## Contents

	Foreword: Sorting Out Our National Liability	*
	Crisis by Richard A. Epstein	page xiii
	Acknowledgments	XXV
	Introduction	1
1.	The Origin of the Contingency Fee	17
2.	How Profitable Are Contingency Fees?	33
3.	Are Contingency Fee Profits "Reasonable"?	47
4.	How Tort Lawyers Have Increased Their Profits	
	by Restraining Competition	57
	A. How Competitive Is the Contingency Fee Market?	57
	B. How Uniform Pricing Overcharges Clients	60
	C. Price Rigidity in the Face of Highly Variable	
	Production Costs	64
	D. Referral Fees as Indicative of Rents: A Product	
	of Uniform Pricing	65
5.	Why the Market Has Failed to Correct the Absence	
	of Price Competition	75
	A. Lack of Transparency	75
	B. Uniform Contingency Fees: A Product of Lawyers'	
	Concerted Actions	78
	C. How the Standard Contingency Fee Became the Standard	tandard 79
	D. The Political Dimension of the Tort System	80

vii

6.	<b>Impediments Imposed by the Bar to Price Competition</b> A. Barriers to Tort Market Entry	91 92
	B. The Prohibition Against the Outright Purchase	14
	of Tort Claims	93
	C. The Use of Ethical Rules to Preclude Price	
	Competition	93
	1. Prohibitions Against Providing Financial	
	Assistance to Clients	94
	2. Prohibitions Against Brokerage of Lawyers'	
	Services	94
	D. The Use of Unauthorized Practice of Law Statutes	96
7.	The Effects of Incentives Created by Contingency Fees	107
	A. "Undesirable Practices"	108
	B. Stock Options and Contingency Fees	109
	C. The Prohibition of Contingency Fees in Criminal	
	Representation	109
	D. Fraudulent Practices	111
	E. "Ambulance Chasing"	112
	F. The Modern Form of Ambulance Chasing: Litigation	
	Screenings	117
	G. The Incidence of Frivolous Litigation	119
8.	How the Quest for Profits Influenced the Development	
	of the Tort System	135
	A. The Deterrent Effect of the Tort System	135
	B. Contingency Fees and the Development of the	
	Modern Tort System	137
	C. The Deterrent Effect of Medical Malpractice Litigation	139
	Lawyers' Role in the Expansion of Tort Liability	153
10.	The Role of the Judiciary in Tort System Expansion	169
11.	Current and Future Expansions of Tort Liability	183
	A. Dispensing with the Requirement of Injury	184
	B. "Lawless" Economic Torts	185
	1. The "Light" Cigarette Class Action	189

viii

## CONTENTS

	2. Medical Monitoring	192
	3. Lead Paint as a "Public Nuisance"	194
	4. Global Warming as a "Public Nuisance"	196
	C. New Frontiers	199
	D. "The Lawyers Are Coming The Lawyers Are Coming"	200
12.	The "Litigation Explosion": Fact or Fiction?	219
	A. The Ineffectiveness of Case Filings as Measures	
	of Changes in the Scope of Tort Liability	223
	B. "Cases," Consolidations, Class Actions, and	
	Bankruptcy Trusts	225
13.	Measures of the Rate of Expansion of Tort Liability	235
	A. Tort System Costs	236
	B. A Comparison of U.S. Tort Costs as a Percentage	
	of GDP with Those of Other Industrialized Countries	238
	C. Indirect Costs of the Tort System	240
14.	The Relationship between Injury Rates and Tort	
	System Costs	253
	A. Propensity to Sue	253
	B. Injury Rates and Tort Litigation	257
15.	The Impacts of Substantial Increases in Tort Lawyers'	
	Effective Hourly Rates	263
	A. The Relationship between Effective Hourly Rates	
	and the Frequency of Tort Claims	263
	B. Effects of Contingency Fees on Tort Claim Valuation	266
	1. Noneconomic Damages ("Pain and Suffering")	266
	2. Medical Expense "Buildup"	270
	3. The Ultimate Medical Expense "Buildup":	
	Whiplash	274
16.	Class Actions	289
	A. Social Benefits versus Costs	291
	B. Regulation for Profit	294
	C. The Unintended Consequence of Consumer	
	Protection Laws	299

ix

17.	Fees in Class Actions	311
	A. How Fees Are Set	311
	B. The Role of "Pay to Play" in Fee Setting	316
	C. How Reasonable Are Class Action Fees?	320
18.	How Class Action Lawyers Game Fee Setting	335
	A. "Clear Sailing" Provisions	336
	B. The Experts Who Bless the Fees	337
	C. Time Records and the Lodestar Process	340
	D. The Reversionary Settlement Ploy	345
	E. Coupon Settlements and the Class Action Fairness Act	346
	F. Inflated Settlement Values	349
	G. The Irrelevance of Response Rates	350
	H. Other Ways Lawyers Game Class Action Fees	356
	I. The Rise and Fall of the Use of Auctions to Set Fees	356
19.	Securities Class Actions	373
	A. Milberg Weiss	375
	B. Use of Contract Lawyers	378
	1. Contract Lawyer Wages: Expenses or Billable Hours?	380
	2. Which Billable Hour Rate: Paralegal, Contract	
	Attorney, or Associate?	382
	3. Subjective Coding by Contract Attorneys: Benefit	
	to the Litigation or to the Lodestar?	384
	4. Use of Contract Lawyers: A Summing Up	385
20.	Regulation through Litigation	393
	A. Conventional Tort Litigation	395
	1. Cerebral Palsy Suits	395
	2. Clergy Sexual Abuse Litigation	396
	B. Seeking Contingency Fees by Effectuating	
	a Regulatory Outcome	397
	1. The State Farm Litigation: Seeking Profit by	
	Banning the Use of Non-original Equipment	
	Automobile Parts	397
	a. Regulation of the Use of OEM Parts	398

Х

## CONTENTS

	b. The Avery Class Action	399
	c. The Effect of the Avery Trial Court Decision	399
	2. The HMO Litigation	401
21.	A New Role for Punitive Damages: Policy Making	
	as a Profit Center	409
	A. The Impact of Punitive Damages on Policy Making	413
	B. Regulating the Temperature of Coffee	414
	C. The GM "Side Saddle" Truck Litigation	416
22.	For-Profit Partnerships between State Attorneys	
	General and Contingency Fee Lawyers	423
	A. The Tobacco Litigation	423
	1. The Appropriations Power	425
	2. "Pay to Play"	426
	3. The "Sale" of the States' Legislative Authority	427
	4. Fee "Arbitration"	427
	5. The Nullification of Ethical Rules Limiting	
	Fees to "Reasonable" Amounts	428
	B. Regulation by Litigation versus Regulation by	
	Legislation or Rule Making	429
	1. The Effect of Policy Making for Profit	429
	2. Institutional Differences between Courts	
	and Legislatures	431
	Conclusion	445
	A. "Loser Pays"	448
	B. Advancing a Consumer Protection Agenda	451
	1. The "Early Offer" Proposal	451
	2. The "Auto Choice" Proposal	455
	3. The "Early Offer" in Medical Malpractice	459
	C. A Proposed Exception to the American Rule	
	for Entrepreneurial Class Actions	460
	D. The Policy Favoring Settlement versus "Just Say No"	464
	E. The Effects of the Legal Professions' Self-Regulatory	
	Power and How to Mount a Challenge	468

## CONTENTS

Appendix A:	A Critique of Alex Tabarrok: The Problem	
	of Contingent Fees for Waiters	489
Appendix B:	Calculating Tort Lawyers' Effective	
	Hourly Rates in 1960	497
Appendix C:	Electronic Discovery and the Use	
	of Contract Lawyers	501
Appendix D:	The HMO Litigation	507
Appendix E:	The GM "Side Saddle" Truck Litigation:	
	The (Short-Lived) Triumph of Litigation	
	Over the Regulatory Process	511
Appendix F:	Modern Class Actions Undermine	
	Democratic Precepts	517
Appendix G:	Other Ways Lawyers Game Class	
	Action Fees	521
	1. The End Run Around the "No	
	Multiplier" Rule in Fee-Shifting Cases	521
	2. The Separately Paid Fee Ploy	522
	3. The Fee-Shifting/Common-Fund	
	Mix-and-Match Ploy	525
Appendix H:	Nonrecourse Financing of Tort Litigation	529
Appendix I:	Political Contributions by Tort Lawyers	
	and the U.S. Chamber of Commerce	533
Appendix J:	Special Rules Favoring Lawyers	537
Appendix K:	The Ultimate Medical Expense "Buildup":	
	Whiplash	541
Appendix L:	The Effect of Punitive Damages on	
	Compensatory Awards	545
Index		549

xii