

# Contingent Fee Litigation in New York City

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*Since 1957, New York courts have required contingent fee lawyers to file “closing statements” that disclose settlement amounts, lawyers’ fees, an accounting of expenses, and other information. This Article provides a preliminary analysis of these data for the period 2004–2013. Among this Article’s findings are that settlement rates in New York state courts are very high (84%) relative to previous studies; that very few cases are resolved by dispositive motions; that litigated cases and settled cases have almost exactly the same average recovery; that median litigation expenses, other than attorney’s fees, are 3% of gross recovery; that claims are disproportionately from poor neighborhoods; and that attorneys’ fees are almost always one-third of net recovery, which is the maximum allowed by law.*

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## INTRODUCTION

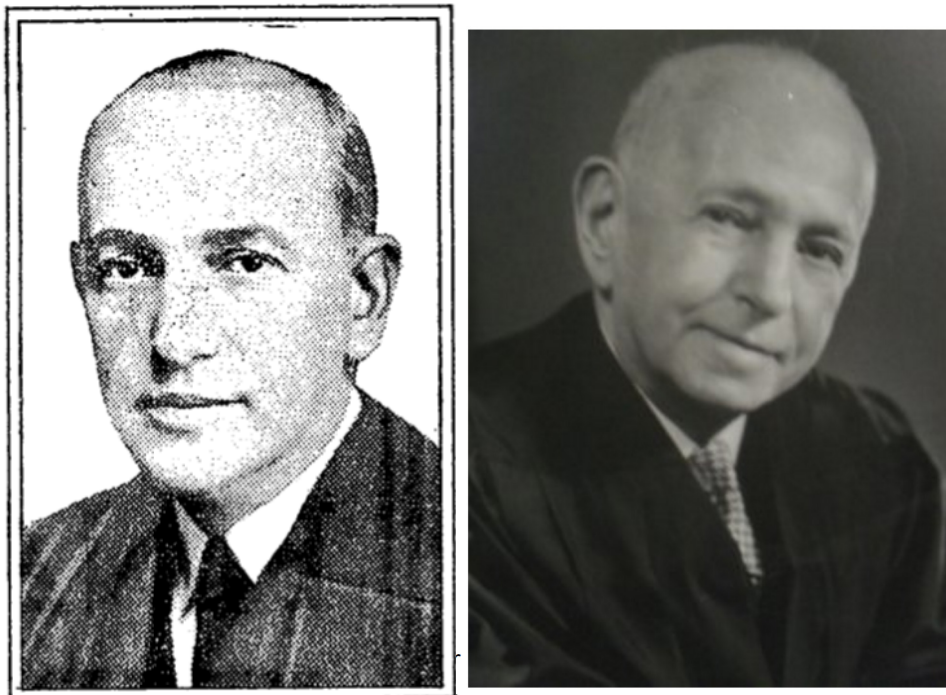
Since 1957, most contingent fee lawyers in New York City have been required to file a “closing statement” with the clerk of the appellate division when a case is resolved, whether the case is resolved by settlement, judgment, or abandonment by the client. The closing statement includes the amount of any settlement or judgment, the amount paid to the lawyer, and an itemization of the lawyer’s expenses. Because they provide information on issues not generally available elsewhere, closing statements provide a unique window into contingent fee litigation. This Article aims to provide a preliminary analysis of the data in the closing statements.

In the next Part we provide information on the origin and content of the data. In Part II we provide evidence on rates at which claims are abandoned, settled, or adjudicated. We find that the settlement rate in the New York data is significantly higher than previous estimates. In Part III we provide information on plaintiff recovery rates. We find that once we account for the riskiness of going to trial, there is relatively little difference between settlement amounts and amounts received in adjudication. In Part IV we provide evidence on the size and composition of expenses and fees. In Part V we present evidence on the demographic distribution of tort claims. Specifically we find that the number of claims is negatively correlated with income. The final Part concludes.

### I. RETAINER AND CLOSING STATEMENTS

In the 1920s, the bar and bench in New York City became increasingly concerned about the conduct of contingent fee lawyers. In 1928, the bar associations for New York City, Manhattan, and the Bronx petitioned the Appellate Division of the First Judicial Department of the New York Supreme Court, which had supervisory powers over state courts in Manhattan and the Bronx, to conduct an investigation. The Appellate Division ordered Justice Wasservogel to produce a report.

FIGURE 1: JUSTICE ISIDOR WASSERVOGEL



**JUSTICE ISIDORE WASSERVOGEL**  
**Who Has Been Named to Conduct**  
**Ambulance-Chasing Inquiry.**

PHOTOGRAPH SOURCES: Left: *Pick Wasservogel for Bar Inquiry*, N.Y. TIMES, Feb. 10, 1928, at 12; Right: *Isidor Wasservogel*, HIST. SOC'Y N.Y. CTS., <http://www.nycourts.gov/history/legal-history-new-york/history-legal-bench-appellate-01.html?http://www.nycourts.gov/history/legal-history-new-york/luminaries-appellate/wasservogel-isidor.html> (last visited Oct. 9, 2017) [<https://perma.cc/8TL5-MPJH>] (photo undated).

Judge Wasservogel held hearings, and, in 1928, issued a report that concluded:

The evidence adduced before me bears out the truth of the allegations contained in the petition of the three bar associations, to the effect that there exists in this Judicial Department a practice commonly known as “ambulance chasing.”

Personal injury cases have, in the main, come into the hands of relatively few lawyers, some of whom have conducted their practice purely as a business, to the detriment of the public and the profession.<sup>1</sup>

To “prevent a recurrence of the improper practices by which attorneys secure retainers from injured persons,” the report recommended that attorneys be required to file “a copy of the retainer

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1. ISIDOR WASSERVOGEL, REPORT TO APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT 4 (1928).

by which the attorney for the plaintiff was engaged, and also an affidavit by such attorney stating that the case was not solicited directly or indirectly, and setting forth how the retainer was obtained.”<sup>2</sup> The report also recommended that all settlements be approved by the court.<sup>3</sup>

In 1929, the First Department implemented some of the recommendations of the report. In particular, they required plaintiffs’ lawyers to file “retainer statements” with the court within ten days of signing the contingent fee agreements. The retainer statement sets out “the terms of compensation.”<sup>4</sup> Regulations also required lawyers to mail their clients a written statement accounting for any judgment or settlement within ten days of receiving the money.<sup>5</sup> If the lawyer was unable to find the client, the lawyer was required to send the accounting to the court, but otherwise the accounting was sent only to the client.<sup>6</sup>

In 1955, Judge Wasservogel, then retired from his judgeship and back in private practice, was again asked to produce a report on contingent fee lawyers, this time with a charge to consider capping contingent fees. This report was commissioned not only by the First Department (Manhattan and the Bronx), but also by the Second Department, which covers the rest of New York City as well as Long Island and five counties immediately north of New York City (Duchess, Orange, Putnam, Rockland, and Westchester). This report used the retainer statement required by the 1929 regulations to ascertain that 60% of retainers filed with the First and Second Judicial Departments were “50% Retainers.” That is, over half of retainer contracts specified that 50% of any judgment or settlement went to the lawyer.<sup>7</sup> The report considered, but did not recommend, caps on fees, although it did mention the possibility of “a sliding scale of fees” whereby lawyers would get 50% of damages up to \$2,000, 40% of damages between \$2,000 and \$10,000, and one-third of amounts over \$10,000.<sup>8</sup> So that the court could ensure that clients received their proper share, the report recommended that “closing statements” be filed with the court specifying how a case was terminated, the gross amount of recovery or

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2. *Id.* at 8–9.

3. *Id.* at 12.

4. SPECIAL R. REGULATING THE CONDUCT OF ATTORNEYS AND COUNSELORS-AT-LAW IN THE FIRST JUDICIAL DEPARTMENT 4-A, *reprinted in* PARSONS’ PRACTICE MANUAL OF THE STATE OF NEW YORK (Austin B. Griffin & John T. Fitzpatrick eds., 7th ed. 1930).

5. *Id.* 4-B.

6. *Id.*

7. ISIDOR WASSERVOGEL, REPORT, FINDINGS AND RECOMMENDATIONS IN THE MATTER OF THE HEARINGS ORDERED BY THE APPELLATE DIVISIONS OF THE SUPREME COURT IN AND FOR THE FIRST AND SECOND JUDICIAL DEPARTMENTS REGARDING A PROPOSED RULE TO LIMIT COMPENSATION OF PLAINTIFFS’ ATTORNEYS IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS 38 (1955).

8. *Id.* at 43–44.

settlement, the amounts paid to the lawyer and client, and an itemization of costs.<sup>9</sup>

The First Department responded with new regulations in 1957. These regulations capped the contingent fee in “action[s] for personal injury or wrongful death” at one-third or a sliding scale similar to the one set out in Judge Wasservogel’s report, although the scale was a little less generous to the lawyer.<sup>10</sup> The regulations also required that the percentage that goes to the lawyer, whether a simple flat percentage or a percentage based on the sliding scale, must be computed “on the net sum recovered after deducting taxable costs and disbursements and expenses for legal, medical, investigative or other services properly chargeable to the claim.”<sup>11</sup> Most importantly for the purposes of this Article, the regulations required that lawyers file with the court a “closing statement” within fifteen days of receiving any money on behalf of a client, whether in judgment or settlement. The closing statement records “[t]he gross amount of the recovery, . . . [t]he taxable costs and disbursements, . . . [t]he net amount of the recovery actually received by the client, . . . [t]he amount of the compensation actually received or retained by the attorney,” and some additional information not important to this Article.<sup>12</sup> The Second and Fourth Departments issued similar rules.<sup>13</sup> The First and Second Departments continue to require closing statements in much the same form, although the Fourth Department repealed its requirement in 2003.

The First Department regulations were modified periodically between 1957 and 2002. By 2002, the requirement to file retainer and closing statements had expanded to include tort cases involving personal injury, property damage, or wrongful death, as well as condemnation and change of grade proceedings.<sup>14</sup> The 2002 regulations

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9. *Id.* at 39–40.

10. SPECIAL R. REGULATING THE CONDUCT OF ATTORNEYS AND COUNSELORS-AT-LAW IN THE FIRST JUDICIAL DEPARTMENT 4(b), *reprinted in* CLEVINGER’S ANNUAL PRACTICE OF NEW YORK 21-10 (Jos. R. Clevenger ed., 1957) [hereinafter 1957 SPECIAL R.].

11. *Id.* 4(c). A rule change in 2014 allowed the lawyer’s percentage to be based on gross recovery. *See infra* note 16.

12. 1957 SPECIAL R., *supra* note 10, 4(e).

13. Because this Article uses data only from the First Department, it does not analyze rules from other departments in any detail.

14. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 603.7(a)(1) (2002):

Every attorney who, in connection with any action or claim for damages for personal injuries or for property damages or for death or loss of services resulting from personal injuries, or in connection with any claim in condemnation or change of grade proceedings, accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered . . . whereby his compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof . . . .

also make clear that a closing statement must be filed even if the plaintiff recovers nothing, whether due to an adverse judgment or because the plaintiff abandoned the claim.<sup>15</sup> There have been no significant changes to the regulations since 2002.<sup>16</sup>

The First Department's retainer and closing statement requirements apply to all attorneys who practice in Manhattan or the Bronx, regardless of the court they file a case in and regardless of whether they practice regularly in New York City.<sup>17</sup> This means that filing statements should be filed for cases brought in federal court. In fact, there are over sixteen thousand closing statements relating to federal cases. Nevertheless, the overwhelming majority of closing statements involve cases filed in state court, and by far the largest number (129,269) involve cases filed in the New York Supreme Court, which is the trial court of general jurisdiction. The Supreme Court is the state trial court one would expect would hear tort cases of any significance. A few thousand closing statements relate to county court and surrogate's court (probate) proceedings, and a handful of cases were filed in small claims court, justice or police court, or out of state.

Retainer and closing statements are considered "confidential" and information may not be "divulged or made available . . . except upon written order of the presiding justice of the Appellate Division."<sup>18</sup> The authors of this Article obtained an order from the presiding justice in 2014 allowing us access to retainer and closing statements from the First Department, albeit with stringent restrictions to protect confidentiality. The court administrator then provided us with PDFs of retainer and closing statements filed in 2004–2013, as well as a "flat file" compiled by court personnel in which some (but not all) of the relevant information had been typed into a database similar to an Excel spreadsheet. Unfortunately, the flat file does not contain key

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Section (a) technically only applies to retainer statements, but section (b)(1) states that "[a] closing statement shall be filed in connection with every claim . . . in which a retainer statement is required." There are relatively few cases involving condemnation or change of grade. We are looking for ways to analyze such cases separately or to exclude them.

15. See *id.* § 603.7(b)(1), (b)(2) Item 6 (stating that a "closing statement shall be filed in connection with every claim, action or proceeding in which a retainer statement is required").

16. On February 19, 2014, the rules were changed to allow the lawyer's percentage to be computed "on the gross sum recovered before deducting expenses and disbursements," if the client agreed to that method in the retainer agreement. N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20(e)(3)(ii) (2017). Because the data analyzed here comes from 2004–2013, that change is not relevant to this Article.

17. See N.Y. COMP. CODES R. & REGS. tit. 22, § 603.1(a) (2002) ("This Part shall apply to all attorneys who are admitted to practice, reside in, commit acts in or who have offices in this judicial department, or who are admitted to practice by a court of another jurisdiction and who practice within this department . . .").

18. See *id.* § 603.7(e)(1).

information, such as expenses or amounts paid to lawyer and client. The authors of this Article have hand coded a random sample of the PDFs and used that hand coding to generate the results presented in Part IV. For future projects, the authors are also utilizing optical character recognition (“OCR”) software to extract this information from the PDFs. This software converts information that was originally handwritten or typed into a form that statistical software can analyze.

A typical retainer statement is displayed below, with identifying information removed, as required by the court order.

FIGURE 2: SAMPLE RETAINER STATEMENT

**RETAINER STATEMENT**

TO: OFFICE OF COURT ADMINISTRATION  
Retainer and Closing Statements  
Post Office Box 2016  
Church Street Station  
New York, NY 10008

*For office use:*  
NYC OCA [REDACTED] 13

1. **Date of agreement as to retainer.**  
[REDACTED] 2013
2. **Terms of compensation.**  
*33 1/3% OF ANY SUMS RECOVERED TO [REDACTED] & [REDACTED]*
3. [REDACTED]
4. **\*If engaged by an attorney, name and office address of retaining attorney**  
\_\_\_\_\_
5. **If claim for personal injuries, wrongful death or property damage, date and place of**  
[REDACTED] 2010 at [REDACTED] New York, NY 10021
6. **If condemnation or change of grade proceeding:**
  - (a) **Title and description:** \_\_\_\_\_  
\_\_\_\_\_
7. **Name, address, occupation and relationship of person referring client:**  
[REDACTED]

*Dated:* NEW YORK \_\_\_\_\_ NY, [REDACTED]

Retainer statements contain relatively little information—the date of agreement, a summary of the terms of compensation (nearly always one-third of recovery to the lawyer), the date and address of the accident (or address of property condemned or subject to a grade proceeding), and information about referrals.

The next two pages display a typical closing statement in a relatively large case, with identifying information removed, as required by the court order.

FIGURE 3: PAGE 1 OF SAMPLE CLOSING STATEMENT

FOR OFFICE USE:

CLOSING STATEMENT

TO: OFFICE OF COURT ADMINISTRATION  
 Retainer and Closing Statements  
 25 Beaver Street - 8<sup>th</sup> Floor  
 New York, New York 10004

NYC OC [REDACTED]

1. [REDACTED]
2. [REDACTED]
3. [REDACTED]
5. (a) If action commenced, state date: [REDACTED], Supreme Court, Queens County; and (b) Was the action disposed of in open Court - No. If not and a Request for Judicial Intervention was filed, state the date the Stipulation or Statement of Discontinuance was filed with the Clerk of the Part to which the action was assigned - [REDACTED]. If not and an Index number was assigned, but no Request for Judicial Intervention was filed, state the date the Stipulation or Statement of Discontinuance was filed with the Clerk - N/A.
6. Check items applicable: Settled [] or claim abandoned by client [] or Judgment []. Date of payment by carrier or defendant - [REDACTED]. Date of payment to client - [REDACTED].
7. Gross amount of recovery (if judgment entered, including any interest, costs or disbursements allowed): \$975,000.00.
8. Name and address of insurance carrier or person payment judgment or claim and carrier's file number, if any: [REDACTED]
9. Net amounts: TO CLIENT - \$451,043.09; COMPENSATION TO UNDERSIGNED - \$143,229.18. Also, include the name(s), address(es) and amount(s) paid to attorneys participating in the contingent compensation: [REDACTED] in the amount of \$95,486.12. [REDACTED] substituted for [REDACTED] in [REDACTED] which received \$79,229.18 for its attorney's fees. Their retainer number is unknown to the undersigned.
10. Compensation fixed by: Retainer Agreement []; under scheduled []; or by Court [].
11. If compensation fixed by Court: Name of Judge: N/A; Court: N/A; County: N/A; Index No.: N/A; and date of Order: N/A.
12. Itemized statement of payments made for hospital, medical care or treatment; liens' assignments; claims; and expenses on behalf of client(s), which would have been charged against the client's share of the recovery, together with the name, address, amount and reason for each payment: [REDACTED] in the amount of \$97,554.85 for worker's compensation and [REDACTED] in the amount of \$87,976.19 for reimbursement of plaintiff's loan.
13. Itemized statement of the amounts of expenses and disbursements paid or agreed to be paid by others for expert testimony; investigative; or other services properly chargeable to the recovery of damages, together with the name, address and reason for each payment: SEE ATTACHED RIDER.
14. Date on which a copy of this Closing Statement has been forwarded to the client: [REDACTED]

DATED: New York, New York

[REDACTED]

[REDACTED]



FIGURE 4: PAGE 2 OF SAMPLE CLOSING STATEMENT

[REDACTED] DISBURSEMENTS

Explanation	Class	Disbs
Court Calendar Watching Services	Calendar Watching	\$ 20.23
Supreme Queens, Summons and Complaint, RJJ, Note of Issue and Motion	Court Filing Fees	\$ 445.70
[REDACTED]	Court Reporters	\$ 373.75
[REDACTED] M.D., [REDACTED] D.O., [REDACTED] Ph.D., [REDACTED]	Expert Witnesses	\$ 11,500.00
[REDACTED] M.D., [REDACTED] M.D.		
[REDACTED]	Investigation	\$ 898.40
Jams	Mediation Fee	\$ 875.00
[REDACTED] Hospital, [REDACTED]	Medical Records	\$ 1,479.13
[REDACTED] M.D., [REDACTED] Physical Therapy, [REDACTED] Surgical Center, [REDACTED] M.D.		
Misc Expenses: Xerox Copies, Express and Certified Mail, Scanning, Faxes, travel expenses	Misc	\$ 3,228.73
[REDACTED]	Process Service	\$ 763.60
[REDACTED] M.D. and [REDACTED]	subpoena	\$ 30.00
IRS	Tax returns	\$ 228.00
[REDACTED]	Comp Records	\$ 296.26
		\$ 20,138.80

Item 1 on the first page (blanked out) is a code that identifies the corresponding retainer statement. Item 2 (blanked out) is the name and address of the client. Item 3 (blanked out) is the name of the plaintiffs. Item 4 (blanked out) is the name of the defendants.

Item 5 on the first page indicates what court the case was filed in. In some statements, the case was resolved before any court filing, in which case this line is blank. Item 5 also provides other information about court proceedings.

Item 6 specifies whether the case was settled, abandoned, or resolved by judgment.

Item 7 indicates the gross recovery. Note that an amount is specified, \$975,000, even though Item 6 indicates that the case was settled.

Item 9 indicates the amount paid to the client and to the various lawyers in the case. In the case described in the closing statement, the lawyers' fee was split among three law firms.

Item 12 indicates that the plaintiff's recovery was partially paid to the workers' compensation fund, which had subrogation rights for

amounts it had previously paid the plaintiff. In addition, Item 12 shows that the plaintiff had received a loan from a litigation financing company, which was entitled to repayment out of the plaintiff's recovery.

Expenses were too large to fit on Item 13 of the form, so the lawyers attached a separate page or rider. This page indicates that expenses totaled \$20,138.80, of which over half was paid to doctors who served as expert consultants or witnesses. Medical records cost \$1,479.13; \$3,228.73 was paid for mailing, photocopying, travel and other miscellaneous expenses; and smaller amounts were paid for service of process, court fees, mediation, and other expenses. Together, the information allows calculation of how the settlement was divided:

975,000.00	Gross Recovery
20,138.80	Expenses (2% of gross recovery)
954,861.20	Net Recovery (gross recovery minus expenses)
636,574.13	Total amount paid to the client or to reimburse entities that previously paid the client (66.67% of net recovery)
	This is the sum of:
	451,043.09 paid directly to the client
	97,554.85 paid to workers compensation fund
	79,229.18 paid to litigation financing company
317,994.48	Total amount paid to lawyers (33.30% of net recovery)
	This is the sum of:
	143,229.18 paid to 1 <sup>st</sup> law firm
	95,486.12 paid to 2 <sup>nd</sup> law firm
	79,229.18 paid to 3 <sup>rd</sup> law firm
342.59	Unaccounted for (0.03% of net recovery)

The division of the recovery is relatively typical. Expenses are low in relationship to gross recovery, reducing net recovery by only 2%. The client received exactly two-thirds of net recovery, which is consistent with a one-third contingent fee. Lawyer fees were shared among three firms and totaled 33.30%, slightly less than the one-third standard contingent fee. The numbers on the form do not add up properly, as there is \$342.59 unaccounted for. This amount probably represents money paid to lawyers that was somehow omitted from the form. If this amount were added to the amounts paid to lawyers specified on the form, the total amount paid to lawyers would be exactly one-third, as would accord with the standard contingency fee.

While the closing statement discussed above is typical of a case in which the plaintiff received a substantial settlement, in many cases the plaintiff recovered nothing, either because the plaintiff abandoned the case or because the plaintiff pursued the case to trial and lost. Closing statements are filed even when cases were abandoned or result in defense victories. In such cases, the plaintiff's lawyer receives no fee, and there is no accounting of expenses.

## II. SETTLEMENT RATES

Eisenberg and Lanvers have produced the most careful study of settlement rates. Using a sample of filed cases they conclude that, in the two federal district courts they analyzed, settlement rates were 57.7% and 71.6%. They note, however, that settlement rates in tort cases were 63.8% and 87.2%.<sup>19</sup> Nevertheless, it should be noted that Eisenberg and Lanvers probably overstate the settlement rate for the districts they study, because they cannot accurately distinguish between settled and abandoned cases. They rely on "case disposition codes" in docket sheets. Unlike the closing statements studied in this Article, docket sheets do not cleanly divide cases into abandoned, settled, or adjudicated categories. While about 22% of cases in docket sheets are explicitly marked as "settled," settlement must be inferred for other cases from "voluntary dismissals." This is problematic, because voluntary dismissals could also be cases abandoned by the plaintiff without settlement. This is especially likely, because the number of cases explicitly categorized by Eisenberg and Lanvers as "other withdrawn, no evidence of settlement" or "dismissal/withdrawal to allow refile" is less than 1%. That is, Eisenberg and Lanvers categorize less than 1% of cases as abandoned, which is unrealistically low. Some of the cases they classify as settled were almost certainly abandoned.<sup>20</sup> Eisenberg and Lanvers also find that a substantial fraction (about 13%) of federal cases are resolved by dispositive motions, such as summary judgment or motions to dismiss for failure to state a claim.

There is also a conventional wisdom that 95% of cases settle. Although there is remarkably little evidence for this settlement rate and it is well known among scholars that the settlement rate is well below 95%, the conventional wisdom seems to be remarkably persistent. One possible source of the 95% rate is Ross's classic study of

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19. Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 130 (2009).

20. *Id.* at 127–28.

closed auto insurance claims from 1962.<sup>21</sup> Although that study is sometimes cited for the idea that 95% or more of cases settle, that is a misreading of Ross's findings. It is true that only 4% of claims resulted in trial, but that does not mean that 96% settled, because 32% were resolved with no recovery and no trial. Using the case disposition categories employed here for the New York data, the 32% resolved without recovery and without trial would be classified as abandoned. That would mean that the settlement rate was only 64%. Unlike the New York data studied here, Ross's data included cases resolved without a lawyer. If only cases involving a lawyer are analyzed, the settlement rate in Ross's data would rise to 73%, and the fraction of represented cases in Ross's data that went to trial is 15%.

Because the New York closing statements clearly distinguish between abandoned and settled cases, and because these data are much more recent than Ross's, they provide new insights into modern settlement rates in an important state court. Item 6 of the closing statement, with a few adjustments,<sup>22</sup> allows categorization into three rough "case dispositions": abandoned, settled, or adjudicated.

TABLE 1: CASE DISPOSITIONS

	Unknown	Abandoned	Settled	Adjudicated
Number	3766	38,532	246,542	3849
% of all cases	1.3%	13.2%	84.2%	1.3%
% of cases for which disposition known	—	13.3%	85.3%	1.3%
% of all cases not abandoned	—	—	98.5%	1.5%
Total Cases: 292,689				

As shown in Table 1 for the New York data, about 84% of all cases settled, 13% were abandoned, and less than 2% went to trial or were otherwise adjudicated. The 84% settlement rate is clearly lower

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21. See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (2d ed. 1980). The figures in this paragraph are calculated by the authors of this Article using data from page 217 of Ross's book. Of course, Ross's data is different from that analyzed here because it involves only auto accidents, whereas the cases in the New York data cover a wide range of torts, including medical malpractice and premises liability.

22. Cases that the closing statement says were "abandoned by client," but in which there was a positive recovery (Item 7) were classified as of "unknown" disposition. Similarly, cases that were "settled," but in which the recovery (Item 7) was zero were also classified as "unknown." Fortunately, there were less than a thousand of such cases. Most cases listed as "unknown" in Table 1 were cases where Item 6 was not recorded in the court's flat file, presumably because it was not marked on the closing statement.

than the 95% or 98% settlement rate that is sometimes mentioned but within the range of settlement rates found by Eisenberg and Lanvers for tort cases. As noted above, however, Eisenberg and Lanvers's estimate counts abandonments as settlements. If abandoned New York cases were also counted as settled, or if abandoned cases are excluded, the settlement rate would be over 98%, which is extremely high.<sup>23</sup>

New York contingent fee litigation also differs from the federal litigation studied by Eisenberg and Lanvers, in that dispositive motions must be far less frequent in New York than the substantial fraction (about 13%) of federal cases Eisenberg and Lanvers find were resolved by dispositive motions. In the New York data, these would be categorized as "adjudicated." Since less than 1.5% of New York cases are adjudicated, it is clear that many fewer were resolved by dispositive motions, such as summary judgment or motions to dismiss. This accords with the general view that federal courts are more likely to grant summary judgment than state courts, although the difference is more stark than one might have expected.

It is also helpful to distinguish between cases that were resolved before a lawsuit was filed and those that were resolved after. Obviously, adjudicated cases were resolved after a lawsuit was filed, but cases can be settled or abandoned before a lawsuit is filed. Fortunately, lawyers are required to file closing statements even in such cases. Tables 2 and 3 show case dispositions depending on whether a suit was filed or not.

TABLE 2: CASE DISPOSITIONS, NO LAWSUIT FILED

	Unknown	Abandoned	Settled	Adjudicated
Number	2981	28,689	100,761	0
% of all cases	2.3%	21.7%	76.1%	0%
% of cases for which disposition known	—	22.2%	77.8%	0%
% of all cases not abandoned	—	—	100%	0%
Total Cases: 132,431				

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23. These calculations exclude unknown cases. If unknown cases were included the settlement rate would still be above 97%. If one analyzed the closing statements of cases that were filed in federal court, the settlement rate is 99.4%. The extremely small number of cases abandoned (47) or adjudicated (44) suggests that lawyers who filed cases in federal court did not consistently file closing statements.

TABLE 3: CASE DISPOSITIONS, LAWSUIT FILED

	Unknown	Abandoned	Settled	Adjudicated
Number	785	9,843	145,781	3849
% of all cases	0.5%	6.1%	91.0%	2.4%
% of cases for which disposition known	—	6.2%	91.4%	2.4%
% of all cases not abandoned	—	—	97.4%	2.6%
Total Cases: 160,258				

Interestingly, almost half of cases were resolved before a lawsuit was filed. Note that these are cases in which the plaintiff had hired a contingent fee lawyer (thus triggering the obligation to file a closing statement), so these resolutions do not include cases resolved by insurance companies or defendants without the involvement of a plaintiff's lawyer. Cases resolved without filing a lawsuit are obviously very different. Many more of them are abandoned (22% versus 6%), fewer are settled (76% versus 91%), and, of course, none are adjudicated. Interestingly, the settlement rate among filed cases is over 90%, which is higher than in the federal data studied by Eisenberg and Lanvers, which was similarly restricted to cases in which lawsuits were filed.<sup>24</sup>

Settlement rates in the New York data are also much higher than that reported in Ross's study of closed auto insurance claims mentioned above. As noted above, if only cases involving a lawyer are analyzed, the settlement rate in Ross's data is 73%, which would still be much lower than in the New York data. Also, the percentage of represented cases in Ross's data that went to trial is 15%, which is much higher than in the New York data. If one looked at cases that resulted in a lawsuit in Ross's data, the contrast to the New York data would be even more extreme. In such cases, Ross's data show that only 51% settled, 25% were tried, and 24% were abandoned.<sup>25</sup>

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24. Figures in Table 3 may slightly overstate the settlement rate because some cases may have been misclassified as not filed when they were actually filed. Cases were classified as "not filed" if no court is listed in Item 5 of the closing form. *Cf.* Eisenberg & Lanvers, *supra* note 19, at 126 (describing methodology for cases included in study). It is a reasonable assumption that such cases were not filed in court, because, if they were, one would expect the court to be mentioned. Nevertheless, about 20% of adjudicated cases also do not list a court in Item 5, suggesting that some cases which do not list a court in Item 5 were cases in which a lawsuit was filed.

25. *See supra* note 21.

## III. AMOUNTS RECOVERED

Table 4 summarizes the amounts recovered.

TABLE 4: RECOVERY AMOUNTS

	Settled Cases	Adjudicated Cases	Adjudicated Cases with Non-Zero Recoveries
Mean (average)	\$89,168	\$92,534	\$315,187
10th percentile	\$1,534	0	\$3,500
25th percentile	\$4,796	0	\$10,000
50th percentile (median)	\$12,000	0	\$30,000
75th percentile	\$37,500	\$6,000	\$148,153
90th percentile	\$125,000	\$78,845	\$659,772
95th percentile	\$300,000	\$300,000	\$1,385,527
99th percentile	\$1,305,681	\$2,010,000	\$5,000,000
N	246,540	3,849	1,130

The average recovery among settled and adjudicated cases is remarkably similar, both around \$90,000. The similar averages, however, mask large differences in distributions. Plaintiffs win only 29% of adjudicated cases, so most adjudicated cases result in no recovery for the plaintiff. In contrast, a settlement, by definition, involves some payment to the plaintiff. Most recoveries in the dataset are relatively small. Seventy-five percent of settlements are \$37,500 or less, and 75% of adjudicated cases result in judgments of \$6,000 or less. On the other hand, the distribution of adjudicated cases is dominated by the fact that over 70% of cases result in no recovery at all. If attention is restricted to adjudicated cases with nonzero recoveries, the seventy-fifth percentile jumps to \$148,153.

It is also helpful to look at the distributions graphically:<sup>26</sup>

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26. These graphs use kernel density estimation to create curves from data that is inherently discrete and lumpy.

FIGURE 5: DISTRIBUTION OF RECOVERIES IN SETTLED AND ADJUDICATED CASES

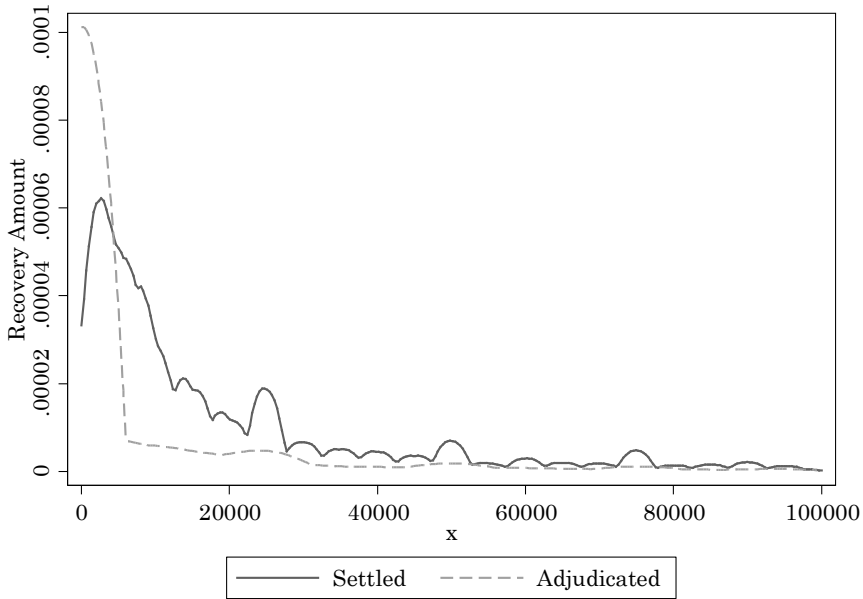
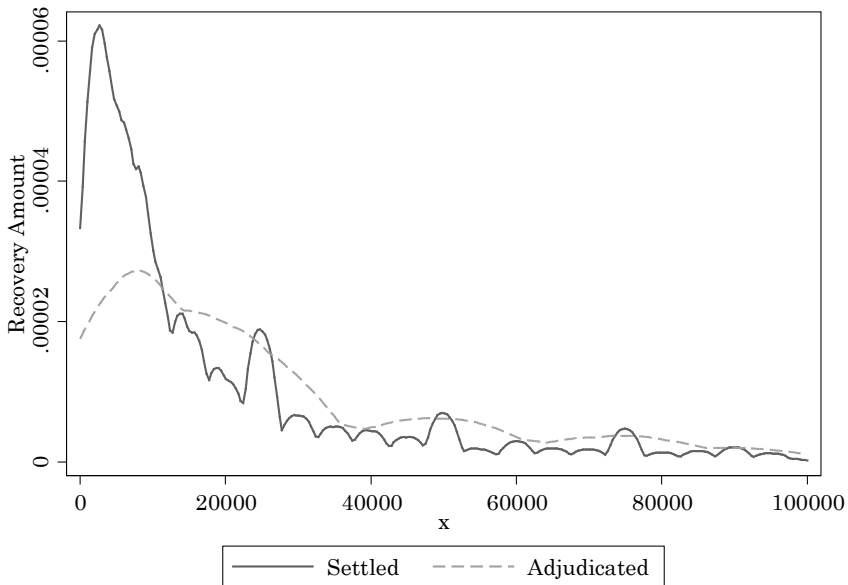


FIGURE 6: DISTRIBUTION OF RECOVERIES IN SETTLED AND ADJUDICATED CASES WITH NONZERO RECOVERIES





In both graphs, the horizontal axis has been truncated at \$100,000. If the graphs included higher amounts, they would be nearly unintelligible because of the long “tail” to the right caused by a few very high settlements and judgments. If the horizontal axis included all recoveries, there would be a spike at the left next to the vertical axis, and then a nearly flat line just above the horizontal axis.

Figure 5 shows the large fraction of adjudicated cases that result in no plaintiff recovery, but does not reveal much about the rest. Settled cases mostly result in relatively low recoveries, and, in general, higher settlements are less common than lower settlements. Figure 6 shows that, if one restricts attention to adjudicated cases with positive recoveries, adjudicated recoveries tend to be higher than settled recoveries. There are fewer very low recoveries and more recoveries larger than about \$20,000.

The distribution of recoveries sheds some light on the selection of disputes for litigation.<sup>27</sup> Priest and Klein’s famous 1984 article asserted that litigated cases are a nonrandom sample of all cases.<sup>28</sup> This Article has spawned a large theoretical and empirical literature.<sup>29</sup> Most of the empirical literature focuses on Priest and Klein’s prediction that plaintiffs will generally win 50% of tried cases. The New York data analyzed here allow additional insight because they reveal settlement amounts. The fact that mean recoveries for settled and adjudicated cases are nearly identical might suggest that there is relatively little selection. That is, settled and adjudicated cases are similar, at least in their average value. This is inconsistent, for example, with simple asymmetric information models of litigation and settlement, which would suggest that litigated cases would be skewed toward those that favor the more informed party.<sup>30</sup> So, if, as is usually assumed in tort cases, the defendant is better informed, one would expect defendants to settle when the plaintiff has a strong case and adjudicate when the plaintiff’s case is weak. This would imply that settlements should, on average, be higher than adjudicated recoveries.

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27. See Eric Helland et al., *Maybe There Is No Bias in the Selection of Disputes for Litigation*, J. INSTITUTIONAL & THEORETICAL ECON. (forthcoming) (discussing in detail the implications of the New York data for the selection of disputes for litigation).

28. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

29. See Daniel Klerman & Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEGAL STUD. 209, 210 n.1 (2014) (noting that the 1984 Priest and Klein article is “one of the most influential law articles of all time” and citing some of the relevant literature).

30. See Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557 (1986); Abraham L. Wickelgren, *Law and Economics of Settlement*, in RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 330, 336 (Jennifer Arlen ed., Edward Elgar Publishers 2013).

Nevertheless, the fact that average recoveries are similar in litigated and settled cases could be made consistent with selection theory, if additional assumptions are made. For example, if plaintiffs were usually better informed, that would lead to adjudicated cases with higher average recoveries. So, if plaintiffs were sometimes better informed, and other times defendants were better informed, the net result might be that average settlements and adjudicated recoveries were the same, as observed.

The fact that plaintiffs win only 29% of litigated cases is inconsistent with Priest and Klein's famous 50% prediction but is consistent with their broader theory, which provides many explanations for deviations from 50%, including asymmetric stakes.<sup>31</sup> If, for example, defendants suffer reputational harm from an adverse judgment, they have more at stake and one would expect defendants to settle all but the cases they are most likely to win, leading to plaintiff trial win rates less than 50%.

#### IV. FEES AND EXPENSES

The analysis of attorneys' fees and expenses is, at the moment, tentative, because New York court administrators did not include this information in their flat file, so we must extract it from the PDFs. The information in this Part is based on hand coding a random sample of one hundred cases.

Expenses are a heterogeneous category that includes court filing fees, expert fees, record fees, postage, transportation, service of process, deposition transcription, and other services. Lawyer fees are, of course, distinct from expenses. Median expenses were 3% of recoveries. Average expenses were somewhat higher (5%), because of a small number of cases with very high expenses. In general, while expenses went up as recoveries went up, the percentage of money paid in expenses went down. As would be expected, the expense percentage also went up when cases were filed (as opposed to resolved before suit) and as the case went through more procedural stages (such as motions), although even if a suit was filed and a motion or other procedure requiring a "request for judicial intervention" was initiated, the expense percentage only rose to 6%. Experts were hired in 21% of cases, and, if an expert was hired, expert fees averaged \$3,654 per case. Court fees averaged \$321 in the cases where suit was filed.

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31. See Daniel Klerman & Yoon-Ho Alex Lee, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT'L REV. L. & ECON. 59 (2016).

Attorneys' fees were exactly one-third of net recovery in most cases. Net recovery is total recovery minus expenses. One-third is the maximum allowed by the New York courts, except when a sliding scale fee is used, which is rare. Even when there were deviations from one-third, the deviations were usually small (e.g. lawyers' fees between 30% and 40%). In only three cases were fees lower than 30%, and in only two cases were fees higher than 40%. One possible explanation for fees lower than a third is that the retainer contract specified a lower percentage. Unfortunately, we were not able to confirm that by looking at the retainer statements, because retainer statements were missing for those cases, probably because they were signed before 2004 and thus not turned over to us. Another reason attorneys' fees are sometimes lower than one-third is that, in medical malpractice cases, a lower percentage is required by New York law.<sup>32</sup> Attorneys' fees higher than one-third are more puzzling because they are forbidden by law. In one case, it appears that the lawyers may have received judicial permission to go over the cap.

#### V. THE DEMOGRAPHICS OF TORT CLAIMS

Because the data set includes the plaintiff's address, it is possible to map claims by zip code:

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32. N.Y. JUD. LAW § 474-a (McKinney 2017).

FIGURE 7: SUITS PER CAPITA (BY ZIP CODE)

Claims Per 1000 Population

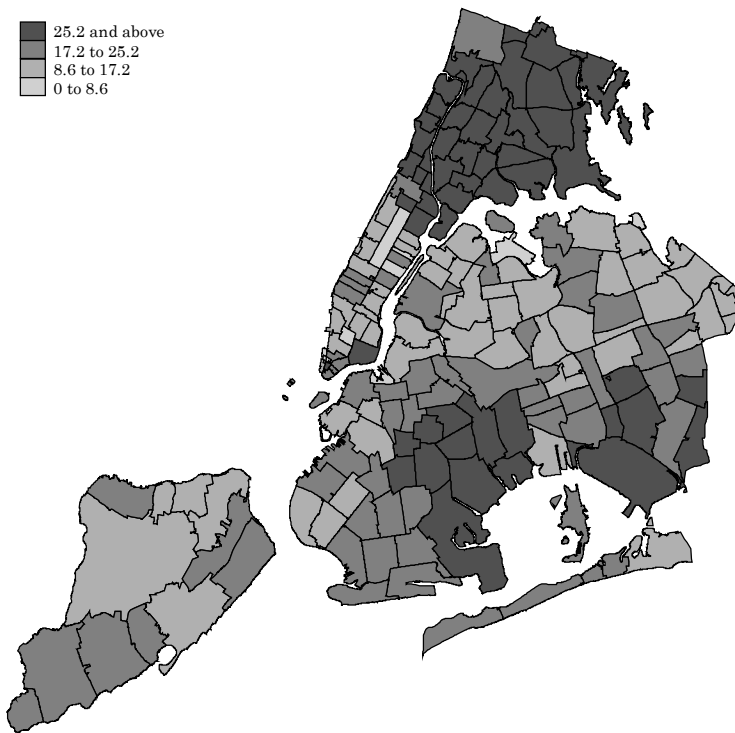
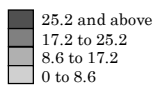


FIGURE 8: INCOME PER CAPITA (BY ZIP CODE)

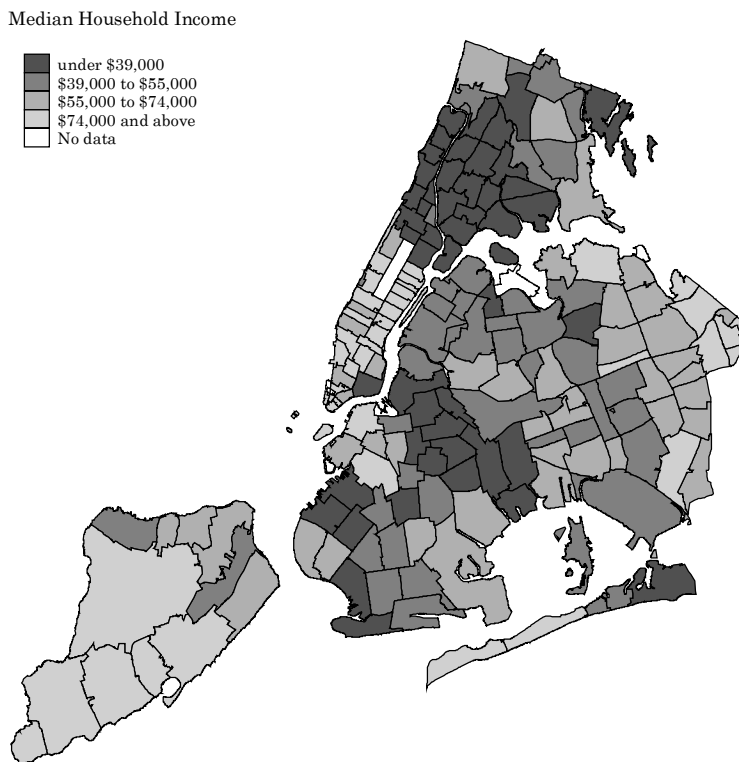


Figure 7 shows claims per capita. Zip codes with more suits are darker. Figure 8 shows income per capita.<sup>33</sup> Zip codes with lower median household income are darker. The two maps are almost identical. Places with many claims per capita (dark areas on Figure 7), such as Harlem and the Bronx, tend to be places with low per capita income (dark areas on Figure 8). Conversely, places with relatively few suits (light areas on Figure 7), such as the Upper East and Upper West Sides of Manhattan, tend to be places with high incomes (light areas on Figure 8).

There are a number of possible explanations for these patterns that we intend to explore in more depth in a future article. One possibility is that poor people are more likely to be injured, perhaps because they are more likely to live or work in less safe conditions, more

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33. AM. FACTFINDER, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (last visited Oct. 28, 2017) [<https://perma.cc/J994-DYV5>] (figures created using data from the 2010 U.S. Census).

likely to use unsafe products, and/or more likely to receive inferior medical care. Another possibility is that poor people are more likely to hire a lawyer and make a claim if injured, perhaps because they are less likely to have insurance or because recoveries of a few thousand dollars, which make up a substantial fraction of all recoveries, would mean more to a poor person than to a rich person.

#### CONCLUSION

The New York courts have collected a wealth of data on contingent fee litigation. This Article barely scratches the surface of what the data contain. Among this Article's findings are that settlement rates are higher than in federal court, that very few cases are resolved by dispositive motions, that litigated cases and settled cases have almost exactly the same average recovery, that poor people are more likely to make a tort claim, and that expenses average 3% of gross recovery, while attorneys' fees are almost always one-third of net recovery, the maximum allowed by law.