

Hire your lawyer on a contingency basis

How to sue the pants off somebody without losing your shirt

BY JEFFREY LERMAN

Before we close the book on the Barry Bonds baseball case, there is one more – perhaps the most important – lesson this dispute teaches us: If you're thinking about filing a lawsuit arising from a business dispute, consider paying your lawyer on a contingency instead of an hourly basis.

To quickly summarize this financial fiasco, Barry Bonds' record 73rd home run ball was tied up in the court for a year by two conflicting claimants. The judge ordered the ball sold and the proceeds split 50/50. The ball sold at auction for "only" \$450,000 – hundreds of thousands, if not millions, of dollars less than what litigants Alex Popov and Patrick Hayashi were hoping for.

After their attorneys' fees, Mr. Popov ended up hundreds of thousands of dollars *in the hole*. Mr. Hayashi, on the other hand, walked away with money in his pocket. Two litigants. Same case. Both received the exact same money award, yet their respective bottom lines were drastically different. Why?

Mr. Popov agreed to pay his lawyer by the hour. His lawyer is now suing him for an astonishing \$473,530 in legal fees, plus \$19,000 in expert's fees – more than double Mr. Popov's half of the \$450,000 sale.

On the other hand, Mr. Hayashi had his attorney working on contingency. He agreed to pay his lawyer a percentage of money that became available to him as a result of the attorney's efforts.

While plaintiffs in personal injury cases almost always structure their attorney's compensation agreement on a contingency basis, claimants in business and other nonpersonal injury civil cases rarely consider this possibility. They should.

If you can find a lawyer willing to work with you (usually solo or small firm practitioners who aren't hampered by conservative committees), a contingency arrangement can yield the same low-risk, yet acceptable, reward outcome that Mr. Hayashi secured. Here's how to evaluate whether your business claim may be a good candidate to pitch to a lawyer on a contingency basis.

The 'pot of gold' factor

How much actual money damages are you claiming? The more, and the more realistic, the better. If a lawyer is going to take a risk on your case, she will generally estimate how many resources she will have to invest before getting paid, then expect a significant bonus for "investing" in your case.

So, for example, if estimated litigation costs are \$100,000, the lawyer may not be interested unless she figures she has a shot at getting \$150,000-\$200,000 if she wins. On a typical 45% contingency (assuming the case goes all the way through trial), that lawyer must perceive the potential award to be in the mid-\$300,000-\$400,000 range. Don't include potential punitive damages. Few

lawyers will get excited about the possibility of getting a percentage of your long-shot exemplary damages claim.

The risk factor

Lawyers underwrite the risk of success before they take contingency cases. The less risk a lawyer perceives, the more willing she will be to "spec out" her time on your fight. How strong a case do you have? How clear is defendant's liability? Does the case involve established law, or does it present an issue that has never been decided?

Collectability of the defendant

If you win, can you collect? There's a reason most contingency cases are for personal injury claims: There's usually an insurance company on the other side whose coverage has been triggered by defendant's negligence. Insurance companies generally pay. Before any lawyer will consider rolling the dice on your case, she will need to understand the odds of being able to collect if you win.

A number of other considerations come into play including how much positive publicity is likely to be generated for the attorney, how expensive will the case be to litigate, how many documents are involved, how litigious is the defendant expected to be, how likely is the case to go through trial and appeal, and how long until a payday?

Finally, if your lawyer rejects your contingency proposal, ask about a hybrid, a reduced hourly with a sliding scale bonus depending on the outcome.

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