

Private Enforcement of Antitrust Law in the United States

A Handbook

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10 Funding litigation

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§ 10.01 Introduction

Private litigation in the United States is financed through a variety of attorney fee arrangements, including contingency fees, hourly fees, and alternative billing arrangements. Behind the scenes, these agreements between attorneys and clients are the lifeblood of private claims, as all such claims require adequate funding at each stage of

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the litigation process to proceed. This chapter discusses the attorney fee arrangements commonly employed in private antitrust litigation in the United States. Although all such arrangements are addressed, the authors place particular emphasis on contingency fees, which have evolved to become a convention of our system's primary tool for the private redress of the widespread harm that can be caused by antitrust violations: the class action. This chapter also discusses the typical costs associated with antitrust litigation, which are likewise significant in funding private antitrust claims in the United States. Costs play a role in budget considerations and vary depending on the stage of the litigation. Finally, this chapter discusses some of the noteworthy antitrust damage recoveries from the previous two decades and the funding arrangements that have accompanied them.

§ 10.02 A history of contingent fees in the United States

The modern contingent fee system is traceable to early English prohibitions preventing a claimant from selling speculative judgment proceeds to a disinterested party in consideration for funding the claimant's underlying claim.² Commonly known as "champerty," this common law prohibition existed as early as the thirteenth century, when English feudal lords and magnates could take advantage of the poor by abusing the legal system in furtherance of their own power or property.³ As the American colonies separated from England and began forming a distinct legal system, access to the courts and assistance of counsel for poor and rich alike became prominent concerns.⁴ Acceptance of the attorney contingency fee grew from the need to foster this access and assistance.⁵

Although the formal prohibition on champerty would remain, a drastic departure from traditional English common law foundations, which forbade any such "contingency fees," began in earnest during the late colonial period in America.⁶ In the early and mid-nineteenth century, the need for such a departure had been validated by title disputes concerning land ownership, which had caused many settlers to be removed from their properties by the true landowners for not being able to afford to defend themselves.⁷ Likewise, during the Industrial Revolution, workers who were the victims of increasing transportation and work-related accidents found that they too needed legal representation they could ill-afford.⁸ Over time, the increase in such claims forced the American Bar Association to accept the contingency fee as a valid

² Stephen Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 262 (1998).

³ *Id.* at 263.

⁴ *Id.*

⁵ David A. Root, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule"*, 15 IND. INT'L & COMP. L. REV. 583, 593 (2005).

⁶ Peter Karsten, *Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231, 232 (1998).

⁷ Kristin Porcu, *Protecting the Poor: The Dangers of Altering the Contingency Fee System*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 149, 152-53 (2000).

⁸ Angela Wennihan, *Let's Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1645-46 (1996).

system for attorney compensation.⁹ By the late nineteenth century, contingency fees were well-accepted.¹⁰

During the late nineteenth and early twentieth centuries, contingency fees grew in popularity. Professor Peter Karsten notes that even before “some of their high courts had sanctioned contingency fees, the American public was putting them to increasing numbers of use.”¹¹ For example, contingency fee contracts could be found among:

[M]inority stockholders and dissident stock subscribers suing corporations, importers and customs brokers suing the federal government, depositors suing banks, creditors suing insolvent railroads and manufacturing firms, merchants and traders reporting depredations and losses at the hands of either Indian tribes or others before federal Claims Commissions, passengers and crews suing steamship companies, urban park commissioners seeking to clear title to park land, county commissioners and state auditors suing for title to land from those without proper title, subordinate government entities suing higher ones over tax revenues, towns and counties suing to halt the issuance or transfer of railroad bonds, as well as bondholders suing counties and municipalities to collect on these bonds.¹²

Such contracts thus began to garner widespread use and binding recognition even before their official sanctioning.¹³ However, despite increasingly broad approval, certain forms of legal representation were deemed unfit for contingency fees, including the pursuit of alimony as part of a divorce, criminal matters,¹⁴ the securing of “a discharge for one who had been drafted during the Civil War,” and the lobbying of legislators for purely private interests.¹⁵ Nevertheless, Congressional attempts to limit contingency fees were met with resistance from the courts. When a 1915 law purported to “[limit] the contingency fees of attorneys representing Southerners claiming damages for depredations or uncompensated takings” that occurred during the Civil War,¹⁶ many high courts found the limitations unconstitutional. By this time there was “clear evidence of the propensity of jurists . . . to treat [contingency] arrangements as part of the legal landscape and as the bread and butter of a large segment of the profession, to be defended when contravened by either the client or the defendant.”¹⁷

Not all courts were willing to sanction contingency fee agreements as written, and legal fictions were sometimes used to work around such restrictions. For example, some courts voided clauses containing an “attorney’s promise to pay all of the costs associated with the suit.”¹⁸ In Massachusetts, contingency fee arrangements were only tolerated if the

⁹ Root, *supra* note 5, at 593.

¹⁰ Karsten, *supra* note 6, at 249. (Supreme Court Chief Justice Morrison once called a contingency fee arrangement “a legitimate and honorable professional assistance”).

¹¹ *Id.* at 248.

¹² *Id.*

¹³ *Id.* at 249.

¹⁴ Porcu, *supra* note 7, at 154.

¹⁵ Karsten, *supra* note 6, at 249.

¹⁶ *Id.*

¹⁷ *Id.* at 250.

¹⁸ *Id.* at 253.

agreement did not contain a “no-win, no-fee” clause (even though all parties understood that the client would not pay if the action was unsuccessful).¹⁹

Today, contingency fee agreements have the official sanction of the American Bar Association. Rule 1.5 of the ABA’s Model Rules of Professional Conduct allows for contingency fee arrangements, provided that they are reasonable and placed in writing. However, courts retain discretion in making a final determination of reasonableness.²⁰ Judges may require attorneys to provide detailed justifications for their fees, or risk the court reducing the fee proportionally to the amount the court determines the attorney has proven reasonable.²¹ For example, when determining the reasonableness of attorney fees drawn from a common class fund, the Third Circuit has held that courts should consider (1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiff’s counsel; and (7) the awards in similar cases.²²

Contingency fee advocates often defend the contingency fee structure on the basis of freedom of contract,²³ and the economic notion that freedom to contract for services enables a market to function most efficiently.²⁴ Some courts have been reluctant to lower attorneys’ contingency fees on the grounds that, “absent fraud or overreaching, the attorney-client contract for legal services should not be intruded upon by the State.”²⁵ Nevertheless, courts routinely do reduce contingency fees. Attorneys and judges alike recognize the equitable power of the court to reduce a contingency fee when it seems excessive, or as a means to administer justice or discipline an unscrupulous attorney.²⁶

§ 10.03 Considerations before funding a contingent fee case

In the modern era, antitrust fee arrangements have seen many different shapes, forms, and sizes. Indeed, differences among funding arrangements in private antitrust cases are often found among opposing parties. A defendant in an antitrust case usually pays attorneys’

¹⁹ *Id.*

²⁰ Porcu, *supra* note 7, at 155–56; *see also In re Relafen Antitrust Litig.*, 231 F.R.D. 52 (D. Mass. 2005).

²¹ Porcu, *supra* note 7, at 153.

²² *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 301 (3d Cir. 2005) (citing *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 195 (3d Cir. 2000)); *see also Segen v. Optionsxpress Holdings, Inc.*, 631 F.Supp. 2d 465, 466 (D. Del. 2009) (reducing requested attorney fees from 33 percent to 8 percent of the recovery).

²³ Angela Wennihan, *Let’s Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1650; *see also* Stephen D. Annand & Roberta F. Green, *Legislative and Judicial Controls of Contingency Fees in Tort Cases*, 99 W. VA. L. REV. 81, 94 (1996) (citing Henry H. Drummonds, *The Law and Ethics of Percentage Contingent Fees in Oregon*, 72 OR. L. REV. 859, 872 n.56 (discussing the enforcement of contingent fees under contract theory)).

²⁴ Wennihan, *supra* note 23, at 1650.

²⁵ *Id.*

²⁶ *Id.* at 1665.

fees on a per diem, or billable hour, basis. Although plaintiffs also pay attorneys' fees by the hour in some circumstances, more often plaintiffs fund antitrust litigation using some form of contingent fee arrangement in which the attorney's fees are paid only if the plaintiff ultimately prevails in the lawsuit. If the plaintiff does not prevail, then the plaintiff does not pay the attorney's fees (or the defendants' expenses).²⁷

When a law firm agrees to represent a client on some type of contingent or alternative fee arrangement, it will consider several factors. These factors include "(1) the likelihood of a favorable outcome, (2) the time frame in which the recovery is likely to occur, (3) the probable amount of recovery, and (4) the percentage contracted for."²⁸ In reality, these factors may vary and other considerations may come into play, including a weighing of a particular attorney or firm's expertise, the other cases that the firm or attorney is handling, and the needs of the particular client. Due to the professional expertise such weighing involves, often the attorney is better positioned than the client to make a determination.²⁹

Certain fixed costs and expenses are associated with litigating a private antitrust case. As part of its retainer agreement with the client, the law firm will address how such costs will be paid. The litigation costs typically range from small expenses such as photocopying and mail service, to larger expenses such as expert fees and travel. These expenses are "out of pocket." In other words, the law firm will have to pay the expenses as they come due, regardless of whether or when there will be a favorable recovery in the case.

When a law firm considers whether to accept a case on an alternative fee basis, it must evaluate what the estimated costs of the case will be. The following items are merely examples, not an exhaustive list, of the larger costs typically associated with litigating a case: electronic document retrieval, storage (or hosting), and production; expert fees; deposition stenographer hourly reporting fees; deposition transcript costs; travel expenses; and legal research using electronic search services.³⁰

In cases in which multiple law firms agree to represent a plaintiff – or more typically, several plaintiffs – on an alternative fee basis, the firms divide the costs of the litigation and the attorneys' fees ultimately recovered.³¹ This assessment is sometimes based on a lodestar value, which is discussed in more detail below. Simply put, the costs and fees are

²⁷ Root, *supra* note 5, at 583, 589, 597–98; Virginia G. Maurer, Robert E. Thomas & Pamela A. DeBooth, *Attorney Fee Arrangements: The U.S. And Western European Perspectives*, 19 NW. J. INT'L. L. & BUS. 272, 293, 306 (1999).

²⁸ Drew C. Phillips, *Contingency Fees: Rules & Ethical Guidelines*, 11 GEO. J. LEGAL ETHICS 233, 237 (1998) (citing STEPHEN GILLERS, *REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS* 140 (1995)).

²⁹ Phillips, *supra* note 28, at 238 ("[I]n most cases, the lawyer is far better equipped than the client to evaluate the criteria that should determine whether or not to take a case on a contingent basis.").

³⁰ The federal tax laws impose an additional hurdle by treating expenses and costs that a plaintiffs' attorney advances as "loans" to the client or putative class of clients. These expenditures are therefore not deductible from income as business expenses for the attorney when they are incurred. In complex cases, these expenses can run into the millions of dollars and financing them can pose a formidable challenge.

³¹ For a discussion of recovery of attorneys' fees and costs in the context of plaintiffs' remedies, see Chapter 9 of this Handbook.

assessed and distributed equitably, based upon the number of hours that each law firm works on the case. Thus, at the end of the case, the attorneys' fees would be distributed to the various law firms based upon the lodestar value.

According to a recent study of class action settlements spanning 1993 to 2008, costs and expenses were a small percentage of the average class recovery.³² In fact, costs and expenses remained a constant percentage over this 15-year period.³³ From 1993 to 2002, the mean costs were 2.8 percent of recovery, and they actually decreased to 2.7 percent during 2003 to 2008.³⁴ The median costs remained at 1.7 percent for the entire time period.³⁵

Finally, in some cases, insurance policies may cover the attorney's fees and expenses for litigation.³⁶ Generally, if a business has purchased a general liability insurance policy, part of the policy's coverage may go towards attorneys' fees. Individuals, unless they have the risk of suit in a professional capacity, do not often purchase general liability insurance in the United States.

§ 10.04 E-Discovery costs

The cost of electronic discovery is another consideration for attorneys in antitrust, indeed any, litigation.³⁷ We live in a digital age where the use of electronically-stored information (ESI) is the norm. Instead of requesting a collection of paper documents, lawyers who deal with discovery in today's environment must be able to identify the key custodians who have responsive information, determine what type of electronic documents exist, establish where the information is stored, and copy the ESI into a useable format. Despite the prevalent use of ESI, courts still wrestle with what aspects of e-discovery are "taxable court costs" that are recoverable.

Generally, the costs of actually producing the electronic documents are taxable, but various other costs associated with electronic discovery may not be. Recoverable e-discovery costs include the copying of files in their native format and the conversion to a standardized file format.³⁸ One court described this process as the "21st century equivalent of making copies."³⁹ In *Neutrino Dev. Corp. v. Sonosite, Inc.*, for example, the court found that the costs of removing metadata from files to be redacted and

³² Theodore Eisenberg & Geoffrey P. Miller, *Attorneys' Fees and Expenses in Class Action Settlements: 1993–2008*, 26 (Cornell Law Faculty Working Papers, NYU Center for Law, Economics and Organization, Law & Economics Research Paper Series Working Paper No. 09-50, Draft of October 30, 2009).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ This subject is worthy of its own separate article and will not be discussed at great length here.

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³⁸ See *CBT Flint Partners, LLC v. Return Path, Inc.*, 676 F. Supp. 2d 1376, 1381 (N. D. Ga. 2009). See also *BDT Prods. V. Lexmark Int'l, Inc.*, 405 F.3d 415, 420 (6th Cir. 2005); *Fast Memory Erase, LLC v. Spansion, Inc.*, 2010 U.S. Dist. LEXIS 132025, at *18–19 (N.D. Tex. Nov. 10, 2010).

³⁹ *Id.*

produced electronically are recoverable.⁴⁰ Other courts have placed limits on the idea that copying electronic files is equivalent to making paper copies, finding that only costs associated with the copying and conversion of “necessary” ESI are recoverable but copying and conversion for counsel’s convenience is not.⁴¹ Some courts do not allow the cost of searching and extracting information because that process is “more like the work of an attorney or legal assistant in locating and segregating documents that may be responsive to discovery than it is like copying those documents for use in a case.”⁴² For example, in *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, the Northern District of Illinois held that costs such as computer time and costs of a computer consultant to search through electronic documents are not recoverable under 28 U.S.C. § 1920 (the bill of costs statute).⁴³

§ 10.05 Types of fee arrangements

The most common fee arrangement in a private antitrust action is the contingency fee.⁴⁴ As fee arrangements are often privately negotiated in the United States, public data on this subject is scarce. In the American Antitrust Institute’s Private Enforcement Project study,⁴⁵ 30 of the 40 cases analyzed are included in tables describing the percentage of plaintiffs’ recovery awarded as attorneys’ fees.⁴⁶ These cases are all contingent-based; the remaining cases’ fee structures are not otherwise discussed or disclosed. In addition to the contingent fee arrangement, the incentive-based fee arrangement, the “billable hour,” the task-based arrangement, the flat fee arrangement, mixed arrangements, and the attorney investment arrangement have all been utilized in some form in antitrust cases. These arrangements are discussed below.

10.05.1 100 percent contingent agreements

The 100 percent contingent arrangement is the commonly understood “no-win, no-pay” system. This arrangement is common in large, class-action lawsuits, including antitrust lawsuits.⁴⁷ The attorneys accept the case in return for “a percentage of any award or

⁴⁰ Civil Action No. H-01-2484, 2007 U.S. Dist. LEXIS 23464, at *12 (S.D. Tex. Mar. 30, 2007).

⁴¹ See *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 2011 U.S. Dist. LEXIS 48847 *at 11–12 (W.D. Pa. May 6, 2011) (discussing the dividing line between “necessary” and “for the convenience of counsel”).

⁴² *Kellogg Brown & Root, Int’l Inc. v. Altanmia Comm. Mktg. Col. W.L.L.*, 2009 U.S. Dist. LEXIS 44137, at *15 (S.D. Tex. May 26, 2009); see also *Klaymin v. Freedom’s Watch, Inc.*, 2008 WL 5111293, at *2 (S.D. Fla. Dec. 4, 2008); *Windy City Innovations, LLC v. AOL, Inc.*, 2006 WL 2224057, at *3 (N.D. Ill. July 31, 2006).

⁴³ No. 01 C 4366, 2004 U.S. Dist. LEXIS 13657, at *19–20 (N.D. Ill. July 19, 2004).

⁴⁴ Sarah Northway, *Non-Traditional Class Action Financing and Traditional Rules of Ethics: Time for A Compromise*, 14 GEO. J. LEGAL ETHICS 241, 245 n.30 (2000).

⁴⁵ Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879 (2007).

⁴⁶ *Id.* at Tables 6A–6C.

⁴⁷ Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291, 291(1994).

settlement.⁴⁸ ABA Model Rule of Professional Conduct 1.5 allows for these types of arrangements, provided that:

A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.⁴⁹

This type of arrangement creates several advantages. First, and most importantly, this arrangement provides disadvantaged plaintiffs with the opportunity for greater access to justice.⁵⁰ Plaintiffs can pursue cases without a large, up-front fee arrangement. Second, contingency fee agreements promote progressive litigation.⁵¹ The Supreme Court identified this advantage in *Deposit Guar. Nat'l Bank of Jackson, Miss. v. Roper*, where the Court described the role of the contingency fee agreement as an effective tool in vindicating smaller aggregated claims unremedied by the regulatory action of government, likening the role of plaintiffs and plaintiffs' counsel to a "private attorney general."⁵² Examples of other progressive litigation include the abolition of government immunity in some states, the right of parents to recover for the wrongful death of an unborn child, and liability lawsuits which have removed harmful products such as flammable children's pajamas, cars that explode on impact, and harmful contraceptive devices.⁵³ Third, contingency fee agreements help align the interests of the attorney and client by providing shared incentives and shared risks.⁵⁴ Fourth, contingency fee agreements that are based upon a percentage of recovery are easier to compute than other common alternative fee arrangements.⁵⁵

Although contingency fees open the justice system for many people, some critics have identified disadvantages of the traditional contingency fee agreement. First, while the client and attorney share a similar end goal of a successful action, their interests are not completely aligned. For instance, "the attorney may want to settle early for a guaranteed fee rather than invest additional hours in the case. Those hours might result in a marginally greater recovery for the client, or alternatively, in the loss of the case altogether."⁵⁶ However, professional responsibility requirements to the client must ultimately motivate the litigation.

⁴⁸ *Id.* at 297.

⁴⁹ ABA MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2004).

⁵⁰ Wennihan, *supra* note 23, at 1649–51.

⁵¹ *Id.* at 1651.

⁵² 445 U.S. 326, 338 (1980).

⁵³ Wennihan, *supra* note 23, at 1651.

⁵⁴ Michael McKee, Rudy Santore & Joel Shelton, *Contingent Fees, Moral Hazard, and Attorney Rents: A Laboratory Experiment*, 36 J. LEGAL STUD. 253, 269–71 (2007).

⁵⁵ Wilson, *supra* note 47, at 308.

⁵⁶ *Id.* at 300.

Second, as the critics note, contingency fees may result in windfall profits for the attorney. For example, an attorney may accept a case with very little risk and very little work required, but with a large potential damage amount. In such a situation, the attorney may collect a “windfall” amount.⁵⁷ Nevertheless, such fee arrangements are subject to checks and balances. Courts often act as gatekeepers to ensure that attorneys do not recover “windfall” amounts. In the *In re Visa Check/MasterMoney Antitrust Litigation*, for example, Judge Gleeson concluded that the plaintiff attorneys’ fee request was “excessive” and “absurd.”⁵⁸ Plaintiffs’ counsel had requested fees at 18 percent of the clients’ monetary relief, or around \$609,012,000.⁵⁹ After applying a six-factor test to determine an appropriate fee, Judge Gleeson awarded \$220,290,160.44 in reduced fees.⁶⁰

Nevertheless, the largest number of cases in which a court awards reduced contingency fees to an individual plaintiff are personal injury cases. These are difficult to compare in size, scope, and damages award amounts to even a small antitrust claim. The similarity that exists is that in either type of case, the court retains the authority to reduce a fee that it believes is excessive. Attorneys may pre-empt this problem by asking the court at the outset for a reduced contingency percentage when the higher-than-expected recovery is returned. In 2007, a report by the American Antitrust Institute’s Private Enforcement Project found that attorneys’ contingency fees in antitrust cases tend to reach the standard one-third amount only in suits resulting in smaller recoveries.⁶¹ In cases where the recovery is between \$100 and \$500 million, the percentage of attorneys’ fees drops proportionally.⁶² Of the five cases with recoveries greater than \$500 million included in the study, four had attorney’s fee percentages between 5.2 and 13 percent. The perceived (and proportional) fairness of the fees guides the court in its determination, whether plaintiffs are injured individuals or members of a large class. Professional associations also recommend limits on such recoveries. The ABA Rules attempt to regulate contingent recoveries by requiring all fees to be “reasonable.”⁶³

A third criticism of the contingency fee model is the increase in litigation that it may engender.⁶⁴ However, such criticism is largely unfounded.⁶⁵ In fact, as discussed later, the

⁵⁷ *Id.* at 309.

⁵⁸ *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp.2d 503, 522 (2003). In his book about the lawsuit, attorney Lloyd Constantine argues that his fee request for the attorneys on the case was justified. LLOYD CONSTANTINE, PRICELESS 224–27 (2009). Mr. Constantine recounts the measures that he and colleagues took to present the attorneys’ fees to Judge Gleeson, including cutting attorney hours that were billed for excessively long days. “In this exercise, my hours were cut for numerous days when I traveled to San Francisco and worked through the night; that is, after my drink in the Redwood Room of the Clift Hotel.” *Id.* at 225.

⁵⁹ *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp.2d at 522.

⁶⁰ Mr. Constantine, who disagreed with the Court’s fee calculation, argues that Judge Gleeson actually awarded a 3.5 multiplier of the \$62,940,045.84 submitted as the lodestar in the fee application. *Id.* at 232.

⁶¹ Lande & Davis, *supra* note 45, Table 6A (2007).

⁶² *Id.* at Table 6B.

⁶³ ABA MODEL RULES OF PROF’L CONDUCT R. 1.5(a) (2004).

⁶⁴ Wennihan, *supra* note 23, at 1658.

⁶⁵ Wennihan, *supra* note 23, at 1659 (citing Stephen Budiansky, et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50–56, for the fact that personal injury contingency litigation remained constant from 1975 to 1990, and has fallen since 1990).

process that attorneys undertake to evaluate a case, as well as the costs associated with litigating a case, often serve as an inherent check on unfettered litigation.⁶⁶

Despite the criticism, a percentage-based contingency fee model has become a widely-used and accepted method for funding private antitrust litigation. As the court commented in *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. and MasterCard Int'l, Inc.*, the trend has been towards applying the percentage-based method because “it directly aligns the interests of the [party] and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation.”⁶⁷

10.05.2 Incentive-based fee arrangement

The incentive-based fee arrangement “creates an incentive for the attorney to obtain a favorable result at a lower cost to all clients in a manner not unlike the contingent fee arrangements for plaintiff clients.”⁶⁸ Under an incentive-based fee arrangement, an attorney’s fees are dependent upon the result – the more favorable the settlement or judgment, the more fees collected by the attorney.⁶⁹ Thus, in this type of arrangement, an “attorney is given an incentive to resolve the lawsuit for the lowest possible cost to the client.”⁷⁰ Furthermore, the “client benefits either from low fees and/or settlement costs due to a favorable resolution of the case or from reduced fees if the settlement or judgment is not favorable.”⁷¹

10.05.3 The “billable hour”

The traditional “billable hour” method gained popularity in the mid-1960s.⁷² This method is the simplest to calculate. The fee is computed by taking the number of hours worked multiplied by the attorney’s hourly billing rate. It was originally thought to improve “fairness.” Calculating a fee based on “the hours of work that a lawyer put[s] into a task was an objective way to measure the amount a client should owe.”⁷³ Thus, this hourly rate is perceived as the “fair value” of services provided to a client.

⁶⁶ *Id.* at 1659 (“[T]he lawyer acts as a buffer between the plaintiff and defendant by not accepting baseless claims because it is not in her own economic best interest to do so.”) (citing Philip H. Corboy, *Contingency Fees: The Individual’s Key to the Courthouse Door*, 1976 LITIGATION 27 (1975–1976); Root, *supra* note 5, at 596 (“[T]he lawyer who takes a certain percentage of the proceeds from a victorious case will screen out those cases lacking sufficient merit to avoid the opportunity cost of wasting his time and resources. Coinciding with this ‘screening out’ argument, others argue that contingency fees actually decrease the amount of frivolous litigation by changing the lawyer’s incentives.”).

⁶⁷ 396 F.3d 96, 121 (2nd Cir. 2005); *see also In re Lease Oil Antitrust Litig.* (No. II), 186 F.R.D. 403, 444 (S.D. Tex. 1999) (commenting upon the strong trend toward the percentage method).

⁶⁸ Stephen W. Jones & Melissa Beard Glover, *The Attack on Traditional Billing Practices*, 20 U. ARK. LITTLE ROCK L.J. 293, 304 (1998).

⁶⁹ *Id.* at 304–05.

⁷⁰ *Id.* at 305.

⁷¹ *Id.*

⁷² *Id.* at 293–99.

⁷³ *Id.* at 294.

In reality, one of the biggest disadvantages of this billing system is the potential for unnecessary increases in litigation costs. The billable hour method rewards inefficiency, because “the more hours worked, the more fees are generated.”⁷⁴ Furthermore, the method lacks a mechanism to control costs, which can be a serious flaw given the unpredictability of litigation. It also fails to solve some of the problems identified earlier in this chapter. People who may not otherwise have access to the court system because they cannot afford it will not be able to fund litigation this way. Moreover, even people who have the funds may not be willing to pursue viable but nevertheless high-stakes, cutting edge legal issues.

10.05.4 *Task-based and flat fee arrangements*

Task-based fee systems are based on the completion of various tasks instead of an hourly or contingent agreement. Tasks may be “defined as narrowly as a specific deposition or as broadly as completion of fact research and case analysis.”⁷⁵ Fees for each task can be negotiated, “creating an incentive for the attorney to perform efficiently.”⁷⁶

Flat fee agreements are exactly that – a fee is “charged for handling a matter from beginning to end.”⁷⁷

10.05.5 *Mixed arrangements*

While the above fee arrangements can be used as the sole type of fee agreement for a specific matter, many fee arrangements in complex litigation are a blending of various types of arrangements. A common “blend” is the partial contingent agreement. In such an agreement, the attorney will be paid a reduced hourly fee, in exchange for an amount from the final judgment. In such a system, for example, an attorney may charge reduced fees in exchange for 10 percent of the final settlement or judgment.

10.05.6 *Attorney investment*

An attorney investment arrangement involves an attorney advancing a share of the litigation expenses in exchange for a specified return on investment to be allocated from the amount approved for attorneys’ fees following judgment or settlement.⁷⁸ However, the setting of attorneys’ fees by fixing a rate of return on an initial investment is uncommon, perhaps as a result of professional responsibility rules dictating that fees must be “reasonable.”⁷⁹ Setting a fixed rate of return on an investment before any recovery is realized may obstruct fairness, as compared to a contingency fee, which may have a greater

⁷⁴ *Id.* at 295.

⁷⁵ *Id.* at 306.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Wilson, *supra* note 47, at 311–12.

⁷⁹ See ABA MODEL RULES OF PROF’L CONDUCT R. 1.8(i) (2004) (“A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting

claim to reasonableness due to its proportionality, whether or not a recovery ultimately covers the expenses advanced. Though the attorney-investment model exists, attorneys have been wary of utilizing it. This is partly due to some high-profile difficulties that arose during the *Agent Orange* litigation,⁸⁰ but primarily due to the availability of the contingent fee method, which is accepted as the norm in class action litigation.

10.05.6(A) THE AGENT ORANGE EXAMPLE

The *Agent Orange* cases have become famous for their association with attorney investment. The plaintiffs in the *Agent Orange* cases adopted an attorney investment fee model after lengthy and “tortuous” attempts to finance the massive, complex litigation.⁸¹ This case was initiated in 1979 by plaintiff Edward J. Gorman and his attorney Victor J. Yannacone, Jr.⁸² Eventually, Yannacone was replaced by a three-member Plaintiffs’ Management Committee (‘PMC’).⁸³ After the court “threw the plaintiffs’ camp into a ‘near-panic’ by setting a trial date which gave the parties less than seven months to complete pre-trial investigation and preparation of the case,” the PMC sought help.⁸⁴ Nine members of a new PMC “executed an agreement requiring six members to advance \$200,000 each for litigation expenses.”⁸⁵ These six “investor-attorneys,” in exchange for the investment, would receive \$600,000 each from the amount of approved attorneys’ fees if the case was successful, and also 50 percent of the remaining amount, which the six were to divide equally.⁸⁶ Of the other 50 percent of the remaining amount, 30 percent would be divided according to hours expended on the case, and 20 percent would be divided based on majority vote.⁸⁷

After the court expressed “serious doubt about its legality and propriety,” the PMC members executed a new agreement.⁸⁸ The new agreement left unchanged the percentage on the return on investment (300 percent), but allowed for an increase of \$50,000 per contributing investor-attorney.⁸⁹ The new agreement, however, eliminated the earlier provisions giving the six investor attorneys 50 percent of the remaining amount, and substituted “division among all PMC members ‘in the proportion the individual’s and/or firm’s fee award bears to the total fees awarded.’”⁹⁰

10.05.6(B) ETHICAL CONSIDERATIONS OF ATTORNEY-INVESTORS

One of the biggest ethical issues raised by attorney investment concerns litigation objectives. A primary premise of American law is that the client defines the objectives of the

for a client except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and (2) contract with a client for a reasonable contingent fee in a civil case.”)

⁸⁰ Wilson, *supra* note 47.

⁸¹ *Id.* at 311.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Wilson, *supra* note 47, at 312.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Wilson, *supra* note 47, at 312.

litigation. In a situation where the attorney holds a financial investment in a case, and in class actions in general, the attorneys “function essentially as entrepreneurs who bear a substantial amount of the litigation risk and exercise nearly plenary control over all important decisions in the lawsuit.”⁹¹

Other conflicts may also arise in attorney-investor agreements. Financial conflicts may arise in cases where an attorney has a financial investment in a case and exercises such great control over day-to-day litigation decisions. These problems may be further exacerbated when a client has difficulty getting information from the attorney about a case or has difficulty dismissing an attorney.⁹² Specifically, the attorney may be guided by his financial considerations instead of the client’s wishes. The Fifth Circuit phrased the issue as follows: “Whenever an attorney is confronted with a potential for choosing between actions which may benefit himself financially and an action which may benefit the class which he represents there is a reasonable possibility that some specifically identifiable impropriety will occur.”⁹³ In *Agent Orange*, the Second Circuit stated:

Given the size and complexity of the litigation, it seems apparent that the potential for abuse was real and should have been discouraged. . . . The conflict obviously lies in the incentive provided to an investor-attorney to settle early and thereby avoid work for which full payment may not be authorized by the district court. Moreover, as soon as an offer of settlement to cover the promised return on investment is made, the investor-attorney will be disinclined to undertake the risks associated with continuing the litigation.⁹⁴

Thus, the investor-attorney model leads to serious potential conflicts. In *Agent Orange*, the Second Circuit refused to accept the PMC’s attorney-investment agreement. Nevertheless, some legal scholars essentially have suggested that the PMC fee arrangement used in *Agent Orange* should be institutionalized, insofar as it creates a risk multiplier for expenses.⁹⁵ “Giving attorneys a risk premium for expenses advanced, as well as for fees, would increase the attorney’s recovery and theoretically minimize the effect of champerty in inducing settlement.”⁹⁶

10.05.7 Other investors

In recent years, the litigation funding industry has grown, especially with regard to plaintiffs’ personal injury cases.⁹⁷ There are now companies that exist to invest money in litigation, by advancing those funds to the attorney or plaintiff involved in the contingency fee case and negotiating the type of return on that investment.⁹⁸ It appears that, though

⁹¹ *Id.* at 316.

⁹² *Id.*

⁹³ *Zylestra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978).

⁹⁴ *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 224 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987).

⁹⁵ *Wilson*, *supra* note 47, at 318.

⁹⁶ *Id.*

⁹⁷ See Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 *FORDHAM J. CORP. & FIN. L.* 55, 55 (2004).

⁹⁸ Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 *MERCER L. REV.* 649, 650 (2005).

the majority of such investments are also structured on a percentage-based contingency fee recovery,⁹⁹ some negotiate a flat fee, based on the specific rate of return on that initial investment.¹⁰⁰ For example, a litigation funding company may loan an attorney money for costs of the litigation, and the attorney, upon recovery, will repay the amount loaned, plus a fee.¹⁰¹ Some companies attach a high interest rate, such as 50 percent, on the money that was initially loaned to the plaintiff.¹⁰² If the plaintiff does not recover any damages from the litigation, the investor recovers nothing, thus participating in the risk involved.¹⁰³

The increase in funding arrangements such as these is more common in the personal injury arena now, probably due to the much smaller amount of money needed to advance the costs of such a lawsuit. If companies such as these continue to grow, non-lawyer investors may be able to fund large antitrust class action cases. Proponents of the increase in litigation funding point to the fact that it increases legal access and thereby “evens the playing field on an economic level in a way that traditional banking institutions cannot.”¹⁰⁴ Most banks regard litigation, with its accompanying uncertainties, as too risky a venture for investment.¹⁰⁵ Additionally, attorneys have been unable in most instances to borrow money to fund a lawsuit from a bank, due to the ethical restrictions on the division of fees and the possibility of accidental partnership formation with non-lawyers.¹⁰⁶

§ 10.06 Court factors in awarding attorneys’ fees

Historically, courts employed a multi-factor test to calculate fee awards in class action cases.¹⁰⁷ Those factors included time and labor, customary fee, whether the fee was fixed or contingent, reputation and ability of the attorneys, awards in similar cases, the professional nature of the relationship between attorney and client, preclusion of other employment, the novelty and difficulty of the case, the skill required to render the legal services, and the undesirability of the case.¹⁰⁸ Today, some courts still utilize factors to determine appropriate attorneys’ fees in class action cases.¹⁰⁹ More typically, courts now employ the percentage method, the lodestar method, or a combination of the two to calculate attorneys’ fees.

⁹⁹ Martin, *supra* note 97, at 55.

¹⁰⁰ Richmond, *supra* note 98, at 650.

¹⁰¹ *Id.*

¹⁰² Martin, *supra* note 97, at 56.

¹⁰³ *Id.*

¹⁰⁴ Christy B. Bushnell, *Champerty Is Still No Excuse in Texas: Why Texas Courts (And The Legislature) Should Uphold Litigation Funding Agreements*, 7 HOUS. BUS. & TAX. L.J. 358, 364 (2007).

¹⁰⁵ *Id.* at note 43.

¹⁰⁶ Wilson, *supra* note 47, at 342.

¹⁰⁷ Johnson v. Georgia Highway Express, 488 F.2d 714, 717–19 (5th Cir. 1974).

¹⁰⁸ *Id.*

¹⁰⁹ See Thompson v. Connick, 553 F.3d 836 (5th Cir. 2008); Gunter v. Ridgewood Energy Corp., 223 F.3d 190, 195 n. 1 (3d Cir. 2000).

10.06.1 *The percentage method*

Under the percentage method, courts multiply the amount that the class recovers by a percentage factor. The Ninth Circuit employs a 25 percent benchmark fee in common fund cases but allows departures based on individual case factors.¹¹⁰ The Eleventh Circuit has recognized that its district courts also employ a 25 percent benchmark.¹¹¹

10.06.2 *The “lodestar” method*

Other courts utilize the lodestar method. The lodestar method was developed in the Third Circuit, and has now been approved by most circuit courts in the United States.¹¹² In using this method, the court “multipl[ies] the number of hours reasonably worked on a client’s case by a reasonable hourly billing rate for such services based on a given geographical area, the nature of services provided, and the experience of the attorneys” to create an objective “lodestar.”¹¹³ Courts then utilize multipliers to adjust the fee subjectively for various situations, such as high-risk litigation.¹¹⁴

Despite the popularity of the lodestar method, some critics cite drawbacks to this system. Criticisms of this method include:

its [creation of] . . . incentives to pad billable hours, its burden on the parties and the court, and the fact that its guarantee of fees in successful cases may cause attorneys to reject a favorable settlement for the class. In 1985, the Third Circuit . . . formed a Task Force to address the “widespread belief that the deficiencies of the current system either offset or exceed its benefits.” Specifically, the Third Circuit Task Force “concluded that the lodestar formula increases the use of judicial resources, encourages attorneys to bill excessive hours, and discourages early settlement.”¹¹⁵

Other commentators have noted the drawbacks from a different perspective:

In some cases, plaintiffs’ attorneys can be tempted to negotiate early with the defense counsel about settlement. The ensuing pre-litigation work becomes merely a “meaningless exercise” to bill additional hours after a settlement has been agreed upon in actuality. In this way, the lodestar approach can produce structural, de facto collusion between the plaintiff’s attorney and defendants. In this scenario, the defendant makes a low settlement offer and then cooperates with the plaintiff’s attorney to allow the latter to accumulate hours, which are deducted from the class recovery at no additional cost to the defendant. “At no point must either side actually link the fee award and the settlement size in their negotiations – the law does this for them by tying fee awards to hours billed rather than settlement size.”¹¹⁶

Thus, the lodestar method can “award a settling attorney the same fee award she would receive if she litigated a much higher recovery for the plaintiffs at trial.”¹¹⁷ As a

¹¹⁰ See, e.g., *Torrissi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

¹¹¹ *Camden I Condominium Ass’n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991).

¹¹² *Id.* at 305.

¹¹³ *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 305–06 (3d Cir. 2005).

¹¹⁴ *Wilson*, *supra* note 47, at 305–06.

¹¹⁵ *Id.* at 307.

¹¹⁶ *Id.* at 307–08 (citations omitted).

¹¹⁷ *Id.* at 308.

consequence, the lodestar approach of setting fees can be “too vulnerable to collusive settlements.”¹¹⁸ Attorneys get no compensation for accepting additional risk by litigating the case, and instead are encouraged to accept large settlements, even if a litigated recovery could be greater.¹¹⁹

Nevertheless, these criticisms have not deterred courts from applying the lodestar method in a number of cases. For example, in *Kenny A. ex rel. Winn v. Perdue*, the court awarded \$10.5 million in attorney’s fees which included an upward adjustment under the lodestar method.¹²⁰ In support of the 75 percent upward adjustment from the requested fees, the court praised the plaintiff’s counsel for their skill, expertise, and professionalism, stating:

[T]he evidence establishes that the quality of service rendered by class counsel, including their extraordinary commitment of capital resources, was far superior to what consumers of legal services . . . could reasonably expect to receive for the rates used in the lodestar calculation. . . .¹²¹ [T]he Court is unaware of any other case in which a plaintiff class has achieved such a favorable result on such a comprehensive scale.¹²²

10.06.3 *Combined method*

Often in antitrust cases, courts will also utilize the lodestar method in order to verify the reasonableness of the percentage-based attorney fee request.¹²³ For example, the court in *In re Relafen Antitrust Litigation* granted \$22.3 million in attorneys’ fees (one-third of the recovery) after conducting a lodestar crosscheck.¹²⁴ The court, citing precedent granting percentage-based fees in excess of four times the lodestar value, stated that the fee request was reasonable as a matter of law.¹²⁵ A court may utilize both the percentage method and the lodestar method as a “check” on the reasonableness of the attorneys’ fees.

10.06.4 *The Goldberger factors*

Although the Second Circuit has approved both the percentage and lodestar methods for calculating attorneys’ fees, the court cautions against the use of “benchmarks” and instead promotes a traditional fact-specific inquiry to determine what amount is reason-

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 454 F.Supp. 2d 1260 (N.D. Ga. 2006), *aff’d by* 532 F.3d 1209 (11th Cir. 2008).

¹²¹ *Id.* at 1288.

¹²² *Id.* at 1290; *see also* *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009) (antitrust suit appropriately applying the lodestar method was remanded for consideration of attorney fees in light of conflict of interest resulting from incentive agreements).

¹²³ *In re Insurance Brokerage Antitrust Litig.*, 2009 WL 411856, *4 (D.N.J. Feb. 17, 2009) (“While either the lodestar or percentage-of-recovery method should ordinarily serve as the primary basis for determining the fee, the Third Circuit has instructed that it is sensible to use the alternative method to double check the reasonableness of the fee.”).

¹²⁴ *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 81–82 (D. Mass. 2005).

¹²⁵ *Id.* at 82; *see also* *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc. and MasterCard Int’l, Inc.*, 396 F.3d 96, 123 (2d Cir. 2005) (approving a percentage-based fee 3.5 times the lodestar value as reasonable).

able under the circumstances.¹²⁶ The Second Circuit's six-factor *Goldberger* test includes (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of the representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.¹²⁷

In 2003, the court in *In re Visa Check/MasterMoney Antitrust Litigation* applied the *Goldberger* test to determine the appropriate amount of attorneys' fees, after rejecting counsel's "excessive" requested fee.¹²⁸ The court found that although the suit went on for many years,¹²⁹ was of a significant size and complexity,¹³⁰ involved substantial risk,¹³¹ and was excellently represented by plaintiffs' counsel,¹³² the request for fees was "excessive."¹³³ Nevertheless, despite counsel's fee request, which the Court found was "fundamentally unreasonable" and "absurd," the *Goldberger* factors "compel[led]" the court to an "award of an extraordinary fee."¹³⁴ The court emphasized that the size of the settlement obtained made "even the exorbitant fee . . . award[ed] seem[] small in comparison."¹³⁵ Finally, the public policy considerations merited a "substantial fee award,"¹³⁶ due to the "significant and lasting benefits for America's merchants and consumers"¹³⁷ arising out of the litigation. The court's ultimate award of \$220,290,160.44 in fees represented 6.511 percent of the settlement fund.¹³⁸

The United States Supreme Court, however, has been critical of courts applying tests similar to the *Goldberger* factors. In reference to the *Johnson-Kerr* method of calculating attorney's fees, an approach originating in the Fifth Circuit in which courts generally consider the following non-exclusive factors: (1) the time and labor required,¹³⁹ (2) the novelty and difficulty of the questions involved,¹⁴⁰ (3) the skill requisite to perform the legal service properly,¹⁴¹ (4) the preclusion of other employment by the attorney due

¹²⁶ *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43 (2d Cir. 2000).

¹²⁷ *Id.* at 50.

¹²⁸ *In re VISA Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 521–22 (E.D.N.Y. 2003) (citing *Goldberger*).

¹²⁹ *Id.* at 523.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 524.

¹³³ *In re VISA Check/MasterMoney Antitrust Litig.*, *supra* note 128 at 522.

¹³⁴ *Id.* at 523.

¹³⁵ *Id.* at 524.

¹³⁶ *Id.*

¹³⁷ *Id.* at 524.

¹³⁸ *In re VISA Check/MasterMoney Antitrust Litig.*, *supra* note 128 at 522.

¹³⁹ The major consideration in determining the amount of a fee award is the result achieved. *See Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983) ("most critical factor is the degree of success obtained").

¹⁴⁰ *See, e.g., In re Linerboard Antitrust Litig.*, 2004 WL 1221350, *10 (E.D. Pa. June 2, 2004) (finding an antitrust class action "is arguably the most complex action to prosecute") (quotation omitted); *In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d 1329, 1337 (N.D. Ga. 2000); *In re Shopping Carts Antitrust Litig.*, 1983 WL 1950, *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy").

¹⁴¹ The caliber of opposing counsel is relevant in assessing the quality of counsel's work. *See, e.g., In re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *J.N. Futia Co. v. Phelps Dodge Indus., Inc.*, 1982 WL 1892 (S.D.N.Y. Sept. 17, 1982).

to acceptance of the case; (5) the customary attorney fee;¹⁴² (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys;¹⁴³ (10) the “undesirability” of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases,¹⁴⁴ the Court noted that this method gives little guidance to federal district courts in setting attorneys’ fees with “sometimes subjective factors [that] place unlimited discretion in trial judges and [produce] disparate results.”¹⁴⁵

In a recent study of fee recoveries in class actions from 1993 to 2002, researchers found that courts’ use of the lodestar method had declined, with only 9.6 percent of cases utilizing this method solely.¹⁴⁶ The study concluded that the percentage method was the primary method that courts used to calculate fees, with many courts performing the lodestar calculation as a check on that fee amount.¹⁴⁷ Another study of all class action settlements in federal court in 2006 and 2007 supported this finding, and revealed that most judges utilized a percentage of the settlement method for calculating attorneys’ fees.¹⁴⁸ The median and mean fee amount was 25 percent of the recovery.¹⁴⁹ The pure lodestar method was used most often in consumer and debt collection cases.¹⁵⁰

§ 10.07 Recovery awarded as attorneys’ fees in antitrust cases

With respect to class actions generally, one study of attorneys’ fees and settlements from 1993 to 2008 confirmed that courts granted the attorneys’ fees requested in more than 70 percent of the cases.¹⁵¹ The Second Circuit granted such requests the least often, particularly compared to the Third Circuit and the Ninth Circuit.¹⁵² When the courts did not award the requested attorneys’ fees, the mean fee amount actually awarded was 68 percent

¹⁴² The customary fees paid in contingent fee, non-class actions are also a factor in this analysis. *See, e.g., In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808, *16 (D.N.J. Nov. 9, 2005). Some private contingent cases (*i.e.*, non-class action cases, and therefore not subject to court approval) provide for fees equaling 30-40 percent of the recovery. *See, e.g., In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, *7 (S.D. Cal. Aug. 30, 1990); *Pemister v. Harcourt Brace Jovanovich, Inc.*, 1984 WL 21981, *15 (N.D. Ill. Sept. 14, 1984).

¹⁴³ *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296, 1313 (E.D.N.Y. 1985); *In re Ashanti Goldfields*, 2005 WL 3050284, *4 (E.D.N.Y. Nov. 15, 2005).

¹⁴⁴ *Brown v. Phillips Petroleum Co.*, 838 F.2d 451, 454-55 (10th Cir. 1988); *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975) (citing *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974)); *cf. United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 406 & n.3 (9th Cir. 1990) (noting that the factors from *Kerr* are used in preliminary determinations of the lodestar).

¹⁴⁵ *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 563, (1986).

¹⁴⁶ Eisenberg & Miller, *supra* note 32, at 20.

¹⁴⁷ *Id.*

¹⁴⁸ Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, (Vanderbilt University Law School, Public Law & Legal Theory, Working Paper Number 10-10, Law & Economics, Working Paper Number 10-06 (draft of July 7, 2010)).

¹⁴⁹ *Id.* at 25, 27.

¹⁵⁰ *Id.* at 25.

¹⁵¹ Eisenberg & Miller, *supra* note 32, at 3, 23.

¹⁵² *Id.*

of the requested amount.¹⁵³ All in all, the mean class recovery calculated under the study during this time period was \$116 million, with a mean fee of \$12.8 million.¹⁵⁴ The median class recovery was \$12.5 million, with a mean fee of \$2.3 million.¹⁵⁵

This study showed that class action litigation in federal court is concentrated heavily in only a few jurisdictions, with more than half of all class action lawsuits occurring in five courts: Southern District of New York, Eastern District of Pennsylvania, Northern District of California, District of New Jersey, and Northern District of Illinois.¹⁵⁶ The Eastern District of New York came in at a close sixth.¹⁵⁷ The researchers also suggested that the jurisdiction depended largely on the type of class action matter, with the Eastern District of Pennsylvania being the leading federal jurisdiction for antitrust and consumer cases.¹⁵⁸

The factor that most determined what fee amount courts awarded was the size of the classes' recovery.¹⁵⁹ Other factors, though not as significant, included the fee method used and the riskiness of the case at issue.¹⁶⁰ Generally, courts awarded an increased fee for cases with greater risk.¹⁶¹ Except for "Antitrust and Other cases," the mean fee percentages were higher in high-risk cases.¹⁶² The study found that cases with objectors had higher fee percentages than cases without objectors.¹⁶³ Also, cases with more than one class member who opted out had lower fee percentages than cases with one or fewer class members who opted out.¹⁶⁴

In the Fitzpatrick study, during the 2006–2007 period, there were \$33 billion in class action settlements, 15 percent of which, or \$5 billion, was awarded to attorneys.¹⁶⁵ Fitzpatrick also found that fee percentages were inversely related to the size of the settlement.¹⁶⁶

In 2007, a report of the American Antitrust Institute's (AAI) Private Enforcement Project analyzed 40 recent private antitrust cases and the results obtained in the cases. Table 1 of the Report indicates that the recoveries in private cases for the 40 cases analyzed ranged from \$36 million to \$5.6 billion.¹⁶⁷ Attorneys' fees recoveries ranged from 5.2 percent of the recovered amount in a case with a \$552 million recovery, to 33.3 percent of the recovered amount in several cases with recoveries ranging from \$50 million to \$220 million.¹⁶⁸

153

Id.

154

Id. at 11.

155

Id.

156

Eisenberg & Miller, *supra* note 32, at 3, 23.

157

Id.

158

Id. at 10–11.

159

Id. at 3.

160

Id.

161

Eisenberg & Miller, *supra* note 32, at 3, 23.

162

Id.

163

Id. at 19.

164

Id.

165

Id. at 19, 31.

166

Id. at 32.

167

Lande & Davis, *supra* note 45, at Table 1.

168

Id. at Tables 6A–6C.

10.07.1 Recoveries exceeding \$500 million

In five of the antitrust cases in the AAI study where recoveries exceeded \$500 million, the authors of the study reported the attorneys' fees as a percentage of recovery as follows:¹⁶⁹ *In re Visa/MasterMoney*: 6.5 percent of \$3.383 billion;¹⁷⁰ *Auction Houses*: 5.2 percent of \$552 million;¹⁷¹ *El Paso*: 6 percent of \$1.427 billion;¹⁷² *Fructose*: 25 percent of \$531 million;¹⁷³ *In re NASDAQ*: 13 percent of \$1.027 billion.¹⁷⁴ *Fructose* and *In re NASDAQ* had the highest percentages.¹⁷⁵ In *Fructose*, the attorneys received attorneys' fees that equaled 25 percent of the recovery amount.¹⁷⁶ *In re Fructose* involved allegations of price fixing among the major manufactures of fructose. No indictments were ever brought, even though the government convened a grand jury. The private enforcement class action lasted for 10 years before finally settling for \$531 million. Of this damages recovery, \$100 million was paid by a foreign entity, A.E. Staley Manufacturing.¹⁷⁷ The payments to the class members themselves were larger than average – over \$10 million per class member in some cases – due to the relatively small number of fructose purchasers.¹⁷⁸ The case established important precedent in antitrust and civil conspiracy, and the court may have awarded the higher percentage of the fund to class counsel due to the ability of counsel, which the court frequently praised.¹⁷⁹ In *In re NASDAQ*, the attorneys recovered fees that equaled 13 percent of the recovery amount.¹⁸⁰ Here, the class received aggregate settlements of approximately \$1.027 billion, all in cash.¹⁸¹ Because the size of the attorneys' fees was a modest percentage of the settlement, class members received \$896,233,301.¹⁸²

¹⁶⁹ *Id.* at Table 6C.

¹⁷⁰ *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp.2d 503, 522 (E.D.N.Y. 2003).

¹⁷¹ *In re Auction Houses Antitrust Litig.*, 164 F. Supp.2d 345 (S.D.N.Y. 200), *aff'd*, 2002 US App. LEXIS 15327 (2d Cir., July 30, 2002) and *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

¹⁷² *Sweetie's v. El Paso Corp.*, No. 319840 (S.F. Super. Ct.); *Continental Forge Co. v. Southern Ca. Gas Co.*, No. BC237336 (L.A. Super. Ct.); *Berg v. Southern Ca. Gas Co.*, No. BC241951 (L.A. Super. Ct.); *City of Long Beach v. Southern Ca. Gas Co.*, No. BC247114 (L.A. Super. Ct.); *Phillip v. El Paso Merchant Energy L.P.*, No. BC265905 (L.A. Super. Ct.); *Phillip v. El Paso Merchant Energy LP*, No. GIC 759425 (S.D. Super. Ct.); *Phillip v. El Paso Merchant Energy LP*, No. GIC 759426 (S.D. Super. Ct.).

¹⁷³ *In re Fructose Antitrust Litig.*, MDL No. 1087, Master File No. 94-1577 (C.D. Ill.).

¹⁷⁴ *In re NASDAQ Market-Makers Antitrust Litig.*, MDL No. 1023, No. 94 Civ. 3996 (S.D.N.Y. 1998).

¹⁷⁵ *Lande & Davis*, *supra* note 45, at Table 6C.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at Case 14 Summary.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at Table 6C.

¹⁸¹ *Id.* at Case 21 Summary.

¹⁸² *Id.*

10.07.2 Recoveries between \$100 million and \$500 million

In the eight antitrust cases in the AAI study in which the damages recovered ranged from \$100 million to \$500 million, the percentage of attorneys' fees recovered ranged from 20 percent to 33.3 percent.¹⁸³ These cases include *Busiprone* (33.3 percent of \$220 million);¹⁸⁴ *Cardizem* (30 percent of \$110 million);¹⁸⁵ *DRAM* (25 percent of \$326 million);¹⁸⁶ *Flat Glass* (32 percent of \$122 million);¹⁸⁷ *Linerboard* (30 percent of \$202 million);¹⁸⁸ *Lease Oil* (25 percent of \$193 million);¹⁸⁹ *Paxil* (20 and 30 percent of \$165 million);¹⁹⁰ and *Relafen* (33 percent of \$250 million).¹⁹¹ In *Paxil*, the plaintiffs received a "megafund" settlement of over \$165 million, on behalf of direct and indirect purchasers of Paxil, with a claim that the defendant Smithkline Beecham Corporation had abused its patent approval process in order to maintain its monopoly over the drug.¹⁹² Because plaintiffs in the two cases were able to coordinate discovery, plaintiffs were able to achieve both a timely result and the favor of the court.¹⁹³ The court awarded 20 and 30 percent of the respective settlements to counsel, due to the case's complexity and the attorneys' skill and efficiency.¹⁹⁴ In *Linerboard*, the class received a cash settlement of \$202.5 million, representing approximately 42–55 percent of plaintiffs' alleged damages.¹⁹⁵ Counsel received 30 percent of that settlement in fees.¹⁹⁶ In determining the fee award, the court emphasized both the "superb" lawyering demonstrated and the groundbreaking nature of this private enforcement action, as the class did not benefit from an earlier government investigation in its case.¹⁹⁷

10.07.3 Recoveries less than \$100 million

In the 17 antitrust cases in the study in which the damages recovered were less than \$100 million, the attorneys' fees ranged from 7 percent to 33.3 percent of recovery.¹⁹⁸ These cases are *Airline Ticket Commission* (33.3 percent of \$86 million);¹⁹⁹ *Augmentin*

¹⁸³ *Id.* at Table 6C.

¹⁸⁴ *In re Busiprone Antitrust Litig.*, MDL Docket No. 1413, 85 F.Supp. 2d 340 (S.D.N.Y. 2002).

¹⁸⁵ *In re Cardizem CD Antitrust Litig.*, MDL No. 1278, 105 F.Supp. 2d 682 (E.D. Mich. 2000).

¹⁸⁶ *In re Dynamic Random Access Memory Antitrust Litig.*, Master File No. M-02-1486PJH, MDL No. 1486 (N.D. Ca.).

¹⁸⁷ *In re Flat Glass Antitrust Litig.*, DL 1200, Master Dkt. No. 97-0550 (W.D. Pa.).

¹⁸⁸ *In re Linerboard Antitrust Litig.*, 2005 WL 1221350 (E.D. Pa. June 2, 2004).

¹⁸⁹ *In re Lease Oil Antitrust Litig. No. II*, 186 F.R.D. 403 (S.D. Tex. 1999).

¹⁹⁰ *Stop & Shop Supermarket Co., et. al. v. SmithKline Beecham Corp.*, 2005 WL 1213926, at *17–18 (E.D. Pa. May 19, 2005); *Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, at *20 (E.D. Pa. Apr. 22, 2005).

¹⁹¹ *In re Relafen Antitrust Litig.*, Civ. Action No. 01-12239, 231 F.R.D. 52 (D. Mass. 2005).

¹⁹² Lande & Davis, *supra* note 45, at Case 27 Summary.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at Case 18 Summary.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Lande & Davis, *supra* note 45, at Table 6C.

¹⁹⁹ *In re Airline Ticket Comm'n Litig.*, 1996 US Dist. LEXIS 20361.

(20 percent and 25 percent of \$91 million);²⁰⁰ *Automotive Refinishing Paint* (32 percent of \$67 million);²⁰¹ *NCAA* (26.8 percent of \$74 million);²⁰² *Remeron* (33.3 percent of \$75 million);²⁰³ *Platinol* (33.3 percent of \$50 million);²⁰⁴ *Taxol* (30 percent of \$66 million);²⁰⁵ *Drill Bits* (30.8 percent of \$53 million);²⁰⁶ *Polypropylene Carpet* (33.3 percent of \$50 million);²⁰⁷ *Sorbates* (22–33 percent of \$96 million);²⁰⁸ *Terazosin* (33.3 percent of \$74 million);²⁰⁹ *Microcrystalline Cellulose* (33.3 percent of \$50 million);²¹⁰ *Specialty Steel* (30 percent of \$50 million);²¹¹ *Lysine* (7 percent of \$65 million);²¹² *Commercial Explosives* (30 percent of \$77 million);²¹³ *Graphite Electrodes* (15 percent of \$47 million).²¹⁴

10.07.4 *Tax implications*

Finally, brief mention of tax considerations is appropriate. A circuit court split exists regarding the appropriate tax treatment of contingent attorneys' fees contained within a recovery.²¹⁵ Some of the circuits have held that contingent attorneys' fees contained within a recovery are part of a recovering party's taxable gross income, while others have determined that these fees are not part of gross income.²¹⁶ Whether contingent attorneys'

²⁰⁰ Ryan-House et al. v. GlaxoSmithKline PLC, C.A. Doc. No. 2:02cv442 (E.D. Va. 2004) and SAJ Distributors, Inc. and Stephen L. LaFrance Holdings, Inc. v. SmithKline Beecham Corp., Doc. No. 2:04cv23 (E.D. Va. 2004).

²⁰¹ *In re Automotive Refinishing Paint Antitrust Litig.*, 2004 US Dist. 29162 (E.D. Pa. Oct. 13, 2004).

²⁰² Law v. National Collegiate Athletic Assoc., 902 F. Supp. 1394 (D. Kan. 1995); *aff'd*, 134 F.3d 1010 (10th Cir. 1998).

²⁰³ *In re Remeron Antitrust Litig.*, 2005 US Dist. LEXIS 27013 (D.N.J. 2005)

²⁰⁴ North Shore Hematology & Oncology Assoc. v. Bristol-Myers Squibb Co., Civil Action No.:04cv248 (2004).

²⁰⁵ Oncology & Radiation Associates v. Bristol-Meyers Squibb Co., Case No. 1:04CV00248 (D.C.C.).

²⁰⁶ Eagle Resources, et. al., v. Baker Hughes Inc., et. al., No. 4:91cv00627 (Docket) (S.D.Tex. Mar. 11, 1991).

²⁰⁷ *In re Polypropylene Carpet Antitrust Litig.*, 93 F.Supp. 2d 1348 (N.D. Ga. 2000).

²⁰⁸ *In re Sorbates Direct Purchaser Antitrust Litig.*, 2002 WL 31655191 (N.D. Cal. Nov. 15, 2002).

²⁰⁹ *In re Terazosin Hydrochloride Antitrust Litig.*, 2005 U.S. Dist. LEXIS 13992 (S.D. Fla. July 8 2005).

²¹⁰ *In re Microcrystalline Cellulose Antitrust Litig.*, 218 F.R.D. 79 (2003).

²¹¹ Transamerican Refining Corp. v. Dravo Corp., et. al, No. 4:88CV00789 (S.D.Tex. 1988) (settlement 1992).

²¹² *In re Amino Acid Lysine Antitrust Litig.*, 918 F. Supp. 1190 (N.D. Ill. 1996).

²¹³ *In re Commercial Explosives Litig.*, 945 F. Supp. 1489 (D. Utah 1996).

²¹⁴ *In re Graphite Electrodes Antitrust Litig.*, 2003 WL 22358491 (E.D. Pa. Apr. 24, 2003).

²¹⁵ Kristina Maynard, *The Fruit Does Not Fall far from the Tree: the Unresolved Tax Treatment of Contingent Attorney's Fees*, 33 LOY. U. CHI. L.J. 991, 993 (2002) (explaining that the Seventh Circuit held that contingent attorneys' fees incurred in obtaining a taxable recovery must be included in taxpayer's gross income. The Third, Fourth, Ninth, Tenth, and Federal Circuits all have held that a taxpayer's gross income includes contingent legal fees paid to obtain a taxable recovery. The Fifth, Sixth, and Eleventh Circuits have held that such fees are not gross income to the taxpayer).

²¹⁶ Lande & Davis, *supra* note 45, at Table 6C.

fees recovered by a party will be included in that party's gross income will depend on the jurisdiction. An attorney and client could take the tax treatment of their jurisdiction into account when structuring a settlement, although timing may matter in that calculation.²¹⁷ Litigation, especially large-scale litigation, can take several years. This fact alone can significantly impact tax liability and should be considered when assessing fees, expenses, and the ultimate recovery.²¹⁸

§ 10.08 Conclusion

Although contingent and other alternative fee arrangements have their detractors and critics, such arrangements permit important antitrust work to proceed in private enforcement actions, which might not occur otherwise. Moreover, courts have typically embraced alternative fee arrangements in antitrust cases, where the issues are complex and require skilled attorneys.

²¹⁷ See Edward A. Morse, *Taxing Plaintiffs: a Look at Tax Accounting for Attorney's Fees and Litigation Costs*, 107 DICK. L. REV. 405, 424 (2003).

²¹⁸ *Id.* at 431.