

## LITIGATORS CORNER:

# Who Says Contingent Fee Lawyers Are the Biggest Moneymakers?



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In the past year, there have been numerous articles about large law firms charging their mostly corporate clients outrageous sums of money. For instance, in September, 2004, the *New York Lawyer* reported that US Airways' trip through bankruptcy cost the company one hundred and twelve million dollars in only nine months. In Chicago, the United Airlines bankruptcy case cost that company two hundred thirty-five million dollars in only 18 months, between December, 2002 and June, 2004. Most of the money in both cases has gone to lawyers. Fees in the United case are now running over eight million dollars per month, with the lead lawyer being paid seven hundred ninety-five dollars an hour. One article reports that, in one instance, three lawyers were sent to do a job that one could have done, and that all three flew first class.

The US Airways and United Airlines matters are bankruptcy cases, not patent cases. But the reports of these extraordinarily expensive proceedings, and the tremendous fees being earned by lawyers, caught my attention. We've seen a good deal lately about the evil patent owners and their extremely greedy contingent fee lawyers. Supposedly, together, the patent owners and we lawyers are enjoying windfall after windfall, made by ripping off big companies.

This simply is not the case. Contingent fee cases are rarely windfalls. They take hard work, and many are settled at reasonable amounts — and are sometimes lost. Even Mickey Mantle was out two out of every three times he was at bat. Contingent fee clients and lawyers aren't walking around picking up and pocketing chunks of gold. Success results from a reasonable case and hard work. Too many non-thinkers believe we are all Jerry Hosiers.

Perhaps it's time to consider the law firms and lawyers who do patent cases on a billable basis and ask this question: can any sane person or company afford the kind of unnecessary expense that results from having a large firm represent a litigant in a patent case on an hourly basis? Patent cases are expensive enough. But, based on many incidents I have seen over the years, billable representation by large firms greatly aggravates the expense, and not for good reasons.

A couple of years ago, some of my partners had the opportunity to represent a company on a contingent fee basis. The company had previously been represented in the usual manner, by a law firm that charged on an hourly basis. Company representatives, who met with a couple of my partners from time to time as the work progressed, told us that it was refreshing not to see a legion of lawyers sitting around the table, as had been their

experience with the previous firm. In fact, one of the people from the company said that, in one meeting with our predecessors, there were so many lawyers in attendance that the company representative finally asked one of the lawyers what he was doing there. After coming to us, they learned that, in contingent fee litigation, there is no incentive to run the meter with billable hours and extra lawyers.

In another of our cases, the court held an initial pretrial conference. It was routine. The parties had already submitted a joint report covering the schedule for the case, how many interrogatories would be issued, procedures for submission of expert reports, and the like. The remaining areas of disagreement were few, and could have been easily dealt with by telephone. But, for some reason, a number of the defendants' lawyers decided to appear. We attended by telephone, incurring no travel expense for our client. However, one of the defense attorneys traveled over one thousand miles for this conference, which lasted about half an hour. And during the conference, this lawyer said nothing but his name; he made no contribution at all. Two days of billings and a round-trip airline ticket probably cost the company thousands of dollars. A telephone call lasting an hour or so would have been enough.

We had a case against a large company headquartered in San Jose, that was transferred from Chicago to the Northern District of California. The Northern District parcels out cases to all the divisions so that San Jose doesn't wind up with too many of them. When the case was transferred, it was assigned to a judge in Oakland. Much to my surprise, the defendant moved for yet another transfer, across San Francisco Bay, to San Jose. Apparently the drive across the Bay Bridge was too much for its lawyers. I don't know what the second set of briefs cost, but what a waste of time and money it was. The Oakland judge granted the transfer and reversed it a few days later, probably after a call from a chief judge.

In the same case, the defendant was represented by a large firm headquartered in New York City. A lawyer from

the firm appeared at a status hearing in Chicago. The same firm has a large office in the Bay area. After the transfer, we had a status hearing in California. The defendant was represented by a lawyer from the West Coast office. We were astonished to see the New York lawyer show up, too. That jaunt must have required two days just for travel, and a third day in California. The New York lawyer had nothing to say that his West Coast counterpart could not have said. The case was too new to have any special history. Thousands more dollars in expenses thrown away.

We also had a claim construction conference in this lawsuit, as required by the Northern District's local patent rules. After lobbying the usual claim charts at each other, the local rules require a meeting to confer about potential compromises on claim interpretation issues. There were only two litigants: one plaintiff and one defendant. We arranged a telephone conference. I was on the telephone; so was one of my partners, for the first forty-five minutes or so. The single defendant, unfortunately for it, had equated size and expense with quality; it had a big law firm representing it, and the law firm piled on. There were seven lawyers on the telephone

representing the defendant. One of the lawyers was even conferenced in from Japan. The seven lawyers gave no sign that each had some special contribution to make. I can only presume they were all there primarily to bill their client. That conference must have cost the defendant five thousand dollars an hour. This is not an isolated occurrence. In other cases, we've seen the same thing occur in telephone conferences.

In one of our suits, again one where the defendant was represented by a large firm, we learned that the defendant had incurred expenses well into seven figures before even one deposition had taken place.

In another suit, we were opposed by seven lawyers from a large firm. I figured they would be organized into teams, to handle various issues, with some focusing on liability, others on damages, and so forth. But there was no organization. They overlapped and duplicated each other's work. Gaggles of them showed up at depositions, where one lawyer would have been sufficient. The only coordinated thing they did was when the firm withdrew (probably after being fired), they all signed the motion to withdraw.

With some large law firms, we see long, pompous letters when a telephone

call or a quick email would do. I am guessing that some associate is told to analyze some discovery responses, and then write a letter, and edit, and revise, and revise the letter some more, until it satisfies a partner. Nothing like a thousand-dollar letter.

No wonder large companies think litigation is too expensive. Their own need to hire big firms, coupled with runaway legal fees, is the largest part of their problem. A defendant that shoots itself in the foot shouldn't blame someone else for its own stupidity. Their corporate mentality, which equates size and expense to quality, is the main cause.

Contingent fee litigation is a reasonable way to conduct litigation without the motive to continue to bill. The case is good and can be pursued, or is not good, and can be settled. But it won't go on and on, *ad infinitum*, like *Jarndyce v. Jarndyce*, the fictional case Charles Dickens described in *Bleak House*, which went on for many years and cost almost as much in legal fees as the estate being fought over was worth. Contingent fee lawyers don't have any meter to run. Plaintiffs who seek access to our courts, in the only way that is economically feasible, are not villains. Neither are their lawyers. 