



Questionnaire on

FUNDING, COSTS AND PROPORTIONALITY IN CIVIL JUSTICE SYSTEMS

Please quote verbatim, or attach, all source documents.

1. What are the costs incurred in civil litigation?

What do the parties (claimants, defendants etc, or persons acting on their behalf) have to pay to the following persons and institutions, and at what stage of the proceedings do they have to make such payments?

1.1 Court charges. – A fee for filing a case in federal court is mandated by 28 U.S.C. Section 1914. The current fee is \$350 and is paid at commencement of the lawsuit.

Other charges in federal court can include taxable court costs such as fees for transcripts, printing, witnesses, and court-appointed experts, as provided for by 28 U.S.C. § 1920, and are paid after entry of judgment. See section 1.6 and 2 regarding other costs.

1.2 Other official charges (VAT, translator, bailiff, service or process, enforcement of a judgment). – There are no VAT or bailiff fees. Service or process fees are paid for at the time of commencement of the lawsuit. Translator fees are paid as incurred. Enforcement of judgment costs are only paid as necessary.

1.3 Lawyers' fees. Please cover all information on fee agreements, hourly rates, fixed fees, success fees, uplifts/contingency fees, pro bono, etc. and say how extensive each method is in practice, and what the size (or range) of fees are in each case.

Lawyer fees are paid depending upon client/attorney arrangements. These can range from hourly charges, paid monthly or quarterly, to contingency fees not payable at all except on successful resolution either by settlement or judgment and after court approval. Some firms have devised composite approaches which offer clients the ability to pay a reduced hourly fee. This fee is subject to a contingency arrangement which is the difference between the value of actual hours worked minus the reduced fee to be paid upon successful resolution

with the potential of a success fee. For example, instead of paying a normal hourly charge for defense of a particular claim, the client arrangement may call for monthly payments of recorded time based on a portion of the hourly charge with the difference held in abeyance until successful resolution. Upon such resolution, the additional fees would be paid in addition to the current outstanding bill. As well, there may be a success fee uplift. If the client was exposed to a \$20 million claim and counsel were able to resolve the exposure for significantly less, the arrangement could provide for a success fee based on the value conferred.

Defense (transaction) firms generally utilize a straight cash flow monthly billing arrangement. See NY Times <http://www.nytimes.com/2009/01/30/business/30hours.html>. There is some movement to alter this method. Plaintiffs' (claimants') firms generally work on a contingency fee basis. In class actions, contingency fees must be reviewed and approved by the court in which the action is pending. Contingency fees range from 5% to 33 1/3% depending on the evaluation of criteria as established by the Judiciary. See, for example, *Visa/MasterCard Antitrust Litigation (attached)* and *Air Passenger Antitrust Litigation (attached)*. In non class actions, contingency fees can range from 25%-50% depending upon whether the case is finally resolved at the trial or appellate level.

1.4 A witness of fact. - Witnesses are only reimbursed for their out of pocket expenses.

1.5 An expert. - Expert witnesses are compensated for their time on an ongoing basis. Ethically, testifying experts may enter into contingency fee arrangements. There are some cases that say non-testifying experts can work on a contingency fee basis. Expert fees can run as high as \$20 million, which was the approximate cost incurred by the Plaintiffs' experts in the *Vitamins Antitrust Litigation* that required the reconstruction of a global market over a decade-long period.

1.6 Any other costs. – Other costs usually involve duplication, transcription and most importantly in class actions – cost of notice and administration. Attached are several examples of these aggregate costs and the factors which drove them. Principally, the size of the class, the ability to provide individual notice and the complexity of the allocation system will influence the magnitude of the expense.

1.7 What other factors constitute a “price” for bringing a claim, such as delays in the legal process, complex procedure, unpredictability of the outcome, opportunity cost, and other strains? How long do (different types of) cases usually take?

The exceptional character of the results, the complexity of the claims that are sought, the risk involved in achieving a favourable outcome, if incidental or non-monetary benefits have been conferred, and the burdens on counsel such as the length of the litigation, if counsel was required to forgo other work, and the amount of expense entailed are all “intangible factors” in the “price” for bringing a claim. As reflected in judicial decisions in class actions

determining the fee to be awarded to counsel, virtually all of these elements are recognized by the court as influencing a client's decision on whether to pursue a claim. (See attached – *Vizcaino v. Microsoft Corporation*).

The Judicial Office of Administrative Procedure maintains statistics on the length of cases in the United States. The length is dependent upon numerous variables ranging from the control a particular judge holds over his/her docket, the complexity of the issues, the number of appeals before judgment, the number of defendants, etc. Attached is a copy of the most recent statistics.

For each item, please:

- (a) quote completely any law or guidance on the subject (general rules, reductions and exemptions),**
- (b) say what rules apply in special cases, such as small claims, special courts/tribunals,**
- (c) give (or estimate) any relevant actual amounts of money involved, and**
- (d) say when the amount of money involved becomes clear to the payer.**

2. Who bears the costs?

Costs are born by each party unless otherwise ordered by the court. Such orders are rare, and only imposed under a finding by the court of misconduct that approaches egregious character.

The Federal Rules of Civil Procedure, as well as common practices of both federal and state courts, establish what specific costs may be payable by one party to another in the course of litigation. Unless otherwise specifically directed by statute or regulation, costs are payable upon success on judgment or success on appeal. Reimbursable appellate costs, like trial costs, are set by procedural rules. .

Taxable costs in federal district court are governed by 28 U.S.C §1920 (see attached court form and Fed. Rule of Civil Procedure 54(d)(1)). Costs on appeal are governed by Federal Rule of Appellate Procedure 39(e). Except under fee-shifting statutes (like the Clayton Act— 15 U.S.C § 15(a)), the prevailing party normally cannot recover his expert costs from an opponent.

In the US, parties do not receive information from each other about the risk of fees that may have to be paid by a party's own counsel or opposing counsel. Unless a client relationship is established on the basis of a fixed-sum for work provided regardless of hours, there is usually no finite prediction made by counsel on estimated costs. This is particularly meaningful in complex matters where interim appeals of rulings may be taken and extended discovery and/or expert work may be required.

3. What are the sources of finance for bringing or defending a legal claim?

What funding is permitted from each of the following sources?

3.1 Personal funds. – Defence work is usually paid for by the corporate or individual defendant client. Plaintiffs' work may be paid for by the individual plaintiff client, but in most instances is funded by the plaintiff's counsel on a contingency basis.

3.2 Legal aid. Legal aid is available in specific circumstances for criminal defendants and otherwise where there are agencies devoted to providing such services in civil matters. In both of these instances, funding is a mixture of public and private monies.

3.3 Legal Expenses Insurance (LEI, i.e. before-the-event), for individuals or companies. – N/A

3.4 After-the-event (ATE) insurance. - N/A

3.5 Loans or grants from banks, trade associations, etc. – N/A

3.6 Funding from a lawyer or other third party investor. – See 3.1 with respect to counsel funding. There is generally no third party investor funding in US litigation. However, with the development of third party funding regimes in Europe and Australia, there are increasing efforts by third party non-lawyer funders to fund US litigation. See attached information from recent Rand-UCLA conference. Though, because lawyers can fund their own cases, take a contingency fee, and are not subject to adverse cost risks, it is unlikely that such efforts will be very successful. In some circumstances where third parties have provided the funding for litigation by others, defendants have requested the court to join the funder as the real party in interest. Under Fed. R. Civ. P. 19, the court must join the funder if complete relief cannot be obtained without joinder, otherwise the court has discretion to bring in the funder under Fed. R. Civ. P. 20.

For each item, please

- (a) quote completely any law or guidance on the subject.
- (b) give or estimate any relevant actual amounts of money involved.
- (c) say how extensively each source of funding is available and used in practice.

4. Further issues

How predictable are the amounts involved? - For the most part, our work has involved highly complex issues and multiple diverse parties. In these instances, costs and expenses of litigation are relatively unpredictable, except within broad parameters. At all times, however, funding consideration is not based on the claim of any single claimant but the aggregate potential recovery for all claimants as a whole. In the last fifty years of complex litigation in the United States, when measured in this context, the cost of litigation was always nominal in comparison to the recovery achieved. For example, total costs (not including fees) in the *Vitamin Antitrust Litigation* were approximately \$30-40 million (which is likely one of the most costly cases ever prosecuted), total recovery was in the billions of dollars.

What strategies are used by the parties to lower costs (e.g. tactics in cases, or procedural options like budgets, cost capping orders, costs protection orders)? - There is generally a marketed difference in philosophy in case cost approaches between defendants

and claimants' contingency work. Defense counsel, as a general matter, will conduct research and implement strategy consistent with a high degree of diligence and time which is not necessarily reflected in the outcome of the work. For example, multiple counsel may be devoted to researching an issue for which consumes a particular period of time when the issue was probably resolvable by the research of half the counsel in half the time. The delta number of counsel and hours incrementally did not change the result that could and should have been obvious at the lower hours. This is why counsel in traditional fee arrangements with clients often write off a great deal of time before sending bills to clients so that the charges are reasonable given the project.

On the other hand, responsible plaintiffs' counsel operating under a contingency arrangement seek to maximize the value of their time wherein their recovery is not based on a strict accounting of hours expended but rather on results obtained. Under these circumstances, counsel will not devote unnecessary incremental time to confirm outcomes observable or predictable but will instead put in the necessary time after they have ascertained the predictable outcome.

On the other hand, it must be acknowledged that not all plaintiffs' counsel are necessarily responsible or productive. There are many instances where time is expended solely to inflate hours and create perceptions of value. Those situations can and should be correctable by a careful review of counsels' time and a disallowance of hours so claimed. In situations where claimants' counsel operate under a contingency arrangement with no court supervision, the expenditure of such time merely dilutes the profit margin of the recovered fees.

In certain instances, defense counsel may operate on a budget proposed by their clients. That type of arrangement, however, can at times unduly restrain a necessary vigorous defense. Likewise, some claimants' counsel may be similarly instructed with a like consequence of limiting the effectiveness of the prosecution.

Furthermore, in US litigation, there are growing discovery costs to plaintiffs' counsel working under contingency arrangements and clients that have retained counsel under traditional fee arrangements. Expert costs, electronic discovery, data collection and hosting, electronic and hard copy document productions, and court reporting services are enormous cost issues (running into the millions of dollars) and have produced a cottage industry of companies and vendors to assist counsel in these areas. Such arrangements are rarely contingency arrangements and require careful strategies to deal with these issues in an efficient and cost-effective manner. Some vendors, such as court reporters, will enter into deferred fee arrangements and requests for competitive bids for any third party litigation service often lead to cost savings for clients and counsel. Experts and vendors are also sometimes open to cost capping arrangements and monthly oversight on billing is essential in order to keep control of costs. Furthermore, putting documents into electronic format can lead to a significant efficiencies and cost savings in terms of hard costs associated with document productions, as well as lawyer time necessary to review and/or produce documents.

Such cost saving measures are necessary in contingency cases where the Court awards reimbursement of expenses. If a court determines that costs were not reasonable and appropriate for the successful prosecution of the case, it will not grant them.

How proportionate are the sums involved? Defense costs may be driven by a directive that the client will pay millions for defense, but not a penny for tribute or attitude. In those situations the sums involved in funding may be disproportionate to either the realistic exposure or settlement or judgment. There are instances in which defendants will rightly defend against claims which are believed to be illusory or without merit. In such circumstances, costs may not dictate the relationship between funding and outcome. In other instances, more pragmatic approaches are taken with a measurement by the defendant of the estimated realistic exposure, costs of defense, likelihood of recovery, and strength or merits of the claim asserted.

On the claimants' side, since costs are principally funded by the person or by counsel, fiscal constraints assume a greater position. Responsible claimants' counsel will always attempt to take into account and put into context the cost of prosecution, as compared to the potential recovery. Even counsel who may not carefully or appropriately measure the merits of the claims they seek to advance on behalf of their clients are practically limited in the amounts they will personally advance to prosecute a claim, since they're risking loss of their own funds.

In other situations where large companies are involved as claimants, costs of litigation may be influenced not merely by potential recovery, but by potential gain in the future. Claimants in patent cases, intellectual property cases, monopoly or abuse of dominant position cases may not only benefit by being compensated for past injury, but also by collection of revenues in the future. Companies excluded from market entry by abuse of dominant power may also approach litigation costs in the context of what they believe they will gain by a successful settlement or judgment in terms of entry into a market in which they expect substantial profit without restraint.

How long do the procedures take? It depends on the complexity, see the statistics.

What proportion of cases is settled and how long do they take? Please see the statistics.

What figures (or estimates) are available on the numbers of civil litigation cases started, completed, or settled before judgment, for different available procedures, e.g. general courts, small claims, commercial or other special courts or tribunals, ombudsmen, special schemes, codes of business conduct, etc? Please give figures back to 2000 if available. Please see the statistics.

What restrictions apply to appeals? Are appeal courts bound by the findings of fact at first instance? What percentage of cases is appealed? How do the costs of an appeal compare to first instance? - Costs of an appeal are minimal in comparison to trial costs. See Federal Rules. Every party has an automatic right of appeal of a trial court judgment. Appeals beyond the first appellate level are by petition to the Supreme Court and are granted

in limited instances. See Supreme Court Rule 10. Appeals are found on law or fact, of final decisions of either the jury or the trial judge. In certain instances, the appellate court may differ from such findings if it determines that they were clearly erroneous (if there was a trial to the court) or not supported by the weight of the evidence (as found by a jury). The standard of review varies by issue and can be affected by statute, but legal issues are usually reviewed de novo. There are other exceptions providing for a denovo review of the records by the appellate court.

What reforms can be recommended? - Reforms are constantly being evaluated in order to improve the access to and effectiveness of the system. As societies have changed, so have the needs of judicial mechanisms. Where permitted, for example, discovery of documentation is no longer in hard copy format, but rather by electronic means. This transference was intended to comport information retention with information requests and changes imposed restrictions on normal business usage, i.e. policy exceptions for retention of information restored in an electronic form when requested by a court process as well as additional litigation costs which have exceeded the reproduction of hard copy. Overall, it is not clear that electronic discovery has made access to such information easier or less costly. On the other hand, reforms were recommended and implemented which limited the time in which a party could depose a witness. That limitation has, in our experience and judgment, influenced counsel to be more to the point and less loquacious. In our view, all judicial mechanisms should be continually evaluated with the dual objective of access and effectiveness.

Case Studies

Please give figures for the costs of claimant and defendant in the following examples, identifying when sums are related to a tariff or are open to be freely agreed.

If a case would normally be resolved not by normal court process but by a different procedure (small claim, no fault compensation scheme, ombudsman, special court or tribunal, business scheme) please state or estimate the amount that such alternative procedure would cost.

Please assume the most normal fee arrangement would apply for the claimant and defendant in each case (as most appropriate for the type of case), but please give some alternatives if 'normal' and success/contingency fees might apply. Assume each case goes all through the court process to a first judgment, and is not settled.

In each case, state the total sum paid by claimant and defendant if (a) claimant wins and (b) defendant wins. If appropriate, give a range of costs where the case (a) is straightforward or (b) turns out to be more complex.

Please give a summary (not exhaustive if the detail would be complex) that shows the calculations and assumptions.

The objective is not to give definitive accuracy, but to give estimated ‘bottom line’ figures from which general comparisons between different costs systems in different countries can be made.

1. **Small claim:** repayment to a consumer of €200 price paid for product not delivered.
2. **Family:** divorce between husband on average income (say €50,000 pa), wife with no income, two children, living in an average home.
3. **RTA:** road traffic accident collision, in which the rear of the claimant’s car and the front of the defendant’s car are moderately damaged (i.e. rear and front respectively require total replacement panels, but engine is undamaged); cost of repair and replacement car €6,000.
4. **Employment:** wrongful loss of employment by a middle-ranging manager (say salary €50,000 pa).
5. **Medical negligence:** doctor’s error results in permanent (a) loss of ability to walk (b) paraplegia, for male claimant aged 25 on salary of €25,000 pa, no current dependents, but likelihood of marriage and two children.
6. **SME:** small company claim for unpaid debt of €8,000.
7. **Large commercial case:** substantial and complex breach of contract claim between two large companies over supply of defective machinery worth €2 million, with €5 million loss of profit.
8. **Injunction – consumer:** against neighbour to stop noise.
9. **Injunction – commercial:** prevent illegal breach of intellectual property in commercial information between two substantial companies.

Questions for Scholars only

- a. Please give the background and historical context to the rules on funding and costs. What principles and theory apply? How do the rules on civil procedure or substantive law affect the current situation on funding and costs?
- b. Please give a critical review of the current position. Please identify general trends, unresolved or contentious issues, likely future reforms. Are the amounts of money involved predictable and proportionate? If not, how could they position be improved? Is settlement between the parties regarded as important, is settlement encouraged by the current system, and how might it be further promoted?

Thank you for completing this questionnaire