CONTINGENCY FEES IN MASS TORTS: ACCESS, RISK, AND THE PROVISION OF LEGAL SERVICES WHEN LAYERS OF LAWYERS WORK FOR INDIVIDUALS AND COLLECTIVES OF CLIENTS

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I. CONTINGENCY FEES: REGULATORY OPPORTUNITIES AND MODALITIES

The term "contingency fee" brings to mind an image of an individual lawyer entering into an agreement with a single client to be paid a percentage of that client's recovery from an allegedly tortious injury.

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In addition, contingency fee contracts call for reimbursement of attorneys by clients of certain kinds of costs (such as filing fees imposed by courts or consulting fees charged by experts) advanced by lawyers on litigants' behalf.

Much of the literature on contingent fees examines the justifications for this form of payment. Enthusiasts praise contingent fee contracts for their capacity to enable access to courts and the provision of legal services for clients otherwise not able to afford counsel. Proponents argue that when contingency fee attorneys reap substantial returns, such sums are appropriate rewards for the willingness to bear the risk of nonpayment and to absorb the expenses of litigation, pending payment. Commentators consider whether the return on risk is optimal or a "windfall," whether incentives created by contingency fees enhance or diminish attorney loyalty and the quality of the services provided, and whether contingency fee lawyers function well or problematically as "gatekeepers" to courts.[1] Because the attorney-client relationship and the resulting obligation to pay are creatures of "private" contract, whatever worries are occasioned by contingency fees are channeled primarily into proposals to regulate attorneys through ethical rules.

The enactment of federal legislation authorizing fee shifting from losing defendant to plaintiff alters the image of the contingent fee and shifts the arena of potential legal intervention. While the risk of nonpayment remains and the contingency lawyer continues to enable access to law and to provide legal services while deferring payment (if any) until the achievement of a positive conclusion, the legislative decision to require payment from a defendant with no contractual obligation to a victorious plaintiff's attorney requires a mechanism other than private contract for setting the amount of the fee.

Because this kind of fee award is dependent upon a victorious outcome, the amount is usually decided at the conclusion of a lawsuit rather than agreed upon in advance. Over the past two decades, case

1. *See generally* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997); Bruce L. Hay, *Optimal Contingent Fees in a World of Settlement*, 26 J. LEGAL STUD. 259 (1997); Bruce L. Hay, *Contingent Fees and Agency Costs*, 25 J. Legal Educ. 503 (1996); Richard W. Painter, *Litigation on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625 (1995); Kevin Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978). Criticism can be found in Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?* 37 UCLA L. REV. 30 (1989) [hereinafter Brickman, *Contingent Fees*] and in a proposal to limit fees in relationship to the timing of settlements, discussed in LESTER BRICKMAN, MICHAEL HOROWITZ & JEFFREY O'CONNELL, RETHINKING CONTINGENCY FEES (Manhattan Institute, 1994).

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law has developed assigning the task of fee setting to trial judges. Debates have begun about the use of a "lodestar" (hours times rate) as compared to a "percentage-of-the-fund" method, and the mixtures in between, including the use of a lodestar plus a "multiplier" to add bonuses to reflect unusual case complexity, attorney skill, and/or greater risk of nonpayment.[2]

Three paradigms dominate the case law around statutory fee shifting. A first arises from the public interest world with its institutional litigators whose clients include children in school desegregation cases, prisoners, mental patients, or environmental claimants. The second exemplar is the lone civil rights claimant, seeking damages in response to alleged violations of first amendment, due process, or liberty rights. A third paradigm is the commercial case, involving antitrust or consumer litigation.

Recently, the Supreme Court endorsed lodestar calculations as the preferable method of calculating fees in statutory fee shifts and ruled out multipliers for risk.[3] Some lower courts, however, have concluded that multipliers can be used to enhance payment for the demonstration of special skills or other unusual circumstances.[4] Hence, a concept of payment *contingent* on something remains in statutory fee shifting.

Concepts of contingency can also be found in the other method by which judges superintend fees. A doctrine—*equitable* rather than statutory—began in the nineteenth century when courts recognized that individual plaintiffs and their attorneys might, by virtue of victorious litigation, confer a benefit on third parties. The classic example is the creation of a common fund or the preservation of an asset in which individuals other than the prevailing party also have an interest. Courts of equity taxed the beneficiaries for a share of the cost of a lawsuit creating or preserving such common funds and thus imposed obligations of payment on a group of plaintiffs or claimants who had

2. *See, e.g.*, City of Burlington v. Dague, 505 U.S. 557 (1992); *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); City of Detroit v. Grinell Corp., 495 F.2d 448 (2d Cir. 1974); Court Awarded Attorney Fees: Report of the Third Circuit Task Force, 108 F.R.D. 237 (1985) [hereinafter *Third Circuit Attorney Fees Report*].

3. *City of Burlington*, 505 U.S. at 562-63, 567.

4. *See, e.g.*, Guam Soc'y of Obstetricians & Gynecologists v. Ada, 100 F.3d 691 (9th Cir. 1996), *reh'g en banc denied*, 100 F.3d 691 (9th Cir. 1997) (reading the *Dague* opinion as limiting enhancements for contingency but not for other factors and upholding a lodestar figure enhanced by a multiplier of two in a statutory fee-shifting case, based on the district court's finding that attorneys faced "fear of ostracization" when litigating abortion rights in Guam).

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no contract with the attorney receiving the compensation.[5] Contemporary reiterations of that doctrine often use a percentage-of-the-fund calculation that looks a good deal like a contingency fee.[6]

In the discussion of how to pay attorneys either through fee-shifting statutes or through equitable reallocation among a group of plaintiffs, the case law and literature generally assume that a single attorney (or law firm) is the recipient of whatever fee the court mandates. The problems—rewarding risk taking to enable pursuit of legal claims, recognizing attorneys' skills and investments, encouraging wise investments of efforts and client-centered behaviors, avoiding windfalls, minimizing the complexity of the judicial task—are addressed with a focus on payment from one relatively anonymous payer (be it defendant or a cohort of presumably similarly-situated plaintiffs) to a single payee, a lawyer or law firm.[7] The struggles about equity and efficiency—cast in terms of whether to develop doctrinal rules insisting on lodestars, with or without multipliers, or percentage-of-the-fund, or whether to attempt up-front bids by attorneys for authorization to represent litigants—have generated a rich debate about the rules that courts or regulatory agencies develop.

But mass torts require thinking again.

II. INDIVIDUAL CLIENTS, AGGREGATE LITIGATION, AND LAYERS OF LAWYERS

In lawsuits involving mass accidents (such as airplane crashes or hotel fires) or claims of exposure to toxic or defective products (such as asbestos, the Dalkon Shield, silicone gel or cigarettes), hundreds or thousands of plaintiffs appear with similar claims. While some of these cases are pursued individually, lawyers and judges have come to see the individual claims as part of a larger pattern and either formally or informally have treated these claims as linked. Hence, mass torts provide those of us interested in contingency fees with a variation on the problems outlined above. Mass tort plaintiffs form a group of clients, some of whom have individual contracts with specific attorneys,

5. *See, e.g.*, Trustees of Greenough, 105 U.S. 527, 537-38 (1881); Central R.R. & Banking Co. v. Pettus, 113 U.S. 116, 128 (1885).

6. *See, e.g.*, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d at 822; Bowling v. Pfizer, 922 F. Supp. 1261, 1278-80 (S.D. Ohio 1996) (summarizing the use of a percentage, its decline in the 1970s in favor of a lodestar, and its renaissance in the 1980s and thereafter).

7. For recent commentary on securities litigation questioning what is termed the "bi-polar" model of class action dynamics and arguing that the dynamics are more complex, see Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559, 575-76 (1996).

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some of whom have no attorneys, and virtually all of whom may be represented in court by a designated group of lawyers with whom they have no contractual relationship at all.

Above, we outlined that the fact of contingent payment could arise by contract, by legislation, or by equitable doctrine and that the concept of contingency remains robust. Now we need to detail how the fact of aggregation comes into play. Again, contract, legislation, and court intervention are the relevant categories. Informal aggregation may occur when defendants or plaintiffs deal with cases as a "block" or when courts apply uniform pre-trial orders to cases officially distinct or assign a set of cases to a single judge or special master for case management. In some of these groupings, informal agreements allocate costs and fees, while, in others, attorneys contract to share clients and compensation.

Moving from informal or contractual aggregation to legislative aggregation, administrative compensation schemes can be understood as a form of aggregation by which individual processing takes place pursuant to rules authored by legislatures or regulatory agencies. For example, black lung claims are processed through procedures that alter the rules of private contract between attorneys and claimants; attorneys cannot receive a fee without approval of its reasonableness from the tribunals before which lawyers appear on behalf of claimants.[8] The revised procedures for veterans' claims offers another illustration of fee regulation,[9] as do limitations in the Social Security Act. Con-

8. *See* The Black Lung Benefits Act of 1972, 30 U.S.C. § 932(a) (1994) (incorporating provisions on fees from the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d) (1994)). After an attorney had been disciplined for violating the act, he protested it, on behalf of claimants, as infringing on their due process rights by prohibiting private contracts and imposing delays on payments to attorneys. The Supreme Court disagreed, finding the statute constitutional and responsive to concerns about protecting claimants from attorneys. *See* United States Dep't of Labor v. Triplett, 494 U.S. 715, 727 (1990).

9. Up until recently, Congress limited fees in veterans' claims to $10. *See generally* Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305 (1985) (upholding, against a facial challenge, a statutory limit of $10 on attorneys' fees for veterans seeking benefits before the Veterans Administration). The 1988 revisions of veterans' claims procedures repealed those limitations; Congress permitted contingency fee awards with limitations and provided procedures for review by the Bureau of Veterans Affairs ("VA"). *See* 38 U.S.C. § 5904(c)(2), (d)(1) (1997); *In re* Smith, 1 Vet. App. 492, 502 (1991) (Steinberg, J., concurring) (explaining the provisions as aimed at limiting contingency fee payments made by the government from past-due benefits to a maximum of 20% but also hoping to enable access and create incentives for attorneys to provide representation).

The VA provisions offer an interesting example of regulatory efforts. In *In re Smith*, Associate Judge Steinberg noted the statutory interpretation questions raised; at issue was whether all fees must be contingent or whether contracts can have variable payment provisions. Steinberg urged a ruling that attorneys and clients have the options of entering different kinds of contracts: if an attorney wanted a guaranteed payment from the "past-due benefits," the contingency fee would

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gress has there imposed a maximum on contingency fees of twenty-five percent to be taken from "past-due benefits" of a claimant by a lawyer who represents the claimant in judicial proceedings and has subjected an attorney to criminal liability who "charges, demands, receives or collects for services rendered" in excess of that amount.[10] Bankruptcy is another legislative aggregate that places a court in the role of superintendent of the payment of fees and costs to the debtor's attorney.[11]

Formal aggregates can also be created by courts relying on rules that authorize judges to certify class actions or to consolidate cases,[12] as well as by federal rules that permit a panel of federal judges to designate a series of cases as encompassed in one "multi-district litigation."[13] At the conclusion of such litigations, when attorney fee payments come into play, the equitable common fund doctrine enables judges to supervise the payment of fees and costs to attorneys.

Having outlined first, the sources of authority to intervene in contingency fee relationships and second, the modes by which aggregate mass torts come into being, a third step is to identify the various attorneys providing representation within mass torts. Such lawsuits often

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be capped at 20%; if the attorney was willing to waive payment from those benefits and instead be paid directly from the claimant, the attorney could obtain a larger percentage in fees; if the attorney wanted a minimum fixed fee as well as a contingent fee, that combination would be permissible but the contingent fee could not be paid directly from the Secretary. *Id.* at 503. In addition, the attorney would also be entitled to "reasonable expenses incurred by the attorney in undertaking the claimant's representation before whatever forum." *Id.* at 511. Further, all such agreements would still be subjected to a review to determine whether a fee is "excessive or unreasonable." *Id.* In subsequent litigation, the United States Court of Veterans Appeals ruled that the Secretary has a "statutory duty to pay to an attorney the fees," and that the courts may enforce that duty. *In re* Smith, 4 Vet. App. 487, 497 (1993). Current regulations are found at 38 C.F.R. § 20.609 (1997).

10. 42 U.S.C. § 406(a), (b) (1997); *see generally* Rodriquez v. Bowen, 865 F.2d 739 (6th Cir. 1989) (creating a presumption that counsel would receive the 25% by contingency fee contract absent evidence of ineffectual or improper conduct or an undeserved windfall); Hayes v. Secretary of Health & Human Servs., 923 F.2d 418 (6th Cir. 1991) (reversing a district court's reduction of a contingent fee by comparison with what hourly rate would have been deduced from it, and holding that district courts should not reduce contingency fees resulting in hourly rates of less than twice the standard market rate but that above that floor, a rebuttable presumption of a proper reduction existed); Damron v. Commissioner of Soc. Sec., 104 F.3d 853 (6th Cir. 1997) (approving a reduction of fees based on the absence of contingency at the time of entering into the contract). The fee limitation does not apply to administrative proceedings, but attorneys are entitled to compensation for such work. *See* Horenstein v. Secretary of Health & Human Servs., 35 F.3d 261, 262 (6th Cir. 1994). Note that the consequence of the statutory interpretation is that attorneys must seek compensation separately from each tribunal from which relief has been obtained. *Id.* at 262 (Boyce, J., concurring).

11. *See* 11 U.S.C. §§ 330(a)(4)(A)(i), 503(b)(4) (1994).

12. *See, e.g.*, FED. R. CIV. P. 23 (class action); FED. R. CIV. P. 42 (consolidation).

13. *See* 28 U.S.C. § 1407 *et seq.* (1997).

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involve layers of lawyers and groups of clients, reflecting a range of relationships among lawyers and clients to each other, to defendants, and to the court. Thus, unlike the paradigms that dominate attorney fee case law and commentary, mass tort cases have neither a single set of lawyers nor a presumptively undifferentiated set of claimants.

Not only do mass torts have many attorneys, the roles of those attorneys are diverse. The differentiation of tasks found in such cases stems from efforts by some judges, opponents, and plaintiffs' lawyers to obtain some kind of organized framework within which to work. One method is to identify spokespersons for the collective of plaintiffs. Either through self-selection, election or nomination by colleagues or through designation by judges, a "lead counsel," "plaintiff steering committee" ("PSC"), or a plaintiffs litigating committee" ("PLC") is assigned to coordinate among plaintiffs and to speak on their collective behalf.[14] PSCs are the voice of the plaintiffs to the court and to defendants in mass torts, and are thus the attorneys most visible to outsiders.

But they are not the only lawyers in the case, for many plaintiffs within such aggregates also retain attorneys—whom we named "individually-retained plaintiffs' attorneys" ("IRPAs"); these attorneys filed the initially-individual lawsuits. As explained in *Individuals Within the Aggregate: Relationships, Representation, and Fees*, the two

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14. Initially, informal networks of lawyers began by selecting their own leaders--an approach supported by the first set of guidelines. MANUAL FOR COMPLEX LITIGATION § 1.92, at 90-91 (1982); *id.* § 4.53, at 157 ("Lead counsel are . . . chosen by the groups of parties having a common interest," and in "exceptional circumstance" or when parties fail to choose, the court may do so). By the mid-1980s, and illustrative of the trend toward increasing judicial managerial control, however, the Manual for Complex Litigation advised judges to oversee the appointment of steering committees ("PSCs") for the plaintiffs' attorneys. MANUAL FOR COMPLEX LITIGATION, SECOND § 20.224, at 19-21 (1985).

PSCs have significant power. *See In re* Ivan Boesky Sec. Litig., 948 F.2d 1358, 1364 (2d Cir. 1991) (describing the function of lead/liaison counsel as including presenting group-wide settlements to courts for approval, and upholding the district court's approval of settlements entered into by those attorneys on behalf of and over objections by individual litigants opposed to the settlement). In *Boesky*, the Second Circuit gave the district court authority to determine whether the "lead counsel has been vested with the responsibility to negotiate and has fulfilled the described responsibilities." *Id.* at 1366. The Court explained: "We are most disinclined to cabin the authority of lead counsel by requiring the explicit agreement of every lawyer for a named plaintiff or subclass to the proposed settlement." *Id.* The Second Circuit also warned potential objectors to register dissent or risk implied consent to terms disclosed to them by lead counsel. *Id.* at 1367. For other discussions of the creation and authority of PSCs, see *In re* Norplant Contraceptive Prods. Liab. Litig., No. MDL 1038, 1995 U.S. Dist. LEXIS 3454 (E.D. Tex. Feb. 22, 1995); *In re* Domestic Air Transp. Antitrust Litig., No. 90-CV-2485-MHS, 1990 U.S. Dist. LEXIS 20095 (N.D. Ga. Dec. 21, 1990); *In re* Wirebound Boxes Antitrust Litig., 128 F.R.D. 256 (D. Minn. 1989); *In re* Telesphere Int'l Sec. Litig., No. 89C1985, 1989 U.S. Dist. LEXIS 2558 (N.D. Ill. Mar. 8, 1989); *In re* Air Crash Disaster at Stapleton Int'l Airport, No. MDL 751, 1988 U.S. Dist. LEXIS 4287 (D. Colo. Apr. 18, 1988).

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sets of attorneys (PSCs and IRPAs) are not monolithic.[15] While some IRPAs may personally interview and engage with individual clients, thereby mirroring the one-on-one relationship of a classic contingency fee situation, others are retained through relatively anonymous exchanges, such as sign-ups in union halls or contacts made through advertisements, and may have tens, hundreds, or thousands of clients. (The terminology in use—an "inventory" of claims or a "stable" of clients—captures a bit of the scale of the activities of some IRPAs.[16]) Similarly, within a PSC may be some lawyers who run the gamut of kinds of IRPAs as well as other attorneys who perceive themselves solely to be representing the group as a whole (sometimes called "tort class action lawyers") and who act as large-scale entrepreneurs, providing financing and administrative support for the substantial investments required in many mass torts.

While the existence of two sets of attorneys in mass torts has become well-known over the past decade, little by way of rules or case law guides courts in sorting out the relationships among clients and the many lawyers within mass tort group litigation. The statutes and rules that create the occasions for group litigation do not reflect the diverse roles for lawyers and their relationships to the methods for calculating fees and costs. Neither the major vehicles in federal litigation by which such groups are currently amassed (the class action rule and the multi-district litigation statute) nor contemporary proposals to expand group litigation (such as by means of revision of federal jurisdictional grants,[17] interstate transfers,[18] and the American Law Institute's proposed "consolidation" of complex litigation[19]) mention the impact of aggregation on the financial incentives of lawyers, on their relations with clients, on risk taking or rewards, or on the work performed.[20] (The "f" word in this context is "fees.")

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15. *See* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 309-21 (1996).

16. See, for example, the description of "inventory plaintiffs" in Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2239 (1997).

17. *See, e.g.*, Multiparty, Multiforum Jurisdiction Act of 1991, H.R. 1100, 103d Cong. (1991).

18. UNIF. TRANSFER OF LITIG. Act § 101, 14 U.L.A. 115 (Supp. 1994); *see, e.g.*, Edward H. Cooper, *Interstate Consolidation: A Comparison of the ALI Project with the Uniform Transfer of Litigation Act*, 54 LA. L. REV. 897 (1994).

19. AMERICAN LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS WITH REPORTER'S STUDY: A MODEL SYSTEM FOR STATE-TO-STATE TRANSFER AND CONSOLIDATION chs. 3-5 (1994) [hereinafter ALI COMPLEX LITIGATION] (proposing federal intrasystem consolidation, consolidation in state courts, and federal-state intersystem consolidation).

20. Another ALI project, developing a restatement on the law of lawyers, considers the question of reasonable fees but does not yet offer guidance on how to think about reasonableness in the context of many lawyers working within a large-scale aggregated litigation. RESTATEMENT

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Congress has paid somewhat more attention to these issues;[21] the 1994 amendments to the Bankruptcy Act offer some direction about fees to be paid to bankruptcy lawyers,[22] and the 1995 securities legislation also raises the issue of payment of fees.[23] But these statutes, like current ethical codes and academic commentary on aggregation, do not address ethical constraints on, fees of, or relationships among, the

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OF THE LAW GOVERNING LAWYERS §§ 46-47 (Proposed Final Draft No. 1, Mar. 29, 1996) (approved tentatively in May of 1996) (discussing contingent fees).

In a discussion of fee splitting, a 1996 draft mentioned class actions and other "conglomerate litigation" that include "novel financing arrangements," and stated that such arrangements should only be undertaken with the "consent of the clients and, in the case of class actions, of the tribunals." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 59, at 5-6 (Council Draft No. 12, Sept. 12, 1996). The 1997 proposed draft comments on class actions in which "lawyers from different firms work together to represent the interests of the class." RESTATEMENT OF THE LAW GOVERNING LAWYERS § 59(h) (Council Draft No. 13, Oct. 8, 1997) [hereinafter ALI COUNCIL DRAFT NO. 13] (Ch. 3, *Client and Lawyer: The Financial and Property Relationship; Topic 5, Fee Splitting with Lawyers Not in the Same Firm*) (approving of fee splitting agreements as long as the "division is in proportion to the services performed by each firm or each firm assumes joint responsibility for the representation;" also noting that while most jurisdictions require written agreements, the absence of a writing should not alter attorneys' rights).

21. As noted above, some administrative regimes address lawyers-client fee arrangements. *See, e.g.*, The Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901-945(c) (1994). A portion of the Act was upheld in *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 727 (1990); *see also* Lester Brickman, *The Asbestos Claims Management Act of 1991: A Proposal to the United States Congress*, 13 CARDOZO L. REV. 1891, 1892, 1915-16 (1992). Brickman advocated that attorneys for successful claimants be paid reasonable fees based on hourly rates that take into account several factors, including comparable rates for lawyers in administrative proceedings, the "risk, if any, borne by the attorney," and the need of claimants for access. *Id.* at 1916. He also recommended that, under limited circumstances, attorneys for unsuccessful claimants be paid as well. *Id.*

22. 11 U.S.C. § 330(a) (1994) (providing in part that courts may award attorneys "reasonable compensation for actual, necessary services;" courts are to "consider the nature, the extent, and the value of such services, taking into account all relevant factors," including time spent, rates charged, and the utility and benefit of the services). This statute also requires courts to consider whether the time charged was "commensurate with the complexity, importance, and nature of the problem," and how the compensation relates to that charged by "comparably skilled practitioners" in non-bankruptcy cases. *Id.* These provisions were amended in 1994 to prohibit payment for duplication of services. *Id.* § 330(a)(4)(A)(i); *see also id.* § 503(b)(4) (allowing reasonable attorneys' fees in administration of estate).

23. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 U.S.C.); 15 U.S.C.A. § 77z-1(a)(3)(B)(v) (West Supp. 1996) ("Selection of lead counsel") ("The most adequate plaintiff shall, subject to the approval of the court, select and retain counsel to represent the class"); *id.* § 77z-1(a)(6) ("Restrictions on payment of attorneys' fees and expenses") ("Total attorneys' fees and expenses awarded by the court to counsel for the plaintiff class shall not exceed a reasonable percentage of the amount of any damages and prejudgment interest actually paid to the class"). As a reading of that language makes plain, the legislature does not direct courts on what constitutes a "reasonable percentage" or on whether to use a lodestar or percentage-of-the-fund to determine an amount. The statute does, however, require consideration of fees and expenses together. *See* Raftery v. Mercury Fin. Co., No. 97C624, 1997 U.S. Dist. LEXIS 12439 (N.D. Ill. Aug. 15, 1997) (interpreting the statute to permit competitive proposals for appointment of lead plaintiffs that include proposals on fees and expenses).

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many lawyers who participate in mass torts,[24] some of whom may work solely for individual plaintiffs, others who may also work for individuals as well as on occasion for the group as a whole, and yet others, who serve on PSCs and are charged officially as working for the plaintiff group as a whole.

III. THE IMPULSE TO REGULATE: THE SIZE OF FEES, THE NATURE OF THE WORK, AND THE QUESTION OF COSTS

In a few aggregate mass torts cases, judges have decided that regulation of contingency fees is appropriate and have intervened to alter the contractual arrangements between clients and attorneys. One question is why: What inspires regulation of regimes that—absent fee shifting legislation—go largely without intervention?[25]

Aggregation inspires superintendence of fees for a range of reasons. First, the work of judges on attorneys' fees in all kinds of cases has exposed the courts to billing practices that upset them; judges have become impatient and distressed at the size of bills and the relationships between outcomes and costs.[26] Second, and specifically in the context of large-scale litigation, the aggregate weaves together a group of claims that can result in recoveries of millions of dollars. While the contracted fee percentage of the award often is the same from the single case to the aggregate litigation, a one-third attorney fee in million and billion dollar cases stuns even professionals accustomed to large payments.[27]

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24. We are not alone in noting the lack of rules. *See, e.g.*, JACK WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION 40-41 (1995) (arguing that ethical issues in mass torts have not "been given the special attention they deserve"); Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995) (describing current rules as unresponsive to issues of mass torts); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be: Non-Jurisdictional Matters* (pt. 2), 42 UCLA L. REV. 967, 1051 (1995) (discussing the increase in consolidated cases, with lead and liaison counsel, and the existence of what she terms "apportionment issues").

25. For discussion of efforts to regulate fees, including some state rules that require that such agreements be filed with the court and rules that prohibit contingency fees for certain kinds of cases, see generally Ted Schneyer, *Legal-Process Constraints on the Regulation of Lawyers' Contingent Fee Contracts*, 47 DEPAUL L. REV. 371 (1998). Statutory regulation is discussed in Brickman, *Contingent Fees*, *supra* note 1, at 124-26 (discussing state legislative limits on recoveries by requiring fee percentages to decline as the amounts of recoveries grow).

26. *See, e.g.*, Broyles v. Director, Office of Workers' Compensation Programs, 974 F.2d 508, 510-12 (4th Cir. 1992) (discussing the examination of an attorney fee application for a black lung claimant, the court questioned the number of hours spent researching a particular area, complained about hours billed per day, and questioned the notation of 15 minutes to make a telephone call; the fee request of $76,795 was denied and the sum of $43,000 was awarded).

27. See, for example, the recent discussion of whether attorneys' fees should be paid to successful plaintiffs' attorneys, retained by Florida when it sued tobacco companies to recover

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Third, because individual claims may result in modest per-person recoveries, attorneys are often the largest stakeholders, receiving fees far in excess of any individual claimant's recovery; the question arises about whether the litigation was "worth it" if the largest "winner" (in monetary, rather than regulatory terms) is the attorney.[28] Fourth, individual litigants are seen as ill-situated to monitor effectively the work of the attorneys; the concern is that large fee awards are made untethered from any oversight about the work performed. Fifth, upon completion of a successful contingency fee claim, the "contingent" nature of the case (ex ante) may be hard to recapture (ex post), resulting in an evaluation of a large monetary payment as a "windfall" to attorneys, seen as having taken relatively little risk yet having received an enormous return.

Sixth, and moving from large fees to relatively smaller fees, a reduction in fees can be justified not by the sheer magnitude of the return but by the repetitive nature of the work and the reduction in risk that can occur toward the tail end of aggregate litigation. In those instances, some judges view much of the work per case as relatively minor and routine and hence unsuitable for a one-third contingency fee. For example, in the Dalkon Shield litigation, a district judge reduced fees to alleviate what he termed "overcompensation" of attorneys who represented individual claimants in the dispute resolution proce-

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Medicaid expenses. *Fight over Attorney Fees Overshadows Tobacco Deal*, ORLANDO SENTINEL, Oct. 5, 1997, at B6. According to the press, five of eleven lawyers retained have "filed liens against the first $750 million paid to the state from the tobacco settlement, insisting that they are entitled to a share of $190 million" or 25%. *Id.*; *see also* John D. McKinnon, *State's Lawyers Battle over Tobacco-Suit Fees*, WALL ST. J., Sept. 10, 1997, at F2 (discussing dispute among lawyers about what percentage or kind of fee to accept); Bowling v. Pfizer, Inc., 102 F.3d 777, 778-79 (6th Cir. 1996) ("Four hundred years ago William Shakespeare observed that lawyers 'dream on fees.' During the ensuing centuries, few lawyers, even in their wildest dreams, have envisioned fees such as those that have resulted in mass tort litigation.") (citation omitted). An occasional opinion praises attorneys and notes that their fees are not exorbitant. *See, e.g.*, Walco Invs., Inc. v. Thenen, 975 F. Supp. 1468, 1471 (S.D. Fla. 1997) (describing a 15% of the common fund fee award as "a bargain" for the clients).

28. The current standard bearer for those critical of contingent and percentage fees is *Kamilewecz v. Bank of Boston*, in which, because of the limited individual recovery and the taxation of attorneys' fees, some "victorious" class members were credited with small sums in recovery and debited with larger sums as payment of their share of attorneys' fees. 92 F.3d 506 (7th Cir. 1996), *reh'g en banc denied*, 100 F.3d 1348 (7th Cir. 1996). The first appellate opinion begins: "A class action in Alabama cost Dexter Kamilewecz $91.33 in attorney fees to recover $2.19 on the merits." 92 F.3d at 508. This kind of case was one of the reasons that the Advisory Committee on Civil Rules revisited the class action rule in the mid-1990s, but, after debates about a proposal (nicknamed "the just ain't worth it" provision) that would have invited consideration of the utility of a class as a predicate to certification, the Advisory Committee has decided not to suggest such an amendment.

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dures created by the Dalkon Shield Claimants Trust.[29] This litigation provides examples of both fee cuts on relatively small sums and of fee cuts that, when aggregated across claimants, still result in large lawyer fees. When affirmed on appeal, the lower court's decision to reduce the fees was itself termed "overly generous,"[30] and the Fourth Circuit noted that one plaintiff's attorney firm with clients receiving $54,754,000 in settlements would, "with the normal contingent fee of one-third," have "produced $18,000,000 in fees."

While some aggregate lawsuits provide impulses to reduce fees, aggregation has also been used to justify increasing litigants' costs. Under-examined in the literature is the point that aggregation itself costs money. One of the few cases facing the issue comes by virtue of a group of thirteen defendants protesting a court-imposed fee of $41,500 per defendant.[31] The litigants had been charged to maintain a

29. *See, e.g., In re* A.H. Robins Co., 182 B.R. 128 (E.D. Va. 1995) (asserting authority to minimize transaction costs under the bankruptcy plan and under bankruptcy code as well as relying on court's inherent powers over fees; concluding that attorneys representing claimants would be overcompensated, were they to receive the full amounts of their contingency fees on the subsequent distributions of funds on a pro rata basis and limited such compensation to no more than 10% of the pro rata payments to claimants), *aff'd sub nom.* Bergstrom v. Dalkon Shield Claimants Trust, 86 F.3d 364 (4th Cir. 1996) (describing the 10,984 attorneys who received notices of the proposed fee limitation, the 29 attorneys who appeared to contest the limitation, and affirming the district court's jurisdiction, the process it afforded the attorneys, and its ruling), *cert. denied*, 117 S. Ct. 483 (1996).

See also In re A.H. Robins Co. (*In re* Norris), 205 B.R. 771 (E.D. Va. 1997) (rejecting an individual attorney's request to permit full fees based on her waiver and reduction of some contingency fees for applicants, her time-intensive assistance of individuals, and the debt claimed to have been incurred in the course of her practice); *In re* A.H. Robins Co. (*In re* Medical Claims Consultants), 205 B.R. 767 (E.D. Va. 1997) (rejecting an application to exempt a consultant group that assisted Dalkon Shield claimants from the fee limitation and warning attorneys that any withholding of funds from clients will be deemed a violation of the court order); *In re* A.H. Robins Co. (*In re* Cashman & Partners), 211 B.R. 536 (E.D. Va. 1997) (rejecting an Australian lawyer's request for fee reinstatement based on his having taken a 25%, rather than a 33%, fee); *In re* A.H. Robins Co. (*In re* Linker), 211 B.R. 533 (E.D. Va. 1997) (rejecting a petition for fee reinstatement based on a request that the court distinguish between those attorneys who invested extensive time and effort for clients before Robins declared bankruptcy and those attorneys who were retained after the bankruptcy filing).

30. *In re* A.H. Robins Co. (Bergstrom v. Dalkon Shield Claimants Trust), 86 F.3d 364, 377 (4th Cir. 1996) (describing the attorneys' disagreement with the trial judge and the appeal as "wonderful examples of chutzpah").

31. *In re* Two Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 994 F.2d 956, 960 (1st Cir. 1993). For discussion of discovery cost-sharing by plaintiffs' attorneys in federal and in state court, see *In re* Norplant Contraceptive Prods. Liab., No. MDL 1038, 1996 U.S. Dist. LEXIS 7104 (E.D. Tex. May 17, 1996) (ordering that representatives of a PSC in a multidistrict litigation contact plaintiffs' counsel in state actions then pending to negotiate discovery and its costs).

More common in the case law is mention of "litigation costs" and the setting aside of sums for the costs of "administration" of a class. *See, e.g., In re* Combustion, Inc., 968 F. Supp. 1116, 1131 (W.D. La. 1997) (establishing a reserve—of up to six percent of approximately $128 million—to

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defendants' "liaison person" and a court-ordered "Joint Document Depository"—a location that participants (more than 2000 plaintiffs and 200 defendants) had to use for discovery documents.[32] A group of insurance defendants argued that they had successfully removed themselves from the litigation on summary judgment,[33] that the documents in the depository were focused on the underlying tort and were irrelevant to their arguments that turned on contract, and that it was inequitable for them to be taxed for such documents' collection and maintenance. The district court disagreed, finding that these defendants had benefited from the depository. The First Circuit upheld the trial court's decision, finding no abuse of discretion.[34]

While information about defendants' costs are unusual to garner from published reports, information is more readily available about the costs of aggregation for plaintiffs. PSCs typically seek reimbursement from courts for those expenses. In essence, PSCs are ad hoc law firms created to litigate a particular case. Sometimes, the costs of creating such a firm are minimal; the participants may use their home offices as a base, travel relatively infrequently, and rely heavily on telecommunication. But in other instances, the ad hoc firm rents an office, hires staff, buys office equipment, prints stationery, hires experts, holds meetings, conducts depositions, and the like.

Note that because the PSC is a creature of a lawsuit, it does not directly have clients. Rather, specific attorneys who serve on a PSC have clients. Thus, unless retainer agreements are modified in advance of or upon the creation of a PSC, no client has agreed by contract to pay the costs of aggregation, and hence the questions emerge

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pay for costs of distributing recoveries, such as newsletters and notices to the class, and the employment of experts to evaluate injuries).

32. *See in re* Two Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig., 994 F.2d at 960-61 (describing pretrial orders making assessments totaling in the aggregate $705,500 and their distribution towards maintenance of offices and operating expenses; also describing planned but abandoned assessments for litigants to subsidize construction of a special courtroom). *In re Two Appeals* held that a district court has the "authority [implied under federal discovery rules] to reallocate court-imposed case-management expenses if, in the exercise of its considered judgment, it determines that equity and the interests of justice so require." *Id.* at 965. The district court's order requiring those payments was subsequently affirmed. *In re* Three Additional Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 93 F.3d 1, 2 (1st Cir. 1996).

33. According to the appellate court: "Fairly early in the game, the pre-fire insurers moved for summary judgment on all claims against them. After a lengthy interval, the district court granted their motions . . . [then] ordered . . . that they bear their own costs" and pay the assessments levied. *In re* Three Additional Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 93 F.3d at 2.

34. *Id.* at 3-6. The appellate court also concluded that courts had to have the authority to insist on joint venturing and that all parties share the associated costs of the aggregation. *Id.* at 5.

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of who pays and how much. The practice is for PSCs to require that each plaintiff's attorney be "assessed" specific amounts (ranging from hundreds to thousands of dollars per client) to fund a litigation. At the conclusion of the lawsuit, an accounting occurs during which PSC members apply to courts to be reimbursed by plaintiffs for the "costs" of aggregation.[35]

The question of costs returns one to the issue of methods of payment of lawyers' fees. Contingency fee and hourly-paid attorneys have different billing practices, albeit ones that are neither static nor fixed.[36] The custom in contingency fee practices has been for lawyers to absorb some overhead and expenses that attorneys who bill by the hour often charge directly to clients. For example, contingency fee percentages generally have been expected to capture all staff costs including paralegal or associate work, while hourly billing attorneys charge such time to clients. Further, all attorneys are expected to specify, in advance, methods of billing and what items are to be charged as "costs;"[37] contingency fee attorneys are supposed also to explain whether any such expenses will be paid directly by the client before or after the percentage fee is calculated. Finally, according to the American Bar Association, attorneys are not supposed to profit

35. *See* Active Prods. Corp. v. A.H. Choitz & Co., 163 F.R.D. 274, 284 (N.D. Ind. 1995) (detailing case management rules and describing assessments to pay for special masters to work on settlement during one of three phases of the litigation). Such requests are not always successful. *See* Rapoport v. Showa Denko K.K. (*In re* Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.--II), 953 F.2d 162, 164 (4th Cir. 1992) (overturning in part an administrative order in which every plaintiff was taxed $1000 plus "0.5% [of the value] of any settlement reached or verdict entered" into on the basis that all derived benefits from a steering committee's discovery); *see also* Case v. Continental Airlines Corp., No. 91-1156, 1992 U.S. App. LEXIS 19148, at *10-11 (10th Cir. Aug. 11, 1992) (overturning assessments of three percent of a settlement and a pro rata share of $12,000 as reimbursement for expenses to PSC and liaison counsel; the individuals ordered to pay (two clients and their attorney) had refused to be bound by an "exemplar" trial and had no access to a joint document depository).

36. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 93-379 (1993) [hereinafter ABA Ethics Op. 93-379] (Billing for Professional Fees, Disbursements, and Other Expenses) (distinguishing between "general overhead," detailed as "the lawyer's cost in maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities and the like," as compared with "disbursements," such as stenographic services, case-specific travel, lodging, and meals, and "in-house provision of services," described as "photocopying, computer research, on-site meals, deliveries and other similar items"). The ABA Committee concluded that attorneys could charge clients for disbursements and in-house services but could not make profits on them. *Id.*; *see also* Pozzi v. Smith, 952 F. Supp. 218, 227 & n.7 (E.D. Pa. 1997) (discussing what expenses are reimbursable and concluding that while LEXIS research is reimbursable in a common fund fee application, the "cost of accessing materials in counsel's law library is part of counsel's overhead and therefore not compensable"); *In re* Rio Hair Naturalizer Prods. Liab. Litig., No. MDL 1055, 1996 U.S. Dist. LEXIS 20440, at *52 & n.15, *58-59 (E.D. Mich. Dec. 20, 1996) (discussing the inclusion of paralegal time and the billing of computer-based research).

37. *See* ABA Ethics Op. 93-379, *supra* note 36.

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from the provision of certain services, such as the cost of making a photocopy, but may be able to recoup "overhead expenses directly associated with the service."[38]

Hence, costs and fees can be intertwined, and the mode of fee payment (hourly billing versus contingent billing) may turn some categories of expenses from "overhead" into charges paid directly by clients. In other words, an agreement for a percentage fee award, made in advance, usually includes all staff services, but awards of percentages of recovered funds, ex post, sometimes are calculated or justified by examining hours spent by attorneys and staff. Confusion arises when judges award lawyers' fees and costs after the fact and specifically when they attempt to rely on a mixture of methods. For example, in the Third Circuit, district courts are instructed to "check" a percentage award against a lodestar calculation.[39] If the results by both methods yield a similar percentage, a court is supposed to be reassured that the percentage selected represents a fair return.[40] Yet the mix of those methods does not mimic charging practices, ex ante, in which lawyers are obliged to disclose both a means of calculating payment and what kinds of items are to be charged and which absorbed in overhead.[41]

A few district courts have understood the interrelationship between fees and costs and the potential for slippage between categories of "fees" and "costs." Those judges have attempted to link the two sets of expenses, either by requiring attorneys to specify a proposed per-

38. *Id.*; *see also* Spicer v. Chicago Bd. Options Exch. Inc., 844 F. Supp. 1226, 1260 (N.D. Ill. 1993) (stating that firms should not run their "photocopy operations as profit centers").

39. *See, e.g.*, *In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 822 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

40. *See, e.g.*, *id.* (urging the use of a cross check between percentage-of-the-fund and lodestar); *In re* Sapiens Sec. Litig., No. 94 Civ. 3315, 1996 U.S. Dist. LEXIS 17644, at *24 (S.D.N.Y. Nov. 27, 1996) (awarding a quarter, instead of the third requested, as attorneys' fees of a settlement fund in a securities litigation; relying in part on an evaluation of hours spent; and noting that "the lodestar amount is useful in testing the propriety of an award based on the percentage of recovery").

41. *See* ABA Ethics Op. 93-379, *supra* note 36; *see also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 94-389 (1994) (Contingent Fees) (stating that contingent fees are ethical "as long as the fee is appropriate and reasonable and the client has been fully informed of the availability of alternative billing arrangements"). For criticism of that opinion, see generally Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-by-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996) (arguing that courts cannot enforce ethical prohibitions on contingency fee abuses and urging regulatory action); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walk*, 65 FORDHAM L. REV. 247 (1996) (arguing that the ABA refused for self-interested reasons to confront routine overcharging in contingency fee cases in which risk is far less than its reward).

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centage that accounts for both forms of charges,[42] or by capping fees and costs together,[43] or by calculating fee percentages on the net, rather than the gross, settlement fund value.[44]

IV. THE REGULATORY OPTIONS IN AGGREGATE TORTS

Where aggregate mass torts and more typical contingency fee arrangements converge is in the search for a "correct" fee.[45] The ever-present issue in the effort is the design of a metric. Should the baseline be the amount an individual attorney might have received, were she or he to bill on an hourly basis?[46] Should the measurement be a percentage of the value of the victory? If so, how should victories be valued?[47] What constitutes a "benefit conferred"? Should the refer-

42. *See, e.g.*, *In re* Oracle Sec. Litig., 131 F.R.D. 688, 132 F.R.D. 538 (N.D. Cal. 1990); *In re* Wells Fargo Sec. Litig., 156 F.R.D. 223 (N.D. Cal. 1994) (requesting bids from proposed lead counsel and requiring information on proposed costs and fees), 157 F.R.D. 467, 470 (N.D. Cal. 1994) (explaining that "an attorney generally has no incentive to minimize litigation expenses unless his fee award is inversely related to such expenses . . . [and that] . . . when an attorney treats a resource devoted to litigation as a reimbursable expense, the attorney has a clear incentive to substitute that resource for those paid out of the attorney fee").

43. For example, the now defunct proposed settlement in the breast implant case stated that the maximum for costs, fees and the expenses of administration would be 24%. *See* Breast Implant Litigation Settlement Notice; *In re* Silicone Gel Breast Implants Prods. Liab. Litig., No. MDL 926 (N.D. Ala. Sept. 16, 1994) (asserting authority over all attorney-fee payments of plaintiff class; not permitting enforcement of contingency fee contracts entered into after March 1, 1994 when the existence of the proposed settlement became known, and reserving the right to "set the maximum limits on the contingency percentages that may be recognized" to "afford equity among counsel" and to pay the services of "common benefit" counsel).

44. *See, e.g.*, LaChance v. Harrington, 965 F. Supp. 630, 647-48 (E.D. Pa. 1997) (relying on the net rather than the gross amount for fee calculation, but declining to include the costs of the administration of the fund as part of the net calculation).

45. And the issue is not limited to contingent fees, as many institutions debate "excessive" attorney fees and seek to curb them. *See generally* Gail Diane Cox, *Fie on Fees: Excessive Fees are Attacked Across the Board*, NAT'L. L.J., Nov. 4, 1996, at A1 (summarizing an array of cases and state activities to deal with attorney overcharging).

46. *See, e.g.*, Bergstrom v. Dalkon Shield Claimants Trust (*In re* A.H. Robins Co.), 86 F.3d 364, 377 (4th Cir. 1996) (criticizing a firm that received $54.7 million in settlements and might receive an additional $22 million from a surplus fund by relying on a $300 per hour attorney who would have to bill 70,000 hours to receive such a sum); Gilman v. Independence Blue Cross, No. 96-1601, 1997 U.S. Dist. LEXIS 15481, at *27, 30 (E.D. Pa. Oct. 6, 1997) (awarding a 25% fee and reporting an analysis of common fund cases in that district in which awards ranged from 25%-35% of the fund, "yet those awards were only 0.29 to 1.6 times the lodestar fee").

See also the description of proposed Illinois legislation which would require lawyers to provide clients with information about the numbers of hours spent and average hourly fees in Rex Bossert, *Tort Law Would Bar Products Test*, NAT'L. L.J., Mar. 3, 1997, at A8 (describing S.B. 383, the Attorney-Client Contingency Fee Information Act, proposed in Illinois in February, 1997); *see also* Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 272-80 (1998) (evaluating contingency fees by calculating the "effective hourly rates").

47. *See, e.g.*, Bowling v. Pfizer, Inc., 922 F. Supp. 1261, 1280-81 (S.D. Ohio 1996) (reducing a fee in part after a dispute on the "value" of the fund recovered to replace defective heart valves

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ent be solely to a monetary outcome, or should valuation include some sums in recognition of the justice of the claim or of the desirability of exposing negligence to the public gaze?

Assuming some means of assessing value, what percentage of that value should be accorded to attorneys? Should familiar numbers, like a third, be used?[48] Or should the measurement be based on some ratio between recovery and the cost of its recoupment, which is to say that the transaction costs of recovery should not eclipse the recovery itself? Further, should fees be structured to create incentives for early settlements to lower transaction costs?[49]

And what about the costs of calculating value or ascertaining the magnitude and utility of attorneys' investment of work and time and learning about the details of the expenditure of funds spent in pursuit of the goal? How are numbers calculated for any of these valuations? What guides judgments about the "reasonableness" of the costs spent? The time invested?

In discussions of attorneys' fees in general and contingency fees in particular, these questions are familiar; they are echoed and answered in part in attorney fee case law. Those enamored with the percentage-of-the-fund method of calculation tout its simplicity and value its ability to lower the costs of determining the amount of payment. Proponents find comfort in its familiarity, for it recycles contingency fee concepts but applies them ex post instead of ex ante. Others object to the arbitrariness of percentages and applaud the specificity of hours worked at market rates.[50] Further, in both the context of statutory fee shifting and common fund awards, the debate about "values" of outcomes comes to the fore, with some complaining the attorneys' fees should not outstrip monetary returns to clients and others arguing that regulatory as well as private goals are advanced by litigation and,

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and in part because of a view that the plaintiffs' proposed percentage of the fee was not "commensurate" with the work involved); Bowling v. Pfizer, Inc., 927 F. Supp. 1036, 1046 (S.D. Ohio 1996) (reconsidering the decision in part and authorizing an increase in payment of expenses to "Special Counsel" and "English co-counsel"). Both decisions were affirmed in Bowling v. Pfizer, Inc., 102 F.3d 777 (6th Cir. 1996).

48. Case law percentages awarded in common fund cases range widely, and also vary with whether one set of lawyers is being paid or whether PSC members are being paid atop their own contractual fees. Numbers like one third or one quarter are often cited. *See, e.g.*, Camden I Condominium Ass'ns, Inc. v. Dunkle, 946 F.2d 768, 774 (11th Cir. 1991) (using 25% as a "benchmark"); Gilman v. Independence Blue Cross, No. 96-1601, 1997 U.S. Dist. LEXIS 15481, at *31 (E.D. Pa. Oct. 6, 1997) (summarizing awards ranging from 25%-35% of common funds); Pozzi v. Smith, 952 F. Supp. 218, 225-26 (E.D. Pa. 1997) (summarizing recoveries ranging from 19%-45%).

49. *See, e.g.*, BRICKMAN, HOROWITZ & O'CONNELL, *supra* note 1, at 36-38.

50. *See, e.g.*, City of Burlington v. Dague, 505 U.S. 557, 562 (1992) (explaining why the "lodestar" has become "the guiding light" of statutory fee-shifting doctrine).

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hence, that attorneys should be rewarded for their efforts to enforce the rule of law.[51]

But the predicate assumption in much of the discussion to date is that however measured, once a fee is determined, its recipient is easily identified. Pay the attorney or the firm. As detailed above, mass torts raise the questions of which attorneys are to be paid what amounts of money. How should costs and fees be allocated among attorneys who participate in such lawsuits on behalf of plaintiffs? The relationships among access, risk, effort expended, services provided, and rewards reaped provide myriad possible results.

Below, we sort through the options. Our goal in this brief commentary is not to argue for a particular result but rather to identify the concerns that might support or negate various regulatory responses. We do, however, have a concern that some of the case law, with its readiness to make assumptions about which attorneys merit what forms of compensation, evidences an understandable but problematic posture of trial judges reluctant to dig into the details of fee and cost applications. What we have learned about the array of arrangements of attorney investments in mass tort litigation makes us advise against too-ready generalizations. Mass torts are themselves a varied lot that should not be seen as an undifferentiated "aggregate." The procedural formats and agreements among participants are diverse, some innovative, some worthy of celebration, and others to be constrained. While guidelines on costs (discussed below) can cushion the work required, regulatory responses of fees (if deemed desirable) should be based on fact-specific, contextualized evaluations that include assessments of risk, as it changes over time and payments for investments of both capital and of work, including the provision of services of individual litigants.

A. Relying on the Regime of Private Contract

One might leave the world as one finds it, in which all fees and costs paid in mass tort resolutions rely on private contracts. Whether providing services individually or working for the "common benefit" of the group as a whole, all lawyers might depend solely on their individ-

51. *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 576-77 (1986). In *Riverside*, the majority approved a fee award of $245,456.25 for pursuit of a civil rights claim resulting in a recovery to the plaintiffs of under $35,000. *Id.* at 565, 581. The majority rejected the concept that attorneys' fees had to be proportionate to recovery in civil rights cases, which (it believed) vindicated "important civil and constitutional rights" and should not, therefore, be valued solely in terms of the "monetary recover[y]." *Id.* at 574, 577. The dissenters disagreed, arguing that results were critical to the "reasonableness" of any fee. *Id.* at 593 (Rehnquist, J., dissenting); *see also supra* note 28 and accompanying text.

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ual client contracts—and whatever additional contracts are made between and among groups of lawyers involved in these cases—for payment. This form of payment is not fanciful, in that according to the litigation papers in the L-Tryptophan litigation, it was adopted;[52] PSC members received no premiums for their group service but rather recouped fees by virtue of their representation of individual clients (and gained professional recognition from being designated to serve on behalf of the whole).

Such a system creates an incentive for plaintiffs' attorneys to have many clients, for payment derives from each one. Thus, for those who believe that: (1) contingency fees align interests of clients and attorneys; (2) lawyers with large numbers of "individual" clients who also represent the group as a whole are desirable group representatives;[53] (3) costs of relying on courts to monitor or of legislation to set fees are great; and (4) the existence of a group requires no special role for a court nor prompts intervention by legislation—then the private contract model of fees and costs suffices.[54] Note further that this model assumes that the PSC will not ask the court to require subsidies from either lawyers or clients for the joint work and that clients pay no additional amounts to specific attorneys for the "benefit" or "cost" of being part of an aggregate process. Rather, clients' obligations to pay fees and costs are limited (or expanded) by whatever agreements they enter into with contracting attorneys, and then attorneys within such aggregates negotiate among themselves about how to allocate work, costs, and remuneration.

One concern about this approach is illustrated by recent asbestos litigation; attorneys who negotiated a settlement on behalf of a class of "future" claimants also had an "inventory" of clients who were, under a proposed agreement, to receive different sums than would future claimants.[55] Many commentators perceived a conflict between the work done on behalf of the group and the representation of indi-

52. Agreement on file with the authors.

53. In contrast, concern has been expressed that lawyers with many clients may not be appropriate representatives for a group as a whole. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2237-39 (1997) (discussing conflicts of interest in representation in the asbestos litigation "futures" settlement).

54. One might even argue that the existence of either a group of plaintiffs or of individually-retained plaintiffs' attorneys ("IRPAs") enables monitoring of attorneys' work and thus responds to some of the problems identified in the literature about the difficulties of ensuring the delivery of services, their quality, and attorneys' fidelity to clients' interests. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

55. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 630-31 (3rd Cir. 1996), *aff'd on different grounds*, Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).

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vidual clients.[56] Therefore, it may be unwise to create incentives for attorneys who represent aggregates to have, simultaneously, large numbers of individual clients within that aggregate.

Another problem can be garnered from some cases in which new filings occur after a good deal of the work of substantiating claims has been accomplished.[57] The worry is about "free riders" who obtain clients and receive, by private contract, significant percentages of the clients' recoveries for minimal work.[58] A third concern is evidenced by judicial rejection and professional prohibitions of attorney efforts to function as investors. In the "Agent Orange" litigation, for example, some lawyers agreed by contract to invest capital and, upon success, to receive substantial recoveries in return; the Second Circuit struck the agreement as illicit.[59]

In short, rejection of a private contract model emerges from several vantages. Regulatory impulses spring from an interest in protecting consumers of legal services, from a professional distaste for "disproportionate" recoveries, and/or from an effort to prohibit attorneys from functioning too brazenly as capital investors in lawsuits.[60]

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56. *See, e.g.*, Susan P. Koniak, *Feasting While the Widow Weeps*, 80 CORNELL L. REV. 1045 (1995); *see generally*, Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811 (1995).

57. The Dalkon Shield fee cutting is justified on this rationale. *See supra* notes 29-30 and accompanying text. The objecting lawyers, however, argued that they had expended large sums of money to explore and develop cases early on and that the judicial description of "surplus" distributions mischaracterizes the sums recovered by the clients; some moneys were withheld to ensure sufficient funds for distribution to all.

58. *In re* Rio Hair Naturalizer Prods. Liab. Litig., No. MDL 1055, 1996 U.S. Dist. LEXIS 20440 (E.D. Mich. Dec. 20, 1996), provides an example of this reaction. The court approved a settlement that resulted in a five million dollar fund, *see id.* at *48, insufficient to compensate fully the injured. *See id.* at *27. The court awarded 20% of that fund to the PSC, praising it for its "terrific job" and noting that a larger award would have been appropriate but for the lack of funds. *See id.* at *56-57. The court then limited IRPAs' contingent fees to no more than five percent of clients' individual recovery, plus costs, and noted "the limited amount of work" done by individual attorneys. *See id.* at *64-65.

59. *In re* "Agent Orange" Prod. Liab. Litig. (David Dean), 818 F.2d 216, 225-26 (2d Cir. 1987) (invalidating an agreement under which members of a Plaintiffs' Management Committee advanced funds and were to receive a "threefold return"). The district court had approved this "inventive method of fundraising." *Id.* at 221. The appellate court concluded that tying fees to amounts expended to finance the litigation violated equitable principles by reallocating fees among lawyers unrelated to services provided. *Id.* at 222. The Second Circuit thought fees should be allocated with some reference to a lodestar calculation and further, that permitting investments generates the potential for attorney conflict of interests, in which investors might want to settle early to recoup funds. *Id.* at 224. The court affirmed a requirement of disclosure of fee sharing agreements in class actions, *id.* at 226, but there is little evidence from the case law of implementation of that practice.

60. Of course, all contingent fee contracts in which lawyers advance costs (often without realistic hopes of repayment) are "investments" in lawsuits. Under current law, investment without responsibilities to provide legal services to clients crosses the line.

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B. *Paying for the "Premium" of an Aggregate, Public Subsidies, or Charging Less for "Economies of Scale"?*

The alternative to a laissez faire approach is to embark on a regulatory regime that reallocates payments. As noted above, the regulatory opportunity to control fees and costs exists because dispositions that encompass an array of claims require either legislation or court approval to conclude.[61] Thus, as a condition of exit from a court system, or as a predicate of entry to an administrative one, regulation of the fees and costs paid to attorneys is possible.

Three questions need to be addressed: What form should such regulation take? Who should regulate this arena? And when should the decision about fees be made? Clarity around these questions might generate more responses to them. We begin that conversation below.

1. *Charges, Subsidies, or Reductions?*

Regulation could take the form of exacting surcharges from litigants, of capping fees and costs of attorneys, of public subsidies, or of requiring transfers of funds from some attorneys to others. One could see the aggregate as appropriately occasioning additional fee and cost awards. Plaintiffs could be surcharged for having their individual attorneys' services augmented by lawyers for the group. Were one to perceive of these sets of lawyers as doing two distinct forms of work—IRPAs as providing individual services to clients and PSC, or other "common benefit" lawyers as working for the group as a whole—one might charge for the "additional" services, be those lawyer fees or the costs of coordination among attorneys.[62]

Before the concept of surcharges is rejected as fanciful in a world much taken by the image of excessive fees charged by attorneys,[63] one should note that case law requiring clients in mass torts to pay the "costs" of PSC members may impose such a surcharge. As discussed above, in addition to the costs specified by individual attorneys in fee contracts, plaintiffs in some mass torts are assessed the costs of the

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61. *See* Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2252 (1997); *see also* Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 858-60 (1997).

62. A few courts have expressly prohibited justifying increased fees or expenses by the addition of lawyers. *See, e.g.*, Lax v. First Merchants Acceptance Corp., No. 97C2716, 1997 U.S. Dist. LEXIS 12432, at *25 (N.D. Ill. Aug. 15, 1997) (permitting two law firms to serve as co-lead counsel in a securities litigation but barring duplicate services or increased fees and costs).

63. *See* Marc Galanter, *Anyone Can Fall into a Manhole: The Contingency Fee and its Discontents*, 47 DEPAUL L. REV. 457, 458-62 (1998) (describing public opinion surveys that perceive attorneys to be overpaid); Cox, *supra* note 45, at A1 (discussing recent protests against attorney fee charges).

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group's attorneys. Such charges can run from paying for office rentals, library research, hotel rooms, telephone calls, and travel, to photocopying and food.[64] Further, as noted above, defendants may also be assessed the costs of group processing.[65] If aggregation is perceived as benefiting individuals—either in terms of obtaining more or more expert legal services, in terms of recouping larger sums, or in other ways achieving "better" results—requiring those individuals to pay for the added benefit would be appropriate.

If aggregation benefits litigants, then taxing litigants for the added value that aggregation brings could be appropriate. Yet a commonplace assumption in some of the literature on aggregation is that, in tort cases, group-based processing is a means to transfer money from plaintiffs with high value claims to plaintiffs with lower value claims. (The animating assumptions are that aggregate litigation cannot generate infinite sums but rather that a capped amount of recoveries is redistributed by virtue of aggregation.)[66] If such a transfer does occur, then taxing plaintiffs who in the absence of aggregation would be economically better off becomes problematic. Taxing the lower-end plaintiffs benefiting from the group processing is more readily explained but in practice may be difficult to accomplish, both because of the problem of sorting "winners" and "losers" and also because the low end recovering plaintiffs will then bear disproportionate large costs from their smaller awards.

Another option is to look outside the aggregate to pay for its expenses. For example, if the assumption of redistribution among claimants is correct, and if that redistribution enhances equity by enabling a wider group of injured individuals to recoup for injuries inflicted, then perhaps the costs of aggregation should be publicly subsidized because of aggregation's capacity to enable fairer distribution through court-based processes. (Some administrative damage regimes have this feature of government subsidies.) Similarly, if aggregation is seen as benefiting courts to enable avoiding repetitive or conflicting decision making or helping other litigants, waiting in the queue for judicial

64. *See, e.g.*, Seidman v. American Mobile Sys., 965 F. Supp. 612, 625 (E.D. Pa. 1997) (discussing compensation for food, photocopy, Lexis and Westlaw charges); *In re* Dupont Plaza Hotel Fire Litig. (Massaro), 111 F.3d 220 (1st Cir. 1997) (upholding charges ordered to be reimbursed by the judge but requiring that PSC members reimburse plaintiffs for some items charged to plaintiffs as "costs," including some of the photocopying costs billed initially at $.25 per page when $.10 per page should have been charged and the payment of $913,000 to an attorney, hired by the PSC but characterized as an "expert").

65. *See In re* Three Additional Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 93 F.3d 1, 6 (1st Cir. 1996).

66. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 904-10 (1987).

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services, then state subsidies of the extra expenses incurred by such processing may be desirable.

But aggregation is more often justified for its assumed ability to economize. In theory, by avoiding individual and repetitive inquiries to establish liability or assess damages, aggregate litigation offers courts and litigants a means to limit transaction costs. Hence, instead of authorizing more funds to be paid from someone for aggregation, aggregate litigation could be used as the reason to cut fees and costs across the board. For example, under this approach, the case law on costs would have to be revisited to insist that individual litigants not absorb the charges of attorneys working for their common benefit, but rather that such lawyers either see "costs" as part of their overhead or obtain reimbursement from other lawyers within the case.

On the issue of how to cut fees, one returns to the literature on how to value lawyer services, such as by hours spent, expertise (translated presumably into rates), outcomes and recoveries, quality of services delivered to litigants, and/or utility of invoking legal processes. The questions echo the debate about percentage-of-the-fund versus hours. But in the aggregate tort, the other issue raised is about which attorneys should take a reduction—all of them? PSC members? IRPAs? Some amalgam? Here the small body of case law has sometimes limited the fees paid to PSC members,[67] at other times has focused on cutting fees of the IRPAs by using individual fee contracts to set the boundaries of fees and then paying PSC members from IRPAs fees,[68] and at still other times by simply reducing the fees received by IRPAs.[69]

One rationale for reallocation between IRPAs and PSC members is to conceptualize the aggregate as a kind of forced referral or sale, in which individual cases are passed on to PSC members to pursue as a unit. On the assumption that the PSC members do the "lion's share" of the work of discovery, case preparation, negotiation, and litigation, paying them for their work is simply reflecting the concept of "quantum meruit." Reducing the fees of IRPAs is similarly explained as the

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67. *See, e.g.*, Bowling v. Pfizer, Inc., 922 F. Supp. 1261 (S.D. Ohio 1996) (reducing a fee request from $33 million to $10 million).

68. *See, e.g*, *In re* Nineteen Appeals Arising out of the Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 615-16 (1st Cir. 1992); *In re* Thirteen Appeals Arising out of the Dupont Plaza Hotel Fire Litig., 56 F.3d 295, 311 (1st Cir. 1995). Both of these cases resulted in a rule that the attorneys' fees were to be funded by the total of contingent fee contracts, and that the fees were to be divided among PSC members and IRPAs with 50% going to those attorneys who had worked as "common benefit" attorneys.

69. *See, e.g.*, *supra* notes 29-30 and accompanying text (discussing the Dalkon Shield litigation).

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means to avoid "unjust compensation" to lawyers, and reducing the gross fees of both sets of lawyers is justified by the economies resulting from the group process.

Fee cutting in aggregate mass torts could also be justified by revisiting the standard justifications of contingency fees—enabling access, providing legal services, and rewarding risk. Which attorneys enable access to asserting legal rights? Which provide legal services and to whom? Who takes the risk? Of what? For example, if mass tort aggregation "solves" the problem of access by shifting the responsibility for gatekeeping from attorney to court—which is to say that if a class is declared and those individuals who lack attorneys nonetheless have plenary access to courts to seek recoupment—then paying at least some lawyers for enabling access seems unnecessary.[70] Similarly, if decision making in the aggregate lowers risk (perhaps for the wrong reason of generating undue pressures to settle),[71] paying premiums to certain attorneys for taking risks is similarly unattractive.

But that analysis assumes that the aggregate itself is not a contingent event. Given current debates about aggregation, complete with appellate reversals of some certified class actions and questions about the longevity of others,[72] individual and group attorneys in at least some cases take risks by agreeing to represent individuals and may have special skills in selecting and developing cases. Hence, both access and risk are neither flat nor static concepts but require analysis not only in a specific case but also over time with an openness to reassess or to acknowledge variation in risk over time.

In addition, assessing the value of contributions of a multitude of attorneys to a particular outcome is very difficult. Are the risk takers the attorneys with the largest financial investments? How does one assess relative contributions of some attorneys who excel in negotia-

70. Here, Dalkon Shield and breast implant litigation provide examples. *See supra* notes 29-30 and accompanying text (discussing the Dalkon Shield cases); *supra* note 42 (discussing breast implant litigation). Widespread notices in the media of the bankruptcy resulted in claims filed many times those brought by individual attorneys. *See* Herbert M. Kritzer, *Public Notification Campaigns in Mass Litigation: The Dalkon Shield Case*, 13 JUST. SYS. J. 220, 223 (1989-89) (describing the media program and the subsequent filing of more than 300,000 additional claims); Barry Meier, *Judge Discloses New Details of Settlement of Implant Suit*, N.Y. TIMES, Oct. 28, 1995, at 10 (discussing revisions of settlement proposal after some 430,000 claimants filed pursuant to a proposed settlement).

71. *See, e.g.*, *In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), *cert. denied*, 116 S. Ct. 184 (1995).

72. *See* Amchem Prods. v. Windsor, 117 S. Ct. 2231 (1997) (affirming the vacating of a class wide settlement and concluding that district courts had to attend to differences among class members before approving settlements); *see also* Flanagan v. Ahearn (*In re* Asbestos Litig.), 90 F.3d 963 (5th Cir. 1996), *vacated and remanded*, 117 S. Ct. 2503 (1997).

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tion, others who work in court, and still others who develop legal theories? Moreover, particularly in aggregations with multiple plaintiffs and defendants, key contributors to plaintiffs' recoveries may be lawyers other than those who represent the plaintiffs, such as defense attorneys who successfully shift blame away from their clients in a fashion that enables recovery from other defendants.

Further, the question of which lawyers provide legal services to whom also demands attention. Judicial intervention to lower fees of IRPAs comes in part from the structure created by judges, who empower PSCs to act on behalf of the group as a whole and thus make invisible to the court the work of IRPAs. As we discussed in *Individuals Within the Aggregate*, the United States legal system aspires to offer individuals the opportunity to assert rights and claims to value process.[73] When working well, lawyers for groups advance group interests, even to the detriment of individual interests.[74] If individual attention remains a desirable goal, IRPAs are the attorneys to deliver this form of legal service, and monetary incentives need to be in place to recognize and reward that work, as well as to equip those clients who have no attorneys.

Yet another problem is the effect of intervention in a world in which all the agreements among lawyers are not revealed. Despite the Second Circuit's announcement of a requirement in class actions that all fee-sharing contracts be provided to courts,[75] neither case law nor

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73. Resnik, Curtis & Hensler, *supra* note 15, at 355-72.

74. For example, attorneys for the class owe a duty to the class and can support settlements opposed by individual named plaintiffs. *See, e.g.*, County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1428, 1434-35 (E.D.N.Y. 1989), *aff'd in part and rev'd in part on other grounds*, 907 F.2d 1295, 1325 (2d Cir. 1990); Parker v. Anderson, 667 F.2d 1204, 1210-11 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982) (approving a consent decree in a class action over the objections of the named party and class representative).

Note also that some courts have begun to award individual named plaintiffs "incentive awards" in recognition of the "existence of special circumstances including the personal risk (if any) incurred by the plaintiff-applicant in becoming and continuing as a litigant, the time and effort expended by that plaintiff in assisting in the prosecution of the litigation or in bringing to bear added value (e.g., factual expertise), any other burdens sustained by that plaintiff in lending himself or herself to the prosecution of the claim and, of course, the ultimate recovery." Roberts v. Texaco, Inc., No. 94 Civ. 2015 (CLB), 1997 U.S. Dist. LEXIS 16962, at *42-43 (S.D.N.Y. July 22, 1997). Such a practice also distinguishes interests of individuals from the group and acknowledges that the two are not also identical.

75. *See supra* note 57 and accompanying text (discussing the "Agent Orange" litigation); *see also* ALI Council Draft No. 13, *supra* note 20 (discussing payments to many attorneys in class action settings and calling for disclosure to tribunals if agreements provide "for payments that are disproportionate to the services performed or funds advanced"). The tentative draft would then have tribunals determine the "justifications for the arrangement, probable effects on the behavior of the lawyers involved, and the timeliness of the disclosure to the tribunal." *Id.* Missing is a mechanism for informing the tribunal of the disproportionate payments. The authority

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anecdotes provide much evidence that attorneys' fee agreements are routinely revealed.[76] To be effective, regulatory efforts to reallocate fees and expenses would necessitate unusually searching inquiries into how moneys, once awarded, are to be allocated in specific cases and in cases over time.[77]

2. *Setting Prices by Clients, Attorneys, or Third Parties?*

Having analyzed the conceptual difficulties of identifying whether fees and costs should be raised, reduced, or reallocated, another problem to be solved is to find a mechanism for decisionmaking about particular costs and fees in specific cases. A first possibility is to look to the model of private contract and try to simulate it, albeit with some regulation. For example, an option unexplored in the literature is for judges, when authorizing an aggregate, to require disclosure of fee proposals by all attorneys then appearing in the litigation to as many identifiable plaintiffs as possible. A court could convene a negotiation (with or without guidelines) among plaintiffs and/or defendants (organized by themselves or with court assistance) and lawyers to set fees and costs.

Such a process would come closer to the client-attorney contract agreements posited by the ABA as appropriate means of setting fees. Further, it would enable consideration of fees toward the beginning of an aggregation, in line with recommendations from some commentators[78] and a few reported cases that have required up-front information on fees and costs.[79] Embarking on this process would necessitate a means of identifying and communicating with clients (no longer "absent" plaintiffs but rather made present) and enabling them to function as a group, which itself would be costly and time-consuming.

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of courts to alter fee agreements among counsel is debated by the majority and the dissent in Hayes v. Haushalter (*In re* FPI/Agretech Sec. Litig.), 105 F.3d 469 (9th Cir. 1997).

76. *See, e.g.*, Bowling v. Pfizer, Inc., 102 F.3d 777, 781 (6th Cir. 1996) (rejecting challenges to the district court's refusal to permit discovery on fee sharing agreements among attorneys for the class and special counsel in the Shiley Heart Valve litigation; distinguishing Agent Orange as an example of a requirement only to provide courts with such information and thus upholding the in camera disclosure of the agreement and its refusal to give information to other parties, but noting the possibility of mandating disclosure under different circumstances).

77. *See, e.g.*, Charles W. Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L. REV. 1228, 1232 (1995) (describing attorneys who "parlay the small favors and back scratching of a series of class-action cases into a position of influence and sizable fees in a future class action of one's own").

78. *See, e.g.*, *Third Circuit Attorney Fees Report*, *supra* note 2.

79. *See, e.g.*, Walco Invs., Inc. v. Thenen, 975 F. Supp. 1468 (S.D. Fla. 1997) (establishing at the outset of a class action a fee that provided interim fee awards at "substantially reduced hourly rates" coupled with a contingency fee payment at the conclusion); *In re* California Micro Devices Sec. Litig., 168 F.R.D. 257, 259 (N.D. Cal. 1996) (initially seeking competitive bids for class counsel).

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Given the dynamic fast-paced activities of aggregate litigation and complex strategic interaction among attorneys for plaintiffs and between defendants and plaintiffs, slowing advocates down to create such structures would be met by some with dismay. Further, such a process presumptively also interrupts extant agreements between individual attorneys and clients.

A second option is to look, as has at least one reported opinion,[80] to the group of attorneys collected within mass torts and to rely on a mixture of self-review by PSC members[81] and oversight by IRPAs. The advantages are that information about costs and capacity to control costs lie to some extent with these lawyers. (The expenses of litigation are not, however, controllable by a single side, for opponents can act strategically to affect costs and courts impose costs as well.) But neither PSCs nor IRPAs are well situated to do the task of superintendence. It is not only participating attorneys' potential and complex self-interest that makes them ill-situated to be able monitors, it is also that the expenses of monitoring are unlikely to be able to be borne by individual attorneys.[82] Absent court-imposed, data-based information, made accessible by telecommunications to and from many locales, difficult and costly work is entailed in digesting accountants' reports of moneys spent by PSCs and other actors. Required are labor-intensive evaluative analyses of bills and expense reports that include understanding the relationships among bills claimed by different attorneys.[83] Assume, for instance, that lawyer A on a PSC claims to have traveled to a particular place to work with lawyers B and C. One would then have to cross-check reports to learn if all lawyers reported the same amount of time spent. Yet another question is whether all three were needed to do the work. To put such burdens of reconstruction and evaluation on lawyers representing individual cli-

80. *See In re* Dupont Plaza Hotel Fire Litigation (Massaro), 111 F.3d 220, 238 (1st Cir. 1996) (criticizing IRPAs for failure to monitor costs more closely during earlier phases of the litigation and rejecting many of their complaints of PSC overspending).

81. A common practice is for PSC members to file monthly reports of fees and costs, prepared by PSC-retained accountants, with courts.

82. *See In re* Abbott Labs. Omniflox Prods. Liab. Litig., No. 94C2469, 1997 U.S. Dist. LEXIS 3679 (N.D. Ill. Mar. 26, 1997) (discussing how the costs of submitting objections to expenses "might discourage" them; the extra amount charged, "spread across the numerous contributors might not be sufficiently large to warrant any one individual contributor to marshal the time and resources to object").

83. *See In re* Ivan Boesky Sec. Litig. (Goodwin v. Boesky), 888 F. Supp. 551, 559-64 (S.D.N.Y. 1995) (discussing the expense that would be required to "unravel the claimed conclusory statements of expenses" and substituting the court's own estimates of what are appropriate reimbursable expenses). Subsequent disputes about fees in this litigation are described in Deborah Pines, *Cuts Sought in Bid for $19 Million Fee*, N.Y. L.J., Nov. 6, 1997, at 1.

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ents in a mass tort is to misperceive both those lawyers' capacities and incentives.

One would have instead to use third parties, and the court is an obvious candidate. For example, many statutes and much of the case law places the district court in charge of setting or approving fees—superintended to some degree by appellate courts. Doctrinally, judges are the fiduciaries for absent clients[84] and hence might serve as exacting overseers.[85]

In practice, however, their roles as disposition-oriented negotiators do not equip them well for that task. Remember that aggregation is not only contingent on judicial willingness to permit group-based processing; it is also contingent on attorneys who are willing to deal as a part of a group. Attorneys can offer credible threats of exit—by refusing to participate in group-based resolutions or by insisting on appealing decisions. One of the unspoken bases of obtaining attorney participation in group-wide resolutions of mass torts is a generous attitude toward costs and fees, in which other attorneys, special masters, and judges are willing to look less than exactingly at the proposals for payments.

The reasons are several. Strict oversight of fees and costs during the disposition stage may destabilize an agreement. By the end, the issues of fees and expense awards come after typically exhausting litigation, and thus there may be little energy left to risk renewed conflict.[86] In addition, the judge, like the lawyers detailed above, is in need of information to do the job well and faces the same set of problems (of reconstruction or evaluation of expense and time reports) as do other attorneys. Further, not only may the trial judge be acutely aware of the needs to resolve litigation, the trial judge is also authorized in some circuits to impose costs on those proceeding en masse.[87] Given judicial interests in case management and processing that can increase costs but alleviate difficulties from the vantage point of the court, the

84. *See In re* General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).

85. Appellate case law has either adopted a standard for distribution (lodestar or percentage-of-the-fund) and then reviewed applications under an abuse of discretion standard, or remitted the questions of both the standard for fee reimbursement and its application to the discretion of the district courts. *See, e.g.*, Bowling v. Pfizer, Inc., 102 F.3d 777, 779 (6th Cir. 1997).

86. In some instances, special masters or magistrate judges are employed to undertake the work of evaluation. *See, e.g.*, Roberts v. Texaco, Inc., No. 94 Civ. 2015 (CLB), 1997 U.S. Dist. LEXIS 16962 (S.D.N.Y. July 22, 1997) (adopting a special master report on fees and "incentive awards" to the named plaintiffs).

87. *See In re* Two Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig., 994 F.2d 956, 960 (1st Cir. 1993) (holding that judicial case management powers include the authority to assess costs of aggregation against disputants).

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judge is awkwardly situated as an exacting overseer of costs and fees. In short, in seeking to capture the economies in transaction costs, neither judges nor lawyers within an aggregate are well situated to be aggressive in the pursuit of such reductions.

As a consequence, it is only recently that one finds attention paid in case law to the details of both costs and fee reports as a few judges scrutinize moneys spent[88] and begin to articulate rules. The questions that animate this essay are now beginning to be a part of decisional law, yet they are often made with some impatience about developing standards to distinguish among various participants.[89] Further, in the case law, relatively little attention is paid directly to the questions of access, risk, and delivery of services, as they play in each litigation setting and on an attorney-by-attorney, client-to-client basis. Moreover, the relatively inexpensive solution of relying on formulas for the recoupment of costs (such as the United States government scale for permissible per diem hotel, travel, and food charges for judicial officers[90]) has not been used to cabin the costs of aggregation. In addition, almost none of the law considers what clients want or what they get from group processing. From reported decisions we learn little about the delivery of legal services within aggregates. Similarly, few decisions detail whether, in fact, transaction costs are minimized, or whether and how those costs are transferred from one set of payers to another during the course of aggregate litigations. Also missing from analyses are the moneys actually received from lawyers, who have contracts with colleagues to split fees and share clients, not only in a particular case but also in a series of transactions.

C. *Complex Contingencies and the Need for Disaggregation*

Four comments are thus in order by way of conclusion. First, however complex the topic of contingency fees in its expression of a relationship between a single client and single lawyer, its richness is magnified when transposed to the aggregate mass tort. Patience, insistence on factual information, determination to learn more empirically about transaction costs and their allocation, and a willingness to delve

88. *See, e.g.*, Weinberger v. Great Northern Nekoosa Corp., 801 F. Supp. 804 (D. Me. 1992), *aff'd on other grounds sub nom.* BTZ, Inc. v. Great Northern Nekoosa Corp., 47 F.3d 463 (1st Cir. 1995).

89. See, for example, *supra* note 30, in which the district court, in the Dalkon Shield decisions, after making an across-the-board cut, also stated a willingness to entertain exceptions. In the cases reported thus far, however, the court has denied variations in its fee cut to all of the lawyers petitioning.

90. See, for example, Guidelines for Reviewing Applications for Compensation and Reimbursement of Expenses Filed under 11 U.S.C.S. §§ 303, 330 (Law Co-op. Supp. July 1995).

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into relationships of cost and value are necessary to make regulation a desirable response.

Second, proposals to regulate fees and judicial rulings on fees fail to distinguish different problems collected within a mass tort aggregate. Some of the concerns around contingency fees in aggregation come from a view that lawyers simply should not make so much money. (Whatever sums defense attorneys make in these transactions are shielded from public view so the visible attorneys—plaintiffs' attorneys—take the brunt of the criticism.) This distress is not animated by nuanced concerns about the relationship of risks to reward or the value of services rendered. It is, put simply, a basic revolt against the "big ticket" known when percentages are calculated from multi-million dollar recoveries. (One might call this the problem of "stunning sums.") A distinct set of concerns revolves around lawyers who treat clients badly, providing little or no services yet recouping fees. These problems are the familiar ones of lawyers who cheat or otherwise misbehave. Yet other concerns stem from lawyers who risk little and gain a lot. We also worry about lawyers who risk a lot, provide useful and intensive services for clients, but are swept into an aggregation under some omnibus order equating every lawyer in the lot.

The assumed fungibility of attorneys or of sets of attorneys and the failure to distinguish between kinds of obnoxious or of praiseworthy activity is our concern. Generalized orders and regulation will not police those who misbehave nor reward those whose skill deserves our commendation. Here, we plea for disaggregation—of the regulatory issues and of the modes of response.

Third, efforts to regulate fees and costs in general are expanding. The growing body of judicial opinions on limiting forms of contingency fees in aggregate torts provide one example; administrative regulations, such as those of the Bureau of Veterans' Affairs or the Office of Bankruptcy Trustees[91] are another illustration of recent interest in developing rules. While the goals of case law and administrative regulation are complimentary, as of yet judges and lawyers in common fund and statutory fee shifting cases do not explore or integrate insights or efforts from these administrative regimes.

Fourth, despite energetic critiques of contingency fees in aggregate tort and in other kinds of litigation, one finds ongoing and renewed preferences for percentages of recovery as a means of compensating attorneys. The last two decades of attorney fee law and commentary

91. *See supra* note 9 and accompanying text (describing veterans' cases); *supra* note 11 and accompanying text (discussing bankruptcy cases).

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in mass tort aggregates demonstrate the commitment of attorneys, judges, and many legal commentators to the concepts—access to courts, provision of legal services, and rewarding risk—that have animated contingency fees from their inception in the United States. But two of these three concepts dominate—access and risk—and the nature and kind of services rendered continues to take a back seat in much of the discussion, with its focus on outcomes rather than on process accorded to individual and to group litigants.[92]

92. An interesting exception involves recent decisions on fee awards in the Shiley Heart Valve case. Bowling v. Pfizer, Inc., 927 F. Supp. 1036, 1043 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996). A district judge created a fee system by which attorneys had to return to court to apply for additional fees for work in the distribution phase of the litigation. *Id.* at 1043-44. As he explained: "[C]ircumstances change: law firms dissolve, lawyers retire and lawyers expire. These uncertainties advise against paying lawyers for services which they have yet to render in a civil matter of this sort." *Id.* at 1043.

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