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Attorneys' Fees--First Department Contingent Fee Schedule--Held Void as Contrary to Statute (Gair v. Peck, 139 N.Y.L.J. No. 64, p. 1, col. 1 (App. Div. 3d Dep't March 27, 1958))

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clauses. Moreover, aware of this construction, parties to collective bargaining contracts will better be able to frame the exact results they want from arbitration.



ATTORNEYS' FEES — FIRST DEPARTMENT CONTINGENT FEE SCHEDULE — HELD VOID AS CONTRARY TO STATUTE. — Plaintiff-attorneys sought a judgment declaring invalid Special Rule 4¹ of the Appellate Division, First Department. The Rule purported to regulate the amounts of contingent fees which attorneys may charge in personal injury and wrongful death actions. The Appellate Division affirmed the New York Supreme Court *holding* that, since the Appellate Division has no power to enact rules of civil practice contrary to statute,² the Rule was void as being in opposition to Section 474 of the Judiciary Law.³ *Gair v. Peck*, 139 N.Y.L.J. No. 64, p. 1, col. 1 (App. Div. 3d Dep't March 27, 1958) (*per curiam*), *affirming* 6 M.2d 739, 165 N.Y.S.2d 247 (Sup. Ct. 1957).

Contracts for attorneys' fees have always been subject to court scrutiny.⁴ In New York, contingent fee agreements are valid provided they are reasonable according to the circumstances of the case.⁵

The New York Appellate Division has powers of inquiry into the activities of attorneys.⁶ They may discipline those guilty of unprofessional conduct⁷ and regulate the admission of attorneys to practice.⁸

Through its general powers of inquiry the Appellate Division has the power to discipline an attorney if he charges an unconscionable fee.⁹ The unconscionableness of the fee, however, is a matter of fact. All the circumstances of the case must be considered, such as the

¹ 1ST DEP'T SPECIAL RULE 4.

² N.Y. JUDICIARY LAW § 83.

³ Attorneys' fees are to be determined by contract between the parties. *Id.* § 474.

⁴ See, *e.g.*, *Nesbit v. Lockman*, 34 N.Y. *167, 169-70 (1866).

⁵ *Fowler v. Callan*, 102 N.Y. *395, 7 N.E. 169 (1886). See also CANONS OF PROF. ETHICS, A. B. A. 13, which provides that a contingent fee agreement is valid, provided it is reasonable according to the circumstances of the case. The canons of professional ethics are entitled to the force of the law in New York. *Cf. Matter of Annunziato's Estate*, 201 Misc. 971, 108 N.Y.S.2d 101 (Surr. Ct. 1951).

⁶ *People ex rel. Karlin v. Culkun*, 248 N.Y. 465, 162 N.E. 487 (1928).

⁷ N.Y. JUDICIARY LAW § 90(2). See also note 6 *supra*.

⁸ *Id.* §§ 53, 56, 460-61, 463-70.

⁹ See *Morehouse v. Brooklyn Heights R.R.*, 185 N.Y. 520, 78 N.E. 179 (1906); *Matter of Fitzsimons*, 174 N.Y. 15, 66 N.E. 554 (1903).

amount of time expended by the attorney and the character of the claim.¹⁰

The legislature has not expressly given the Appellate Division the power to regulate contingent fees,¹¹ although in certain specific cases (*e.g.*, in actions instituted in behalf of an infant,¹² bastardy proceedings,¹³ and estate proceedings¹⁴) the courts are empowered by statute to set fees. Section 474 of the Judiciary Law states that fees are to be determined by agreement between the parties.¹⁵ The Court of Appeals, commenting on this section, stated in *Matter of Fitzsimons*:¹⁶

In view of the fact that by express statute [the predecessor of § 474] the right is conferred upon an attorney or counselor to regulate the amount of his compensation by agreement with his client, which is unrestrained and unlimited by law, we cannot see how such an agreement can be interfered with and held illegal until the question has been fully and fairly investigated and the facts relating to the transaction plainly established by a trial. The statute conferred upon the parties the right to make the contract, and conferred upon the court no authority to make it for them.¹⁷

The Court in *Gair v. Peck*¹⁸ likewise reasoned that the express statement by the legislature in Section 474 impliedly negated any judicial power of prior regulation of fees without express legislative authorization.

However, legislative regulation of legal fees involves a constitutional question. The constitutionality of price regulation by state¹⁹ and federal²⁰ legislatures has been upheld as a valid exercise of the police power. These regulatory enactments, though in derogation of freedom of contract, may be sustained if they bear a substantial relation to public health, safety, welfare or morals.²¹ For example, the prices of rent,²² milk,²³ lumber²⁴ and other commodities have been regulated on the federal or state levels.²⁵

¹⁰ *Morehouse v. Brooklyn Heights R.R.*, note 9 *supra*.

¹¹ See *Gair v. Peck*, 139 N.Y.L.J. No. 64, p. 1, col. 1 (App. Div. 3d Dep't March 27, 1958) (per curiam).

¹² N.Y. JUDICIARY LAW § 474.

¹³ N.Y. DOM. REL. LAW § 120.

¹⁴ N.Y. Surr. Ct. Act § 231-a.

¹⁵ N.Y. JUDICIARY LAW § 474.

¹⁶ 174 N.Y. 15, 66 N.E. 554 (1903).

¹⁷ *Id.* at 23, 66 N.E. at 562.

¹⁸ 139 N.Y.L.J. No. 64, p. 1, col. 1 (App. Div. 3d Dep't March 27, 1958) (per curiam).

¹⁹ *Nebbia v. New York*, 291 U.S. 502 (1933).

²⁰ *Stafford v. Wallace*, 258 U.S. 495 (1922).

²¹ See *Bowles v. Willingham*, 321 U.S. 503 (1942); *Nebbia v. New York*, note 19 *supra*.

²² *Bowles v. Willingham*, note 21 *supra*.

²³ *Nebbia v. New York*, note 19 *supra*.

²⁴ *Central Lumber Co. v. South Dakota*, 226 U.S. 157 (1912).

²⁵ See *Nebbia v. New York*, 291 U.S. 502, 522 n.6 (1933).

Legislatures have also regulated legal fees, notably in the workmen's compensation area. This power to set fees in specific compensation cases has been delegated to workmen's compensation commissions.²⁶ Apparently, the requirement of substantial relation to public welfare is satisfied if the purpose of the regulation is to protect claimants from the practices of unscrupulous attorneys and to remove the occasion for these practices.²⁷ As was said in *Calhoun v. Massie*:²⁸

By the enactment . . . of laws . . . placing limitations upon the fees properly chargeable for services, Congress has sought both to prevent the stirring up of unjust claims . . . and to reduce the temptation to adopt improper methods of prosecution which contracts for large fees, contingent upon success, . . . encourage.²⁹

It would then appear that any regulation of amounts of contingent fees can be effected only through legislation. Such legislation, if a proper exercise of the state's police power, would not violate constitutional requirements. The only question remaining is whether such regulation is desirable.



BANKS AND BANKING — DISCOUNTING OF LOANS SECURED BY CHATTEL MORTGAGES HELD NOT IN VIOLATION OF BANKING LAW SECTION 131 AND GENERAL CORPORATION LAW SECTION 18. — Defendant, a non-banking corporation, loaned plaintiff-corporation \$129,500 and received in return promissory notes totaling \$200,000 in value and a chattel mortgage on plaintiff's furniture and fixtures. Plaintiff seeks a judgment declaring the notes and mortgage void under Section 131 of the New York Banking Law and Section 18 of the New York General Corporation Law which prohibit the discounting of loans by non-banking corporations. In granting a motion by the defendant for summary judgment the New York Supreme Court held that the discounting of loans secured by chattel mortgages is not

²⁶ See, e.g., CAL. LAB. CODE ANN. § 4906 (West 1955), which provides that the Industrial Accident Commission may determine reasonable legal fees; in Arizona, ARIZ. REV. STAT. § 23-1069 (1955) provides that the Industrial Commission, upon application, may make provision for an attorney's fee; in Florida, the Industrial Commission may provide for an attorney's fee, according to FLA. STAT. ANN. § 440.34 (1951).

²⁷ See *Calhoun v. Massie*, 253 U.S. 170 (1920). See also the broad dictum in *Yeiser v. Dysart*, 267 U.S. 540, 541 (1924), indicating that, since the practice of law is a privilege granted by the state, the legislature may impose any reasonable conditions upon such practice for the public good.

²⁸ 253 U.S. 170 (1920).

²⁹ *Id.* at 174.