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Conditional Fees and the Contingency Fees distinction: A comparative study of the UK and US risk assessment for insurers in litigation

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Abstract

The Conditional Fee Agreements in the UK and the Contingency Fee in the US for legal retainers can be distinguished by their risk lawyers take even if they both allow law firms to be stakeholders in the litigation process. The introduction of the conditional fee agreements (CFI) in England enabled a framework of civil litigation that could be relied upon where the cause of action could not be financed by the client. There was an element of risk involved which the insurance company had to calculate and the Jackson Reforms were responsible for effective management of litigation through the introduction of costs budgeting. While the after effects insurance was abolished the various forms of CFI could facilitate the insured litigant. This has been harmonised by a consumer based legal provision in the UK that is the priority of the Legal Services Act 2007. The comparison needs to drawn with the contingency fee agreement offered by US firms that have encouraged litigation and allow the losing party to forfeit costs when losing their case. The argument of this paper is to retain both these form of agreements in their respective jurisdictions but to retain the flexibility of allowing out of court settlements.

Key words: code of conduct, professional regulation, legal expense insurance, conditional fee, contingency fees, risk assessment

1. INTRODUCTION

The common law courts have legal systems that rely on judicial precedent and statutory law and which are designed to safeguard the integrity of the profession. In England and Wales there is the Bar Standards Board and the Solicitors Regulations Authority that regulate the profession, whilst in the US there is a fused profession that is governed by a stringent code of conduct that for licensed Attorneys. The risk assessment prior to litigation arises from the fee arrangements with the clients based on success of a court case, and the issue is if the retainer in these jurisdictions increases the probability of unnecessary litigation and at the cost of the clients forsaking out of court settlements.

In the UK, historically, one of the most common of all complaints relates to the lawyers' fees.[1] Dishonesty is regarded as the most serious lapse in professional standards, and the usual penalty is striking off for solicitors and a barrister's disbarment who is found to have breached his fiduciary duty to his client. The Legal Services Act (LSA) 2007 established a comprehensive framework for the regulation of legal services in England and Wales. It created the Office for Legal Complaints (OLC) to administer a scheme to deal with consumer complaints about legal services as an independent body under the supervision of the Legal Services Board (LSB), which is responsible for overseeing the regulation of all lawyers and is sponsored by the Ministry of Justice. It established the Office of the Legal Ombudsman in 2010 under Part 6 section 129 of the Act to adjudicate the legal complaints. Prior to this the complaints against lawyers were dealt with by "self

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[1] The English legal profession has moved a long way from this public perception so vividly captured by Charles Dickens who wrote: "The one great principle of the English law is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble" (Dickens, 1853, 39.4-6).

regulation and statutory oversight" and the new system for complaint handling introduced created "a 'hybrid' ombudsman to deal with complaints" against legal professionals (Seneviratne, 2015).

Section I (f) of the LSA sets out the need for diversity in the profession as a regulatory objective which the LSB has interpreted as follows:

"A diverse legal profession is one that reflects and is representative of the full spectrum of the population it serves so as to harness the broadest possible range of talent in the meeting of the regulatory objectives. We consider that for public interest reasons and good business sense as much as for meeting this regulatory objective that the legal industry should reflect the population it serves… We will promote equality and diversity through our regulatory framework and we expect approved regulators to do the same".[2]

In the US the Standing Committee on Ethics and Professional Responsibility of ABA has developed model national ethical standards for lawyers and the judiciary by drafting the ABA Rules and Opinions interpreting and applying those standards. Since its inception in 1908 the Association's Ethics Committee has led the development of national standards for lawyers and the judiciary. In 1984 it undertook an effort to encourage nationwide adoption of the Model Rules of Professional Conduct, which updated and refined the then prevailing ethical standards.[3]

The Centre for Professional Responsibility (CPR) Policy Implementation Committee focuses on the revisions to the Model Rules of Professional Conduct and the Model Code of Judicial Conduct, the policies of the Multijurisdictional Practice Commission and other models and policies developed by the Center for Professional Responsibility.[4] It also assists the States in their implementation of changes to the Model Rules of Professional Conduct.

This paper examines the risk liability insurance in civil litigation when a lawyer acts for a client under the CFA in the UK and the comparable duties under the Contingency Fee Agreements in the US. The issues considered are the client relationship based on the conduct rules when the lawyer has to satisfy the bona fides of the legal agreement with their clients. The insured party is prevented from liability if the compensation received from the other party is shared or is included in fees dispensation. The important criteria that is salient is the risk based agreements that apply to the parties in both these agreements and there is determination of how the stakeholders can increase their cover in litigation in both jurisdictions.

2. UK JURISDICTION

2.1. Financial probity in stakeholder agreements

The core ethical challenges faced by the legal profession in UK (England and Wales) are based on the established norms to maintain a high degree of integrity in the legal profession (Humphries, 2009). These can be defined under the costs of litigation as operating three particular mechanisms for financing a legal claim: 1) legal expense insurance; 2) legal aid; and 3) trade unions membership (for particular parties). There is no "loser pays" absolute rule or automatic rule, but the costs are awarded in the court's discretion. It is the legal expense insurance which is the mechanism through which the plaintiff is insured against the potential of paying the entire amount of his opponent's fees. This secondary industry allows plaintiffs with financial cover but not necessarily a guarantee against financial loss should they have to fully bear a victorious opponent's costs.[5]

The availability of litigation insurance helps minimize the risks involved if one loses because otherwise these types of cases would never be filed. However, it is important not to confuse the functioning of legal expense insurance with complete indemnification for a plaintiff who loses on a counterclaim, as it only covers the costs of losing. Finally, while legal expense insurance appears greatly fortune based it must be noted that only about two percent of all cases litigated in the early 1990s, were brought by insured plaintiffs. The Access to Justice Act 1999 permitted for the first time in England and Wales

[2] Legal Services Act 2007, Chapter 29, 30th October 2007.

[3] Between 1987 and 1990 the Standing Committee developed a revised Model Code of Judicial Conduct, adopted by the American Bar Association which have been widely accepted throughout the country. The Committee also provides consultation to other ABA entities, state and local bars, law school communities, the legal news media and the public on matters of emerging interest in the area of legal and judicial ethics. Available at: http://apps.americanbar.org/dch/committee.cfm?com=SC111000&new.

[4] CPR Policy Implementation Committee, available at: https://www.americanbar.org/groups/professional_responsibility/policy/aboutUs.html.

[5] Prior to commencing litigation the parties are encouraged to negotiate and to settle the claim under Part 36 of the Civil Procedure Rules. If a party fails to accept a realistic offer made by the other side, it is at risk of being penalised in costs and interest at the end of the case. In the event that the offeror's Part 36 offer is not beaten at trial, then the offeree will have to pay a proportion of the off eror's costs from the date on which the relevant period expired.

the recovery of success fees and premiums paid for after the event insurance policies.[6]

The legal expense insurance is structured so that vexatious, frivolous or unreasonable claims are filtered out of the system more efficiently than in the contingency fee system because insurance providers utilise case-screening procedures that effectively remove the doubtful cases. [7] It is assumed that the "English rule" reflects this principle that a "victory is not complete in civil litigation if it leaves substantial expenses uncovered". Furthermore, the "English rule" rests on two simple premises: 1) defeat provides adequate basis for imposing legal fees on the losing party; and 2) the winner deserves to be fully compensated for all legal costs, including attorneys fees and incidental expenses (Root, 2005).

In 2010 the much publicised report by Lord Jacksonaimed to reforming the draconian "winner pays all" approach to costs in fast track personal injury cases stated it was a "recipe for runaway costs" and a fairer and pre-emptive approach whereby costs would be controlled from the outset should be established (Jackson, 2009, 27).It was hoped that this, in turn, would promote proportionality and access to justice. The objective of these proposals was the introduction of fixed recoverable costs in some personal injury cases up to the value of £25,000 and costs budgeting in all cases above the same amount with the latter being controlled by the court (Womble Bond Dickinson, 2017).

The Jackson reforms recommended the introduction of a general fixed recoverable costs regime for the County Court fast track as well as a new, intermediate County Court track for claims between the value of £25,000 – 100,000 that would operate on a fixed recoverable cost basis (Jackson, 2009, 9). The availability of conditional fee agreements and a variation of new rules have become extremely complex and this area remains an ethical minefield. The complex fee system can lead to substantial satellite litigation and there has been the arrival post Jackson of the Damage Based Agreements (DBA). The Contingency Fee Agreements (CFA) in respect of contentious business are designated DBA under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") and the Damage Based Agreement Regulations 2013[8] and s.58AA of the Courts and Legal Services Act 1990. The LASPO renders such agreements lawful, so long as the regulatory requirements are complied with. There are concerns about the DBA Regulations as to whether they are sufficiently clearly drafted to enable a barrister to enter into a DBA without any risk of it being challenged in the future.[9]

Any DBA which fails to meet requirements of the regulations and statutory regime will be deemed unenforceable. This is a form of contingency fee agreement in the form of damage based agreements (DBA) that has led to a sophisticated fee recovery regime and compensates the successful party.[10] These have been reinforced by the new Civil Procedure Rules that the courts have been encouraged to adopt towards adopting a flexible approach in awarding costs in litigation. The new CPR came into effect in 1998 as a result of the Access to Justice Final Report, by The Right Honourable Lord Woolf, Master of the Rolls (Wolf, 1996).Part 44 of the Civil Procedure Rules allows the recovery of the costs. Section 1(1)(1) Act states that the costs awards have to be "proportionate" and "just". They are under the discretion of the judge (Part 44.2) and can be awarded on the standard basis or on the indemnity basis, but the court will not in either case

[6] In *Coventry v Lawrence [2015] UKSC 50* the Supreme Court rejected an argument that recoverability of success fees and After-the-Event insurance premium constituted a breach of either the Human Rights Act 1998 or the European Convention on Human Rights which is scheduled to that Act. In *The Queen (on the application of Tony Whitston for and on behalf of Asbestos Victims Support Groups Forum UK) and Secretary of State for Justice and The Association of British Insurers [2014] EWHC 3044 (Admin)* the Administrative Court quashed the Government's attempt to abolish recoverability of success fees and After-the-Event insurance premiums in mesothelioma cases.

[7] Lord Woolf intended a framework for civil litigation which included the provision for the legal proceedings to be avoided wherever possible; to be less adversarial;less complex; timescale to be made shorter and more certain;cost of issuing to be more affordable, more predictable, and more proportionate to the value and complexity of individual cases; parties of limited financial means will be able to conduct litigation on a more equal footing; and there will be clear lines of judicial and administrative responsibility for the civil justice system (Clementi, 2004).

[8] The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 does not allow solicitors to recover all costs from the defending party. However a more positive aspect of the LASPO was to implement a **10% increase** in the amount of compensation injured people receive from April 2013. This is designed to partially offset the additional legal fees claimants are now faced with.

[9] The term first appears to have been first introduced by the Ministry of Justice in 2009 (Coroners and Justice Act 2009 s 154).

[10] Under the 2013 Damages-Based Agreements Regulations, a cap was placed on the proportion of damages that could be taken as a success fee by a solicitor: 25 per cent for personal injury cases, 35 per cent for tribunal cases, and 50 per cent for others. However, successful parties could no longer recover success fees from the losing party or recover the premium paid for after-the-event insurance. Moreover, both sides in a dispute were obliged to provide detailed budgets to the court and to stick to them. Any higher costs had to be sanctioned in advance by the court.

allow costs which have been unreasonably incurred or are unreasonable in amount (44.3).[11]

These principles underpin the current regulatory framework that has placed the interests of the public and consumer as the main goals (Clementi, 2004, 1-2). This is consistent with the overarching theme of the Clementi Report that stated there was an "over-complex and inconsistent system of oversight regulatory arrangements for existing front-line regulatory bodies" and that "there are no clear objectives and principles which underlie this regulatory system; and the system has insufficient regard to the interests of consumers" (Clementi, 2004, 2). The report identified three areas in which complaints arose against the legal profession with a particular focus on the solicitors profession. It separated them into the Law Society operational system that divided the case management between cases where redress may be due, and those which relate solely to conduct matters (Clementi, 2004, 52-54).

The three categories that Clementi identified were inadequate professional service such as not causingto upseta client's instructions, or allowing unreasonable delays; and professional misconducte.g. not keeping a client's business confidential or failing to pay money over to a client when due, and thirdly negligence (Clementi, 2004, 53-54). The report was crucial in leading up to the LSA two years later that brought about reform to the structure of the conduct of the legal profession.

These reforms impact upon the conditional fee agreements with insurance costs covered that is necessary to cover the conditional fee agreements. The effect of the reliability of insurance is that this facilitates the civil litigation in the courts in England and Wales. It insures the litigation costs will be borne for those lawyers who are involved in law suits and where their costs will not be borne by the party instructing them. This is an important part of the regulatory framework of the legal profession in the UK that has been achieved by the reform proposals, legislation, and the cases that have been decided by the courts that have considered costs.

2.2. Conditional Fee Agreements (CFA) in high risk claims

The litigation in personal injury claims and medical negligence is an area in which lawyers agree to act for a client on CFAs in England. The CFAs are designed in order for the solicitor to become a stakeholder in the case outcome and but he will not get paid if his client fails. With a CFA in place the solicitor makes a greater effort to succeed but there have been suggestions in the UK that solicitors on CFAs collude in manufactured claims which is a high risk strategy that has the potential to incur an excessive costs burden on opposing parties, whose costs liability could become grossly disproportionate if they contested the case to trial and lost (Jackson, 2009, 80).

Lord Justice Jackson identified the effect of the previous arrangements where claimants (who are the predominant users of such arrangements, could litigate "risk-free" at huge cost to losing defendants (Herbert Smith Freehills, 2019).If the claim was lost they would not have to pay their lawyer anything under the CFA, but they would not have to pay the opponent's costs because those were covered by the ATE insurance, and the ATE premium had been deferred and self-insured. If they won they would recover their costs from the defendant, including the success fee under the CFA and the ATE premium. This placed an excessive costs burden on opposing parties, whose costs liability could become grossly disproportionate if they contested the case to trial and lost. The defendant's costs liability could be up to four times the "normal" costs of a party to the litigation, in that they would have to pay their own legal fees and disbursements; the success fee of up to 100% normal fees; and the claimant's ATE premium which (for a deferred and self-insured policy) could be in the region of 90% of the sum insured (Jackson, 2009, Para 4.16).

The LASPO sections 44 and 46 amended the relevant sections of the Courts and Legal Services Act 1990, and if the parties fund their litigation through CFAs and/or after-the-event (ATE) insurance the CFA success fee and ATE premium are no longer recoverable from the losing opponent if the case is successful.[12] The litigants can still enter into CFAs and subscribe to ATE insurance to fund their litigation, but have to bear the additional costs of doing so. The parties can enter into a CFA with their lawyer by paying double the normal fee if the case is won and no damages or sometimes a discounted fee, if the case is lost. The uplifted fee is called a success fee and it is capped at 100% and the Claimant has to be inform consent as to the 100% success fee that it is standard across all cases and the firm has to actually assess the specific risks in the case.[13]

[11] Civil Procedure Rules & Practice Directions, Part 44 – General rules about costs. Available at:https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-44-general-rules-about-costs.

[12] CPR 36.17 which would allow the Claimant entitlement to his costs from the expiry of the relevant period. No costs up to the relevant date were ordered.

[13] *Herbert v HH Limited (2019) EWCA Civ 527.*

The government adopted this policy citing the "need to reduce the unfair costs suffered by the many businesses, individuals and other organisations (including the NHS) that have been faced with CFA actions that restore greater proportionality to the costs of civil cases" (Reforming Civil Litigation, 2011, 3). The decision to abolish recoverability was however very controversial, with claimant lawyers in particular arguing that the changes would mean a decrease in access to justice. The Law Society deputy Vice President David Greene, described it as "a sharp tug on the leash for claimants, and their ability to bring proceedings" (Taddia, 2018). However, the defendants who are generally subject to claims on an industrial basis adopted their strategy to address excessive legal costs awarded based on the CFAs. There are claimants being transferred by lawyers from legal aid to no-win no-fee funding just prior to changes in the rules resulting from the "LASPO" reforms in April 2013. This would lead to higher cost claims against the NHS.

In *S v Barnet and Chase Farm Hospital NHS Trust, AH v Lewisham Hospital NHS Trust and Y v Doncaster & Bassetlaw Hospitals NHS Foundation Trust,*[14] the law firm Irwin Mitchell had switched three clients from legal aid funding to CFAs, with claims against different NHS trusts, in March 2013. Their legal aid certificates which had been signed up to seven years earlier were discharged just days before the LASPO came into force and the recoverability of solicitors' success fees and ATE premium was abolished.

The clients argued that this was without disclosing full details of the agreement. The case reached the Court of Appeal where the judgment was awarded against the law firm which had transferred the clients on to the CFAs.The Court upheld the rulings of the original costs judges in each case, effectively stating clients were not given adequate advice about funding changes.

LJ Lewison ruled:

"The bottom line is that in each of the three cases the advice given to the client had exaggerated (and in two cases misrepresented) the disadvantages of remaining with legal aid funding; and had omitted entirely any mention of the certain disadvantage of entering into a CFA. Moreover, one of the advantages of entering into the CFA was Irwin Mitchell's own prospective entitlement to a substantial success fee. In those circumstances I consider that DJ Besford was correct in saying at [81]: "Where one of two or more options available to a client is more financially beneficial to the solicitor, the need for transparency becomes ever greater".[15]

This can be attributed to the policy of disclosure and transparency in the approach of law firms and their stake in the operation by the process of CFAs. This can increase the prospect of litigation and lead to un meritorious claims and this is why the CFA structure has not worked well for the UK client professional relationship. Lord Neuberger, the former Supreme Court president in the UK has warned that alternative business structures and CFA sare two "concerning" developments which could pose a threat to lawyers' ethical duties (Smith, 2016).This is because there is a "conflict of interest" within an Alternative Business Structure (ABS) and his Lordship has stated: "The investors will often have no interest in lawyers' ethical duties and will ultimately only be concerned" with the ability to insure the clients. His Lordship stated that this was similar to the "contingency fee arrangements and success fees also increase the scope for a conflict of interest, as they give advocates and lawyers a financial interest in litigation".[16]

Lord Neuberger observed that the CFE arrangements "did help improve access to justice but the lawyers' commitment to high ethical standards was 'sufficiently robust' to resist the temptations conditional fee arrangements or ABSs give rise to.The high level of regulation in the legal profession could lead to an 'attractive culture', which takes high ethical standards for granted, being replaced by a 'box-ticking' exercise. The Professional ethics cannot always be reduced to simple rules, and if that leads regulators to produce increasingly complex and detailed rules, I wonder whether we are better as a result". The implications of a conflict of interest was obvious in the realm of ethical conduct and the development of the ABS in which there was financial investment by the directors of the company.

This highlights the framework of the CFAs and success fees increasing the scope for a conflict of interest as they allow advocates and lawyers a financial interest in litigation. It has led in the UK to a reluctance in introducing the contingency fee to the existing framework of such arrangements. It is prudent for any personal injury lawyers who are charging 100% success fees, to carry out all the risk assessments. There are risks associated of levying standard fee levels.

In *A and M v Royal Mail Group*[17] the issue was based on an infant claim which required need for judicial approval of the success fee. There were two children who were victims in a road traffic accident, the claimant law firm charged a standard 100% success fee, to be

[14] *[2018] EWCA Civ 451.*

[15] *[2018] EWCA Civ* 451, at 60.

[16] Ibid.

[17] *[2015] EW Misc B24 (CC).*

capped at 25% of damages. The firm did not conduct a risk assessment of the case before setting the success fee but it was not actually expecting to receive a 100% uplift, because it would never get more than 25% from the compensation payment on the CFE because of the statutory cap. The success fee ratio was simply applied "without any risk assessment of the particular case and the firm were using a standard approach to success fees", in a field of work where fees have been drastically reduced.[18]

The Court ruled "It seems it has now become commonplace for solicitors to enter conditional fee agreements with clients with a stated success fee of 100%, even though the prospects of the claim being successful are virtually certain". Judge Lumb stated: "It is true that the current legislation does not specify a requirement for a risk assessment [but] the Practice Direction refers to the risk assessment as being one of the documents to be produced on an application for payment of expenses from the protected party's funds. That requirement is not consistent with any argument that a risk assessment is now redundant".[19]

Furthermore Judge Lumb held "Indeed, if solicitors/ litigation friends wish to justify proposed deductions from a child's damages as being reasonable, then a risk assessment would be at least highly desirable as evidence in support of their arguments. The very fact that it is mentioned as one of the documents to be produced may mean that it is, in effect, a requirement".[20]

The Court decided not to allow the cost of the after-the-event insurance premium, on the basis that he considered this particular case to be such that there was effectively no risk to insure against. This was because of the facts in the case and whether the cost of an unnecessary premium should be taken from a child's damages. This is detrimental for ATE insurers, and for PI firms that may have chosen to offer insurance across all their caseload, at relatively low cost and the insurers would ideally need a full range of cases.

The implication of the case is that "a realistic risk assessment really must be carried out in every case, if law firms are to give themselves the best chance of recovering their success fee; not to mention protecting themselves from complaints to the regulator or from litigation – or indeed group litigation – brought by disgruntled clients. But regardless of whether or not a risk assessment is carried out, in infant claims at least, judges seem pretty cool on the concept of lawyers' charging success fees at all" (Rothwell, 2015).

[18] *[2015] EW Misc B24 (CC)*, para 35.

[19] *[2015] EW Misc B24 (CC)*, para 41.

[20] *[2015] EW Misc B24 (CC)*, para 42.

The issue that needs to be resolved at the start of negotiation is the fiction of the 100% risk as clearly there is not a risk at that level in all cases. However the amount being paid by insurers may be so low that solicitors need to charge up to 25% of the compensation. The mechanism may not be realistic whereby the 25% charge is calculated based on alleged risk which is at fault and not the principle in itself. This is in addition to costs with client's receiving 10% more on the compensation which the insurance will not cover. The 100%should not be the focus of the risk and the costs borne by lawyers, including the 10% general damages awards, acting on CFA are interested in the 25% plus fixed or inter partes costs in the outcome of the litigation.

The CFAs are a permanent feature of litigation and an essential source of capital. The anticipation is that "litigation funding from third party funders will undoubtedly increase, moving from funding individual cases into funding or buying, 'books' of cases, with an increasingly porous dividing line between third party funders and legal expense insurers". However, the increase will be predominantly because of "the market liberalisation of legal services which will facilitate the introduction of capital into litigation funding on an unprecedented scale" (Hogan 2015).

There are regulatory changes pending by the SRA that will impact on litigation funding. These will allow solicitors to deliver non reserved services to the public from unregulated entities. They have sought to create 2 separate codes – a Code of Conduct for Solicitors and a Code of Conduct for Firms. This claims the "future regulatory model that has two distinct strands" the one for the solicitor will be "about education and entry standards, and ongoing competence and ethical behaviours". The second strand is for regulatory framework of firms which will "deliver reserved legal activities and provide systems of control in the firm and the availability of additional consumer protections - including professional indemnity insurance (PII) arrangements and access to the Compensation Fund"(Solicitors Regulation Authority, n/a).

The reforms will lead to the provision of reserved legal services to the public through an authorised (a regulated) organisation, such as a law firm "subject to the core professional principles and our code of conduct, ensuring core public protection. If individual solicitors deliver non-reserved services to the public through an unauthorised organisation, protections, such as access to the Legal Ombudsman will remain. However, the SRA will be able to "impose restrictions around holding client money; put in place personal responsibilities around professional indemnity insurance; and limit

access to the compensation fund"(Solicitors Regulation Authority, n/a).

The Law Society has rejected the de regulation of legal services by solicitors for non reserved activities because it will "fail the litmus tests for regulation: they jeopardise the public interest and risk weakening the rule of law". The Society claims the reforms are "not supported by robust impact assessments or cost-benefit analysis appropriate for rule changes that will fundamentally change the legal services landscape" and they should not be accepted because they "could put consumers at risk and ultimately undermine trust in legal services".[21]

3. US JURISDICTION

3.1. Civil procedure and attorney liability

The Federal Rules of Civil Procedu (effective December 1, 2019) govern civil proceedings in the US district courts and their purpose is "… to secure the just, speedy, and inexpensive determination of every action and proceeding".[22] These have been devised under the Title 28 of the US Code and are rules of general applicability, which apply in *all* of the federal courts at a given level (e.g., the Federal Rules of Civil Procedure, which apply in all U.S. District Courts; or the Federal Rules of Appellate Procedure, which apply in all U.S. Circuit Courts of Appeal).The objective is similar to the Civil Procedure Code in the UK which states in its overriding objective set out in Rule 1.1(1) of the procedural code to enable the court to deal with cases justly which (2) includes ensuring the parties are on equal footing; saving expense; and dealing with case in ways that are proportionate.[23]

The ABA Model Rules do not include provisions that explicitly recognize, or call on lawyers to promote and protect, the interests of clients as "consumers" of legal services, or to promote competition in the provision of legal services, as set down by the LSB in the UK.[24]Those who are tradition minded attorneys at the bar who do not want to see any dilution of the prohibition against lawyers sharing legal fees with non lawyers as set forth in Rule 5.4(a) of the Model Rules, which argue against reformists who state that, in an increasingly borderless world for the provision of legal services to some clients, such practices are common in foreign jurisdictions and should be permitted and regulated in the US.[25] The CFS is a fee structure that is intrinsic to the American system of civil litigation that overrides many of the objections about the lack of multi disciplinary practices and non lawyers finding the process of civil litigation.

The CFS gives the lawyer a personal stake in the outcome of the case and allows the costs of litigation to be borne by the attorney until they recover the contingency fee which may mean that an adverse outcome is financially prohibitive for the lawyer. The disadvantage of this arrangement is if the defendant is willing to settle early in the process, the plaintiffs attorney may be more willing to settle for a lesser amount as he has not invested as much time, effort or expertise as they would in the later stages of the case (Havers, 2000, 621).

There are, it is argued in litigation "essentially 2 main issues in the US which are, firstly, limitation on the lawyer's contingency fees and, secondly, whether losing parties should be required to pay the insurance costs. The proponents of litigation urge both measures but those who oppose state reform would be unfair would be unfair to plaintiff's and make litigation unaffordable for most plaintiffs" (Painter, 1995).

The contingency fees provides legal services as well as the additional services which are financing and insurance. This involves in a typical non-contingent fee agreements that lawyers charge their clients up-front with a flat fee, or quote their hourly fee and explain that incidental expenses will also be charged (Kritzer, 1998).[26] The lawyers charge a down payment because it is obvious there will be the difficulties of recovering from a client after the conclusion of a case, especially after an unfavourable outcome.

However, in a contingency agreement, the lawyer normally will not collect fees or incurred expenses until after the conclusion of the case which means that by delaying collection, "the contingency fee lawyer

[21] Law Society document, Shake up of legal services not backed by evidence**,** 14 August 2018, https://www.lawsociety.org.uk/.../shake-up-of-legal-services-not-backed-by-evidence/.

[22] Federal Rules of Civil Procedure, Rule 1. Scope and Purpose. Available at: https://www.uscourts.gov/sites/default/files/federal_rules_of_civil_procedure_dec_1_2019_0.pdf.

[23] The Civil Procedure Rules 1998, No 3132 (L. 17).

[24] Regulatory Objectives (1)(d) and (e) The regulatory objectives , paragraph 43 Chapter 29,1 Legal Services Board:

[25] See Comments of the Association of Professional Responsibility Lawyers to the ABA Commission on Ethics 20/20 (April 4, 2011), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/ethics_20_20_.

[26] "The popular image of the contingencies involved in the contingency fee does not fully represent the way the fee works". Under a non-contingency client/lawyer agreement, the lawyer charges an hourly fee or a flat fee, as well as expenses, both with the expectation that these sums will be collected promptly and while the case is still progressing. However, the additional services provided by a contingency agreement revolve around time and the outcome of the case (Kritzer, 1998, 267, 270).

finances the litigation for the client while a case is pending" (Blumberg, 1967, 27).[27]The lawyer receives the defendant's payment on behalf of the client, and then deducts fees and expenses before disbursing funds to the client. In addition to financing, the CFA offers clients insurance by providing protection for both expenses and time (Kritzer, 1998, 288).[28] Some states require a client to compensate his lawyer for expenses incurred, when an unsuccessful result occurs under a contingency fee agreement, the lawyer typically will not look to collect these expenses (Kritzer, 1998, 289). Furthermore, because a lawyer collects only after a favourable judgment in a contingency agreement, he essentially bears the opportunity cost of performing the litigation regardless of the outcome, especially if unsuccessful (Kritzer, 1998, 290).[29] These arise in the cases where there is recovery for the client (Kritzer, 1998, 270).[30]

The object of CFS is that litigation can be a recourse to remedy societal problems because it encourages the use of claiming fees from the other party where there was evidence of bad faith in the transaction and contingency fee is a financial vehicle to alleviate these ills. In conjunction with the free access to the courts made available through the contingency fee, litigation may also be used to promote broad and far reaching social policies. The Supreme Court values the contingency fee with the belief that "[c]ontingent fees, which promote access to the legal system, are… an expression of national policy favouring such access". Thus, the contingency fee may possibly find constitutional protection from the perspective of the Court (Brickman 1989, 100).

The CFS does allow referral fees which would permit the legal fees to be shared when one lawyer refers a case to another lawyer outside the firm as part of a long-standing and common practice, particularly, where it becomes necessary to instruct a trial lawyer to handle a litigation matter involving a contingency fee (Hudson, 2016).However the division of fees is subject to certain limitations, which are generally set forth in Model Rule Rule 1.5(e) which covers a referral fee arrangement under this provision. Under this Model Rule lawyers who are not in the same firm may divide a fee only if (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable. A referral fee arrangement also subjects both lawyers to the conflict provisions in Model Rule 1.7.[31]

The exceptions are set forth in Rule 1.7(b), which allows a lawyer to represent a client even when there is a concurrent conflict of interest if (1) the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve assertion of a claim by one client against another client represented by the lawyer in the same litigation; and (4) each affected client gives informed consent, confirmed in writing.

The application of the rules on division of fees is expounded in detail in ABA Formal Opinion 474 which was issued April 21 by the Standing Committee on Ethics and Professional Responsibility.[32] The opinion states that "joint responsibility" is not defined by the text of Model Rule 1.5(e). However, the opinion points out that the application of" Comment [7] to Rule 1.5 provides guidance noting that 'Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.' Implicit in the terms of the fee division allowed by Rule 1.5(e) is the concept that the referring lawyer who divides a legal fee has undertaken representation of the client."[33]

[27] From a criminal lawyer's perspective, "because there are great risks of nonpayment of the fee, due to the impecuniousness of his clients, and the fact that a man who is sentenced to jail may be a singularly unappreciative client, the criminal lawyer collects his fee in advance".

[28] "If the lawyer obtains no recovery for the client, the lawyer absorbs the entire opportunity cost of the time expended on the case".

[29] "If the lawyer obtains no recovery for the client, the lawyer absorbs the entire opportunity cost of the time expended on the case".

[30] In these cases, the opportunity cost is the difference between the lawyer's compensation for the successful outcome and the amount of compensation he could have earned had he spent the time working on a different case, whether a flat fee case or successful contingency case.

[31] Rule 1.7(a) provides that, subject to some exceptions, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest". Under the rule, such a conflict exists if (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person, or by a personal interest of the lawyer.

[32] ABA Formal Opinion 474 which was issued April 21 by the Standing Committee on Ethics and Professional Responsibility. Conflicts of Interest and Referral fees.*https://www.americanbar.org/.../aba/.../professional_responsibility/aba_formal_opinion.*

[33] Available at:https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/.

The impact is that if the lawyer wants to share a fee, then he must actually undertake to represent the client whereas prior to this opinion, "joint responsibility" was required, but it was unclear what the term meant in practice. It means joint representation of the client and each of them will be subject to the conflict of interest provisions of Rule 1.7. The implication is that a fee-sharing lawyer has all of the professional responsibilities that are assumed to exist in a full legal representation, including the duties of loyalty, confidentiality, competence and diligence among others. This means that the conflict-of-interest rules apply to the referring lawyer.

Opinion 474 acknowledges that there is a significant amount of variation in state ethics rules governing division of fees. Colorado, for instance, prohibits referral fees outright, while a few others have not incorporated ABA Model Rule 1.5(e) into their ethics codes. Some States, such as California, only require "client consent and a total reasonable fee" and do not require joint responsibility. This explains that the total fee must be reasonable, approved by the client and then confirmed in writing. It states further: "The agreement must describe in sufficient detail the division of the fee between the lawyers, including the share each lawyer will receive", and it "should not be entered into toward the end" of the attorney-client relationship" but instead "the division of fees must be agreed to either before or within a reasonable time after commencing the representation".[34]

There is legal aid available in the US for litigants in civil matters which is administered by the Legal Services Corporation, based in Washington, that is the single largest funder of civil legal aid for low-income Americans. It is responsible for helping those who live below a certain threshold in terms of financial status.[35] This charitable organisation in its recent report criticised the provision of legal aid funding to Americans who are below the poverty line and it is dispensing legal aid to those in need in civil matters.[36]The lack of a provision outside of the LSC for legal aid is one of the reasons why the US has adopted the Contingency Fee System (CFS) and it owes itself to the documents of the US Constitution which states its aim is "to guarantee that both rich and poor will have access to the courts and will be assured an opportunity to avail themselves of the assistance of counsel". This seems to resound the theme of equality purported in the Declaration of Independence that "all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness..." (The Declaration of Independence para. 2 (U.S. 1776)) (Landsman, 1998).

The most significant aspect of the CFS is its ability to provide "all American citizens an opportunity to litigate even if they cannot access legal aid or are unable to pay themselves" even while "litigation outcomes are often unpredictable, and the right to have one's day in court is a central concern of the American legal system" (Kordziel, 1993, 454).This right is deemed by some to be "constitutionally protected" and CFS are motivated by this objective of a fundamental aspiration to equality as enshrined in the US constitution.[37]

3.2. Insurance costs and the CFS

The major criticism of the contingency fee system stems from the fact that very large awards have been made to successful plaintiffs even if the framework is viewed by some to aid in accomplishing the goal of furthering social reform (Root, 2005).There are clearly negative reasons for the CFA based on the fact that they have the potential to open the floodgates of litigation.[38] There has been a growth of litigation stimulated by CFAs and this type of fee arrangement has vindicated the rights of individuals who otherwise might not consider it worth the effort to initiate litigation in which

[34] In Nevada the Model Rules state 1.5 (e) A division of a fee between lawyers who are not in the same firm may be made only if: (1) Reserved; (2) The client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) The total fee is reasonable.[Added; effective May 1, 2006.]

[35] The Legal Services Corporation(LSC) based in Washington, that is the single largest funder of civil legal aid for low-income Americans. LSC-funded programs help people who live in households with annual incomes at or below125% of the federal poverty guidelines – in 2015, that is $14,713 for an individual, $30,313 for a family of four. Available at: https://www.lsc.gov/what-legal-aid.

[36] Its findings reveal 86% of the civil legal problems reported by low-income Americans in the past year received inadequate or no legal help. In 2017, low-income Americans will approach LSC-funded legal aid organizations for support with an estimated 1.7 million problems. They will receive only limited or no legal help for more than half of these problems because of a lack of resources (Legal Services Corporation, 2017).

[37] In citing one goal of class actions as providing the injured a legal voice, the author comments that "fair process is often celebrated as an end in itself" (Harvard Law Review, 2000, 1809).

[38] The American Bar Association [ABA], reflecting on the history of the contingency fee as one of grudging acceptance, gave its reluctant approval in 1908. "Further pressuring the ABA to accept the contingency fee was the increasing judicial approval of contingency fees" (Brickman, 1989, 37).

the optimum result might be more than consumed by the cost.

In the context of medical malpractice there has been disquiet by lawyers who consider as over compensatory for the litigating client. Richard Abel contends that "[l] imiting contingent fees would reduce frivolous suits and unrealistic settlement demands" and the increasing frequency of this form of litigation contributes to the rising cost of health care (Abel, 1999, 548).[39]In addition to medical malpractice concerns the argument against the contingency fee is that it is for the wealthy to intimidate the impoverished and to blackmail the rich (van den Haag, 1984).[40]In the global context, in order to decrease vexatious litigation, the CFA is banned in most countries outside the US" (Wilson, 1994, 297). There is also the factor of increasing medical insurance if there is more litigation based on contingency fees. It has been argued that it is rational to limit attorney's fees which may be collected in malpractice suits and not in other actions because the limitation is also related to reducing malpractice insurance costs and, consequently, medical costs. This would result in the limit on the attorney's fee that will deter lawyers from launching CFA litigation to encourage the settlement of such litigation saving expenses and ultimately reducing medical costs to the consumer.[41]

The high fee percentages in CFA mainly arise from the risk of the litigation being assumed by the lawyer, due to the no-win, no-pay nature of the agreement (Vairo, 1992, 619). This has also been has criticized because of the use of high contingency fee arrangements in claims resolution, as opposed to litigation, contexts because the high risk does not exist (Vairo, 1992). It is assumed that it is unethical for lawyers to collect high percentage fees in contingency agreement cases involving diminution in the risk of loss. However, there is a counter argument that this produces results roughly equal to those of flat fee or hourly based fee schedules (Inselbuch, 2001, 186–187).This argument rests on the notion that both the amount of fees collected in a contingent agreement and on a flat fee agreement are coincidental if they approximate the fee with the time and effort spent (Inselbuch, 2001, 187). Moreover, neither the contingency fee nor hourly flat fee agreement account for the difficulty of representation or the quality of work performed.[42]The contingency fee is a product of the most important element of the legal services, which the hourly fee does not uphold that arises from initiative that favours the party who initiated the lawsuit.

Philip Havers argues that the "negative aspect of the overbearing insurance is if the defendant is willing to settle early in the process, the plaintiffs attorney may be more willing to settle for a lesser amount as he has not invested as much time, effort or expertise as he would in the later stages of the case. The contingency fee agreements are often complex because of fee structures based on the various stages of the proceedings and in separating costs from fees, the client is often not fully certain of the result of the agreement that includes the conditional fee on his judgment. There are many instances where the attorney receives not only one-third of the damages, but also a substantial amount for legal costs. The cumulative effect of this is that the plaintiff receives only about half of the total damages recovered which can be a surprise for most plaintiffs when entering into the CF agreement with the attorney. While the lawyers are meant to inform their client of the percentages involved this is not simple to enforce under the current structure" (Havers, 2000, 650).

This can by implication promote distrust in what is still a fiduciary relationship between individual attorneys and clients, in addition, to damaging the reputation of the profession. The lawyer has to be receptive of the clients interest in proposing a certain cause of action or settlement and the notion that the CFS is a mechanism for high, relatively easy returns has to be dispelled. Those plaintiffs who would not litigate if they knew they must compensate their lawyer upon winning or losing anticipate upon entering a CFA to proceed with their claim irrespective of the prospects of success.

The recovery is about the 30% or more obtainable through the CFS by those lawyers who act for their clients in vexatious litigation in the hopes of obtaining an early settlement. The courts and ABA have attempted to prevent such cases under Rule 1127 sanctions[43] and by compelling the losing side to pay the innocent party's

[39] See also *Roa v. Lodi Med. Group, Inc., 695 P.2d 164, 170-71 (Cal. 1985)* arguing the legislature imposed limits on contingency fees, for medical malpractice actions, in the hopes of reducing the amount of frivolous litigation and unreasonably high settlement amounts.

[40] "The contingency fee system] encourages litigiousness and makes it inviting for rich persons to harass poor ones and for poor persons to, in effect, blackmail corporations and the rich".

[41] See *DiFillippo v. Beck, 520 F.Supp. 1009, 1016 (D. Del. 1981.*

[42] Inselbuch arguesthat highly experienced attorneys charge high hourly rates not because of their knowledge of the instant dispute, but because of the presumption that, on average, over time they will provide greater knowledge and experience on specific issues).

[43] FED. Rules. of Civil Procedure Rule 11. For further discussion of Rule 11, see *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990)* noting that Rule l 's "central purpose is to deter baseless filings".

court costs, and there are several defendants who find it more cost effective to settle the matter out of court rather proceed to trial on the facts of the case.[44]

The plaintiffs lawyers may take the view that corporate defense attorneys are mere extensions of the defendant enterprise for receiving compensation and, consequently, the discovery process has grown increasingly hostile and complex with both sides never completely trust the other to exchange all of the required documents. There is the likelihood of a high volume of contingency rates for cases where the outcome is not really in any litigation and where the amount paid to the attorney is unjustifiably higher for the amount of work actually done. The success rate of group claims in recent times have encouraged other types of complex cases with several plaintiffs. These are not purposely class actions and thus not subject to the fee rates set down by the courts, for example, the courts have recently been overwhelmed by asbestos injury claims with each case involving multiple plaintiffs and defendants.[45]

The ABA applies the rule based not on a specific civil nor criminal case of attorney discipline but on the "Formal charges of misconduct, lesser misconduct, petitions for reinstatement and readmission, and petitions for transfer to and from disability inactive status" (American Bar Association, 2020, Rule 18). The burden of meeting the standard of proof depends on the circumstances in disciplinary proceedings. It is on the disciplined counsel who are seeking reinstatement, readmission, or transfer from disability inactive status by the thematic review of regulators' disciplinary and enforcement procedures status when it is transferred onto the respondent (American Bar Association, 2020, Rule 18).

4. CONCLUSION

The evidence shows that the fiduciary relationship between the client and the lawyer is not breached because of the CFA in England and Wales because there is a strong consumer protection in the LSA, and despite the formation of ABS there is an approach that emphasises welfare of the public. The professional and regulatory objectives set out by the LSB are very stringent in this regard and the lawyers have to be diligent and express care and attention towards their client. There is less probability of harm that might flow through a breach of conduct rules by the professional lawyer.

The delegation of powers to regulate conduct of the legal profession to the BSB and the SRA has not impinged the ability to keep an oversight on the practitioners when they enter into a CFA and the framework has to accord with the practitioner guidelines. The regulatory bodies are able to prevent any litigation where the lawyers are able to enter into an CFA against a public sector body that can be sued for compensation where their means tested benefits can attain legal aid in court proceedings.

The CFS in the US have a higher probability of risk because of sanctions imposed through the Rule 1127 which prevent the frivolous claims. However, the cumulative effect of the contingency fee agreements is that the plaintiff receives approximately 50% in compensation and there is potential for distrust that is exemplified by the courts setting down the fee structures in more complex cases but not in group claims that are not class action law suits. There is in such cases a more thorough discovery process that can raise the amount charged in fees and lead to higher costs in litigation.

It is crucial to note the reform of the professional conduct rules have been accompanied by the provision of a consumer driven legal service sector in the UK. There is provision of alternative business structures that prioritise the market forces to dominate and this has the potential to increase the risk element in litigation. In the US this is a subject of debate and the contingency fee agreement is a substitute for this lack of ability of non lawyers to gain equity in law firms. The incentive to lawyers for increasing the risk to their clients needs to be prevented by fees based on positive outcomes and in both jurisdictions there are rigorous ethical standards and conduct rules. These are two different streams that lead to optimising the prospects for success but it is the risk that needs to brought within the bounds of reasonableness.

[44] See 28 U.S.C. § 1927 (1988). See also, e.g., *Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Hall v. Cole, 412 U.S. 1 (1973)*. Both cases hold that if a party engages in bad faith litigation, this entities the opposing party to an award of attorney's fees from the abusing party.

[45] See, e.g., *Malcolm v. Nat'l Gypsum Co., 995 F.2d 346 (2d. Cir. 1993)*. In this case, 600 separate cases were consolidated into one action, with each plaintiff naming between fourteen and forty-two defendants. The jury award was over $94 million. Although the suit was eventually remanded for improper consolidation, had it stood, the plaintiffs' lawyers would have collected over $30 million in legal fees.

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