer, who receives only a third of the return for her work. Nonetheless, under a contingent fee contract, the interests of the lawyer and of the client are rea-

31. Federal funding of legal aid, in the form of the Legal Services Corporation, has been under attack for years, primarily from conservatives who view the Legal Services Corporation as a liberal ideological machine, advancing a left-wing agenda at taxpayer expense. See David E. Rovella, *Will Court Win Spur GOP Backlash*, NAT'L L.J., Jan. 13, 1997, at A1; Robert Schmidt, *Congress Sharpens Ax with LSC in its Sights*, RECORDER, Mar. 5, 1997, at 1, available in LEXIS, News Library, Papers File; Richard Willing, *Federal Legal Service for Poor Faces Budget Cuts, Possible Elimination*, DET. NEWS & FREE PRESS, Sept. 3, 1995, at 11A, available in LEXIS, News Library, Papers File.

32. See Rhonda McMillion, *Grappling over Future of LSC*, 81 A.B.A. J. 100, 100 (1995); Rhonda McMillion, *LSC Down but Not Out*, 82 A.B.A. J. 118, 118 (1996).

33. F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 196-200 (1964); Kevin M. Clermont & John D. Curri van, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529, 534-37 (1978); Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198-202 (1987).

sonably well aligned. The client has only an indirect interest in the number of hours worked by the lawyer, and both have similar interests in the total recovery. Equally important, a contingent fee requires no monitoring or even record keeping of the lawyer's time, since the fee is set solely by the settlement or award. And since the plaintiff's lawyer is paid from the recovery, and paid only if there is a recovery, it may seem that the fee is paid by the defendant and won by the plaintiff's attorney.

With hourly fees, the plaintiff's lawyer loses any direct financial interest in the outcome of the case. Worse, the lawyer and the client now have opposing interests in the amount of time the lawyer spends working on the case—the longer the former works the more she earns, and the more the latter pays. This sort of fee arrangement can breed friction and ill will, especially if the charges are high, the client has little experience with the type of work, and there is no prior relationship between the parties.

If plaintiffs end up paying their lawyers by the hour, they will want to be able to better monitor their lawyers' time and effort. That will be hard for inexperienced one-shot player plaintiffs: How can anyone who does not do that sort of work tell whether twenty hours is a reasonable amount of time for rebuilding the engine of a car, or repairing the damaged foundation of a garage, or painting a portrait, or handling the negotiations in a \$10,000 automobile accident case? For legal representation the problem is especially difficult because in many cases neither the amount of work required nor the quality of the outcome can be predicted with any confidence. Perhaps novel mechanisms for monitoring will develop: manuals or other sources of information for clients; time-keeping systems that both account for and explain the lawyer's work; who knows what else. Alternatively, plaintiffs may be more comfortable with a system of representation that does not require them to pay their lawyers by the hour: a system in which they pay a fixed fee for a case or for each stage of a case, or a system in which their lawyers are employees of other entities—for example, litigation insurance companies.

If individual plaintiffs do pay their lawyers by the hour, that will have two additional consequences for the structure of civil litigation. First, it will change the terms of pre-trial negotiations to the advantage of civil defendants. Under the current contingent fee practice, a plaintiff's lawyer can truthfully tell her opponent that if the settlement offer is too low the plaintiff will happily proceed to trial, since, as far as the

client is concerned, the trial is already paid for.³⁴ But if the defendant knows that the plaintiff will have to pay new money to go to trial, perhaps a lot of it, trial becomes a less credible threat. Second, paying by the hour will put pressure on lawyers' fees and drive them down. At present, it is uncommon for plaintiffs' attorneys to compete by varying the terms of the contingent fee contracts that they offer.³⁵ But if they have to charge by the hour, they will have to compete to attract middle-class and working-class accident victims. Competition will be all the more fierce since the abolition of contingent fees will probably produce a significant reduction in litigation and a glut of attorneys. And it will not just affect plaintiffs' attorneys; the loss of business and the glut of lawyers will hit both sides of the street. There will be a parallel loss of compensation for civil defense lawyers, and, as the ripples expand, for the legal profession in general.

2. *Alternatives to Full-dress Litigation*

The banning of contingent fees would make lawyers harder to obtain and force many plaintiffs to pay their lawyers by the hour. As a result, there would be an increase in the demand for forms of dispute resolution that require less lawyer time, or none at all. Several forms of alternative dispute resolution (ADR) might fit this bill and would be natural candidates to meet that demand. But there is a hitch. In the usual tort case, there is no pre-existing relationship between the parties. Therefore, they must agree on an alternative to litigation, if at all, *after* the claim has matured—i.e., after the accident has happened. At that stage, the defendant—or in most cases, its insurer—will have little incentive to agree to an *alternative* to litigation, since, in the absence of contingent fees, litigation itself will be such a disadvantage to the plaintiff.

Some forms of ADR might grow to fill some of the gaps left by the demise of contingent fees, if they can be required by rule or statute, or agreed to by the parties in advance. The natural candidate is arbitration. Legislatures could require arbitration for certain types of claims—for example, automobile-accident claims below a certain level of damages. Some hospitals and health maintenance organizations (HMOs) already try to persuade their patients (and potential future plaintiffs) to agree in advance to settle claims by arbitration, and some require them to do so.³⁶ Without contingent fees to provide access to

34. Gross & Syverud, *supra* note 4, at 349-50.

35. Kritzer, *supra* note 1, at 285-90.

36. See *Madden v. Kaiser Found. Hosp.*, 552 P.2d 1178, 1184 (Cal. 1976) (holding that insurers may include mandatory arbitration procedures in health insurance packages); Victoria Slind-

the courts, arbitration clauses will become much more popular with patients. They might become a selling point: The Good Provider Health Maintenance Organization is so confident of its services and so concerned for the welfare of its patients that it offers them a built-in affordable way to obtain compensation, if compensation is deserved, instead of forcing them to use the prohibitively expensive remedy of the personal injury law suit.

As we now use it, arbitration itself frequently involves lawyers.³⁷ Arbitration does use less of the lawyers' time than trials, which will be attractive to plaintiffs who pay by the hour. But for arbitration to best fill the needs of a post-contingent fee world, the role of lawyers would have to be minimized, or eliminated altogether—as it is in most small claims courts.

Small claims courts are the ultimate in people's justice. They typically operate with no lawyers and no legal fees.³⁸ They might serve as a model for lawyerless arbitration in specialized contexts. They would certainly experience a major boom in their own business, since for many plaintiffs a small claims recovery, even if it is only a fraction of their damages, would be the only alternative to getting nothing at all. The apparent injustice of that state of affairs would create pressure to increase the jurisdictional limits of small claims courts,³⁹ or to create a new layer of not-quite-so-small-claims courts that have somewhat more elaborate procedures but still operate without lawyers.

3. *Self-representation*

In small claims court, self-representation is often mandatory. That makes it an attractive forum for litigants who cannot afford lawyers, a field on which they are on reasonably equal terms with richer oppo-

Flor, *California High Court Agrees to Hear HMO Arbitration Case*, NAT'L L.J., Nov. 20, 1995, at A7 (discussing recent controversy over Kaiser Foundation Health Plan's 20 year-old mandatory arbitration procedures); see also Cannon v. Lane, 867 P.2d 1235, 1239 (Okla. 1993) (holding that HMO binding arbitration provisions may be void as contrary to public policy).

37. See, e.g., Raymond J. Broderick, *Court-Annexed Compulsory Arbitration: It Works*, 72 JUDICATURE 217 (1988-1989) (referring to the continuing presence of attorneys in arbitration proceedings); cf. Paul D. Carrington, *ADR and Future Adjudication: A Primer on Dispute Resolution*, 15 REV. LITIG. 485, 489-92 (1996) (discussing the use of alternative dispute resolution, including arbitration, as a means of decreasing the role of lawyers in the legal process).

38. In some states, attorney representation is prohibited in most small claims cases. See, e.g., ARIZ. REV. STAT. ANN. § 22-512 (1956); CAL. CIV. PROC. CODE § 116.530 (West 1982 & Supp. 1997). In others, it is permitted but not required. See, e.g., MICH. COMP. LAWS ANN. § 205.763 (West 1986); N.H. REV. STAT. ANN. § 503:2 (1997).

39. At the moment, the common jurisdictional limits of small claims courts are modest, but not insignificant. See, e.g., ARIZ. REV. STAT. ANN. § 22-503 (1956 & Supp. 1996) (generally \$2,500); CAL. CIV. PROC. CODE § 116.220 (West 1982 & Supp. 1997) (generally \$5,000); TEX. GOV'T CODE ANN. § 28.003 (West 1988 & Supp. 1997) (\$5,000).

nents. But self-representation is also possible, if not easy, in ordinary civil courts of general jurisdiction. In a world without contingent fees, self-representation in ordinary civil litigation will become more common for the simple reason that some plaintiffs will have no better option. Increased interest in self-representation will fuel a rapid expansion in the In Pro Per industry.⁴⁰ There will be new manuals, videos, courses, software, and Internet services designed and marketed to help lay people file and prosecute law suits on their own behalf. Before long colorful successful pro se litigants will become well-known media personalities: few melodrama characters have longer pedigrees than the Common Man Who Beat The Lawyers. They will proselytize the virtues of self-representation, they will take calls on radio and TV talk shows—and like other proponents of the In Pro Per revolution, they will put pressure on the line that divides lawful advice and education from the unlawful practice of law without a license.

4. *Simplification of the Rules*

Just as the abolition of contingent fees would create pressure for cheaper alternatives to ordinary litigation, so it would create pressure for cheaper and simpler rules for those cases that are litigated in court. Part of the push would come from the enlarged corps of pro se litigants, since the disadvantages of inexperience and lack of training are magnified by complex rules of practice. In addition, plaintiffs who pay their lawyers by the hour will want the rules of civil procedure simplified to reduce the time and expense of the process. All sorts of rules might be up for grabs, from filing and service of process through appeal. The most logical candidates for pruning, however, are pre-trial discovery and the right to a jury trial. If pre-trial discovery were greatly simplified, and if pre-trial proceedings in general were brought under tight judicial control in the context of a non-jury system of adjudication, then it might just be possible to dramatically limit litigation costs.

Another type of move that might be tried is simplification of the substantive rules that govern compensation. The likely change in this domain would be a retreat from the fault principle. In theory, that ought to make trials simpler and recovery cheaper and easier to obtain. Whether that would happen in practice is not so clear. Experi-

40. In the past twenty years, there has already been a dramatic increase in the provision of legal services and information by nonlawyers. See Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701, 704 (1996) (discussing the expansion and composition of nonlawyer practice and its effects on the legal profession).

ence with "strict liability" in product liability litigation suggests that if substantial defenses are developed, and if the procedural context remains the same, purporting to remove fault as an element of a cause of action will do little or nothing to simplify practice.⁴¹

5. *Public Prosecution*

Drivers who are sued for negligence may also be cited for violating traffic laws. Manufacturers that are sued by their neighbors for injuries caused by toxic pollutants may be sued by the state for damages and clean-up costs, and may also be prosecuted for criminal offenses. Doctors who are sued for medical malpractice may also have their medical licenses revoked. There is a hydraulic relationship between private and public litigation. The elimination of contingent fees, by making the former more difficult, will increase the pressure on government lawyers to pursue the latter. This will happen for two reasons.

First, public prosecution will be more necessary to serve the deterrence and incapacitation functions that are now served by a combination of public and private litigation. For example, to the extent that medical malpractice litigation wanes, there may be increased demand for license revocation proceedings as the only remaining mechanism to deter careless conduct by doctors and to root out the incompetents. In addition, civil litigation against a wrongdoer sometimes serves an expressive or retributive function. To the extent that private litigation is suppressed, public prosecution may grow to fill the void.

Second, there will be pressure to increase the use of public prosecutions in order to help private plaintiffs recover damages. For example, at present many motorists are allowed to plead "no contest" to traffic violations in order to avoid the risk that guilty pleas or judgments of conviction will be used against them in a civil law suit.⁴² If private law suits become more difficult to pursue, potential plaintiffs in traffic ac-

41. See Choharis, *supra* note 10, at 447-48; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 215 (1974) ("[T]he similarities between the common law of negligence and the system of strict liability . . . are perhaps more important than the differences between them."); see generally James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991) (describing the history and development of product liability law in the United States).

42. Thus, for example Federal Rule of Evidence 410 provides in part: "[E]vidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea . . . (2) a plea of *nolo contendere* . . ." FED. R. EVID. 410. The Advisory Committee Note to this rule explains: "The present rule gives effect to the principal traditional characteristic of the *nolo* plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty." *Id.* at 410 advisory committee's notes (emphasis in original); see also *id.* at 803(22) (providing that felony

cident cases may need more help. As a result the private plaintiffs will be more likely to object to the entry of “no contest” pleas, prosecutors and judges will be less likely to accept them, and more criminal traffic cases will be forced to trial. At the other end of the spectrum, there will be more pressure on public prosecutors to pursue major toxic tort, environmental, and commercial fraud prosecutions, in order to pave the way for private litigants; in some contexts, this might even take the form of direct representation of private claimants by public attorneys.

C. Claim Reduction

1. Increase in Uncompensated Claims

One of the chief complaints by the opponents of the contingent fee is that it has helped produce an epidemic of meritless litigation.⁴³ What makes these law suits attractive (we are told) is the notorious unpredictability of American civil justice in general, and of jury verdicts in particular. If the damages are very high, and if your claim has some emotional hook, there is always a chance that a crazy jury will give you a ton of money, regardless of the evidence and in the teeth of the law. Naturally, some plaintiffs are anxious to gamble on these unlikely verdicts: the prizes are so tempting. Contingent fees enable plaintiffs to enter these litigation lotteries at no out-of-pocket cost. They also give plaintiffs’ lawyers financial incentives to encourage their clients to do so, and to devote their own time and money to these undeserving cases. Defendants, insurance companies, and by extension all of us, pay the piper: every bogus case must be defended; sometimes the plaintiff does win big; more often an honest manufacturer or a careful doctor settles to avoid the risk of a ruinous verdict. And so, the argument goes, if contingent fees were banned, plaintiffs would not be able to sue so easily, and unscrupulous plaintiffs’ attorneys could not get rich by drumming up phony cases.

Banning contingent fees might well reduce the number of meritless claims, but the main mechanism would be brute force. The single most likely effect of this reform will be a great reduction in the total number of claims that obtain compensation—including many that have merit, and some that do not. Whatever else might be said about the contingent fee, it is a great leveler. Assuming equal information, an indigent tort victim is almost as well situated to get high quality

convictions after trial or guilty plea, “but not upon a plea of *nolo contendere*,” are admissible in evidence as an exception to the hearsay rule).

43. E.g., *Contingent Fee Abuses, Hearings on Contingency Fee Abuses Before the Senate Comm. on the Judiciary*, 104th Cong. (1995) (statement of Lester Brickman, Professor, Cardozo School of Law), available in LEXIS, Legis Library, CNGTST file.

representation as an upper-middle-class victim. Unless a market in tort claims is developed as a substitute, eliminating contingent fees will greatly increase the advantages of wealth in litigation. Poor people will have a much harder time getting lawyers, and many claims for which they would have received compensation under the present system will not be pursued at all.

In a contingent fee system, a plaintiff has little or no incentive to refrain from filing a claim—if she can get a lawyer to represent her. As Herbert Kritzer and Mitchell Pickerill have shown, this puts plaintiffs' lawyers in the role of gatekeepers to the courts, in which capacity they reject more cases than they accept.⁴⁴ Under ordinary circumstances, contingent fee lawyers must prefer cases that are likely to win; any other strategy would be ruinous. The contingent fee, by giving plaintiffs' lawyers a financial interest in the outcomes of their cases, serves the socially useful function of motivating those lawyers to sift the good claims from the bad. If contingent fees are eliminated, that winnowing function will be destroyed.

It may also be true that in some unusual contexts the contingent fee system creates incentives for attorneys to file complaints in cases in which the potential damages are very high, but the probability of winning is low. This could be the case, for example, for some mass toxic torts. If so, the abolition of contingent fees might change that practice—or it might not, depending on what happens next.

Imagine a post-contingent fee system that relies primarily on plaintiffs' lawyers who are hired by individual plaintiffs and paid by the hour. In that situation, the lawyers will have a strong economic incentive to favor cases that will require a lot of their time, and that are brought by clients who can afford to pay them. The lawyers will still have personal, ethical, professional and reputational incentives to favor meritorious cases and to give good advice, but even a skeptic about the unique power of economic incentives might conclude that this will be a less efficient system for sorting cases by merit than one driven by the lawyers' self-interest. On the clients' side, these plaintiffs of the future who pay their lawyers by the hour will be much more careful in filing law suits than those of the present, who do not. They will not want to take risks for good and obvious reasons: even those plaintiffs who are able to afford litigation will be squeezed by the costs; as one-shot players, they will not be able to spread their

44. Herbert M. Kritzer & J. Mitchell Pickerill, *Contingent Fee Lawyers as Gatekeepers in the American Civil Justice System* (paper presented at the 1996 Annual Meeting of the American Political Science Association, San Francisco, CA, Aug. 28-Sept. 1, 1996) (on file with the *DePaul Law Review*).

risks over many cases; and they will have a hard time evaluating their chances. The likely net result is that they will become excessively cautious. They will not play many lottery-type long shots, which may be good, but they also will not sue in many winning cases that would have been brought under the contingent fee system.

On the other hand, what if the next step is the development of a market in tort claims?⁴⁵ In that situation, poor people will have at least as much access to compensation as they now have, and the proportion of meritorious claims that are compensated might well increase. At the same time, the potential for gambling on low-probability/high-damage tort cases might also increase, since the claims could be bought outright by well-financed risk-neutral claims merchants.

2. *First-party Insurance*

One way to avoid the difficulty of collecting damages from tortfeasors is through first-party insurance. Uninsured motorist coverage serves that function. In theory, uninsured motorists are responsible for the harm they have done us; in practice we insure because it is impractical or impossible to make them pay. Since the abolition of contingent fees will make it more difficult and expensive to collect damages through the tort system, it will increase the demand for first-party insurance as an alternative form of compensation. Like litigation insurance, this new first-party tort insurance will probably be marketed as a line on other personal insurance policies—automobile, homeowner's, health, disability, life—or as a component of employees' fringe benefit packages. As with litigation insurance, this option is not likely to benefit the poor, who carry little or no insurance as it is. And, as with litigation insurance, that gap could be closed by public subsidies or by an expanded program of social insurance. At the moment, of course, no such public program is politically conceivable.

Ultimately, first-party insurance could absorb third-party claims directly. Jeffrey O'Connell has proposed a system of first-party accident insurance that is partly financed by transferring the victims' tort claims to the insurers.⁴⁶ Under this scheme, an insured pedestrian

45. See *supra* notes 8-19 and accompanying text.

46. Jeffrey O'Connell, *Harnessing the Liability Lottery: Elective First Party No-Fault Insurance Financed by Third-Party Tort Claims*, 1978 WASH. U. L.Q. 693, 697 [hereinafter O'Connell, *Harnessing the Liability Lottery*]; Jeffrey O'Connell & Janet Beck, *Overcoming Legal Barriers to the Transfer of Third-Party Tort Claims as a Means of Financing First-Party No-Fault Insurance*, 1980 WASH. U. L.Q. 55, 55-8. My description of O'Connell's plan does not do full justice to the original. In particular, for the sake of simplicity, I have not mentioned the special provisions he

who is injured by a motorist will receive compensation from his or her own insurance company, and will in turn assign the tort claim to that company. Under current law in most states, a first-party insurer may obtain "subrogation rights" for payments made to a policy holder. The insurer may recover the amount it paid out (but no more) from any third party that is responsible for the harm to the insured.⁴⁷ This subrogation right is a limited exception to the rule prohibiting the assignment of tort claims.⁴⁸ O'Connell proposes extending that exception to allow the insurance company to recover on the entire claim. In effect, O'Connell has proposed a limited market for tort claims in which the only qualified buyers are insurance companies who buy up the claims in advance. So far, no state has adopted O'Connell's proposal, but if the abolition of contingent fees made recovery in tort much more difficult, it would be an attractive method to help fill the gap by lowering the premiums for first-party insurance.

From the point of view of the defendants, this new arrangement may look quite a bit like the same old tort system. About as many claims will be brought, at least by insured plaintiffs, and they will be handled by the same combination of litigation and negotiation. The only formal difference would be that the claims would be owned and prosecuted by the plaintiffs' insurance companies. In practice, O'Connell anticipates that these cases will be handled much more cheaply and routinely, by large scale settlements between insurance companies on the two sides of the table.⁴⁹ From the point of view of plaintiffs, however, things will look very different. They not only give up their rights to sue, in return for compensation—as they would in any system in which their claims are assigned—but they do so in advance. When they buy insurance, they give up their rights to sue for future injuries with unknown causes and unknown consequences.

Robert Cooter and Stephen Sugarman have proposed to make the transformation of third-party claims into first-party insurance even more explicit.⁵⁰ Under their scheme, workers would sell their unma-
tured pre-injury tort rights against manufacturers of products that

includes to avoid conflicts of interest between an insurer and its insured. See O'Connell, *Harnessing the Liability Lottery*, *supra*, at 698-701.

47. See O'Connell & Beck, *supra* note 46, at 67-74.

48. See *supra* note 8 and accompanying text.

49. O'Connell, *Harnessing the Liability Lottery*, *supra* note 46, at 703.

50. STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW: NEW COMPENSATION MECHANISMS FOR VICTIMS, CONSUMERS, AND BUSINESS 202-09 (1989); Robert Cooter & Stephen D. Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract*, in *NEW DIRECTIONS IN LIABILITY LAW* 174, 175 (Walter Olsen ed., 1988); Robert Cooter, *Toward a Market in Unmatured Tort Claims*, 75 VA. L. REV. 383, 391 (1989).

might injure them to their own employers, in return for additional compensation or health and insurance benefits.⁵¹ The employers, in turn, would consolidate these rights and sell them back to the potential defendants. The net effect would be that manufacturers would pay the insurance premiums for the workers' additional health and disability benefits, in consideration of reduced exposure to product liability litigation. As Sugarman and his colleagues recognize, this transformation, if widely extended, would mean the demise of personal injury litigation as we know it.⁵²

III. CONCLUSION

We have developed a very expensive, highly complex, privatized, lawyer-dominated system of civil litigation. Almost no litigants can afford to play this game with their own money. Instead, they are financed by liability insurance, and by contingent fees—which, in turn, are financed by liability insurance. With this financial backing, we are able to maintain a high rate of civil litigation, and a large corps of lawyers who are well paid to prosecute and defend civil claims. If the contingent fee were pulled from the foundation, the whole structure might fall to the ground—or it might be propped up in some new and reduced form. The real issue is not so much what the direct effects of abolishing contingent fees would be, but how those who are affected would respond.

Speculating about what might happen to the American system of civil litigations if contingent fees were abolished is a bit like writing science fiction: an opportunity to imagine a change so basic and so improbable that it would have many complicated and bizarre consequences. The conceptual problem is also the same as in science fiction. It is impossible to say which of these consequences would actually occur or how they would interact with each other. The only clear lesson to draw from all this is that it will not happen, not any time soon, not unless other events change the context. Even the lamest pass at predicting the effects of abolishing contingent fees quickly highlights predictable points of resistance, and there are many.

Despite these disclaimers, and despite the fact that this is fantasy rather than prediction, I believe there are three types of changes that would very likely follow the abolition of contingent fees.

First, there would be a great decrease in the number of damage claims brought in court or in any forum. In addition to the effects that

51. SUGARMAN, *supra* note 50, at 202-09.

52. *Id.*

would have on the potential claimants and defendants, this decrease in litigation would have major repercussions for the legal profession and the legal system as a whole.

Second, there would be moves to simplify the procedures for pursuing claims in courts and to create simpler alternatives to formal litigation. Some of the basic components of our system of civil litigation, from discovery through jury trial, might end up on the chopping block.

Third, the system of compensation for accidents would change in kind. In theory, our present system is based on adjudication of fault; in practice, it consists primarily of adversarial bargaining in the shadow of that sort of adjudication. If contingent fees were abolished, most accident victims might come to rely primarily on payments from first-party insurers, or from claims merchants who buy up their causes of action after the fact and extract their value en masse. One way or the other, adjudication would atrophy and the process of obtaining compensation for injuries would become increasingly bureaucratic.