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Judicial Power over Contingent Fee Contracts: Reasonableness and Ethics

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JUDICIAL POWER OVER CONTINGENT FEE CONTRACTS: REASONABLENESS AND ETHICS

Contingent fee contracts serve a valuable function in providing potential claimants, unable to obtain traditional financing for legal representation, access to the legal system. Because of the special risks involved, attorneys may reap a windfall. This potential abuse can trigger the equitable power of the judiciary to supervise these agreements. This Note discusses the proper scope of this power in terms of the standards used to judge the propriety of contingent fee arrangements. The author examines the reasonableness standard used by a majority of courts and finds that an approach which focuses on the ethics of the contract is preferable to avoid the confusion and doctrinal difficulties inherent in the reasonableness analysis.

INTRODUCTION

CONTINGENT FEE CONTRACTS[1] between attorneys and clients are an established part of the practice of law. These arrangements have received the approval of the American Bar Association[2] as well as many state bars because such contracts provide the only economical and practical means for some persons to pursue legal claims.[3] Though the use of the contingent fee contract is established, disputes often arise when attempts are made to enforce or limit these contracts in court.[4]

Courts in most jurisdictions have held that there is an inherent equitable power vested in a trial court to pass upon the propriety of counsel fees in connection with any matter before it.[5] This

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1. A contingent fee contract has been defined as:

> A contract between an attorney . . . and a client wherein the former agrees to represent the latter as the latter's attorney . . . in the commencement and prosecution of a suit on behalf of the latter for a fee amounting to a certain percent of the amount of the judgment obtained in the action for the client, no charge to be made by the attorney against the client in the event the action is not successful in behalf of the client.

BALLENTINE'S LAW DICTIONARY 260 (3d ed. 1969).

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1976).

3. 1 S. SPEISER, ATTORNEYS' FEES 84 (1973); Case Comment, Walker v. Telex Corp.: *Contingent Fee—Presumptive Value of a Benefit*, 3 OKLA. CITY U. L. REV. 759, 764 (1979) ("The historical justification for contingency fee contracts was to enable the penniless client to obtain compensation.").

4. "In some cases, the issue of attorneys' fees becomes more complicated and involves more attorney time than the underlying lawsuit." Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 292 (1977). For example, in Kiser v. Miller, 364 F. Supp. 1311, 1316–17 (D.D.C. 1973), nearly half of the papers filed involved attorneys' fees issues; *see* notes 39–40 *infra* and accompanying text.

5. *E.g.*, Schlesinger v. Teitelbaum, 475 F.2d 137, 141 (3d Cir.), *cert. denied*, 414 U.S.

view, however, has not been universally accepted. For example, in *Thatcher v. Industrial Commission*,[6] the Utah Supreme Court challenged this general rule stating:

> [W]e are not aware of any power in the judiciary to fix or regulate attorney's fees. We do not think it can be inferred from the power to promulgate rules of practice and procedure nor from the power to provide for the examination, licensing or regulation of admission to the bar . . ., nor from the auxiliary power to discipline attorneys as officers of the court for unprofessional conduct. . . . [T]he attorney's fee is left to agreement between the attorney and his client subject to the right of the court to discipline the attorney where the fee charged is unconscionable, or advantage is taken of the ignorance of the client. . . . We must therefore conclude that the judiciary does not regulate attorneys in the sense that it supervises them in their office transactions and that the matter of fixing fees is generally a matter of agreement.[7]

In passing on the propriety of the fees garnered by contingent fee contracts, courts have recognized a unique feature of such arrangements—the risk of no recovery for the client and thus no fee for the attorney. Consequently, courts have enforced contracts where the fee is greater than the value of the services performed.[8]

Despite seemingly favorable treatment of the attorney's interest in these contracts, there is some "judicial and legislative suspicion" of such contracts, a belief that attorneys may be tempted to take advantage of their clients.[9] Accordingly, there is a tendency among courts to construe any ambiguity in a fee contract liberally in favor of the client,[10] consistent with the general rule that an

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1111 (1973) ("in its supervisory power over the members of its bar, a court has jurisdiction of certain activities of such members, including the charges of contingent fees"); Baumrin v. Cournoyer, 448 F. Supp. 225, 228 (D. Mass. 1978) (inherent equitable power vested in district court to judge the reasonableness of counsel fees in any case before it); Jersey Land and Dev. Corp. v. United States, 342 F. Supp. 48, 54 (D.N.J. 1972), *rev'd on other grounds*, 539 F.2d 311 (3d Cir. 1976) (a court has an "inherent equitable power to pass upon the reasonableness of counsel fees charged in connection with any matter before it. . . ."). One commentator has noted that "the general view in all jurisdictions seems to be that this right to make fee contracts is limited by the basic power of the courts to prevent unprofessional conduct by its officers. . . ." F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES 43 (1964).

6. 115 Utah 568, 207 P.2d 178 (1949).

7. *Id.* at 574–75, 207 P.2d at 181.

8. F. MACKINNON, *supra* note 5, at 62. For a different view of modern contingent fee contracts, *See* Case Comment, *supra* note 3 ("Contingency fee contracts today are not formed as simple, salaried propositions, but are in essence an application of risk capital seeking higher returns").

9. F. MACKINNON, *supra* note 5, at 44.

10. *See* note 5 *supra*.

ambiguous contract is construed against its drafter.[11]

Such modification of these arrangements poses significant problems of legitimacy. Since a court can intervene in the contingent fee agreement only in extraordinary circumstances,[12] proper articulation of the limits of judicial supervisory power in terms of appropriate standards to review these agreements is necessary. For the most part, courts have discussed such standards in terms of the reasonableness of the fee gained in relation to the effort of the attorney.[13] Whether this reasonableness approach adequately describes the proper scope of judicial authority is the focus of this Note.

Interestingly, this issue may be complicated when a court has statutory authority not merely to supervise a fee arrangement, but to grant a fee award outright. A recent case of much notoriety, *Krause v. Rhodes* (the *Kent State* case),[14] serves as an example of a situation where it is unclear whether the court was relying primarily on statutory authority to award attorneys' fees or on general supervisory authority in abrogating the applicable contingent fee contracts. The oral opinion of the court[15] noted its authority to exercise discretion to set attorneys' fees pursuant to section 1988 of the Civil Rights Act.[16] A subsequent oral ruling seemingly "reaffirmed" the grounds upon which the court had limited the fee claims of counsel in the prior opinion.[17] However, it could be argued, as appellee did,[18] that in this latter opinion the court made no mention of the statute but rather, specifically drew upon the cases cited in its earlier opinion as the basis for its general supervisory power.[19] Thus, the district court had retreated from any statutory basis for its decision and relied instead on its general supervisory power.

This Note examines the development of the courts' general supervisory power over contingent fee agreements.[20] Specifically, the Note traces the growth of the "reasonableness" standard

11. *See* Jersey Land and Dev. Corp. v. United States, 342 F. Supp. 48, 54 (D.N.J. 1972).

12. *See* notes 25–33 *infra* and accompanying text.

13. *See* notes 38–45 *infra* and accompanying text.

14. No. 70–544 (N.D. Ohio Jan. 4, 1979) (settlement and dismissal order), *appeal docketed*, No. 79-3115 (6th Cir. March 9, 1979).

15. Krause v. Rhodes, No. 70–544 (N.D. Ohio Feb. 6, 1979) (oral opinion).

16. 42 U.S.C. § 1988 (1976).

17. Krause v. Rhodes, No. 70–544 (N.D. Ohio March 9, 1979) (oral ruling) at 2.

18. Brief for Appellee, Krause v. Rhodes, No. 70–544 (N.D. Ohio Jan. 4, 1979).

19. *Id.* at 17 n.5.

20. *See* notes 38–48 *infra* and accompanying text.

through case law. It focuses on the problems inherent in this standard—judicial arbitrariness, misuse of precedent, and confusion of the issues[21]—and proposes an alternative approach which emphasizes the ethical relationship between attorney and client.[22] Such an approach, this Note argues, not only avoids some of the difficulties encountered with the reasonableness standard, but also is more consistent with case law.[23] Finally, to demonstrate the utility of this alternative ethical approach, this Note applies it to the exceptional circumstances of the *Kent State* case.[24]

I. THE RESTRICTED RIGHT TO CONTRACT FOR A CONTINGENT FEE: THE DEVELOPMENT OF THE REASONABLENESS STANDARD

A court, in the exercise of its supervisory power over attorneys as officers of the court, generally determines the propriety of a contingent fee contract.[25] In other words, there is no "unrestricted right to contract for a contingent fee."[26] Further, there are several policy grounds which by virtue of special equitable circumstances often dictate judicial intervention.[27] One such policy, protection of minors, compelled judicial intervention in *Cappel v. Adams*.[28] *Cappel* was an action for the wrongful death of a mother and personal injuries to a father resulting from carbon monoxide poisoning.[29] The contingent fee contract between the father (on behalf of himself and his children) and the attorney provided for a fee of one-third of any recovery made through judgment or settlement.[30] Upon actual settlement, however, the district court limited the attorney's share of the children's award to one fifth.[31] The attorney contended on appeal that the court had interfered with the right of attorney and client to establish attorney fees by mutual agreement "without being restrained by the law."[32] The Fifth Circuit noted,

21. *See* notes 49–59 *infra* and accompanying text.
22. *See* notes 49–77 *infra* and accompanying text.
23. *See* notes 60–77 *infra* and accompanying text.
24. *See* notes 78–90 *infra* and accompanying text.
25. Allen v. United States, 606 F.2d 432, 435 (4th Cir. 1979) (generally recognized power of courts to deal with contingent fee contracts in the cases before them is "well-established"); *see* F. MACKINNON, *supra* note 5, at 43.
26. *Recent Developments*, 60 COLUM. L. REV. 242, 244 (1960).
27. *Id.*
28. 434 F.2d 1278 (5th Cir. 1970).
29. *Id.* at 1279.
30. *Id.*
31. *Id.* The district court approved the one-third fee as to the father. *Id.*
32. *Id.* at 1280.

however, that "the right to contract for a contingent fee has never been thought to be unrestrained . . . [and that such contracts are] especially subject to restriction when the client is a minor, largely because of the obvious possibility of unfair advantage."[33]

No matter how broadly one defines the right to contract—and thus narrowly defines the right of judicial intervention—serious questions remain regarding the scope of the power of a court to interfere in the contractual relationship. One federal district court, in *United States v. 115.128 Acres of Land, More or Less in Newark, N.J.*,[34] set a definite limit: in the absence of fraud or undue influence, courts should not set aside an attorney's contract for contingent fees unless the fees are exhorbitant.[35] The same court, twenty-one years later, stated the limits in a slightly different way:

> This Court has the inherent equitable power to pass upon the reasonableness of counsel fees charged in connection with any matter before it, provided that the action of the Court does not nullify or diminish the effectiveness of a valid contract voluntarily entered upon by parties of equal bargaining power.[36]

Most federal courts have not felt their power to be so limited. These courts have interpreted their power to extend well beyond the spirit, if not the words, of limitation set forth in *115.128 Acres*.[37]

Starting from the premise, established in the seminal case of *Spilker v. Hankin*,[38] that contingent fee contracts are not to be treated as ordinary contracts, courts have developed an analysis which examines the reasonableness of the contract. For example, in *Kiser v. Miller*,[39] the court extended this notion of different, special treatment for contingent fee contracts. Emphasizing that the *Spilker* rule was based on the fiduciary relationship of the parties, the *Kiser* court, although discussing the reasonableness of the fee in question, ruled that such contracts were "presumptively void."[40]

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33. *Id.*

34. 101 F. Supp. 796 (D.N.J. 1951).

35. *Id.* at 799.

36. Jersey Land and Dev. Corp. v. United States, 342 F. Supp. 48, 54 (D.N.J. 1972), *rev'd on other grounds*, 539 F.2d 311 (3d Cir. 1976).

37. *See* text accompanying note 35 *supra.*

38. 188 F.2d 35 (D.C. Cir. 1951).

39. 364 F. Supp. 1311 (D.D.C. 1973), *modified sub nom.*, Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974). *See* notes 62–67 *infra* and accompanying text.

40. 364 F. Supp. at 1319.

In *Dunn v. H.K. Porter Co.*,[41] the court went even further. Acknowledging the special nature of contingent fee contracts, the court noted that the *ABA Canons of Professional Ethics* had qualified the right of an attorney to enter into such agreements "with the proviso that [the contracts] are subject to the 'supervision of the courts, as to [their] reasonableness."[42] From this, the *Dunn* court established a specific standard by which contracts were to be judged—a standard that was arguably divorced from the fiduciary principles inherent in the supervisory authority. Seemingly ignoring its true objective in monitoring contingent fee contracts, *i.e.*, to eliminate overreaching, the court declared that a contract would be struck down if the fee were merely found to be unreasonable.[43]

Such an approach was ratified in *Allen v. United States*,[44] where the court noted that in determining the propriety or reasonableness of a contingent fee, "A court abuses its discretion if it allows a fee without carefully considering the factors relevant to fair compensation."[45] Thus, from the suggestion that, because of the fiduciary relationship of the parties, the court should treat contingent fee contracts with more care than ordinary contracts, an analysis evolved which required a detailed inquiry into the reasonableness of the fee. Yet, such an analysis is imprecise.[46] Not only does the reasonableness standard serve as the cause for confusion with standards used in other contexts,[47] but it also is an inaccurate label for the analyses actually used by the courts.[48]

II. THE PROBLEM WITH THE REASONABLENESS STANDARD: THE CASE FOR THE ETHICAL APPROACH

A. *Reasonableness as a Confusing Standard*

The approach taken by the court in *Allen v. United States*[49] typifies the confusion engendered in resorting to the reasonableness standard when courts must decide the propriety of contingent fee contracts. As noted, the *Allen* court required a careful consid-

41. 602 F.2d 1105 (3d Cir. 1979). *See* notes 68–77 *infra* and accompanying text.

42. 602 F.2d at 1108 (citing Canon 13 of the ABA CANONS OF PROFESSIONAL ETHICS, (current version ABA CODE OF PROFESSIONAL RESPONSIBILITY DR2–106 (A)(8) (1976)).

43. *Id.* at 1109.

44. 606 F.2d 432 (4th Cir. 1979). *See* notes 49–55 *infra* and accompanying text.

45. 606 F.2d at 435.

46. *See* notes 49–77 *infra* and accompanying text.

47. *See* notes 49–55 *infra* and accompanying text.

48. *See* notes 56–77 *infra* and accompanying text.

49. 606 F.2d 432 (4th Cir. 1979).

eration of the "factors relevant to fair compensation."[50] Specifically, the court remanded the case to the district court with direction to apply the widely approved list of factors for determining reasonable attorneys' fees articulated by the Fifth Circuit in *Johnson v. Georgia Highway Express, Inc.*[51] Yet, in *Johnson*, the court dealt with the determination of reasonable fees in connection with a statutory grant of authority to award such fees.[52] This question is significantly different from a consideration of the propriety of a contingent fee.

The importance of this distinction was succinctly stated in *Farmington Dowel Products Co. v. Forster Manufacturing Co. (Farmington Dowel I)*.[53]

> [T]here is a difference in overall complexity between the court's role in awarding a fee under section 4 [of the Clayton Act] and in exercising its supervisory power over the bar. The first is commonly exercised; the second is reserved for exceptional circumstances. The first requires the court to arrive at a figure which it considers reasonable; the second requires it to arrive at a figure which it considers the outer limit of reasonableness. The first determination is made without reference to any prior agreement between the parties; the second must take account of the fact that an agreement, if freely made, is not lightly set aside. A section 4 award has only economic impact; a supervisory decision in an *ethical judgment*.[54]

Thus, one problem with the reasonableness standard is that courts may indiscriminately use cases and authority, which construe reasonableness in terms of a fair statutorily authorized award, in the context of deciding whether the court may equitably enforce a fee gained through agreement. Rather than mechanically following the law surrounding the word "reasonableness,"

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50. *Id.* at 435. *See* notes 44–45 *supra* and accompanying text.

51. 488 F.2d 714, 717–19 (5th Cir. 1974). The *Allen* court stated:

> *Johnson* directs the court's attention to (1) the time and labor required in the case, (2) the novelty and difficulty of the questions presented, (3) the skill required to perform the necessary legal services, (4) the preclusion of other employment by the lawyer due to acceptance of the case, (5) the customary fee for similar work, (6) the contingency of a fee, (7) the time pressures imposed in the case, (8) the award involved and the results obtained, (9) the experience, reputation, and ability of the lawyer, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship between the lawyer and the client, and (12) the fee awards made in similar cases.

606 F.2d at 436.

52. The *Johnson* court addressed the adequacy of an attorney fee award pursuant to section 706(k) of the Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1976). 488 F.2d at 714.

53. 421 F.2d 61 (1st Cir. 1970).

54. *Id.* at 90 (emphasis added).

courts must be aware that in the former situation guidelines may be more strictly applied then in the latter situation.

Notably, the result in *Allen* was arguably correct, but for the wrong reason. Instead of justifying application of the *Johnson* statutory reasonableness criteria by reference to the court's general duty to supervise a contingent fee contract, the *Allen* court may have validly relied on authority to determine fair compensation expressly given to the court by the agreement in question.[55] Such a situation could be likened more to an award of reasonable fees under statutory authority than to an analysis of the outer limits of reasonableness.

Yet, absent such fortuitous circumstances, judicial application of reasonableness standards derived from statutory authority to contingent fee propriety issues without an appreciation of the different nature of these questions is incorrect and is inconsistent with the proper scope of the court's power. Such a result may be easily expected from resort to similar terms in differing contexts. Reformulation of the standard in the contingent fee context to portray more accurately the proper inquiry of the court and thus the proper scope of the court's power is no doubt preferable.

B. *Reasonableness as an Inaccurate Standard—The Ethical Approach Revealed*

Perhaps the most disturbing aspect of a reasonableness standard is that it at once goes too far and not far enough. As noted above, the reasonableness standard is seemingly separated from the ethical bases of the right of judicial intervention in contingent fee contracts.[56] By requiring intervention absent any inquiry into abuse, impropriety, or overreaching,[57] the reasonableness standard may interfere with a contract which accurately and appropriately assesses the risk involved.[58] Such a result may serve to discourage future arrangements and hence prevent potential, legitimate claimants, unable to enter into traditional financial arrangements, from gaining access to legal services.

Another consequence of the separation of reasonableness from the equitable principles of judicial supervisory power is that the standard may prove insufficient. By examining factors such as the

55. The parties had agreed to "seek the guidance of the court in setting a fee not to exceed 25%" of the benefits gained. 606 F.2d at 434.

56. *See* text accompanying note 43 *supra*.

57. *See, e.g.*, note 51 *supra*.

58. *See* note 3 *supra*.

efforts of the attorney (in terms of hours, hourly rate, difficulty of the problem) and (perhaps) risk to the attorney,[59] the reasonableness standard may omit other important considerations such as how the contract was established, the sophistication of the parties, and other indicia of the ethical propriety of the contract.

The propriety of the ethical approach, however, does not only arise from the deficiencies of the reasonableness standard, but also from the fact that such an approach is consistent with the analyses actually employed by the courts. Although the *Spilker* line of cases may lead to the conclusion that reasonableness is an acceptable standard to use in determining the propriety of contingent fee contracts,[60] a closer examination reveals that courts, in fact, have determined the ethical propriety of the fee, the attorney's conduct, and other circumstances surrounding the contract and have discussed propriety in terms of reasonableness, inaccurately portraying the actual analysis used. This revelation is not profound; judicial intervention is based, after all, on the court's equitable power and on the special fiduciary relationship between the contracting parties. For example, in *Spilker* the court emphasized that contingent fee contracts were not to be treated as ordinary contracts where "a contract beneficial to the attorney is executed long after the attorney-client relationship has commenced, when the position of trust is well established, and the litigation is reaching its culmination."[61]

That questions of the propriety of contingent fee contracts involve inquiry into the "ethics" of the contract is perhaps most readily demonstrated in *Kiser v. Miller*.[62] *Kiser* involved a class action for recovery of retroactive pension benefits for retired coal miners.[63] Contingent fee contracts were obtained after counsel actually knew the outcome of the case.[64] Although the court did discuss the contract fee in terms of its reasonableness—finding it to be excessive and not a "true reflection of a reasonable fee in this suit"[65]—the decision was based upon equitable considerations. The court framed the issue as "whether the court can, in good conscience, enforce a contract made with class members, who

59. *See* note 51 *supra*.

60. *See* notes 38–45 *supra* and accompanying text.

61. 188 F.2d at 39.

62. 364 F. Supp. 1311 (D.D.C. 1973), *modified sub nom.* Kiser v. Huge, 517 F.2d 1237 (D.C. Cir. 1974).

63. *Id.* at 1313.

64. *Id.* at 1318–19.

65. *Id.* at 1317.

more likely than not, lack sophistication, experience, and education to act understandingly and deal with their attorneys on an equal basis at arms length."[66] It decided that, in light of all the circumstances, to allow counsel to benefit from the settlement would be "inconsistent with the high duties of the legal profession to assist the disadvantaged and the downtrodden. . . ."[67] Thus, the *Kiser* court, implicitly judging the ethics of the formation of the contract, struck down the arrangement.

In *Dunn v. H.K. Porter Co.*,[68] the court also judged the ethical propriety of the contract, yet failed to adequately explain its analysis. This failure is particularly significant since *Dunn* facially supports use of the reasonableness standard.[69] In *Dunn*, a district court refused to enforce a contingent fee contract involving a class action which sought pension benefits.[70] In reviewing the lower court's ruling, the Third Circuit emphasized the duty imposed on the courts by Federal Rule of Civil Procedure 23(e). It noted that this rule "imposes . . . a responsibility to protect the interests of class members from abuse."[71] In addition, the court realized that this responsibility was enhanced when settlement funds were involved since an "adversarial relationship" developed between attorney and client due to the potential reduction in client award caused by any increase in attorneys' fees.[72]

The appellate court noted that the district court's decision was authorized even though "the district court made a specific finding that the agreements were obtained without any impropriety and [that there was] . . . very little empirical evidence suggesting a wide-spread abuse of the fee system."[73] This, when taken together with the court's discussion of reasonableness of the contract seemingly indicated an abandonment of the ethics inquiry derived from *Spilker* and *Kiser*. Since no impropriety had been found and the contract could still be overturned, one could effectively argue that the court had gone beyond an inquiry into possible overreaching in determining reasonableness, and hence, the propriety of the contract.

66. *Id.* at 1319.
67. *Id.* at 1320.
68. 602 F.2d 1105 (3d Cir. 1979).
69. *See* notes 41–43 *supra* and accompanying text.
70. Dunn v. H.K. Porter Co., 78 F.R.D. 41, 46 (E.D. Pa. 1977), *vacated*, 602 F.2d 1105 (3d Cir. 1979).
71. 602 F.2d at 1109.
72. *Id.*
73. *Id.*

Yet, a determination of no impropriety and intervention in the contract does not necessarily lead to the conclusion that the ethical inquiry was totally foresaken. First, the court articulated an obligation to look beyond the face of the contract.[74] It directed an inquiry into several "critical factors" which included the manner into which the contract was entered, the status and sophistication of the clients, the size of the award, and whether the fee would be sufficient to encourage capable counsel in similar litigation in the future.[75] This seems more consistent with an equitable inquiry than an examination of the consistency of the fee with the attorney's effort.

Second, the court noted the special nature of contingent fee contracts and, hence, the special role of the courts:

> The strong judicial reluctance to enforce the terms of a judicially fashioned bargain upon the parties . . . presses in favor of honoring the express terms of the fee agreement [entered into prior to litigation]. . . . We . . . believe that the courts should be loathe to intrude into a contractual relationship between an attorney and client.[76]

That statement implies that a court should "intrude" into an attorney-client contractual relationship only when it has a special duty to do so. In *Dunn*, one could easily argue that the acknowledged obligation of Rule 23(e) was such a special duty. Notably, inherent in the rule's obligation to prevent abuse is an obligation to assure ethical propriety in the course of a class action. Perhaps most importantly, the Rule 23(e) duty may be analogized to a special policy consideration, similar to the protection of minors in *Cappel v. Adams*,[77] which compels judicial intervention into contingent fee arrangements by virtue of a court's equitable powers. Thus, even in a case like *Dunn*, which seemingly supports the use of a reasonableness standard, the ethical approach may be found to have a basis.

III. Application of the Ethical Approach: An Acceptable Solution to a Difficult Problem

The merit in resorting to the ethical approach lies not only in its doctrinal correctness and in the clarity resulting from its use, but also in its ability to serve as an acceptable answer to difficult

74. *Id.* at 1110.
75. *Id.*
76. *Id.* at 1111–12.
77. 434 F.2d 1278 (5th Cir. 1970). *See* notes 28–33 *supra* and accompanying text.

problems. The *Kent State* case[78] is an example of a case where the ethical approach may provide a solution to confused and confusing doctrine. In that case, several wounded victims and parents of deceased victims of the May 4, 1970 shootings at Kent State University retained counsel on a contingent fee basis and sought redress for their injuries.[79] The case proceeded through both state and federal court systems on the issue of sovereign and official immunity, eventually reaching the Ohio Supreme Court[80] and the United States Supreme Court.[81] The initial federal trial on the merits resulted in a verdict for the defendants. However, that verdict was later reversed and remanded.[82]

On January 4, 1979, four days into the second trial, the *Kent State* case was settled for $675,000 to be paid by the state of Ohio.[83] In expressly limiting the attorney fees to $50,000, the court stated that the fees had to be fixed and the contracted contingent fees modified "in order to effect a settlement and to end this litigation which seemed as if it would never end."[84]

Some dispute exists, however, concerning the justification upon which the court based its order to set aside the contingent fee contract.[85] If the court did not modify the contract but rather set an award pursuant to its authority under the Civil Rights Act,[86] the order may easily be justified by resort to a reasonableness standard and a showing that the award satisfied the criterion of economic fairness to the attorneys.[87] However, if the court was indeed passing on the propriety of the contract fee, then justification of the decision becomes problematic. Resort to a reasonableness standard in light of the court's desire to reach a settlement and end litigation seemingly equates reasonableness with efficiency and expediency. Such a conclusion raises two problems. First, deliberate (and ostensibly arbitrary) intervention into attor-

78. Krause v. Rhodes, No. 70-544 (N.D. Ohio Jan. 4, 1979) (settlement and dismissal order), *appeal docketed*, No. 79-3115 (6th Cir. March 9, 1979).

79. Memorandum of Trustee Re Allocation of Attorneys [*sic*] Fees and Costs from the Settlement Fund, Krause v. Rhodes, No. 70–544 (N.D. Ohio Jan. 4, 1979) 3–4.

80. Krause v. Rhodes, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1973).

81. Shauer v. Rhodes, 416 U.S. 232 (1974).

82. Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

83. Krause v. Rhodes, No. 70–544 (N.D. Ohio Jan. 4, 1979), *appeal docketed*, No. 79–3115 (6th Cir. 1979). The settlement also provided that a statement of regret would be signed by all defendants. *Id.*

84. *Id.* at 7.

85. *See* notes 14–19 *supra* and accompanying text.

86. 42 U.S.C. § 1988 (1976).

87. *See* notes 49–55 *supra* and accompanying text.

ney-client agreements is far removed from the special or exceptional circumstances usually thought to require judicial involvement.[88] Second, such action apparently recognizes almost unlimited power of the courts to modify contingent fee arrangements. Both of these difficulties would very likely discourage the use of contingent fee contracts and thus preclude a significant avenue to legal recourse by the public.

Notably, resort to an ethical approach would rectify the difficulties presented by the reasonableness standard. Indeed, the district court appeared to have undertaken such an analysis when it noted that "[t]here is a strong equitable justification for this court's exercise of a limiting restraint upon the fees of an officer of this court who would self-centeredly seek to deprive his clients of the full sums which the State of Ohio has specifically reserved for these plaintiffs."[89] Significantly, under the ethical approach the court could consider factors foreign to a reasonableness inquiry. After nine years of litigation, victims of a tragic event could possibly have been prevented from attaining satisfaction of their claims by one attorney.[90] Such circumstances seem to be squarely within the scope of a court's power if articulated to be limited to an examination of the ethics of contingent fee agreements. Thus, by using such an approach a court could redress wrongs in contingent fee arrangements in a manner consistent with the theoretical underpinnings of its supervisory power and in a manner which sets a straightforward standard by which attorneys could shape their activities, giving contingent fee mechanisms added usefulness and cogency.

IV. CONCLUSION

Contingent fee contracts receive special treatment. Because of the risk that an attorney takes in entering into such agreements, fees may be allowed that are greater than the market value of the attorney's services.[91] Yet, such agreements, perhaps because of

88. *See* notes 26–33 *supra* and accompanying text.

89. Krause v. Rhodes No. 70–544 (N.D. Ohio March 9, 1979) (oral ruling) at 3.

90. The attorney who eventually sought review of the district court's attorney fees ruling in the settlement and dismissal order did not conduct the appeal that resulted in a new trial and "played no part in creating the settlement fund." Krause v. Rhodes, No. 70–544 (N.D. Ohio Feb. 6, 1979) (oral opinion) at 8. No other attorney appealed the court's settlement and dismissal order to assert rights under the fee contracts. *See id.* at 9–10.

91. *See* note 8 *supra* and accompanying text.

the potential windfall available to an attorney, are suspect.[92] Although it seems clear that courts have the right to supervise contingent fee arrangements,[93] the proper scope of the power to intervene must be somewhat limited in keeping with the special nature of the court's power—to attain equity—and in order to maintain the contingent fee arrangement as a viable and attractive mechanism for financing legal action.

Many courts have developed standards of reviewing contingent fee contracts which have scrutinized the agreements in terms of reasonableness.[94] This approach has several weaknesses. First, it serves to confuse matters since courts have indiscriminately used authority construing the reasonableness of statutorily authorized fee awards—an entirely and significantly distinct question—without an appreciation of the different nature of the questions.[95] Second, the reasonableness standard, by virtue of its distance from any foundation in the equitable principles of a court's supervisory power, may be used broadly to intervene where the courts should not. Yet, for the same reason, the standard may be used to shield those arrangements where the court should legitimately intervene.[96]

An alternative analysis looks to the ethical circumstances surrounding such arrangements. This approach not only obviates the problems encountered with the reasonableness standard,[97] but is in fact more consistent with the analysis used by some courts.[98] Further, the ethical approach appears to be of significant utility in areas of current doctrinal difficulty and yet remains an analysis which is consistent with the fundamental equitable principles of a court's intervention power and which promotes the viability of the contingent fee mechanism.[99]

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92. *See* note 9 *supra* and accompanying text.
93. *See* notes 26–33 *supra* and accompanying text.
94. *See* notes 38–45 *supra* and accompanying text.
95. *See* notes 49–50 *supra* and accompanying text.
96. *See* notes 56–59 *supra* and accompanying text.
97. *See* notes 56–59 *supra* and accompanying text.
98. *See* notes 60–77 *supra* and accompanying text.
99. *See* notes 78–90 *supra* and accompanying text.