

BOOK REVIEWS
Lawyer Barons: What Their
Contingency Fees Really Cost
America

BY LESTER BRICKMAN

Reviewed by Margaret A. Little*

No scholar has studied the role of the contingency fee in America more comprehensively than Professor Lester Brickman. He has now published a definitive book that examines the historic, economic, and political legacy of this American means of financing the always elusive quest for justice. His book proves the ancient maxim that justice truly is the least observed of all the virtues.

Acknowledging the contingency fee's role as the "key to the courthouse," and giving fair due to the very real problem of access to justice that the contingency fee is designed to address, he patiently and exhaustively dissects the body of civil tort law as we now know it, and exposes the formidable costs and distortions imposed by the contingency fee upon the civil justice system and core principles of democratic governance. He lays out a system where lawyers' financial stakes take precedence over that of their clients' and the public, with lawyers and judges collaborating to expand liability at great cost to the allocations of power between the branches of government, to say nothing of the economic and social costs of such lavishly compensated and ineffectively compensatory and deterrent tort litigation.

Professor Brickman brings to this undertaking not only decades of teaching in the field but hands-on experience with mass tort litigations such as asbestos, silica, diet drugs, breast implants, and welding fumes. This practical experience allows the book to address with authority lawyers' use and misuse of anticompetitive practices and ethical rules, why a lawyer's stake in the outcome leads to perverse and unethical practices, and how judges (by expanding liability and engaging in brazen nullification of tort reform), legislatures, and law schools work to perpetuate these lawyer-favoring financial incentives.

Brickman has also worked to expose mass tort fraud in many of these mass litigations. The silicosis case alone demonstrates a system where courts, prosecutors, and disciplinary institutions failed to intervene, and permitted members of the legal and medical professions to perpetrate massive fraud on our judicial system.

Early in the book, he quotes Stuart Taylor Jr.'s observation made after long scrutiny of this field: "How often plaintiffs' lawyers pervert our lawsuit industry for personal and political gain, under the indulgent eyes of judges, without rectifying any injustices, at the expense of the rest of us." Such behavior, "which we would condemn in most other spheres of life," as

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Brickman notes, occurs because of one key fact: *Litigation, while public in name, takes place out of the public eye.* He argues that "contingency fees provide a type of stealth sheathing that hides information about tort lawyers' income from view and obscures the effect of inordinately high contingency fees on the tort system." The lack of any public knowledge of mass tort lawyer income, coupled with professional biases, judges aggrandizing their roles, and the trial bar's political and financial alliances with lawmakers and the law academy have worked to ensure that these disturbing developments and the lavish compensation of some of the bar is utterly unknown to the public. He brings excellent analysis and scholarship to the important point that the defense bar is up to its elbows in preserving these arrangements because of the mirror image benefits they derive from the expansion and complexity of tort liability.

Brickman takes on the shibboleth of the "social benefits" of the contingency fee and painstakingly shows why from the simplest tort case to the largest of the state-sponsored litigations, the contingency fee imposes dangerous costs and perverse incentives recognizable to all but the way-too-deeply-invested legal profession and thereby proves the wisdom of Great Britain's historic ban on such fees. The following are paraphrases of some of his key points.

- Tort lawyer's incomes have increased 1000% in the last forty-five years.
- Law is a self-regulated profession, with state courts as the exclusive regulator, and those courts are complicit in the financial benefits and expansion of law.
- Judges collaborate in this lucrative expansion of lawyer compensation opportunities because it gives them power to allocate resources elsewhere unknown in political theory.
- The lavish compensation generated by the contingency fee has unleashed a litigation explosion, unjustified by any real increase in social injuries, and has, in partnership with the medical profession, driven up medical claims that are often wasteful if not outright phony.
- Regulation by litigation is today a powerful and largely opaque force in our society, turning tort lawyers into barons who threaten the viability of all but the largest of corporations, with many of them paying extortionate settlements to save the viability of even large industries.
- These super-profits get funneled back into the courts and legislatures leading to a judiciary and ever-expanding legislation designed to protect the legal profession's interests at steep social cost to democratic institutions, political accountability, and the economic health of the nation.

Brickman methodically takes on his critics and academic supporters of the contingency fee, offering both analytical and empirical evidence to support his theses. He offers the reader a dispiriting tour through the silicosis scandal, the "light" cigarette class actions, medical monitoring litigation, lead paint and global warming as public nuisances, the state attorney general

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to tobacco cases, class action coupon settlements, Milberg Weiss's shameful and illegal class action conduct, cerebral palsy suits, clergy sexual abuse, the State Farm auto parts debacle, HMO litigation, the infamous McDonald's coffee case, auto products liability suits, and a host of examples from more garden variety tort cases to support his case that we have a system that has been very effectively gamed by lawyers and that is largely shielded from public scrutiny.

The Contingency Fee Is Here to Stay

Given the devastating case he makes that "it is the fee tail that wags the tort dog," it is discouraging to find that in the end, he throws up his hands and admits that serious systemic reform is simply not going to happen. Despite setting forth a compelling case for moving to some variant of the English "loser pays" system, Brickman declines to propose so radical a solution for the simple reason that it is politically and professionally untenable. Pragmatically speaking, he is probably right. Given the dismal fortunes of far more modest attempts at tort reform, it may be unrealistic to hope for such radical change.

However, this reviewer recently read of proposed legislation in Texas that imposes a loser pays system upon the bar aimed at deterring junk litigation and making the legal system less of a burden to a recovering economy. Could this Texas experiment be the start of more widespread reform?

What Is to Be Done?

The proposals Brickman makes bear serious consideration and include

- Early offer proposal whereby injured persons and insurance companies can effectively bypass the huge unearned lawyer premiums common to most clear-liability tort cases.
- Unbundling of personal injury auto insurance that allows consumers to purchase only personal injury protection without coverage for pain and suffering damages, a proposal that Brickman argues would benefit consumers through lower premiums, more widespread coverage while allowing more modest and swift recoveries. His account of the fate of such proposed legislation devastatingly proves Pogo's maxim "We have met the enemy and he is us."
- Specialized early offers in med mal cases that would incentivize doctor self-reporting, increase the amount of compensation to victims, and function far better as a deterrent to future malpractice.
- Exception to the American rule for entrepreneurial class actions.
- Judicial elections that put the role of the courts to public vote and scrutiny.

Brickman writes that both plaintiffs and defense tort lawyers oppose such reform because of their mutual entrenched interests in the status quo. He also discusses scholarship in other fields and a fascinating essay by Second Circuit Judge Dennis Jacobs that delves into what he views as the flaws and self-interest of the legal profession.¹

Is There Any Hope for Reform?

This reviewer would add another line of action to the modest—if hard to attain—proposals that Brickman makes. And that is exposure of these systemic problems to public scrutiny. Brickman writes at length about the role of the bench, bar, and legal academy in allowing excessive and unethical fee deals, but he pays less attention to how the mainstream media and even the arts—via popular fiction and Hollywood—plays a key role in lionizing the tort bar and tort litigation and entrenching those interests. Movie adaptations of real and fictional lawsuits—*Erin Brockovich*, *The Insider* to name just two—help to form pro-trial lawyer public opinion. John Grisham's recent book, *The Appeal*, is a made-to-order trial bar brief against the sort of judicial election reform proposed by Brickman. One of the most important suggestions made by Brickman is that "[e]ducating the news media about how consumer and societal interests have been sublimated in favor of lawyers' interests is an essential starting point for refocusing the content of state supreme court elections."

There are compelling and competing narratives that need to be told. The subsequent fates of Dickie Scruggs (who had a cameo appearance in *The Insider* while he was still a free man), the corruption conviction of Texas AG Dan Morales, the conviction of the Milberg Weiss attorneys such as Bill Lerach, the whole silicosis mass fraud, need to come to the public's attention. The striking correlation of the major players in these high-stakes games and subsequent apprehension by the law should receive far more attention than it has. This book is a start.

Brickman's book will serve as a gold mine of analytical and empirical evidence of how the rule of lawyers and regulation by litigation have left a political system in shambles, with the powers assigned to the coordinate political branches appropriated by obscenely compensated lawyers and life-tenured judges heady with grandiose arrogations of power and prestige. This book sets forth hard and uncomfortable truths about the legal profession and proposes daunting, and important, reforms.

Endnotes

1 Dennis Jacobs, *The Secret Life of Judges*, 75 *FORDHAM L. REV.* 2855 (2007).