CALCULATING THE CONTINGENT FEE: DETERMINATION OF THE BASIS

I. INTRODUCTION

While contingent fee contracts have been both praised and maligned, there is little doubt that they have become a permanent part of the legal landscape. Since the question of the existence of the contingent fee seems settled, the next logical topic of discussion concerns the calculation of the fee. To calculate the contingent fee, one must first decide what items are to be included in the basis. It is from the basis that a percentage is taken and the attorney paid. While it would be easy to say that the basis includes all amounts recovered by the attorney on behalf of the client, this statement would be incorrect. The law has excluded some items from the basis completely. Of the items not excluded by law, what is included in the basis depends primarily on the wording found in the contingent fee contract between the attorney and the client.

II. ITEMS THAT CANNOT BE INCLUDED IN THE BASIS FOR DETERMINING CONTINGENT FEES

As a general rule, the basis may not include amounts recovered as part of divorce actions, actions for alimony, and actions for child support.\(^1\) The primary reason behind these disallowances is that such inclusions tend to be violative of public policy.\(^2\) The two main categories of prohibition are (1) alimony and child support and (2) divorce actions.

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A. Alimony and Child Support

The basis may not include amounts recovered as alimony or child support. As a general rule, contracts calling for the fee to be based on these amounts are violative of public policy. Contingent fees in such instances tend to disrupt court-rendered support awards. Furthermore, some States have a general public policy against contracts which are detrimental to the family relationship, and contingent fee contracts for securing alimony or divorce are likely to be considered as types of these detrimental contracts. There are multiple cases illustrating these points.

In Williams v. Garrison, the contingent fee contract between the attorney and the client called for the attorney's fee to be based upon the amount recovered as equitable distribution in the client's case. When the case was argued, the attorney claimed that since the fee was based on the equitable distribution amount and not on the amounts recovered for child support and alimony, then the contract should be valid. The North Carolina Court of Appeals held that the contract between the attorney and his client was for child support and alimony as well as for the equitable distribution that the attorney claimed. Just because the fee was to be based on the equitable distribution amount did not change its basic character. The court stated that a "contingent fee contract for either alimony or child support is void regardless of how such fee is to be calculated." Because the court decided that this contract was really for child support and alimony, it held the whole contract to be violative of public policy and therefore void.

In Davis v. Taylor, another North Carolina Case, the attorney and the client entered into a contingent fee contract whereby in exchange for a percentage of the recovery, the attorney would represent the client in a paternity and child support suit. Following a decision in another case,
the attorney and his client altered the contract to a non-contingent fee contract. However, in awarding fees to the client, the court ordered the defendant father to pay attorney's fees based on the contingent fee contract. The father contested the fees awarded. The court held that the contingent fee contract for pursuit of the child support action was void for having violated public policy. Therefore, the court stated that under the ruling in Thompson v. Thompson, the attorney was denied recovery for "the reasonable value of services rendered pursuant to this [the contingent fee] contract."

B. Divorce Actions

In divorce actions, contingent fees are simply disallowed in all states but Texas. As mentioned earlier, some States have a general public policy against contracts which tend to be disruptive to the family. Actions for securing divorce are considered detrimental to the family. Therefore contingent fee contracts to prosecute a divorce action are held to be void.

Illustrative of how contingent fee contracts are treated in divorce cases is Barrelli v. Levin. In Barrelli, the attorney and his client entered into a contingent fee contract for the attorney to handle the client's claim for damages resulting from divorce. The attorney filed an attorney's lien against the settlement amount and the client then filed suit to get rid of the lien. The Indiana court held the contract in Barrelli to

14. See id. at 21.
15. See id.
16. See id.
17. See Davis, 344 S.E.2d at 21.
19. Davis, 344 S.E.2d at 21.
21. See Davis, 344 S.E.2d at 22 (citing Mathews v. Mathews, 162 S.E.2d 697 (N.C. Ct. App. 1968)).
22. See id.
24. See id.
25. See id. at 848.
be void. The court stated that the contract violated the public policy of Indiana that "all fee contracts between wives and their attorneys which measure the fee in terms of sums equal to 'whatever may be recovered' in the prosecution or settlement of 'claims for damage . . . on account of Divorce' are void." According to the court, the contract in this case was essentially a contract to "prosecute the wife's divorce."

One exception concerning contingent fee contracts in divorce actions occurs when the client agreeing to the contingent fee is the defendant. In Krieger v. Bulpitt, the defendant in a divorce action retained attorneys under a contingent fee contract to defend against his wife's suit. The contract called for the attorneys to receive a percentage of the property that the attorneys secured for the defendant. Later, the defendant alleged that the contract was violative of public policy and therefore should not be enforced. The California Supreme Court reiterated the accepted rule that a contract for securing divorce was violative of public policy since promoting divorce is against the interests of society. However, the court held the contract in this case to be valid and enforceable since it was entered into to defend against a divorce action, not prosecute one. Furthermore, the California court stated that "[t]here should not be a dogmatic condemnation of every contingent fee contract in a divorce action regardless of distinguishable circumstances." Rather, the court advocated looking at each case in light of the circumstances peculiar to that case and the public policy appropriate to that situation.

### III. Items Whose Inclusion in the Basis Depend Upon the Drafting of the Contingent Fee Contract

26. See id. at 854.
27. Id.
30. Id.
31. See id.
32. See id.
33. See id. at 674.
34. See Krieger, 251 P.2d at 674.
35. See id.
36. Id. at 675.
37. See id.
Other than amounts recovered in divorce, child support, and alimony cases, the rest of the vast array of possible amounts recovered have generally been included or excluded from the basis depending not upon any characteristics particular to that type of recovery, but rather upon how the contingent fee contract has been drafted. As a general rule, ambiguous drafting has lead to various amounts being excluded.

A. Medical expenses

First, there are those cases involving the question of whether medical expenses are to be included in the basis. Where drafting of the contract is ambiguous, courts generally construe the contract against the attorney. Consequently, courts have held that the basis does not include medical expenses unless they are unambiguously provided for in the contingent fee contract.38

One case illustrating the importance of contract drafting where medical expenses are involved is *Baker v. Whitaker.*39 In *Baker*, the Missouri Court of Appeals held the term in the contingent fee contract calling for a percentage of all “amounts paid me [the client]” to be ambiguous.40 It was the failure of the contract to explicitly make provision for whether medical expenses were to be deducted that resulted in the court’s holding of the above contract term to be ambiguous.41 Because of this ambiguity, the case was remanded to the trial court for it to determine the meaning of the phrase in light of the circumstances of the case.42 The implication of *Baker* is that had the contract been clear and stated explicitly that medical expenses were to be included in the basis, then the court would likely have upheld the amount the attorneys claimed as their due.

*Doucet v. Standard Supply & Hardware Co.*43 is another example of how contract drafting resulted in medical expenses not being included in the basis for determining the attorney’s fee. In *Doucet*, the attorney and his client had entered into a contingent fee contract calling for the

39. 887 S.W.2d 664.
40. *See id.* at 669.
41. *See id.* at 670.
42. *See id.* at 670-671.
43. 250 So.2d 549 (La. Ct. App. 1971).
attorney to receive as compensation "30% of all amounts recovered." The Louisiana court interpreted this statement to mean "that the fee will be based on amounts recovered for the sole benefit of" the client. Since medical expenses were paid to the insurer, they were not recovered for the client’s "sole benefit" and were therefore not included in the basis. Failure to draft the contract to explicitly include the medical expenses in the basis resulted in the court reducing the attorney’s fees.

In Raulston v. Workmen’s Compensation Appeal Board, the Commonwealth Court of Pennsylvania ruled that an attorney could be entitled to include in the basis amounts recovered as medical expenses. The court in Raulston remanded the board’s order so that a "factual determination of whether the claimant and his attorney intended for the attorney to receive a percentage of the medical bill reimbursements as part of his fee." Once again, the contract is the determining factor in whether the medical expenses are included. Far more than any other branch of law, it is contract law that courts seem to fall back on in deciding whether medical expenses are included in the basis.

Overall, there does not appear to be a blanket restriction forbidding the inclusion of medical expenses in the basis. However, as Baker and Doucet illustrate, courts are unwilling to construe an ambiguous contingent fee contract in favor of the attorney. If medical expenses are not clearly included in the contract, they are excluded.

B. Interest on Judgments

A second category of cases pointing to the importance of the contract itself are those cases dealing with interest on judgments. As long as the contract is clearly written so as to include interest in the basis, then courts have allowed the inclusion. In Smith v. Howery, the Montana Supreme Court found that the contingent fee contract was "clear and unambiguous." The contract called for the attorneys to receive "40% of

44. Id. at 551.
45. See id.
46. See id.
48. Id. at 670.
50. See id.
51. Id. at 1383.
any recovery on appeal." In the opinion, the court stated the following:

    When an attorney enters into a contingent fee arrangement based on
    a percentage of the judgment or award recovered by the client and
    the total amount recovered includes interest, the attorney is entitled
    not only to a percentage of the actual damages recovered, but also to
    a percentage of the pre-judgment and post-judgment interest recov-
    ered."

Once again, as was the case with medical expenses, the contract itself
was the deciding factor for inclusion, not the nature of the item at issue.

In Newcomb v. Bretile, a dispute arose over whether interest was
to be included in the base amount used to determine the attorney’s per-
centage. The Kansas Supreme Court ruled that interest was properly in-
cluded in the basis for determining the attorney’s percentage. The court
reasoned that “[c]onsiderable latitude must be allowed the parties in nego-
tiating the basis for a contingent fee." Since the parties had negotiated
the inclusion of interest, the court saw no need to upset the agreement.
Because the contract called for inclusion, the interest was allowed to
stand as part of the basis.

C. Counterclaims and Offsets

A third category of cases are those dealing with counterclaims and
offsets. Amounts awarded as counterclaims or offsets are to be deducted
from the basis, unless the contract specifies otherwise. In Kramer v.
Fallert, the Missouri Court of Appeals stated that counterclaims and
offsets are to be deducted from the basis used to determine the attorney’s
percentage. The court’s decision rested primarily upon its interpretation
of the phrase in the contingent fee contract “net amount recovered.”
The phrase, according to the court, possessed a specific meaning in attor-

52. Id.
53. Id.
54. 413 P.2d 116 (Kan. 1966).
55. See id. at 119.
56. Id.
57. See id.
59. Id.
60. See id. at 674.
61. Id.
ney-client contingent fee contracts.\textsuperscript{62} The phrase "net amount recovered" referred to "the amount of the verdict . . . which remains after reduction by any amount of any counterclaim or offset, unless otherwise expressed."\textsuperscript{63} The key words are "unless otherwise expressed." Had the attorney more carefully drafted the contract so as to explicitly prevent deduction of counterclaims and offsets, then, judging by the court's language, the fee probably would have been upheld.

\textbf{D. Social Security and Workmen's Compensation}

There is a final category of cases which represent a hybrid between the cases dealing with items which are always excludable and those dealing with items whose inclusion depends on contract drafting. The two types of cases in this category are social security cases and workmen's compensation cases. Inclusion or exclusion here depends not only on contract drafting, but upon the impact of statutes, local and federal, on the contingent fee arrangement.

\textit{1. Social Security—}In social security cases, contingent fee contracts are not prohibited.\textsuperscript{64} According to one district court, "congress did not intend to invalidate contingent fee arrangements in social security cases."\textsuperscript{65} However, such arrangements are limited.\textsuperscript{66} According to the United States Code, the court may allow an attorney a reasonable fee for representing a client in an action for past due benefits, but the fee cannot exceed twenty-five percent of the past due benefits to which the client is entitled under the judgment.\textsuperscript{67} Therefore, when representing clients in social security cases, attorneys may receive their contingent fees, but these fees will be limited to a maximum of twenty-five percent of the benefits the client is awarded.

This twenty-five percent limit, however, is not a guarantee of a twenty-five percent fee.\textsuperscript{68} Instead, district courts are responsible for set-

\textsuperscript{62} See id.
\textsuperscript{63} Kramer, 628 S.W.2d at 674.
\textsuperscript{65} Id. at 321 (citing Wells v. Sullivan, 907 F.2d 367 (2d Cir. 1990)).
\textsuperscript{66} See id.
\textsuperscript{67} See 42 U.S.C.A. § 406(b) (West Supp. 1995).
ting a reasonable fee in social security cases. In making their determina-
tion as to what constitutes a reasonable fee, the courts are allowed to
consider such factors as the skill required in the case and the actual time
spent on the case. Courts are also allowed to consider any contingent
fee arrangement in determining the fee. However, the contingent fee
contract is not binding on the court. Therefore, the twenty-five percent
limit imposed by federal law is a maximum on what reasonable fee the
court sets, not the fee the attorney necessarily receives.

2. Workmen’s Compensation—In workmen’s compensation cases,
the contingent fee may or may not be allowed, depending upon state law.
In States permitting the use of contingent fee contracts, the basis has been
allowed to include whatever amounts are awarded to the client, as long as
such a fee is reasonable. In Workmen’s Compensation Appeals Bd. v.
General Mach. Products Co., the attorney agreed to represent the cli-
ent in exchange for twenty percent of any award to the client. The Ap-
peals Board limited the attorney’s fee to twenty percent of the first check
only. The Pennsylvania court ruled that this was an error. According
to the court, the Pennsylvania statute authorizing contingent fees in
workmen’s compensation cases clearly stated “amount awarded,” and this
applied to all of the award, not just the first check.

Not every State has allowed contingent fee contracts in workmen’s
compensation cases to stand. In Rice v. Pigman, the Ohio court of
appeals struck down a contingent fee contract in a worker’s compensation
case for being champertous and therefore void as against public policy.
However, the contingent fee contract in this particular case included fees

69. See id.
70. See id.
71. See Allen v. Shalala, 48 F.3d 456, 460 (9th Cir. 1995).
72. See Brissette v. Heckler, 784 F.2d 864 (8th Cir. 1986).
73. See Workmen’s Compensation Appeal Bd. v. General Mach. Products Co.,
74. Id.
75. See id. at 913.
76. See id.
77. See id. at 915.
78. See Workmen’s, 353 A.2d at 915.
80. Id.
81. See id. at 741.
and court costs in the twenty percent amount claimed by the attorney, thereby effectively freeing the client from all costs of the litigation. This leads to the conclusion that perhaps it was not the contingent fee arrangement in general that resulted in the unenforceability of this contract, but rather its own specific terms. Once again, the importance of careful drafting is brought to the forefront.

The important point to be noted about social security and workmen's compensation cases is that statutes play a large role in governing the contingent fee contract. Social security is a federal law and workman's compensation is subject to State statutes. While a survey of every state and federal statute concerning these areas is beyond the scope of this Article, it is important to remember when dealing with these cases that statutes in a particular jurisdiction could either supplement or supplant the case law that applies in the prior cases like medical expenses and pre-judgment interest.

IV. CONCLUSION

In drafting a contingent fee contract it is important to be explicit about just what amounts are to be included in the contract. Aside from alimony, child support and recoveries resulting from divorce actions, courts have been willing to include or exclude amounts recovered based upon how carefully the contingent fee contract was drafted. The only other exception to watch for is the effect of local or federal statutes in social security and workmen's compensation cases.

In closing, there are several general rules which apply to contingent fee agreements:

1. Contingent fee contracts in which the fee is to be determined based on amounts recovered as child support, alimony or in a divorce action are almost universally held to be void for violating public policy. The only exception is when the contingent fee contract is entered into for purposes of defending against a divorce action rather than prosecuting one.

2. Phrases like "net amount recovered" are to be avoided since they allow courts room to interpret and possibly abrogate the fee.

3. Specific drafting on the part of attorneys who draw up contingent fee contracts is essential. Ambiguity in a contingent fee contract is usual-

82. See id. at 739.
ly construed against the attorney. If there is doubt about whether something is included under the terms of the contract, courts have generally excluded it.

4. When social security and workmen's compensation are involved, local and federal statutes could affect the amount of the fee.

Tommy C. Ritter