

Is the market for contingent fee-financed tort litigation competitive?

Making Lawyers Compete

BY LESTER BRICKMAN

Cardozo School of Law, Yeshiva University

THE RANGE OF ACTS THAT CAN GIVE rise to tort liability has burgeoned over the past four decades. During that period, the costs of the tort system have increased far in excess of the growth in the Gross Domestic Product. After a slowdown in 1988–1998, the rate of increase in tort costs is now accelerating, even exceeding the quite substantial growth rates in 1960–1988. Projections of future growth indicate a doubling of tort costs over the next 10 years.

The enormity of wealth transferred under the tort system and the consequent costs imposed on the economy have spawned the ongoing tort reform movement. That movement, and the opposition to it, will undoubtedly continue to grow in the future as the costs of the tort system mount.

CONTINGENT FEES Virtually all tort claiming is financed by plaintiff lawyers through contingent fees. Because the fees are assessed against the wealth transferred, the enormous increases in tort liability have redounded to the financial benefit of plaintiff lawyers. Over the past 40 years, the average effective hourly rate of the contingent-fee bar has increased, in inflation-adjusted dollars, by between 1,000 and 1,400 percent. Moreover, the top quartile of the torts bar obtains effective rates of thousands of dollars an hour. I estimate that tort fees total \$22 billion annually; others estimate the total as high as \$40 billion.

The resultant increased financial capacity of the plaintiff's bar may thus be seen as simply reflecting its success in vastly enlarging the scope of tort liability. Viewed from this conventional perspective, the dynamic relationship between the increases in tort liability and contingent-fee incomes is

apparent: Increasing incomes have enabled lawyers to undertake the financing of larger-scale tort litigation, thus generating increased revenues that support still larger investments in tort claiming.

But the parallelism between increases in effective hourly rates and expansion of tort liability obscures the role of contingent fees in the expansion. While the volume of tort litigation may be thought to be a function of rates of injury and the state of tort doctrine, in fact the rate of tort claiming is primarily a function of attorneys' yields from claiming. Increasing fees results in increased litigation; decreasing fees results in decreased tort litigation. The conclusion that the substantial increase in the profitability of contingent-fee claiming is the primary factor accounting for the enormous expansion of tort liability has profound implications for our civil justice system and the ongoing tort reform debate.

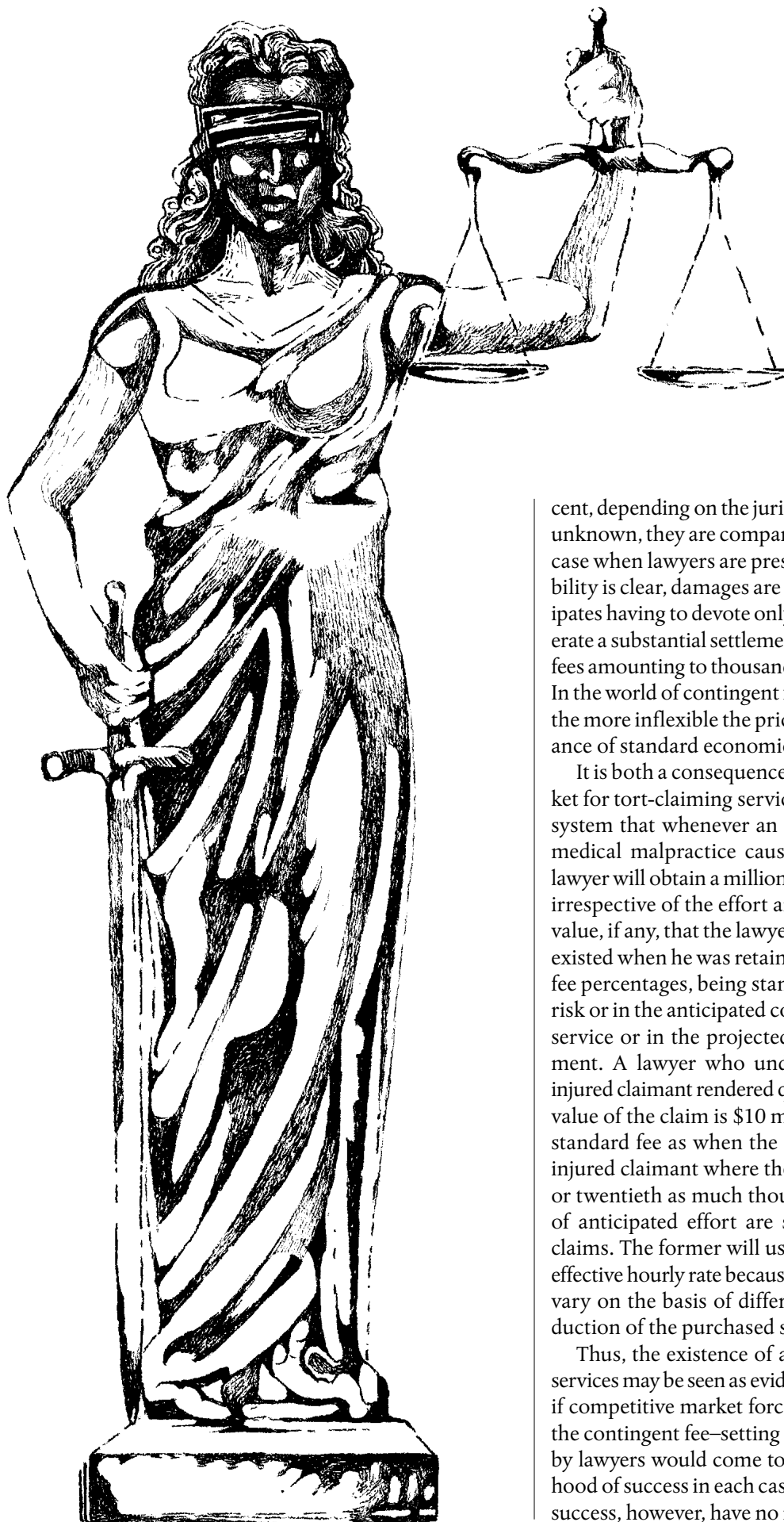
Those who conclude, as a matter of their political calculus, that the quantum of wealth transferred is excessive, and who therefore promote changing tort doctrines and rules of civil procedure, are barking up the wrong tree. They would do well to shift their focus to the central cause of tort liability expansion: the contingency fee and how lawyers have been able to increase their profits from tort claiming by such a substantial margin.

While there is a basis for concluding that some of the increased profits from tort claiming reflect increases in opportunity costs, for the most part the profits reflect returns above competitive rates. The market for tort claiming services is not price competitive. Lawyers assiduously maintain a uniform price — the "standard contingency fee" — irrespective of anticipated risk or commitment of time. In cases without meaningful risk, I estimate that rents amount to upwards of \$4–\$7 billion a year.

Regulatory agencies with authority to investigate and prosecute coordinated efforts by professionals to prevent price competition should therefore find their interests impli-

Lester Brickman is a professor of law at the Benjamin N. Cardozo School of Law of Yeshiva University. He can be contacted by e-mail at brickman@yu.edu.

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cated. In particular, this is an antitrust violation tailor-made for the Federal Trade Commission. The fact that the FTC has not undertaken even a serious inquiry of fee setting in tort litigation is a tribute to the power of tort lawyers.

UNIFORM PRICING

The dominant feature of the tort litigation market is that pricing of lawyers' services is uniform. Lawyers charge standard contingent fees in all personal injury litigation ranging from 33 1/3 to 50 per-

cent, depending on the jurisdiction. While deviations are not unknown, they are comparatively rare. That is especially the case when lawyers are presented with tort claims where liability is clear, damages are substantial, and the lawyer anticipates having to devote only modest amounts of time to generate a substantial settlement offer. In those matters, windfall fees amounting to thousands of dollars an hour are obtained. In the world of contingent fees, the more lucrative the claim, the more inflexible the pricing — which seems to be in defiance of standard economic theory.

It is both a consequence of the lack of a competitive market for tort-claiming services and an indictment of our tort system that whenever an egregious and undeniable act of medical malpractice causing severe injury occurs, a tort lawyer will obtain a million-dollar or multi-million dollar fee irrespective of the effort anticipated to be required and the value, if any, that the lawyer adds to the value of the claim as existed when he was retained. That is so because contingent fee percentages, being standard, fail to reflect differences in risk or in the anticipated costs for the production of the tort service or in the projected returns on the lawyer's investment. A lawyer who undertakes to represent a severely injured claimant rendered quadriplegic, where the settlement value of the claim is \$10 million or more, charges the same standard fee as when the lawyer represents a less severely injured claimant where the settlement value is only a tenth or twentieth as much though the liability risk and amount of anticipated effort are substantially the same for both claims. The former will usually yield a substantially higher effective hourly rate because pricing is inflexible and does not vary on the basis of differences in risk or the cost of production of the purchased service.

Thus, the existence of a uniform price for tort-claiming services may be seen as evidence of a market failure. Arguably, if competitive market forces were effectively operational in the contingent fee-setting process, the percentages charged by lawyers would come to reflect, albeit roughly, the likelihood of success in each case. Differences in the likelihood of success, however, have no impact on the contingent fee per-

centage. With few exceptions, price is unrelated to risk.

AGENCY COSTS Nonetheless, the fact that contingent fees are standardized does not, in itself, indicate that the market for contingent fee-financed tort claiming is not competitive. Indeed, the fact of uniform pricing is compatible both with the hypothesis that the market is not competitive and its opposite, that such pricing is the result of a competitive market reaching an equilibrium price.

One argument advanced in support of the competitive market model is that uniform pricing in markets is efficient because it lowers transactional costs and minimizes agency costs (as, for example, in the real estate brokerage market where the contingency fee is a standard commission of six percent of the sale price of the house). However, uniform contingency fee rates do not meaningfully reduce agency costs in the tort-claiming services market. That is so, in part, because contingency fee lawyers, while charging uniform rates, do not apply their time and capital in equal portions to each of their cases. Instead, they allocate their time and capital as if they were charging differential contingency fee rates. Their behavior may be best understood if one concludes that they are, in reality, charging substantially differentiated fees.

The likelihood of success in prosecuting personal injury claims ranges from zero to 100 percent. Lawyers, however, do not randomly select their cases from among those offered by claimants. To diversify and control risk and generate predictable income streams, contingency fee lawyers assemble portfolios of cases, carefully screening claims by rejecting more than half and selecting only those that they expect to generate returns at least equal to their opportunity costs. The screening process is so effective that tort lawyers prevail in 70 to 90 percent of the cases they accept and obtain nearly 100 percent reimbursement of litigation expenses advanced, including expenses advanced in cases in which they do not prevail. As part of the selection process, lawyers estimate how much time will be needed and how much capital will have to be advanced for litigation costs. After selections are made, lawyers constantly reevaluate the cases in their portfolios and rearrange their investments going forward. Cases that appeared promising at the outset, but that depreciated in value as information accumulated, will thereafter have less time and capital appropriated to them. And conversely, cases that initially promised profitable but not exceptional returns, but later proved to be even more promising, will be allocated additional time and capital.

Effectively then, contingency fee lawyers perceive their cases as generating returns measured, for comparative purposes, in hourly rates. At any and every moment in time, as part of the process of evaluating their portfolios' expected returns, contingent fee lawyers estimate the projected hourly rate to be earned for each case by estimating the amount of time to be required to generate a settlement or take the case to trial, the settlement or trial value of the case (which takes litigation risk into account), the lawyer's share thereof, and the amount of new capital to be put at risk in the form of advances for litigation costs.

Thus, while contingency fee uniformity has an effect on the calculation of the projected return for each case, its effect on minimizing agency costs is marginal. Lawyers have differing levels of incentives to invest time and money in clients' cases and do not devote uniform efforts to advancing their clients' interests. Instead, the level of effort is a function of maximization of their effective hourly rates of return. Uniform contingency fee rates are not designed to, and do not, maximize joint revenue. Rather, they maximize attorneys' rents at their principals' expense.

INELASTICITY In freely competitive markets for uniform or easily substitutable goods or services, prices would gravitate toward an equilibrium point. Inefficient producers would tend to be forced out of the market and the costs of production of efficient producers would tend toward uniformity.

The market for tort claiming services is quite different. There is enormous variation in the costs of production of, and the rates of return realized from, tort claiming services. One claim may present substantial risk and a need for a high investment level but also have very high reward possibilities. Another claim may present identical risk and reward probabilities but require only a modest investment. In a competitive market, the prices charged by producers would vary on the basis of differences in production costs and anticipated rewards. However, prices for tort claiming services do not vary. Because low-cost/high-return claim representation is priced the same as higher-cost/lower-return claim representation, the former generate substantial rents.

REFERRAL FEES Though tort claims are generally not assignable and lawyers are the only permissible partial purchasers, tort lawyers maintain an exclusive and active secondary market in tort claims. Many tort lawyers vigorously seek out clients with the intent of selling off the claims to other lawyers who will do the actual negotiating or litigating and who will pay them a commission — i.e., a "referral fee." The fee typically ranges from 30 to 50 percent of the contingent fee, an amount far in excess of typical commission costs and finders' fees in other commercial endeavors. Were contingent-fee pricing subject to competitive forces, the lawyers who purchase the claims in the secondary market could be expected to share some of the saved commission costs with claimants who seek to capture at least some of the commissions by bypassing the business finder and going directly to the lawyer-litigator. Despite the substantial savings realized from disintermediation, lawyer-litigators who routinely agree to pay 30 to 50 percent of their fee when the case is referred to them just as routinely refuse to discount their standard rates when the claimant comes directly to them. This further evidences the existence of a substantial rents component in the standard contingent fee.

PRICE ADVERTISING Competitive markets virtually always feature price (and quality) advertising by suppliers of goods and services. If the tort-claiming market were competitive, we would expect to see lawyers advertising their prices, per-

haps offering “special deals” to attract business. Contingency fee lawyers, however, do not engage in competitive fee advertising. In fact, they simply do not mention price in their advertisements. They rely instead on general public knowledge that fees are standard and amount to one third of the recovery. For those not so informed, a visit to a tort lawyer’s office provides the following fee information: We charge the going rate, one third of any recovery; that is the same as what other tort lawyers charge. Though some claimants do shop around for lower pricing, they quickly find that lawyers are unwilling to bargain over the fee percentage. As a consequence of tort lawyers’ practices, claimants are discouraged from seeking lower prices by price shopping and bargaining because they have learned what lawyers have intended for them to perceive: There is an industry-wide practice of maintaining standard pricing, and price shopping is therefore futile.

ASYMMETRICAL INFORMATION

In order for a competitive market to exist, consumers must be informed of the prices being charged by service providers. That information must be easily available in terms that are meaningful to consumers; that is, the units in which the prices are stated must convey sufficient information to enable consumers to make price comparisons. In addition, consumers must be able to determine the relative quality levels of the service providers vying for their business so that they can make informed price/quality tradeoffs in selecting a provider. But tort service consumers lack such essential knowledge and experience in dealing with lawyer-providers and are therefore disadvantaged in bargaining with lawyer-providers for services.

CLAIM VALUES In the market for tort-claiming services, awareness of price requires knowledge of the value of claims because, while consumers are purchasing a service from the lawyer, they are paying for the service by exchanging a share of their claims. The reasonableness of the price of the service is therefore a function of the value of the claim being exchanged. Many tort claimants do not know whether they have a compensable claim and most have little knowledge of the value of their claims or of the risk the lawyer is assuming in purchasing a share of their claims. That risk is itself a function of litigation risk and what the lawyer projects placing at risk — the amount of time the lawyer anticipates will be required to produce an adequate recovery and the litigation costs that he will have to advance. Tort lawyers, on the other hand, are experts in the valuation of claims and the risk involved, the estimated time to be required, and the amount of funds that they will need to advance.

That advantage redounds to the lawyer’s benefit and disadvantages the consumer with regard to bargaining over the price of the service. If risk and anticipated effort are so low that charging a standard contingency fee will likely lead to a windfall for the lawyer, he does not, as a matter of practice, share that information with the client. If the client questions whether the fee is justified in light of the size or clarity of the claim, the lawyer

can use his superior knowledge to fend off the attempt to bargain over the fee by, for example, exaggerating risk in order to justify the high price implicit in the standard contingent fee.

At first blush, it seems incongruous to argue that claimants lack knowledge of the price of lawyers’ services when contingent fees are standard. However, knowing that the lawyer is charging one third or 40 percent of the value of a claim as realized does not yield the kind of meaningful information that is needed for the operation of a competitive market. In order to make price comparisons, many consumers who purchase services effectively translate the cost of those services into a rough hourly rate equivalent. Consumers of tort-claiming services, however, have no basis upon which to estimate the effective hourly rate that the lawyer anticipates receiving because that requires estimates of the value of the claim and the amount of time to be required to produce an acceptable settlement or to take the case to trial. Here too, it is in lawyers’ self-interest not to make such disclosures because that might induce clients to bargain for lower fees.

Moreover, even after a settlement has been reached, tort claimants attempting to learn how many hours the attorney devoted to their matter are almost always rebuffed. Thus, a typical tort claimant agreeing to pay a lawyer a standard one-third fee has no idea, *ex ante*, of the amount of the fee he is agreeing to pay, let alone of the effective hourly rate that the lawyer is charging, and does not know the effective hourly rate he actually paid, *ex post*.

In addition to lacking knowledge of the value of their claims and the anticipated effective hourly rates that the client is agreeing to pay, clients lack knowledge that would enable them to assess the quality of lawyering services. Clients are therefore unable to exercise the kinds of choices that consumers regularly make in competitive markets.

SEARCH COSTS The effect of the great imbalances between claimants’ knowledge levels and that of tort lawyers is to tilt the fee-bargain playing field decidedly in the direction of the lawyer. A claimant seeking to overcome the asymmetrical information burden faces a daunting task. As noted, tort lawyers do not engage in price advertising, let alone competitive price advertising. Claimants entering the market quickly learn, if they did not already know, that virtually all lawyers charge the same contingent fee percentage. The signal is clear; attempts to obtain lower prices are simply rebuffed.

Magnifying the search cost is the fact that most tort claimants are unsophisticated one-time users of legal services and lack experience in negotiating fees with lawyers. Even if some claimants devote the requisite resources to amass information about the value of their claims, the amount of time a lawyer would reasonably anticipate being required and the quality of the lawyers being considered, the substantial cost of doing so would have to be justified by the savings to be realized. Any rational assessment, therefore, has to take into account that even when armed with this information, claimants may still not be able to induce lawyers to bargain over fees. Thus, for the one-time purchaser of tort-claiming services who cannot amortize costs

over a series of cases, standard pricing may raise search costs from daunting to prohibitive.

Search costs are further magnified by the unique efficacy of standard contingency fees in conveying deceptive information with regard to risk. To be sure, while many tort claims involve considerable risk and insufficient reward, those are typically rejected. Many claims, however, involve little risk and relatively high reward, generating windfall fees. To justify those sub-

each other by maintaining at least near-price uniformity. Lawyers maintain a uniform price for the same reason: It maximizes revenue and also yields considerable rents. Moreover, price collusion is aided by control over the practice of law that courts have reposed in themselves and by use of that control to prohibit competitive behavior.

The argument that lawyers are acting collusively to fix the price of tort claiming is open to a number of objections. A

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stantial fees, contingency fee lawyers may, in the low visibility confines of their offices, exaggerate the risk they are undertaking in those cases.

As an alternative to such expressly deceptive behavior, tort lawyers, by collectively maintaining a standard rate, can announce to all claimants that they are simply charging the standard fee that prevails in the community. In addition, by maintaining a substantial standard contingent fee percentage ranging from one third to 50 percent, they also signal to potential tort claimants that all contingency fee-financed litigation is high risk. If the case involves high risk and insufficient reward, the lawyer simply declines to take the case. If it will generate a substantial effective hourly rate, the lawyer presents the claimant with his standard contingent fee agreement form. If the client believes, however correctly, that his claim presents a low or nonexistent risk and therefore seeks a lower percentage fee, the lawyer insists on the standard rate because it is the standard rate. Because all lawyers charge the same rate, it is necessarily "fair" and comparison-shopping is therefore unnecessary.

COLLUSION Contingency fee lawyers maintain uniform pricing because they perceive that it is in their self-interest to do so and not deviate, even infrequently, from the standard fee. A law firm considering whether to undercut the standard price would recognize that if it successfully did so, other firms would also lower their prices and that, as a consequence, both aggregate and individual income would fall. That recognition provides a strong incentive for acting collusively to maintain a uniform price.

By "collusive," I do not mean that lawyers meet together, clandestinely or otherwise, to agree on a uniform price. Rather, I mean that lawyers act in the same manner as do gas station owners on adjacent corners who recognize that if any of them lowers the price, the others will respond by lowering their prices. The ensuing "gas war" will lead to lower profits for all of the adjacent owners. To avoid such mutually destructive behavior, adjacent gas station owners consciously collude with

collusive pricing system maintained by a few gas station owners is easily policed. Prices are posted and deviations are instantly identified. Thousands of lawyers operating in the low-visibility confines of their offices cannot be nearly so sanguine that other players are maintaining the standard price. Indeed, economists would predict that some lawyers would deviate from cooperating with other contingent fee lawyers to maximize joint profits by charging less than the standard price, expecting to increase the volume of sales sufficiently to generate higher profits. In addition, lawyers who operate more efficiently or who are more competent (and therefore are able to obtain higher settlements) would also be expected to bid prices down, driving out less efficient and less competent lawyers. That contingent fee lawyers do not deviate from standard contingent fee pricing is therefore, under standard economic theory, an indication that the standard price is some form of competitive market-derived equilibrium price. In that market, lawyers who charged less would not be able to compensate for lower prices with sufficient increased volume to generate higher profits.

Standard economic theory, which seeks to explain the operation of markets under ideal conditions, does not adequately account for the maintenance of uniform contingent-fee pricing. Because deviations from expected competitive behavior appear to be the norm and not the exception, we need to look beyond standard economic theory to explain an apparent market failure.

MONITORING Consumers' lack of knowledge of the value of their claims disadvantages them in negotiating price with contingency fee lawyers. Claimants are also disadvantaged because they cannot effectively monitor their lawyer's services — that is, they have no realistic way of determining whether their lawyer is shirking or otherwise acting self-interestedly in negotiating a settlement.

Those attributes of contingent-fee claiming create a significant bias in favor of maintaining standard pricing. A price cutter may indeed be offering the same quality of service as

other providers charging standard contingent fees, but a price cutter may also be signaling that she intends to devote fewer resources to prosecution of the claim. As a consequence, a lower settlement may be secured that yields a lower net payment to the client. When the client is neither able to determine the competence level of the lawyer he selects nor to verify the level of his lawyer's efforts, a rational response is to shun price cutters and instead pay the standard contingent fee.

A related reason why lawyers who may wish to undercut the standard rate are deterred from doing so is because clients would likely perceive a cut-rate price offer as signaling that the lawyer is inferior in quality to price maintainers. Because the client cannot monitor the lawyer's efforts, the decision whether to hire that lawyer may entail substantial risk. As with a shirking lawyer, an inferior lawyer may gain a lower settlement, generating a lower net payment to the client than a lawyer charging the more expensive standard rate.

BAR-IMPOSED IMPEDIMENTS

Though price competition for tort representation services does not exist, there is one intriguing exception. In the airline crash litigation market, which averages 200 or so claims annually, insurers send out early offers of settlement that are usually taken to lawyers to determine their fairness. This induces claimants to insist that lawyers' contingency fees be restricted to value added to the settlement offers. In addition, lawyers routinely flout ethical rules prohibiting solicitation and actively solicit clients, bidding against each other and driving the contingent fee to below 20 percent. Anti-solicitation rules are apparently more efficacious in curbing price competition in the general tort-claiming market where claiming levels average one million annually. Such rules are one of a number of anti-competitive policies instituted by the bar to preclude price competition. The policies are intended to prevent market mechanisms that would otherwise arise to challenge uniform pricing.

To be sure, all occupational groups seek to institute policies designed to limit price competition. For example, all seek to limit the supply of their services to drive up prices, and then justify those and other anti-competitive strategies by invocation of the "public interest." The same is true with lawyers. Over 150 years ago, lawyers fought to free themselves from legislative regulation of the prices they charged and to substitute market-based pricing. Once they achieved the right to negotiate prices with their clients freely, they then sought to insulate themselves from market forces by restricting entry to the profession, banning competition from non-lawyers, prohibiting the outright purchase of tort claims, and adopting ethical rules to preclude price competition (including rules prohibiting lawyers' providing financial assistance to tort clients and the brokerage of lawyers' services).

ENTRY BARRIERS The beginning point of any analysis of why the rigidity of standard contingent fee pricing has not been counteracted by market solutions is lawyers' control over the market for tort claims. Tort claimants who wish to finance their pursuit by selling a percentage of their claim have a limited mar-

ket. Non-lawyers are impermissible purchasers; the contingent fee system channels all tort claims sellers to one class of purchaser — the lawyer-oligopsonist.

By insulating themselves from competition from non-lawyers for the purchase of tort claims, lawyers fully capture, as one form of rent, the substantial referral fees that would otherwise be shared with non-lawyers or with clients who disintermediate and directly deal with the lawyer-litigator. By precluding competition in the purchase of tort claims, lawyers also facilitate minimization of price competition in the provision of legal services to tort claimants.

PURCHASING CLAIMS Most commentators agree that the most efficient fee structure — one that competition among contingency fee lawyers would give rise to — is where attorneys vie with each other to buy the right to a client's legal claim and prosecute it on their own behalf. Such a structure, as well as other efficient fee structures that would promote competition, are prohibited; states do not allow lawyers to purchase tort claims outright or bid for clients. Whatever the historical bases for those restrictions, they are maintained today to inhibit the competitive behavior that would otherwise be unleashed.

ETHICS RULES From the time the first code of ethics was adopted, a central feature of the ethics regimes promulgated by the bar has been restraint of price competition by lawyers. But for the intercessions of the U.S. Supreme Court, such essential elements of price competition as the absence of mandated minimum fees, advertising, and group legal services would have remained ethically constrained. Despite repeated instances of the Supreme Court's striking down anti-competitive rules adopted by the bar, many restraints on competition, expressed in the form of ethics rules, endure. In particular, restraints continue to exist on financing tort claimants and on business practices and organizational structures that would facilitate price competition.

One ethics rule that applies virtually exclusively to contingent fee-financed tort claiming prohibits lawyers from providing financial assistance to clients, typically in the form of payments to clients to defray living costs while the litigation proceeds. The ostensible purpose of those prohibitions is to protect clients from being seduced by offers of subsidized living costs into selecting lawyers on the basis of such offers rather than for more "appropriate" criteria. The real reason is otherwise. In the absence of such a prohibition, lawyers would be expected to bid against each other through offers of financial assistance based upon the anticipated value of the claim. That would effectively drive contingent fee rates down, forcing lawyers to divide rents with their clients. Indeed, for many high-value claims in which there is no meaningful risk, lawyers could be expected to offer to pay substantial sums as signing bonuses.

BROKERING One business structure that we would expect to emerge if the contingent fee market were competitive is the legal practice equivalent of mortgage brokering — a

business structure that arose after the home mortgage market was deregulated. Mortgage brokers intermediate between borrowers and banks, offering to evaluate the borrower's financial circumstances, recommend and obtain the lowest bank mortgage loan rates available to the lender, and further facilitate the lending process. Because of economies of scale, the brokers are able to obtain discounted mortgage rates from banks and other lenders that they pass on to borrowers, thereby underselling the very same banks and lenders. They derive income both from fees paid directly by the borrowers and from commissions paid by the lending banks. In a competitive contingency fee/personal injury market, we would expect a similar structure to be replicated: the contingent fee lawyer-broker.

To ward off price competition that would be engendered by lawyer brokerages, the bar has promulgated ethics rules essentially prohibiting for-profit "lawyer referral services" — the term it uses to refer to the brokering of lawyers' services — and restricting not-for-profit lawyer referral services to those that pose no threat of price competition.

CONCLUSION

The market for tort-claiming services is not price competitive. Indicators of an uncompetitive market include uniform pricing unjustified by considerations of efficiency or reduction in agency costs, price inelasticity in the face of highly variable production costs and rewards, the level of increase over the past 40 years in the inflation-adjusted effective hourly rate realized by tort lawyers, and the historical derivation of the standard contingent fee.

Factors that inhibit the emergence of a competitive market include asymmetrical information with regard to the value of tort claims and quality of lawyering services, daunting if not prohibitive search costs, and price-cutting as signaling an inferior or shirking lawyer. Impediments to price competition imposed by the bar include barriers to entry, the prohibition of the outright purchase of tort claims, and the use of ethical rules to prevent price competition including prohibitions against providing financial assistance to clients and brokerage of lawyers' services.

There is little reason to expect price-competitive behavior to emerge in the tort litigation services market in the immediately foreseeable future. The only way that the barriers that have been erected or that arise as part of the operation of that market may be overcome is by regulation of tort lawyers' actions. In theory, the market for tort-claiming services is already regulated. Contingent fees are subject to both ethics rules and fiducial principles that limit such fees to "reasonable" amounts. In practice, however, the regulatory regimes have proven to be largely devoid of content and serve mostly to displace more effective regulation from outside the bar.

The regulatory change that should be first considered is one that would emulate the market bargain that would result if lawyers competed with each other on the basis of price — as they do in airline crash litigation. If such a bargain prevailed, the lawyer would apply a negotiated contingent fee only to the amount of any recovery added to the value of the

claim as it existed before the lawyer's efforts augmented the claim value.

For such a regulatory approach to be implemented, it would have to be self-effectuating, require no additional bureaucracy for its enforcement, and impose no significant transactional costs — especially with regard to identifying the value of the unaugmented claim. Those attributes are achieved in the "early offer" proposal that others and I have advanced. The proposal would prohibit plaintiff lawyers in personal injury cases from charging standard contingency fees where alleged responsible parties made early settlement offers before the lawyer added any significant value to the claim. Instead, the lawyer would be restricted to charging an hourly rate fee for the effort required to assemble and notify the allegedly responsible party of the relevant details of the claim. If an early settlement offer were rejected and a subsequent settlement or judgment were obtained, the lawyer would apply a contingent percentage to the amount in excess of the early offer.

This proposal is intended for adoption by state legislatures as an anti-price gouging consumer protection statute and by state supreme courts as part of the ethics code regulating lawyers' behavior. It would only address a small configuration of the problem identified, but it would nonetheless constitute a significant step towards wresting control of the tort claiming market from those who impose limits on price competition and benefit from its absence. **R**



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