Denying the Devil His Due: Contingency Fee Multipliers after City of Burlington v. Dague

Kyle R. Kravitz
DENYING THE DEVIL HIS DUE: CONTINGENCY FEE MULTIPLIERS AFTER CITY OF BURLINGTON v. DAGUE

I. Introduction

Congress created the first federal fee-shifting statutes following the Civil War to ensure enforcement of the newly-enacted civil rights acts. As a result, substantive civil rights and the enforcement mechanism of fee-shifting have been "closely interwoven" from the outset. Fee-shifting statutes allow winning parties who have brought suits to enforce certain constitutional and federal statutory rights to recover "reasonable" attorney's fees from losing parties.

Fee-shifting statutes were enacted to encourage private enforcement of statutory civil rights and, to this day, Congress relies almost exclusively on private lawyers to enforce these statutory rights. This private enforcement scheme is founded on the notion that individuals

1. S. Rep. No. 1011, 94th Cong., 2d Sess. 3 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5911 ("The very first attorneys' fee statute was a civil rights law, the Enforcement Act of 1870 . . .").
2. Id., 1976 U.S.C.C.A.N. at 5910 ("[C]ivil rights and attorneys' fees have always been closely interwoven.").

According to one source, there are well over 200 fee-shifting statutes attached to substantive statutes on topics as diverse as bankruptcy and civil rights. See Jeffrey R. Goodstein, ATTORNEY'S FEES: WINNING A RECOVERY IN FEDERAL COURT (1985) (identifying various federal fee-shifting provisions).

3. See, e.g., S. Rep. No. 1011, supra note 1, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913 ("The Supreme Court has laid down . . . the practice of awarding attorneys' fees."). Due to the similarity of fee-shifting provisions, this Note uses the term "civil rights" to refer to all statutory rights enforced by fee-shifting statutes. See generally Goodstein, supra note 2.

By way of example, the Civil Rights Attorney's Fee Awards Act of 1976 provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.


4. See S. Rep. No. 1011, supra note 1, at 2-3, reprinted in 1976 U.S.C.C.A.N. at 5909-11 ("[I]f private citizens are to be able to assert their civil rights . . . then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.").

This Note discusses different fee-shifting statutes. It is, however, important to note that the Supreme Court has said that all fee-shifting statutes should be interpreted the same way. City of Burlington v. Dague, 112 S. Ct. 2638, 2641 (1992) ("[O]ur caselaw construing what is a 'reasonable' fee applies uniformly to all [fee-shifting statutes]."); Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (stating that similar language indicates similar interpretation).

(1661)
challenging violations of their rights generate benefits to society beyond their personal recovery. Because these societal benefits are of the type government typically provides, courts and commentators often refer to lawyers who perform civil rights enforcement functions by prosecuting private suits as "private attorneys general." 

Despite the longevity of the private attorney general concept, competing policy considerations remain regarding the proper method for computing statutory fees. On one hand, fees should provide compensation that is adequate to "level the playing field" by making statutory-fee cases as financially appealing to lawyers as cases with guaranteed payment. On the other hand, fees should not generate an unnecessary windfall for lawyers.

The United States Supreme Court recently addressed the issue of statutory fee computation in City of Burlington v. Dague. Dague involved a suit by residents of the City of Burlington, Vermont against the City regarding the City's operation of a landfill. The residents prevailed on all of their substantive claims and sought an award of statutory attorney's fees, including a contingency multiplier. In Dague, the Supreme Court held that "contingency multipliers," which attempt to compensate private lawyers for providing both representation and financing over the term of the litigation to their statutory fee clients, are neither required

5. See S. REP. No. 1011, supra note 1, at 4, reprinted in 1976 U.S.C.C.A.N. at 5911 ("The[] fee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation, while at the same time limiting the growth of the enforcement bureaucracy.").

6. Associated Indus. of New York State v. Ickes, 134 F.2d 694, 704 (2d Cir.) ("Such [private enforcers], so authorized, are, so to speak, private Attorney Generals"), vacated as moot, 320 U.S. 707 (1943). The private attorney general concept has been described as follows:

As most college sophomores know, the private attorney general is someone who sues "to vindicate the public interest" by representing collectively those who individually could not afford the costs of litigation; and, as every law student knows, our society places extensive reliance upon such private attorneys general to enforce the federal antitrust and securities laws, to challenge corporate self-dealing in derivative actions, and to protect a host of other statutory policies.


7. S. REP. No. 1011, supra note 1, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913 (fees awarded under statute to be "adequate to attract competent counsel").

8. See id. (appropriate fee-shifting cases "do not produce windfalls to attorneys"); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986) (Delaware Valley I) (Fee-shifting statutes "were not designed as a form of economic relief to improve the financial lot of lawyers.''), rev'd on other grounds on rehearing, 483 U.S. 711 (1987).


11. Dague, 935 F.2d at 1347.
nor permissible under any of the fee-shifting statutes.\textsuperscript{12}

This Note analyzes the \textit{Dague} decision, beginning with a broad overview of fee-shifting mechanisms in Section II.\textsuperscript{13} It briefly discusses the tension between the competing policies of providing adequate compensation for a lawyer’s statutory-fee work and preventing windfalls for those attorneys.\textsuperscript{14} Section II then reviews the pre-\textit{Dague} caselaw on fee shifting.\textsuperscript{15} This section explains the Supreme Court’s prior attempt to resolve the contingency enhancement question and discusses the effect of that effort in the circuit courts of appeals. Section III discusses the \textit{Dague} opinion, setting forth the Court’s reasoning and identifying the major features of the opinion.\textsuperscript{16} This section also analyzes the Court’s underlying assumptions and critiques the Court’s approach to the issue of contingency enhancement.\textsuperscript{17}

Sections IV and V propose actions that both Congress and the courts can take to remedy some of the problems caused by \textit{Dague}. Section IV suggests that Congress should act quickly to reassess the role of fee-shifting.\textsuperscript{18} This section maintains that Congress should undertake a reasoned and comprehensive review to consider both the policy and procedural questions surrounding fee shifting. Section V submits several permissible alternatives to contingency enhancement that courts may use to increase fee awards where necessary in order to grant a fully compensatory fee.\textsuperscript{19}

\section{II. Background}

\subsection*{A. Statutory Fee-Shifting Concepts}

The basic mechanism of statutory fee shifting is not complex. The

\begin{itemize}
  \item 12. \textit{Dague}, 112 S. Ct. at 2643-44. Throughout this Note, the terms “contingency multiplier,” “risk multiplier” and “contingency enhancement” are used interchangeably. These terms refer to some type of additional fee that is to compensate statutory-fee lawyers for the representation and financing they have provided for their clients.
  \item 13. For a discussion of the fee-shifting system, see \textit{infra} notes 20-23 and accompanying text.
  \item 14. For a discussion of the tension between fully compensatory fees and attorney windfalls, see \textit{supra} notes 6-8 and accompanying text.
  \item 15. For a discussion of the Court’s opinion in \textit{Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air}, see \textit{infra} notes 24-46 and accompanying text. For a discussion of the impact of \textit{Delaware Valley} in the circuit courts, see \textit{infra} notes 47-73 and accompanying text.
  \item 16. For a discussion of the \textit{Dague} opinion, see \textit{infra} notes 74-157 and accompanying text.
  \item 17. For a discussion of the Court’s reasoning in \textit{Dague}, see \textit{infra} notes 86-116 and accompanying text. For a critique of the \textit{Dague} Court’s approach, see \textit{infra} notes 127-57 and accompanying text.
  \item 18. For a discussion of proposed congressional action, see \textit{infra} notes 158-64 and accompanying text.
  \item 19. For a discussion of the alternative approaches to contingency enhancement, see \textit{infra} notes 165-92 and accompanying text.
\end{itemize}
"lodestar" method of fee computation is currently used by most courts and has been endorsed by the United States Supreme Court. Under the lodestar scheme, the district court arrives at an "objectively reasonable" number of hours expended on the litigation, which the court then multiplies by an "objectively reasonable" hourly rate to arrive at a fee that approximates what a lawyer would charge a normal paying client. At other times, courts have used methods involving analysis of a complex list of factors or that allot some percentage of the amount awarded.

20. See Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) ("The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.").

21. The United States Court of Appeals for the Third Circuit developed the lodestar method in Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973) (Lindy I, vacated), 540 F.2d 102 (3d Cir. 1976). In Lindy I, the Third Circuit noted that the method used to calculate fees in a "common-fund" case — where plaintiffs' counsel generates a large monetary recovery to be shared by other plaintiffs — was not appropriate in statutory fee cases because no fund existed from which to draw the fees. Id. at 168. The court, adopting an "objective" approach, calculated a "reasonable" hourly rate for attorneys of comparable skill and experience and multiplied it by a "reasonable" number of hours expended on the litigation. Id. The lodestar method was not the only approach to fee calculation existing at this time. See, e.g., Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) (articulating 12-factor test for determining reasonable fees). For a discussion of the Johnson factors, see infra notes 170-92 and accompanying text.

In Hensley v. Eckerhart, 461 U.S. 424 (1983), the Supreme Court endorsed the lodestar method of computation, although the Court did not expressly prohibit use of other methods. Id. at 433. Hensley involved a suit brought in the United States District Court for the Western District of Missouri against officials of the Forensic Unit of the Fulton State Hospital in Fulton, Missouri. Id. at 426. The plaintiffs prevailed on their claim that patients were not receiving constitutionally adequate treatment and the district court awarded them attorneys' fees of $133,332.25. Id. at 427-28. The fee award did not include the plaintiffs' requested 30-50% enhancement for contingency. Id. at 428-29. The United States Court of Appeals for the Eighth Circuit affirmed the attorneys' fee award without opinion. Hensley v. Eckerhart, 664 F.2d 294 (8th Cir. 1981), vacated, 461 U.S. 424 (1983).

The Supreme Court granted certiorari and reversed the fee award because the lower courts had not considered the relationship between the plaintiffs' degree of success on the merits of their suit and the fee award. Hensley, 461 U.S. at 440. The Court noted that while the lodestar was a reasonable starting point for a fee award, "[t]here remain other considerations that may lead the district court to adjust the fee upward or downward." Id. at 434. In particular, the Hensley Court held that when computing a lodestar, a district court must first consider whether the plaintiff has been successful on all prosecuted claims or only on some. Id. at 440. If the plaintiff has not prevailed on a particular claim, "the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." Id.
to the prevailing party in varying types of cases. Despite the lodestar method’s apparent simplicity, practitioners remain concerned about how courts arrive at a statutory fee because of the risk inherent in taking a case in which they will not be paid until after the case is resolved and only if the case is resolved in the plaintiff’s favor.

B. The Supreme Court Perspective: The Delaware Valley Cases

In 1985, the Supreme Court first attempted to resolve the question of contingency enhancement in Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air (Delaware Valley I). Unable to arrive at a consensus on the contingency enhancement issue, the Court took the extraordinary step of remanding the case for District Court to determine the appropriateness of the multiplier, finding that the case did not involve an application of that act.

22. Hensley, 461 U.S. at 433. The base requirement of fee-shifting statutes is that a court may award fees only to a party prevailing on its claims. This standard has been interpreted to mean that a party must prevail on claims that are "reasonably related" to the hours compensated. See id. at 434 (discussing "results obtained" factor as being "particularly crucial where a plaintiff is deemed to have prevailed" even though [plaintiff] succeeded only on some of his claims for relief”).


24. 478 U.S. 546 (1986), rev’d on other grounds on rehearing, 483 U.S. 711 (1987). The Supreme Court came late to the debate over contingency enhancements, granting certiorari in Delaware Valley I after several circuits had developed their own divergent viewpoints. Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 474 U.S. 815 (1985). Before Delaware Valley I, the circuits had taken divergent positions on the calculation of statutory-fee awards ranging from a pure lodestar approach to a complex 12-factor process. See Wildman v. Lerner Stores Corp., 771 F.2d 605, 614 (1st Cir. 1985) (contingency multiplier is appropriate given five-step evaluation: (1) what would lawyers have gotten if their client had lost; (2) what costs would lawyers have incurred if their client had lost; (3) were the lawyers completely dependent upon court fees for fees prevailing; (4) whether the time case consumed required lawyers to compensate associates and carry overhead expenses without any assurance of compensation; and (5) whether other lawyers refused to take case because of lack of assurance of compensation); Delaware Valley Citizens Council for Clean Air v. Pennsylvania, 762 F.2d 272, 280 (3d Cir. 1985) (contingency multiplier allowable where plaintiff’s counsel identifies risk), aff’d in part, rev’d in part, 478 U.S. 546 (1985), and rev’d on other grounds on rehearing, 483 U.S. 711 (1987); LaDuke v. Nelson, 762 F.2d 1318, 1392-33 (9th Cir. 1985) (upheld 20% contingency multiplier based on contingent nature of fee awards under the Equal Access to Justice Act); Sierra Club v. Clark, 755 F.2d 608, 620 (8th Cir. 1985) (contingency multipliers appropriate); McKinnon v. City of Berwyn, 750 F.2d 1383, 1393 (7th Cir. 1984) (contingency multiplier not permissible because it compensates for cases not won); Jones v. Central Soya Co., Inc., 748 F.2d 586, 591 (11th Cir. 1984) (upheld multiplier because of pre-existing contingent fee arrangement); Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 28 (D.C. Cir. 1984) (contingency multiplier impermissible in all but most exceptional cases), cert. denied, 472 U.S. 1021 (1985); Johnson v. Georgia Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974) (articulating 12-factor test to be used in computing statutory fees). For cases Congress cited in the legislative history of the Civil Rights Attorney’s Fee Awards Act, 42 U.S.C. § 1988 (1988 & Supp. III 1991), see infra note 136.
nary step of requesting reargument during the 1986 term limited to the issue of contingency enhancements.\textsuperscript{25} The Delaware Valley cases involved a class action suit regarding the Commonwealth of Pennsylvania's compliance with provisions of the Clean Air Act (CAA).\textsuperscript{26} The United States District Court for the Eastern District of Pennsylvania found that the plaintiffs had "prevailed" and approved plaintiffs' petition for an award of attorneys' fees.\textsuperscript{27} In determining an appropriate attorneys' fee award, the court divided the litigation into discrete phases.\textsuperscript{28} In those phases where the court determined that the plaintiffs had had a small chance of success, it granted a multiplier of two, doubling the requested fees.\textsuperscript{29} The United States Court of Appeals for the Third Circuit subsequently affirmed the district court's substantive holding and the attorneys' fee award.\textsuperscript{30}

Despite the Supreme Court's express intent to resolve the contingency enhancement question, neither the view that contingency enhancements are impermissible nor the view that such enhancements are required attracted a majority in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II).\textsuperscript{31} Writing for a sharply divided plurality, Justice White concluded that the plaintiffs had not demonstrated extraordinary difficulty in finding counsel.\textsuperscript{32} Therefore, risk en-


\textsuperscript{26} Id. at 714. The Commonwealth of Pennsylvania had agreed, in a 1978 consent decree, to "establish a program for the inspection and maintenance of vehicle emissions . . . by August 1980." Id. However, the Commonwealth failed to establish the agreed-upon programs and "protracted litigation ensued." Id. After plaintiffs and the Commonwealth entered into a second consent decree in May 1983, the plaintiffs petitioned for attorneys' fees and costs associated with the enforcement litigation. Id.


\textsuperscript{28} Delaware Valley II, 483 U.S. at 714.

\textsuperscript{29} Id. The district court divided the litigation into nine phases and doubled the lodestar request for phases four, five and seven, finding that the plaintiffs' risk of not prevailing was the greatest in those stages. Delaware Valley, 581 F. Supp. at 1431. The district court noted that "[t]he contingent nature of plaintiff's success has been apparent throughout this litigation." Id.


\textsuperscript{31} 483 U.S. 711, 729-30 (1987). Chief Justice Rehnquist and Justices White, Powell and Scalia found that the facts of the case did not warrant any contingency enhancement. Id. Justice O'Connor concurred with Justice White in the result but agreed with the dissenters, Justices Blackmun, Brennan, Marshall and Stevens, that "Congress did not intend to foreclose consideration of contingency in setting a reasonable fee under the fee-shifting provisions." Id. at 731 (O'Connor, J., concurring).

\textsuperscript{32} Id. at 731 (White, J.).
hancement was not justified.  

Justice White articulated a three-part criticism of the approach to risk enhancement the district court had taken and the Third Circuit had affirmed: (1) there is great difficulty inherent in making an after-the-fact determination of the risk of not prevailing from the outset; (2) basing enhancement on the risk of a particular case allows, at least in theory, for infinitely large multipliers in cases with small chances of prevailing and penalizes the defendants with the least-clear liability; and (3) awarding contingency enhancement is contrary to Congress' intent because it forces non-prevailing parties to compensate prevailing counsel for other cases not won. Only three other Justices concurred, however, with Justice White's opinion that "multipliers or other enhancement of a reasonable lodestar fee to compensate for assuming the risk of loss is impermissible under the usual fee-shifting statutes."  

Justices Blackmun, Brennan, Marshall and Stevens, in dissent, took a far more expansive view of contingency multipliers than did Justice White's plurality. They would have allowed enhancement if the plaintiffs had demonstrated that: (1) their counsel had taken the case on a contingent basis; (2) they had been unable to mitigate the risks of non-payment in any way; and (3) other economic risks had been intensified by the contingency of payment. The dissenters felt this broad scheme

---

33. *Id.* at 727 (White, J.). Justice White would have held that "[b]efore adjusting for risk assumption, there should be evidence in the record, and the trial court should so find that, without risk enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market." *Id.* at 731 (White, J.).


35. *Delaware Valley II*, 483 U.S. at 727 (White, J.). Chief Justice Rehnquist and Justices White, Powell and Scalia would allow contingency enhancement in only the most extreme circumstances, and, even in those situations, only up to one-third of the lodestar. *Id.* at 730 (White, J.). They would have held that: [I]f the trial court specifically finds that there was a real risk-of-not-prevailing issue in the case, an upward adjustment of the lodestar may be made, but, as a general rule, in an amount no more than one-third of the lodestar. *Any additional adjustment would require the most exacting justification.*

*Id.* at 730 (emphasis added).

36. *Id.* at 740 (Blackmun, J., dissenting) ("An adjustment for contingency is necessary if statutory fees are to be competitive with the private market and if competent lawyers are to be attracted in their private practice to prosecute statutory violations.").

37. *Id.* at 754 (Blackmun, J., dissenting). The dissenters would have allowed additional fee enhancement "because of the significant legal risks apparent at the outset of the litigation and because of the importance of the case." *Id.* at 755 (Blackmun, J., dissenting).
was necessary "so that highly skilled lawyers will be available to vindicate the statutory rights conferred by Congress."

Justice O'Connor's separate opinion, concurring in the plurality judgment but approving of the less-restrictive use of multipliers, became the most important statement to emerge from Delaware Valley II. Justice O'Connor disagreed with the plurality's view that Congress did not intend contingency multipliers to be available. Justice O'Connor did, however, concur with Justice White's view that courts should only grant enhancements for risk where the prevailing party needs an enhancement in order to obtain counsel.

Justice O'Connor advocated a three-part approach that emphasized the need for a consistent, non-arbitrary method for determining when

38. Id. at 755 (Blackmun, J., dissenting). The dissenters would have remanded the case to the district court for detailed findings on the three factors identified. Id. (Blackmun, J., dissenting). Moreover, the dissenters rejected, at least in part, the rationale the district court and the Third Circuit used to justify the awarded multiplier. Id. at 755 n.18 (Blackmun, J., dissenting). The dissenting Justices stated that the defendant's "serious and persistent opposition," a focus of the Third Circuit's analysis, could not justify a multiplier because the "opposition" factor was subsumed in the lodestar's number of hours calculation. Id. (Blackmun, J., dissenting). Further, the dissenters recognized that the case presented no novel or complex legal risks that would justify extraordinary enhancement. Id. at 755 (Blackmun, J., dissenting). They noted that the "respondent's attorneys began this litigation in order to enforce a consent decree—a situation that does not usually entail difficult legal risks." Id. (Blackmun, J., dissenting).

39. Id. at 731-34 (O'Connor, J., concurring). Following Delaware Valley II, many circuits considered Justice O'Connor's position to be the state of the law because O'Connor concurred, at least in theory, with the dissenters that multipliers should be widely available. See Blum v. Witco Chem. Corp., 888 F.2d 975, 980-82 (3d Cir. 1989) (following Justice O'Connor's position); Islamic Center v. Starkville, 876 F.2d 465, 473-75 & n.55 (5th Cir. 1989) (noting that previously every circuit considering issue after Delaware Valley II had adopted Justice O'Connor's position); Spell v. McDaniel, 824 F.2d 1380, 1404 (4th Cir. 1987) (same), cert. denied, 484 U.S. 1027 (1988); Clark v. City of Los Angeles, 803 F.2d 987, 991 (9th Cir. 1986) (allowed enhancement based on "risk and delay in payment inherent in [contingency] fee arrangements"). But see Martin v. University of South Alabama, 911 F.2d 604, 611 (11th Cir. 1990) (following neither Justice White nor Justice O'Connor; requiring showing that enhancement was necessary to attract counsel in postjudgment phases of litigation, not in merits phase); Conklin v. Lovely, 834 F.2d 543, 553 (6th Cir. 1987) (followed Justice White in requiring factual showing that enhancement needed to compensate for possibility of not prevailing).

In the wake of the Court's 4-1-4 split, most lower courts regarded the positions of Justice O'Connor and the four dissenters to comprise a majority view. See Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . '").


41. Id. at 733 (O'Connor, J., concurring).
an adjustment is necessary. First, and most importantly, Justice O'Connor stated that the lower courts should determine "how [their] particular market compensates for contingency." Second, the fee applicant should bear the burden of demonstrating that the relevant market provides incentives to take contingency cases. In Justice O'Connor's opinion, any enhancement should be limited to that necessary to attract competent counsel. Third, enhancement should not be based on the prevailing party's risk of not winning the particular case at hand.

C. Risk Multipliers After Delaware Valley II

Following the fractured decision in Delaware Valley II, most lower federal courts searching for meaningful guidance on whether and when to enhance a fee award to account for contingency regarded the concur-

42. Id. at 732 (O'Connor, J., concurring).
43. Id. at 733 (O'Connor, J., concurring). According to Justice O'Connor, this determination should be controlling for future cases unless a subsequent prevailing party can show that it is no longer accurate. Id. (O'Connor, J., concurring). Moreover, "[d]eterminations involving different markets should also comport with each other... [An] applicant should be able to point to differences in... markets that would justify... different rates of compensation." Id. (O'Connor, J., concurring).
44. Id. (O'Connor, J., concurring). Requiring the fee applicant to show how the relevant market compensates for contingency is consistent with the Court's other fee shifting burdens of proof. A fee applicant bears the burden of showing that both the number of hours claimed and the rate requested are "reasonable." See, e.g., Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (noting that "fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates") (quoted in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 733 (1987) (O'Connor, J., dissenting)).
45. Delaware Valley II, 483 U.S. at 733 (O'Connor, J., concurring). Justice O'Connor notes that this burden of proof is the same as that borne by the fee applicant for all aspects of the fee petition. Id. (O'Connor, J., concurring); see also Blum v. Stenson, 465 U.S. 858, 898 (1984) (stating that "[i]f the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee"); Hensley, 461 U.S. at 437 (noting that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates").
46. Delaware Valley II, 483 U.S. at 734 (O'Connor, J., concurring). This "case-specific" risk method was the one the district court used and the Third Circuit adopted in Delaware Valley. For a discussion of the district court and Third Circuit's approach to enhancement, see supra notes 28-30 and accompanying text.

Justice O'Connor suggested that refusing to grant enhancement based on case-specific risk serves two functions. Delaware Valley II, 483 U.S. at 734 (O'Connor, J., concurring). First, it recognizes that lawyers refuse statutory fee cases based on factors, such as delay in payment, that are unrelated to case-specific risk. Id. (O'Connor, J., concurring). Second, it prevents courts from having to answer an impossible factual question at the end of litigation: what was the risk of not prevailing at the outset? Id. (O'Connor, J., concurring).
ring opinion of Justice O'Connor as representative of the Court's thinking. For example, in *Blum v. Witco Chemical Corp. (Blum I)*, the United States Court of Appeals for the Third Circuit followed Justice O'Connor's concurring opinion in *Delaware Valley II*.49

*Blum I* involved a group of chemists who brought suit against Witco Chemical Corporation under the Age Discrimination in Employment Act (ADEA).50 After the chemists had prevailed on their ADEA claims, the United States District Court for the District of New Jersey awarded attorney's fees in the amount of $135,977.40.51 The Third Circuit subsequently reversed the award of a contingency multiplier, reasoning *inter alia* that the district court had not made the specific factual findings concerning how the New Jersey legal market compensated private attorneys for contingency cases that *Delaware Valley II* required.52

The *Blum I* opinion began by noting that "[t]he 4-1-4 division [in *Delaware Valley II*] makes it difficult to identify the reasoning or derive guidance from the various alliances the [Supreme Court] formed to reach its holdings."53

The court's opinion identified five areas of difficulty in implementing Justice O'Connor's concurring opinion in *Delaware Valley II*.54 First, a contingency multiplier cannot be based on the difficulty of the case.55 Second, the plaintiff must provide expert testimony or a study to establish the way in which the relevant market treats contingency cases as a whole.56 Third, to be sufficient, a study will have to include *all contin-

47. For a discussion of the application of Justice O'Connor's opinion in the circuit courts, see infra notes 48-73 and accompanying text.
48. 829 F.2d 367 (3d Cir. 1987).
49. Id. at 380.
50. 29 U.S.C. §§ 621-694 (1988 & Supp. III 1991). The chemists, all of whom were over the age of 55, claimed Witco unlawfully discharged them when it closed its research division while it retained other, younger employees. *Blum I*, 829 F.2d at 370-71. Witco claimed that it retained the other chemists because they were connected with an ongoing project, while those discharged had narrow specialties that would "make retention elsewhere in the company [in]feasible." Id. at 371.
51. *Blum I*, 829 F.2d at 372.
53. *Blum I*, 829 F.2d at 380. The Third Circuit recognized the confusion *Delaware Valley II* caused and stated that it intended for its opinion to serve as "a blueprint for an evidentiary hearing [and] ... findings that will satisfy the [Delaware Valley II] rule." Id. The *Blum I* court attempted to "give some guidance and to identify some important issues and suggest ways that a record might be developed." Id.
54. *Blum I*, 829 F.2d at 380-82.
55. Id. at 380 ("[T]he plaintiffs must develop an evidentiary presentation on remand. If they fail, they must suffer the proverbial 'Scotch verdict'—'not proven.'").
56. Id. "It may also be that an expert economist will be required, even one
gency cases, not just those involving fee-shifting statutes.\textsuperscript{57} Fourth, once the court has determined how its particular market compensates for contingency, that determination must control future cases within the same market.\textsuperscript{58} Fifth, "Justice O'Connor's conclusion that any difference in fee structures of contingency versus assured hourly rate cases must be reflected in an upward adjustment of the lodestar should be tempered by the consideration of the fee necessary to attract competent counsel."\textsuperscript{59} Demonstrating the many questions left in the wake of \textit{Delaware Valley II}, the Blum \textit{I} court merely identified these five concerns, providing no further guidance on how the district courts should act to alleviate them.\textsuperscript{60}

Other courts, however, declined to follow Justice O'Connor's concurrence. For example, in \textit{Homeward Bound, Inc. v. Hisson Memorial Center},\textsuperscript{61} the United States Court of Appeals for the Tenth Circuit expressly adopted Justice White's plurality opinion in \textit{Delaware Valley II} and rejected Justice O'Connor's approach.\textsuperscript{62} Plaintiff Homeward Bound, an association of parents whose children resided in the defendant state institution for the developmentally disabled, brought suit in the United States District Court for the Northern District of Oklahoma.\textsuperscript{63} The plaintiffs claimed that the defendant's operation of the home violated their children's various constitutional and statutory rights.\textsuperscript{64} Following able to develop some kind of econometric model. . . that [can] determine\[\ldots] the mathematical relationship between hourly rate and contingency." \textit{Id.} However, the court noted that even such an intricate model would not fully satisfy the requisite evidentiary standard because "it says nothing about the question whether the multiple is necessary to attract competent counsel." \textit{Id.} at 381.

\textsuperscript{57} \textit{Id.} Chief Judge Becker, writing for the \textit{Blum I} court, found that "[i]t does not appear that Justice O'Connor . . . contemplated that the class of cases to be studied be anything less than all contingency cases in a given geographic market, including personal injury cases, which constitute the biggest group." \textit{Id.}

\textsuperscript{58} \textit{Id.} The \textit{Blum I} court stated that "perhaps the district court will wish to appoint a special or even a standing master to develop findings about contingency cases in its geographic area that can be used in all cases, or at least as a point of departure." \textit{Id.} The court noted, in passing, that such a study might present due process problems if those who will later be affected by its outcome are unable to participate in its formulation. \textit{Id.}

\textsuperscript{59} \textit{Id.} at 382. This element is intended to interject a note of "realism" into the class-based contingency analysis, which, "despite its theoretical integrity, may result in too high a multiplier." \textit{Id.} at 381-82.

\textsuperscript{60} \textit{Id.} at 380-82.

\textsuperscript{61} 963 F.2d 1352 (10th Cir. 1992).

\textsuperscript{62} \textit{Homeward Bound}, 963 F.2d at 1358 ("[W]e reaffirm the standard . . . approved of by the \textit{Delaware Valley II} plurality, and we decline to adopt Justice O'Connor's concurring opinion in \textit{Delaware Valley II} as the law of this Circuit.").

\textsuperscript{63} \textit{Id.} at 1354. The plaintiffs sought both injunctive and declaratory relief. \textit{Id.}

\textsuperscript{64} See \textit{id.} at 1354 n.3. The court summarized the broadly worded complaint: "[p]laaintiffs alleged violations of the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and sought relief under 42 U.S.C. \S 1983. Plaintiffs also claimed violations of The Rehabilitation Act of
protracted litigation, the district court found for the plaintiffs and approved their lodestar request.65 However, the court denied the plaintiffs' application for a contingency enhancement.66

Judge Baldock, writing for a panel of the Tenth Circuit, affirmed the district court's denial of a contingency enhancement.67 The court held that Justice O'Connor's position in Delaware Valley II was not based on sufficiently narrow grounds to constitute a majority under the plurality judgment rule set forth in Marks v. United States.68 Under the Marks rule, only the views of those justices concurring in the judgment on the narrowest possible grounds are regarded as precedential.69 Relying on Justice White's plurality opinion in Delaware Valley II and a prior Tenth Circuit case,70 the court held that risk multipliers were to be available only in "exceptional cases" and should be based on the risk inherent in a particular case and not on a class-wide analysis.71 However, courts should view such multipliers cautiously and should only award them in cases where "prior to the litigation, the attorney for the prevailing party was confronted with a 'real risk of not prevailing.'"72 The court further held that the prevailing party must show that the risk of not prevailing created an inability to find counsel in the relevant market absent some multiplier.73

1973, Title XIX of The Social Security Act, and Education of the Handicapped Act." Id. at 1354 n.3 (citations omitted).
65. Homeward Bound, 963 F.2d at 1354.
66. Id. The district court, following Justice O'Connor's approach in Delaware Valley II, denied the multiplier because the plaintiffs had presented no evidence showing how the relevant market treated contingency cases and because the plaintiffs' risk of not prevailing in this particular case was not high from the outset. Id.
67. Id. at 1360.
68. Id. at 1358 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).
69. Id. (citing Marks v. United States, 430 U.S. 188, 193 (1977)). For a discussion of the impact of Supreme Court opinions when there is no clear majority, so-called Marks majorities, see supra note 39.
70. Homeward Bound, 963 F.2d at 1360. The court held that its opinion in Ramos v. Lamm, 713 F.2d 546, 558 (10th Cir. 1983) that contingency enhancement must be based on the "risk presented by the particular case at hand," was not affected by Delaware Valley II. Homeward Bound, 963 F.2d at 1356 n.6.
71. Id. at 1360. The court reaffirmed that multipliers for contingency are available "notwithstanding that four members of the Supreme Court have stated that such enhancements are never appropriate." Id. (citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 727 (1987)). For a discussion of the positions of individual justices in Delaware Valley II, see supra note 31.
72. Homeward Bound, 963 F.2d at 1360 (quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711, 729-30 (1985)). This "risk of not prevailing" is based on a two-part inquiry: (1) to what extent was the relevant law unsettled at the time the suit was filed and (2) to what extent was the suit's outcome dependant on the resolution of a disputed material fact. Id.
73. Id. "This [difficulty] may be shown by evidence that the plaintiff encountered actual difficulty in securing counsel . . . [or] by showing that lawyers in
1993] NOTE 1673

III. CITY OF BURLINGTON v. DAGUE

The Court's most recent statement on statutory fees had its roots in a dispute between residents of Burlington, Vermont and the City of Burlington (the City) regarding the City's operation of a landfill. Ernest Dague and his neighbors lived next to a landfill owned and operated by the City.74 In October of 1985, Dague brought suit against the City in the United States District Court for the District of Vermont, alleging that the operation of the landfill violated various provisions of the Resource Conservation and Recovery Act (RCRA),75 the Clean Water Act (CWA)76 and the Vermont Groundwater Protection Law.77 After a bench trial, the district court found for Dague on virtually all of his claims.78 The court granted Dague’s petition for an award of attorney’s fees pursuant to the fee-shifting provisions of the RCRA79 and the CWA.80 The court awarded Dague lodestar fees in the amount of $198,027.50 and costs of $10,929.66.81 The court also increased the

the relevant market, generally will not take cases on contingency absent some guarantee of an enhancement.” Id. (citations omitted).


77. VT. STAT. ANN. tit. 10, § 1410 (Supp. 1992) (abolishing common-law doctrine of absolute ownership of groundwater and providing cause of action for “unreasonable harm caused by another person withdrawing, diverting or altering the character or quality of groundwater”), cited in Dague, 935 F.2d at 1346.

78. See Dague, 935 F.2d at 1349. Specifically, the district court found that the City had violated the RCRA prohibitions against open dumping. Id. at 1346. The City had also violated § 6945(a) of the RCRA by generating methane gas, which polluted United States waters without a permit. Id. at 1349. Further, the “landfill may have presented an imminent and substantial endangerment to health or the environment, and therefore, its continued operation violated [the RCRA].” Id. The City had also violated the CWA by “discharging pollutants from a point source . . . without authorization.” Id. Lastly, the City violated the Vermont Groundwater Protection Law “by altering the character and quality of the groundwater beneath and north of the landfill.” Id.

79. Id. at 1346 (citing Resource Conservation and Recovery Act, 42 U.S.C. § 6972(a) (1988 & Supp. III 1991) (“The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”)).

80. Id. (citing Clean Water Act, 33 U.S.C. § 1365(d) (1988 & Supp. III 1991) (“The court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.”)).

81. Id. at 1347.
lodestar by twenty-five percent to account for the risk involved in the case, yielding total fees of $258,464.03.82

The City appealed both the district court’s findings on the merits and the award of attorney’s fees.83 The United States Court of Appeals for the Second Circuit affirmed the district court’s findings on the merits and upheld the lodestar calculation, including the twenty-five percent multiplier.84 The Supreme Court granted certiorari, limited to the issue of whether the lower court’s grant of an enhancement for contingency was permissible under federal fee-shifting statutes.85

A. Narrative Analysis

The fee-shifting provisions at issue in City of Burlington v. Dague86 were those incorporated in the Resource Conservation and Recovery Act (RCRA) and the Clean Water Act (CWA).87 Justice Scalia, writing for the six-justice majority, began by noting that the Court’s prior caselaw indicated that all fee-shifting provisions should be interpreted similarly.88 The particular fee-shifting provision before the Court was, therefore, largely irrelevant.89 Justice Scalia reiterated the Court’s belief that the lodestar method produces reasonable fees, noting that it has “become the guiding light of our fee-shifting jurisprudence.”90 Further, he stated the “strong presumption” that the lodestar method’s reasonable hours multiplied by reasonable hourly rate calculation

82. Id.
83. Id.
84. Id. at 1356-60. The panel was comprised of Circuit Judges Newman and Pratt and Judge Griesa of the United States District Court for the Southern District of New York, sitting by designation. Id. at 1346. Judge Pratt’s unanimous opinion held that: (1) Dague was a prevailing party and his victory was not de minimis; (2) the district court did not abuse its discretion by not reducing the lodestar to account for limited success; and (3) the 25% contingency enhancement was warranted because Dague would otherwise have had difficulty finding competent counsel and “the risk of not prevailing was substantial.” Id. at 1357-60. In upholding the enhancement for contingency, the Second Circuit did not recognize any opinion in Delaware Valley II as controlling and relied expressly on its own precedent in Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295 (2d Cir. 1987). Dague, 935 F.2d at 1360.
85. City of Burlington v. Dague, 112 S. Ct. 964 (1992). The Court granted certiorari because the “question [was] essentially identical to the one [it] addressed, but did not resolve, in Delaware Valley II.” Dague, 112 S. Ct. at 2639 (citation omitted).
87. Id. at 2641. For a discussion of the fee-shifting provisions of the RCRA and the CWA, see supra notes 79-80.
88. Dague, 112 S. Ct. at 2641. Chief Justice Rehnquist and Justices White, Kennedy, Souter and Thomas joined Justice Scalia’s majority opinion. Id. at 2639. Justice Blackmun dissented, joined by Justice Stevens, and Justice O’Connor dissented separately. Id.
89. For a discussion of the interpretive similarity of fee-shifting provisions, see supra note 4 and accompanying text.
90. Dague, 112 S. Ct. at 2641.
generates, for nearly all purposes, a "reasonable fee."\textsuperscript{91}

Turning generally to the question of what role an enhancement for contingency should serve within the fee-shifting system, Justice Scalia suggested that the risk borne by an attorney is the product of two factors: "(1) the legal and factual merits of the claim, and (2) the difficulty of establishing those merits."\textsuperscript{92} Of these factors, the latter is subsumed in the lodestar calculation, either in an increased number of hours or a higher hourly rate for more experienced counsel.\textsuperscript{93} Justice Scalia reasoned that the legal merits factor should not play any role in determining fee awards and is, therefore, not reflected in the lodestar calculation.\textsuperscript{94} Considering legal merits "would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well."\textsuperscript{95}

The Court next rejected the approach taken by Justice O'Connor in her concurring opinion in \textit{Delaware Valley II}.\textsuperscript{96} The Court found two major faults with Justice O'Connor's position that enhancements for contingency should be based on how the relevant market treats all contingency cases as a class. First, the Court found Justice O'Connor's approach to be inherently contradictory.\textsuperscript{97} Justice O'Connor would require a prevailing party to demonstrate that, absent enhancement, he or she would have had substantial difficulty finding counsel, and yet Justice O'Connor would forbid enhancement based on the risks associated with the particular case.\textsuperscript{98} According to the \textit{Dague} majority, the unavailability of counsel is inextricably linked to the riskiness of a particular case.\textsuperscript{99}

Second, Justice O'Connor's approach, which requires looking to the


\textsuperscript{92} \textit{Id.}

\textsuperscript{93} \textit{Id.} Justice Scalia stated that considering this factor in assessing a multiplier "amounts to double counting" because the difficulty in establishing a suit's merits is already reflected in the basic lodestar calculation. \textit{Id.}

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} at 2642. Justice Scalia explained:
Assume, for example, two claims, one with underlying merit of 20%, the other of 80%. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20% claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80% claim. \textit{Id.}

Moreover, the legal merits factor would require considering a multiplier in every case because no suit has a 100% chance of success. \textit{Id.} at 2641.

\textsuperscript{96} \textit{Id.} at 2642. "\textit{Dague} urges that we adopt the approach set forth in the \textit{Delaware Valley II} concurrence. We decline to do so, first and foremost because we do not see how it can intelligibly be applied." \textit{Id.}

\textsuperscript{97} \textit{Id.} at 2642.

\textsuperscript{98} \textit{Id.}

\textsuperscript{99} \textit{Id.} at 2641.
“market treatment” of contingency cases is unworkable in many statutory-fee cases because no relevant market exists. Many statutory-fee cases, especially those seeking equitable (non-monetary) relief, would not be brought if not for fee-shifting statutes. In those cases, therefore, the only market is one artificially created by fee-shifting statutes. Moreover, even in cases where there is a relevant class to analyze, that “average” class treatment is irrelevant. Lawyers faced with a contingent fee case do not compare it to win-or-lose fee cases, but rather evaluate its particular merits. Lawyers set fees based on their chance of success. Moving away from Justice O’Connor’s approach in Delaware Valley II, Justice Scalia could find no other method “by which contingency enhancement, if adopted, could be restricted to fewer than all contingent-fee cases.”

Justice Scalia advanced two reasons for believing that enhancement for risk does not comport with the legislative intent behind fee-shifting statutes or the Court’s other fee-shifting jurisprudence. First, only “prevailing parties” can recover fees at all. Therefore, even a “successful” party can only recover fees for those claims within the litigation upon which the party actually prevailed. Because contingent fee attorneys operate by “pooling” the risk of numerous cases, awarding a fee similar to that available in the general contingent fee market can be...

100. Id. at 2642.
101. Id.
102. Id. “[L]ooking to that [artificial] ‘market' for the meaning of fee-shifting is obviously circular. Our decrees would follow the ‘market,’ which in turn is based on our decrees.” Id. This reasoning is essentially the same as that of the United States Court of Appeals for the District of Columbia Circuit. See King v. Palmer, 906 F.2d 762, 770 (D.C. Cir. 1990) (Williams, J., concurring) (“I see the judicial judgment as defining the market, not vice versa.”), vacated, 950 F.2d 771 (D.C. Cir. 1991), cert. denied sub nom King v. Ridley, 112 S. Ct. 3054 (1992).
103. Dague, 112 S. Ct. at 2642. This is because the “contingent risk of a case ... depends principally upon its particular merits.” Id.
104. Id.
105. Id. The Court stated that:
Contingency enhancement calculated on any class-wide basis, therefore, guarantees at best ... that those cases within the class that have the class-average chance of success will be compensated according to what the ‘market' requires to produce the services, and that all cases having above-class-average chance of success will be overcompensated.
Id.
106. Id. at 2642-43.
108. Dague, 112 S. Ct. at 2643 (citing Hensley v. Eckerhart, 461 U.S. 424 (1983) (setting standard for determining who is prevailing party for purposes of fee-shifting)). This prevailing party concept is the baseline requirement for an award of fees under any fee-shifting statute. Under all such statutes, with the exception of 42 U.S.C. § 1988, only a plaintiff may be a prevailing party. See S. Rep. No. 1011, supra note 1, at 4 n.4, reprinted in 1976 U.S.C.C.A.N. at 5912 (stating that defendants may be awarded fees under 42 U.S.C. § 1988).
sates attorneys for other cases not won against other parties. The Court viewed this as violating the most basic requirement for fee-shifting—that a party receive fees only for claims prevailed upon.

Second, Justice Scalia asserted that the “contingent-fee” model is incompatible with the lodestar model. Grafting enhancement factors from the contingent-fee model onto the lodestar model would create an awkward and inequitable system. Under such a “hybrid” model, risk could be used to increase a lodestar, but absence of risk could not be used to reduce it.

Finally, the Court rejected contingency multipliers because multipliers tend to generate an undesirable amount of “satellite litigation.” Beyond the theoretical concerns about incentives and different models, the Court also expressed an underlying concern for the “administrability” of fee-shifting. This interest in administrability, Justice Scalia suggests, has been the motivating factor behind the Court’s acceptance of the objective lodestar model.

In dissent, Justices Blackmun and Stevens identified two overriding principles that require the availability of a contingency multiplier. First, the legislative history of fee-shifting statutes and the Court’s prior caselaw require that a “reasonable” fee be one that is fully compensatory. Second, “professional standards” permit an attorney who takes

109. Dague, 112 S. Ct. at 2643. This concept of risk “pooling” means that for a contingent fee attorney “cases that turn out to be successful pay for the time . . . gambled on those that did not.” Id.

110. Id.

111. Id. The Court noted that “we have generally turned away from the contingent-fee model . . . to the lodestar model.” Id. (quoting Venegas v. Mitchell, 495 U.S. 82, 87 (1990)).

112. Id.

113. Id. (“To engraft this feature onto the lodestar model would be to concoct a hybrid scheme that resorts to the contingent-fee model to increase a fee award but not to reduce it.”).

114. Id. The Court first used the term “satellite litigation” in connection with statutory fees in Hensley v. Eckerhart, 461 U.S. 424 (1983). The Hensley Court was concerned that fee-shifting “not result in a second major litigation.” 461 U.S. at 437. The Dague majority argued that “[c]ontingency enhancement is a feature inherent in the contingent-fee model. . . . [I]t is therefore not consistent with our general rejection of the contingent-fee model for fee awards, nor is it necessary to the determination of a reasonable fee.” Dague, 112 S. Ct. at 2643.

115. Dague, 112 S. Ct. at 2643. For a discussion of “administrability,” see infra note 130.

116. Dague, 112 S. Ct. at 2643. “Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.” Id.

117. Id. at 2644 (Blackmun, J., dissenting). Citing the Court’s opinion in Missouri v. Jenkins, 491 U.S. 274, 286 (1989), Justice Blackmun noted that a reasonable fee is one “calculated on the basis of rates and practices prevailing in the relevant market.” Dague, 112 S. Ct. at 2644 (Blackmun, J., dissenting); see also Hensley, 461 U.S. at 435 (stating that reasonable fee must be one that fully compensates).
a case on a contingency basis to be compensated more highly than an
attorney certain to recover a fee.118 "The Court," writes Justice Black-
mun, "does not deny these principles. It simply refuses to draw the con-
clusion that follows ineluctably"—that if the market provides incentives
for contingency, so must a "fully compensatory" statutory fee.119

Justice Blackmun next looked to the purpose behind fee-shifting
statutes. He stated that the entire notion of private civil rights enforce-
ment was tied to the availability of skilled private counsel.120 Specifically, fee-shifting provisions reflect congressional concerns that: (1)
many potential plaintiffs lack the resources necessary to hire an attorney
and (2) many civil rights suits generate no monetary recovery from
which to pay an attorney.121

Justice O'Connor, in dissent, reasserted the theme of her concur-
ing opinion in Delaware Valley II.122 O'Connor again advocated the use
of a class-wide analysis, suggesting that the majority opinion is flawed
because it focuses almost exclusively on multipliers granted for the risk
inherent in a particular case.123 Instead, she asserted that a court
should require evidence showing that competent counsel will avoid fee-
shifting cases without the promise of some enhancement.124 Justice

118. Dague, 112 S. Ct. at 2644 (Blackmun, J., dissenting). The dissenting
Justices cited to a provision of the American Bar Association Code of Profes-
sional Conduct to demonstrate that higher fees in contingency cases are the
rule, not the exception. Id. at 2644 n.3 (Blackmun, J., dissenting); see also MODEL
RULES OF PROFESSIONAL CONDUCT Rule 1.5(a)(8) (1992) (allowing for contin-
gency-fee arrangements).

119. Dague, 112 S. Ct. at 2644 (Blackmun, J., dissenting). The conclusion
that Justice Blackmun referred to is that if the relevant "market" compensates
for risk, then "reasonable" market-based statutory fees must do likewise. Id.
(Blackmun, J., dissenting).

120. Id. (Blackmun, J., dissenting) ("Congress' purpose in adopting fee-
shifting provisions was to strengthen the enforcement of selected federal laws by
ensuring that private persons . . . could retain competent counsel.").

121. Id. (Blackmun, J., dissenting). The dissent stated that these two
concerns combine in the notion that if statutory rights cases are less profitable than
win-or-lose fee cases, only less competent attorneys—judged so because they are
not occupied by other cases—will take statutory rights cases. Id. (Blackmun, J.,
dissenting). This group of sub-standard lawyers, combined with the relatively
few public-interest law projects is not sufficient to enforce the myriad of civil
rights cases that develop. Id. at 2644-45 (Blackmun, J., dissenting).

122. Id. at 2648 (O'Connor, J., dissenting). For a discussion of Justice
O'Connor's concurrence in Delaware Valley II, see supra notes 39-46 and accom-
panying text.

123. Dague, 112 S. Ct. at 2649 (O'Connor, J., dissenting) (voting to reverse
lower court's award of multiplier and remand for reconsideration because "it was
error to base the degree of enhancement on case-specific factors").

124. Id. at 2648 (O'Connor, J., dissenting). The majority criticizes this
class-wide calculation because it would be based on imperfect data. Id. at 2642.
However, Justice O'Connor points out that courts are often called to "make eco-
nomic determinations on less-than-perfect data," such as in inverse condemnation
and antitrust cases. Id. at 2648 (O'Connor, J., dissenting). Nevertheless,
Justice O'Connor asserted that courts must make imperfect calculations in order
O'Connor argued, as she did in Delaware Valley II, that a fee that will attract competent counsel is "reasonable."\textsuperscript{125} If a contingency enhancement is necessary to attract competent counsel, then it, too, must be "reasonable" and permissible under federal fee-shifting statutes.\textsuperscript{126}

B. Critical Analysis

By refusing contingency multipliers in all cases, the Dague majority opts for the most convenient solution. Justice Scalia's majority opinion seeks predictability at all costs. Amidst the comfort that certainty brings, however, lingering doubts remain about whether the Court has placed the form of statutory fee-shifting before its substance. Will choosing the most easily administered solution remove an essential incentive for private enforcement of civil rights? In the end, the Court rejects contingency enhancement because of the myriad problems it associates with it.\textsuperscript{127} However, many of those problems are created by the Court's persistence in characterizing contingency multipliers as only those granted to account for the risk inherent in the particular case at hand instead of as market-based incentives for successful lawyers to take statutory-fee cases.\textsuperscript{128}

1. Administrability

The Dague majority is consumed by administrability. It rejects enhancement based on how the market treats contingency cases as a class—Justice O'Connor's position in Delaware Valley II—because it "do[es] not see how it can intelligibly be applied."\textsuperscript{129} It rejects all other approaches to realize Congress' purpose in enacting those statutes. \textit{Id.} (O'Connor, J., dissenting). Moreover, the "initial [computational] hurdles would be overcome as the enhancements appropriate to various markets became settled in the district courts and courts of appeals," according to Justice O'Connor. \textit{Id.} (O'Connor, J., dissenting). Justice O'Connor concluded that any harm that would result from this initial inaccuracy would be more than offset by the benefits that would result from increased willingness on the part of lawyers to take statutory fee cases. \textit{Id.} (O'Connor, J., dissenting).

\textsuperscript{125} \textit{Id.} (O'Connor, J., dissenting) ("reasonable fee should be one that would attract competent counsel").

\textsuperscript{126} \textit{Id.} (O'Connor, J., dissenting). Contingency enhancement, however, must be based upon concrete (if incomplete) data showing that private counsel in the relevant market require additional economic incentives to take the risks associated with a statutory fee case. \textit{Id.} (O'Connor, J., dissenting). Justice O'Connor would vacate the lower court's fee award and remand for further factual findings because the record did not contain "market-specific support for the 25% enhancement figure." \textit{Id.} at 2649 (O'Connor, J., dissenting).

\textsuperscript{127} For a discussion of the problems leading to the Court's rejection of contingency enhancement, see \textit{supra} notes 92-116 and accompanying text.

\textsuperscript{128} For a discussion of the Dague majority's view of the role of risk, see \textit{supra} note 94 and accompanying text.

\textsuperscript{129} \textit{Dague}, 112 S. Ct. at 2642. The majority's inability to apply class-based enhancement in a satisfactory way was its "first and foremost" reason for rejecting that approach. \textit{Id.}
because "the interest in ready administrability . . . and the related interest in avoiding burdensome satellite litigation . . . counsel strongly against adoption of contingency enhancement."  

However, as Justices Blackmun and Stevens point out in dissent, "speculation that [contingency] enhancement determinations would be 'burdensome' does not speak to the issue whether they are required by the fee-shifting statutes." Fee-shifting statutes have always had one purpose—"to strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel." Admittedly, neither the language of the Civil Rights Attorneys' Fees Awards Act, 42 U.S.C. § 1988, nor its legislative history explicitly mandates contingency enhancement. Congress

130. Id. at 2643. This concern with administrability is identified as the element that "has underlain [the Court's] adoption of the lodestar approach." Id. The majority asserts that contingency enhancement would lead to protracted litigation because it "would make the setting of fees more complex and arbitrary [and] hence more unpredictable." Id.

Justice Scalia's concern for administrability crosses jurisprudential boundaries. In cases ranging from habeas corpus procedure to First Amendment rights, Justice Scalia has advocated positions that are easy to administer. See, e.g., Lehnert v. Ferris Faculty Ass'n, 111 S. Ct. 1950, 1963 (1991) (majority criticized Justice Scalia for "sacrific[ing] sound constitutional analysis for the appearance of administrability"); Ylst v. Nunnemaker, 111 S. Ct. 2590, 2594-95 (1991) (Justice Scalia adopts habeas corpus presumption because it "assists . . . administrability.").

131. See Dague, 112 S. Ct. at 2643.

132. Id. at 2647 (Blackmun, J., dissenting). The dissenters note that even if the majority's "satellite litigation" argument were valid, Dague is an unlikely case to illustrate that point because "the issue of enhancement hardly occupied center stage in the fees portion of this litigation." Id. (Blackmun, J., dissenting). In fact, contingency enhancement only became an issue when the Supreme Court granted certiorari "limited to [that] question alone." Id. (Blackmun, J., dissenting). Perhaps the dissenters recognize that Dague was not the appropriate case with which to resolve the question of contingency enhancement because that issue was not foremost in the case. Moreover, the issue would become less burdensome if Justice O'Connor's class-based enhancement position were adopted because "the amount by which fees should be increased would quickly become settled in the various district courts." Id. (Blackmun, J., dissenting).


134. For the text of § 1988, see supra note 3.

135. For the legislative history of § 1988, see generally S. REP. No. 1011, supra note 1, reprinted in 1976 U.S.C.C.A.N. 5908. Both proponents and opponents of contingency enhancement recognize this lack of explicit congressional guidance. See, e.g., Delaware Valley II, 483 U.S. at 723 ("The disagreement among the Circuits and commentators indicates that Congress has not clearly directed or authorized multipliers or enhancements for assuming the risk of loss."); Id. at 797-98 (Blackmun, J., dissenting) (noting that Congress required only that court-awarded fees "be . . . at a rate that is basically competitive with what the
did, however, cite two cases in section 1988's legislative history that permitted enhancement.\textsuperscript{136} These citations may be interpreted as Congress' implicit endorsement of contingency enhancement.\textsuperscript{137}

Moreover, Congress' dictate that court-awarded fees be "adequate to attract competent counsel, but . . . not produce windfalls to attorneys"\textsuperscript{138} leads to the conclusion that contingency enhancement should be available if such enhancement is necessary to attract competent counsel.\textsuperscript{139} The Dague majority either discounts or ignores the weight of evi-

-----------------------------------------------------------------------------------


Two of these four cases refer to some sort of contingency enhancement. The Johnson court hints at contingency in at least five of its twelve "subjective factors": the preclusion of other employment by the attorney due to acceptance of the case, the attorney's customary fee, whether the attorney's fee is fixed or contingent, the "undesirability" of the case and fee awards in similar cases. Johnson, 488 F.2d at 717-19. Similarly, in Stanford Daily, the court granted an increase in the lodestar "to reflect the fact that the attorneys' compensation . . . was contingent in nature." Stanford Daily, 64 F.R.D. at 686.

\textsuperscript{137} There is, however, a competing viewpoint. At least one author has suggested that the Senate's citations to Johnson and Stanford Daily cannot reasonably support an endorsement of contingency enhancement. See James D. Kole, Note, Nonpayment Risk Multipliers: Incentives or Windfalls?, 53 U. Chi. L. Rev. 1074, 1086-88 (1986). Kole further suggests that:

[T]he rationale offered in [Stanford Daily] for allowing contingency bonuses is impossible to reconcile with the other statements of Congressional intent in the Fees Act. In Stanford Daily, the district court awarded an enhancement because it "insures that counsel are compensated not only for their successful efforts but also for unsuccessful litigation."

Id. at 1087-88 (footnote omitted). Kole believes that the Stanford Daily court's reasoning cannot support contingency enhancement because this "risk pooling" argument is precluded by the prevailing party limitation. Id. at 1088. For a discussion of the prevailing party limitation and risk pooling, see supra notes 107-10 and accompanying text & infra note 149.


\textsuperscript{139} See Dague, 112 S. Ct. at 2644 (Blackmun, J., dissenting) (noting that contingency enhancement is mandated because anything less would not be "fully compensatory"); Delaware Valley II, 438 U.S. at 737 (Blackmun, J., dissenting) (noting that "unless the fee reimbursement [is] 'full and complete,' . . . statutory rights [will] be meaningless because they would remain largely unenforced"); John L. Griffith, The Contingency Factor in Attorney Fee Awards, 90 YALE L.J. 473, 480 (1981) ("A lawyer who both bears the risk of not being paid and
dence showing that, absent compensation for risk, private practitioners necessarily avoid contingent-fee cases because of the risk of not prevailing.140

It is worthwhile to recall Congress’ warning that “[i]f our civil rights laws are not to become mere hollow pronouncements . . . we must maintain the traditionally effective remedy of fee shifting in these cases.”141 If, as seems evident, private attorneys are unwilling or unable to take statutory-fee cases, the entire system of private enforcement of rights is threatened. Many observers and several members of the Supreme Court believe that the elimination of enhancements for contingency creates just such a threat.142 It stands to reason, therefore, that if a fee peti-

140. See, e.g., Delaware Valley II, 483 U.S. at 740 (Blackmun, J., dissenting) (“An adjustment for contingency is necessary if . . . competent lawyers are to be attracted in their private practice to prosecute statutory violations.”); Leubsdorf, supra note 139, at 474 (“The contingency bonus affects the level of private litigation and can be of crucial importance in deciding how many rights are privately enforced.”); Arthur J. Lachman, Note, Attorney’s Fee Contingency Enhancements: Toward A Complete Incentive to Litigate Under Federal Fee-Shifting Statutes, 63 WASH. L. Rev. 469, 481 & n.85 (1988) (“Unless compensation under fee-shifting statutes is complete, private attorneys will not take public interest cases outside their limited pro bono practices.”) (citing H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1, 3 (1976) & Brief for Amicus Curiae Twelve Small Private Civil Rights Law Firms in Support of Respondents at 6-29, Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air, 483 U.S. 711 (1987) (No. 85-5)).

141. S. Rep. No. 1011, supra note 1, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913. Since Congress passed the first fee-shifting statute in 1870, Congress has delegated the enforcement of statutory civil rights to private attorneys. See id. at 3-5 (noting that “the effects of such [statutory] fee awards are ancillary and incidental to securing compliance with these [civil rights] laws, and that fee awards are an integral part of the remedies necessary to obtain such compliance”).

142. See, e.g., Leubsdorf, supra note 139, at 474 (“The contingency bonus affects the level of private litigation and can be of crucial importance in deciding how many rights are privately enforced”); The Supreme Court - Leading Cases, supra note 139, at 298 (noting that difficulty or inability to obtain contingency enhancement “make citizens’ suits less attractive to attorneys”); Kole, Note, supra note 137, at 1074 (stating that “the level of fee awards directly affects the number of civil rights cases litigated”); Lachman, Note, supra note 140, at 481-82 (noting that “[i]f attorneys must choose between . . . a case in which compensation is regularly received as services are rendered and litigation under a fee-shifting statute where compensation will be received only at the end of the litigation . . . [and] only if their client prevails, most will choose the noncontingent employment”).

Justices Brennan, Marshall, Blackmun, Stevens and O’Connor have asserted in dissent that creating uncertainty about the availability of contingency enhancement or eliminating it altogether will have a chilling effect on private enforcement of civil rights. Dagwe, 112 S. Ct. at 2644-45 (Blackmun, J., dissenting); id. at 2648 (O’Connor, J., dissenting). For a discussion of the dissenters’ position in Delaware Valley II, see supra notes 36-38 and accompanying text. For a discussion of Justices Blackmun and Stevens dissenting position in
tioner can show that contingency enhancement is necessary to attract competent counsel in the relevant market, enhancement is necessary to enforce the purpose behind fee-shifting statutes.

2. Case-Specific Risk vs. Market Incentives

Having decided that Congress did not mandate contingency enhancement, the Dague majority rejects it in all cases because of the many problems it sees with this method of calculation. Many of these problems, however, are the result of the majority's characterization of contingency enhancement as related to the risk inherent in a particular case. Justice Scalia identified three problems with contingency enhancement that directly result from the way he frames the issue.

First, when discussing enhancement based on how the "market" treats contingency cases as a class, the Dague majority claims that "the contingent risk of a case... depends principally upon its particular merits." From that perspective, the relevant market's incentives for attorneys to take contingent-fee cases will only ensure that cases "having above-class-average chance of success will be overcompensated." The majority does not consider the possibility that a market-based incentive may be directed at the choice between a case with an up-front fee and one where a fee comes only if there is a successful conclusion. This market-based concept is entirely different from compensating for case-specific risk. In the system Justice O'Connor proposed, for example, the enhancements would become standardized over time within a market, yielding only the incentive necessary to attract competent counsel.

---

Dague, see supra notes 117-21 and accompanying text. For a discussion of Justice O'Connor's dissenting position in Dague, see supra notes 122-26 and accompanying text.

143. For a discussion of the Dague majority's reasons for rejecting contingency enhancement, see supra notes 92-116 and accompanying text.

144. See Dague, 112 S. Ct. at 2641-42. Enhancement should, however, be based on "the fact of, rather than the degree of, contingency in a particular case." Jean R. Sternlight, The Supreme Court's Denial of Reasonable Attorney's Fees to Prevailing Civil Rights Plaintiffs, 17 N.Y.U. REV. L. & SOC. CHANGE 535, 557 (1989-90). In Delaware Valley II, Justice White referred exclusively to case-specific-risk multipliers when he stated that he and his plurality were "unconvinced that Congress intended the risk of losing a lawsuit to be an independent basis for increasing the amount of any otherwise reasonable fee." Delaware Valley II, 483 U.S. at 725.

145. Dague, 112 S. Ct. at 2642.

146. Id.

147. For a discussion of market-based versus case-specific risk, see supra notes 143-57 and accompanying text.

148. Justice O'Connor's opinion in Delaware Valley II foresaw a classwide study, encompassing all contingency cases within a market. 483 U.S. at 731-34; see also Blum v. Witco Chem. Corp., 829 F.2d 367, 381 (3d Cir. 1987) (Justice O'Connor "contemplated that the class of cases to be studied [not] be anything less than all contingency cases in a given geographic market."). A court's deter-
Second, Justice Scalia states that awarding fees in the same way as private contingency agreements violates the “prevailing party” limitation because it essentially compensates attorneys for losing other cases.149 This again reflects the Court’s one-by-one, case-specific view of statutory-fee cases. It both ignores the purpose of contingency enhancement, to equalize statutory fee and up-front fee cases, and, as Justice Blackmun suggests, reveals “the [majority’s] inattention to the language of the statutes.”150 The fee-shifting statutes award fees to prevailing parties, not their counsel.151 Therefore, even the most exorbitant fee award would not violate the prevailing party limitation so long as it is given to a party that has actually prevailed.152

Finally, the Dague majority refuses to “engraft” contingency enhancement onto the lodestar model.153 According to the majority, such

minoration of the level of incentive necessary to attract competent counsel to a contingent-fee case would be controlling for all cases where courts compute fees. Delaware Valley II, 483 U.S. at 733 (O’Connor, J., concurring). Therefore, the contingency enhancements awarded under such a system would be only large enough to allow statutory fee cases to be competitive with up-front fee cases in the eyes of private counsel. Id. (O’Connor, J., concurring).

It is possible, however, to regard even that level of enhancement as unreasonably providing a windfall for attorneys because attorneys will receive more than the basic lodestar amount. See Dague, 112 S. Ct. at 2641 (noting “strong presumption” that lodestar represents “reasonable” fee). Enhanced-fee awards that compensate for contingency in the same way as the private market could, however, still comport with both the intent of Congress that fees be “reasonable” and the Court’s dictate in Hensley v. Eckerhart that awarded fees be “fully compensatory.” See Hensley, 461 U.S. at 435.

149. Dague, 112 S. Ct. at 2643 (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). The Dague majority believes that private contingent-fee arrangements allow for greater fees than hourly arrangements because attorneys must cover the costs of lost cases taken on the same contingent basis. Id. (stating that “cases that turn out to be successful pay for the time [a lawyer] gambled on those that did not”). This “risk pooling” is, according to the Dague majority, not unlike awarding fees to an attorney for cases or claims not prevailed upon, and therefore violates the prevailing party limitation of § 1988. Id. Similarly, in Hensley, the Court held that because only “prevailing parties” could be awarded fees under § 1988, fees could not be awarded for unsuccessful claims by winning parties. Hensley, 461 U.S. at 433-35.

150. Dague, 112 S. Ct. at 2646 (Blackmun, J., dissenting).

151. Id. at 2647 (Blackmun, J., dissenting) (noting that “[r]espondents simply do not advocate awarding fees to any party who has not prevailed”).

152. Justice Blackmun notes that the Court’s concern about violating the prevailing party limitation is “misleading [because its] real objection . . . is that the amount of an enhanced award would be excessive.” Id. (Blackmun, J., dissenting) (emphasis in original).

153. Id. at 2643. Justice Scalia believes that there are two competing “models” for fee awards, the “contingent-fee” model and the “lodestar” model. Id. He considers these models to be incompatible and, in endorsing the “lodestar” model, the Court has “generally turned away from the contingent-fee model.” Id. (quoting Venegas v. Mitchell, 495 U.S. 82, 87 (1990)). As one author has noted “compensation for ‘contingency’ is separate and distinct from ‘contingent fee arrangements.’” See Lachman, Note, supra note 140, at 474 n.35 (“The two concepts are related only in that they both involve the risk of not being paid.”).
a "hybrid" would be undesirable because it would allow considerations of contingency to enhance a fee award but would not permit the absence of contingency to reduce a fee award.\textsuperscript{154} There is, however, nothing incongruous about adjusting the basic lodestar figure to account for some otherwise-unreflected factor.\textsuperscript{155} Moreover, it is illogical to reject contingency enhancement simply because it is only capable of adjusting the lodestar in one direction. The riskiness of a statutory-fee case may cause a private attorney to shun it. However, lack of risk will not cause a lawyer to prefer a statutory-fee case to an hourly-fee case. Even if the former will generate certain fees, it will do so only after much delay and much work on fee petitions. Such a reduction for "lack of risk" would also be inconsistent with both the fee-shifting statutes and the Court's prior fee-shifting jurisprudence.\textsuperscript{156} A fee award smaller than the basic lodestar would not pay for "all time reasonably expended," and could not, by definition, be "fully compensatory."\textsuperscript{157}

IV. THE NEED FOR CONGRESSIONAL ACTION

Courts evaluating fee petitions after \textit{Dague} have uniformly found that the opinion precludes any contingency enhancement.\textsuperscript{158} These re-

\textsuperscript{154} \textit{Dague}, 112 S. Ct. at 2643 (stating that "[c]ontingency enhancement is a feature inherent in the contingent-fee model . . . since attorneys factor in the particular risks of a case in negotiating their fee").

\textsuperscript{155} Congress' citation to \textit{Johnson v. Georgia Highway Express} in § 1988's legislative history is recognition that many factors were not subsumed in the lodestar calculation. \textit{See} S. Rep. No. 1011, \textit{supra} note 1, at 6, \textit{reprinted} in 1976 U.S.C.C.A.N. at 5913. The Court recognized that the lodestar is an incomplete measure of a "fully compensatory fee" in \textit{Hensley} when it endorsed a fee calculation scheme that begins with the lodestar, which is augmented or decreased to account for factors such as delay in payment that are not reflected therein. \textit{See Hensley}, 461 U.S. at 434 (citing \textit{Johnson v. Georgia Highway Express}, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974)).

\textsuperscript{156} Section 1988 requires that "counsel for prevailing parties . . . be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all time reasonably expended on a matter.'" \textit{S. Rep. No. 1011, supra} note 1, at 6, \textit{reprinted} in 1976 U.S.C.C.A.N. at 5913 (citations omitted). Additionally, the Court has "established a 'strong presumption' that the lodestar represents the 'reasonable' fee." \textit{Dague}, 112 S. Ct. at 2641. Moreover, reducing the lodestar to account for lack of risk would not calculate statutory fees "on the basis of rates and practices prevailing in the relevant market." \textit{Dague}, 112 S. Ct. at 2644 (Blackmun, J., dissenting) (quoting \textit{Missouri v. Jenkins}, 491 U.S. 274, 286 (1989) (noting that ABA Model Rules of Professional Conduct permit contingency fee arrangements)).


cent decisions reflect Dague's chief virtue, clarity. However, the important congressional policy behind fee-shifting, to encourage private enforcement of statutory rights, is hollow unless competent lawyers are willing to represent wronged parties. Congress and the courts should take all measures necessary to ensure that aggrieved citizens can find competent counsel. Recent decisions have made it clear that the Supreme Court is unwilling to interpret the existing fee-shifting legislation to require or even permit incentives that appear necessary to attract lawyers to the cause of civil rights plaintiffs. Therefore, Congress should make plain what was implicit in section 1988's legislative history: courts should compute statutory fees to make statutory-fee cases as attractive as other private litigation.

To avoid future confusion, legislation to overrule Dague will also have to explicitly set forth a method for computing fees. The method should be explicit enough to prevent courts from frustrating Congress' purpose in enacting it. Because of the Court's concern about administrability, it would likely be unwilling to apply another vague legisla-

159. See S. REP. No. 1011, supra note 1, at 5, reprinted in 1976 U.S.C.C.A.N. at 5912-13 (noting that "fee awards are an integral part of the remedies necessary to obtain . . . compliance" with civil rights laws).

160. See Sternlight, supra note 144. Sternlight, writing before Dague, cites evidence showing that "numerous attorneys have been forced to withdraw from civil rights practice for financial reasons." Id. at 538. One reason for this abandonment is that decisions such as Hensley v. Eckerhart and Delaware Valley II have effectively defeated Congress' dictate that "reasonable" fees be awarded. Id. at 536. The courts' refusal to award fees that are "reasonable" given the incentives currently required has been "subtle but devastating." Id. at 538.

161. See S. REP. No. 1011, supra note 1, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913; Lachman, Note, supra note 140, at 483 ("The legislative history of [§ 1988] . . . clearly shows Congress contemplated contingency enhancements in computing a reasonable fee award."); see also Leubsdorf, supra note 139, at 500 ("A system of contingency bonuses is helpful for statutes . . . that contemplate enforcement by private attorneys general.").

Even without congressional action, some room remains for courts to fashion interim remedies. For example, one concern lawyers have regarding taking statutory-fee cases is the time that elapses between performing services and being paid for them. See Lachman, Note, supra note 140, at 486. One author even suggests that enhancements for delay might provide enough incentive so as not to require outright contingency enhancement. Id. (arguing that "courts can achieve the incentive effect intended by Congress by awarding enhancements for contingency tied to enhancements for delay"). The Court has held that "an appropriate adjustment for delay in payment whether by the application of current rather than historic hourly rates or otherwise is within the contemplation of [§ 1988]." Missouri v. Jenkins, 491 U.S. 274, 284 (1989). The Court's decision in Dague does not appear to affect this delay enhancement.

Further, at least one court has concluded that Dague does not foreclose adjustment of the lodestar to account for the "undesirability" of a particular case. See Gomez v. Gates, 804 F. Supp. 69 (C.D. Cal. 1992). For a discussion of Gomez, see infra notes 185-187 and accompanying text. For a discussion of factors other than contingency that warrant an enhancement to the lodestar, see infra notes 170-192 and accompanying text.

162. Commentators have suggested many methods for computing contin-
tive contingency enhancement standard. Further, Congress should take this opportunity to consider the role litigation incentives will play in private civil rights enforcement. The availability of contingency bonuses in statutory-fee cases directly affects the number of civil rights suits citizens bring. It is possible, therefore, that Congress will consider certain rights and classes of cases important enough to warrant awarding fees greater than those that would be fully compensatory.

V. ALTERNATIVES TO CONTINGENCY: TOWARD A FULLY COMPENSATORY FEE

Justice Scalia and the other members of the Dague majority may consider the lodestar to be the "guiding light" of fee shifting. However, it is clear from the legislative history of section 1988 and the Court's prior fee shifting cases that a fully compensatory fee is the foundation upon which fee shifting has been built. The central difficulty in Dague is the Court's narrow focus on the lodestar, which has caused it to eliminate flexibility in the fee-determination process that may be essential to granting a fully compensatory fee. If even one prevailing party can show that his or her counsel cannot be fully compensated without payment for contingency, the fee shifting system is not functioning as Congress intended.

The goal of this section is to identify factors that courts should carefully scrutinize to ensure that a fee award is fully compensatory. The list of factors that follows is far from exhaustive and the factors are not intended as rationalizations for larger than necessary or erratic fee awards. However, if a litigant can show that any of the following factors are present in a particular case, failure to enhance a fee award to account for them would result in a fee that is less than fully compensatory. Courts

163. For a discussion of the Court's administrability concerns, see supra notes 129-142 and accompanying text.
164. Leubsdorf, supra note 139, at 474 ("The contingency bonus affects the level of private litigation and can be of crucial importance in deciding how many rights are privately enforced.").
165. Dague, 112 S. Ct. at 2641 ("The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence.").
166. See, e.g., S. Rep. No. 1011, supra note 1, at 2, reprinted in 1976 U.S.C.C.A.N. at 5910 (stating that "citizens must have the opportunity to recover what it costs them to vindicate [their] rights in court"); Blum v. Stenson, 465 U.S. 886, 897 (1984) (attorney's fee statute "requires a 'reasonable fee, and there may be times when the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high").
167. For a discussion of the Court's focus on the lodestar, see supra notes 90-95 and accompanying text.
168. For a discussion of Congress' intent in enacting fee-shifting statutes, see supra notes 135-139 and accompanying text.
may, therefore, increase a fee award to reflect the presence of these factors where evidence of them is clear and convincing without violating the dictates of Dague.169

A useful point for the list of alternatives to contingency enhancement are the twelve factors the Fifth Circuit identified in the 1974 case of Johnson v. Georgia Highway Express.170 These factors are: (1) the time and labor required by an attorney in a statutory-fee case; (2) the novelty and difficulty of the questions presented in the case; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney because of the statutory-fee case; (5) the attorney's normal and customary fee; (6) whether the fee in question is fixed or contingent; (7) the time limitations on the case imposed by the client or the circumstances; (8) the amount of money involved in the case and the results the lawyer obtained; (9) the experience, reputation and ability of the attorneys; (10) the "undesirability" of the statutory-fee case; (11) the nature and length of the lawyer's professional relationship with the client; and (12) statutory-fee awards in similar cases.171

While endorsing the lodestar method in Hensley v. Eckerhart,172 the Supreme Court refused to prohibit reference to the Johnson factors as a means of adjusting the lodestar upward or downward.173 The Court did, however, note that some of the Johnson factors "are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate."174 In other words, the time and labor required by an attorney is completely reflected in the reasonable number of hours calculation.175 The factors regarding novelty and difficulty of the questions, the skill requisite to perform the services properly and the

169. For a discussion of the Court's endorsement of factors outside the lodestar other than contingency, see supra notes 159-164 and accompanying text.

170. 488 F.2d 714, 717-19 (5th Cir. 1974).

171. Id. The Court noted that "[t]hese guidelines are consistent with those recommended by the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106." Id.


173. Id. at 434. The Hensley Court noted that "[t]he product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward."

174. Id. at 434 n.9 (citing Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980)). In Copeland, the United States Court of Appeals for the District of Columbia Circuit expressly adopted the lodestar approach the Third Circuit developed in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), vacated, 540 F.2d 102 (3d Cir. 1976). Copeland v. Marshall, 641 F.2d 880, 890-91 (D.C. Cir. 1980). However, the D.C. Circuit recognized that adjustments based on factors external to the lodestar may still be used when necessary. Id. at 889. In particular, the court identified the "contingent nature of success" and the "quality of representation" as factors that could warrant adjustment to the lodestar. Id. at 892-93.

175. Hensley, 461 U.S. at 434 n.9.
experience, reputation and ability of counsel are also reflected in the 
lodestar's reasonable hourly rate calculation. \textsuperscript{176} The \textit{Hensley} Court fo-
cused on the eighth factor, the results obtained, holding that a court 
could reduce a lodestar to account for less-than-complete success on the 
merits. \textsuperscript{177} The sixth factor, whether the fee is fixed or contingent, is 
foreclosed by \textit{Dague}. \textsuperscript{178} This result, however, appears to be a product of 
the Court's view that contingency-fee arrangements and the contingent 
nature of a statutory-fee case are interchangeable concepts. \textsuperscript{179}

Three of the remaining six \textit{Johnson} factors bear closer examination. 
The factor regarding preclusion of other employment reflects more than 
the time that is unavailable for other cases. It also includes the cases 
that an attorney must turn away because of conflicts of interest that inev-
itably result from any case. \textsuperscript{180} For example, a case brought against local 
police for alleged brutality may prohibit an attorney from representing 
the defendant municipality in other matters. A litigant seeking to use 
this factor to justify an increased fee award should, however, be required 
to meet the most exacting standards of proof to show both the foregone 
opportunities and the resultant harm. \textsuperscript{181}

Another of the \textit{Johnson} factors, the time limitations imposed by the 
client or circumstances, may reflect more than just the time pressure 
under which the lawyer is forced to work. Rather, this factor may con-
ceal work for other clients that was pushed aside or distributed to other 
lawyers because of the urgency of the action at hand. \textsuperscript{182} It is not diffi-
cult to conceive of an indigent plaintiff who finds willing counsel mere 

\textsuperscript{176} Courts are not always consistent about which half of the lodestar cal-
culation subsumes which \textit{Johnson} factors. For example, in \textit{Blum v. Stenson}, 465 
U.S. 886 (1984), the Supreme Court considered the factors regarding novelty 
and complexity of the issues to be reflected in the number of hours billed rather 
than in the rate charged by an attorney skilled enough to handle such difficult 
issues. \textit{Id.} at 898.

\textsuperscript{177} \textit{Hensley}, 461 U.S. at 436-37. Under \textit{Hensley}, the district court has great 
latitude to adjust a lodestar downward when the prevailing party's success is not 
complete. \textit{Id.} An upward adjustment to account for the results obtained is also 
available, but only "in some cases of exceptional success." \textit{Id.} at 435.

\textsuperscript{178} For a discussion of the \textit{Dague} majority opinion, see \textit{supra} notes 86-116 
and accompanying text.

\textsuperscript{179} For a discussion of the Court's overlapping use of contingency fee ar-
rangements and the contingent nature of a case, see \textit{supra} note 153 and accompa-
nying text.

\textsuperscript{180} \textit{Johnson v. Georgia Highway Express}, 488 F.2d 714, 718 (5th Cir. 
1974). The court recognized "the fact that once the employment is undertaken 
the attorney is not free to use the time spent on the client's behalf for other 
purposes." \textit{Id.}

\textsuperscript{181} Such foregone opportunities may not be quantifiable. The process of 
fee enhancement is no more an exact science than is the lodestar calculation 
itself. Courts should remain flexible enough to fashion methods of compens-
ing for lost opportunities when the evidence is sufficient to show that no fee will 
be fully compensatory without such restitution.

\textsuperscript{182} \textit{Johnson}, 488 F.2d at 718.
weeks or even days before the expiration of a crucial statute of limitations. In that instance, counsel may well have expenses and foregone opportunities that cannot be reflected in an hours-times-hourly-rate calculation.

The third relevant Johnson factor is the "undesirability" of the case. This element recognizes that "[c]ivil rights attorneys face hardships in their communities because of their desire to help the civil rights litigant." The history of civil rights has been written by individuals seeking to enforce their rights against the will of the majority. For example, in Gomez v. Gates, decided after Dague, the United States District Court for the Central District of California held that a suit by a convicted robber against the police who shot him was "undesirable" enough to warrant some adjustment to the basic lodestar. The court recognized that "it is difficult for unattractive plaintiffs to prevail in undesirable cases for reasons unrelated to the relative merits of the claim." Courts should look carefully at whether a lawyer's decision to represent a particular client in a particular case has diminished the lawyer's standing in the community, causing other potential litigants to seek other counsel. As with the preclusion of employment factor, this is a complex and delicate fact question that requires persuasive evidence.

A final factor, not a product of Johnson, is the time that elapses between the time services are provided to a statutory-fee litigant and the time a lawyer is paid for them. This "delay in payment" factor compensates lawyers for the financing they provide to their clients over the course of statutory-fee litigation. The Supreme Court has explicitly endorsed additions to the lodestar to compensate for the delay in payment. The Court has held that "an appropriate adjustment for delay

183. Id. at 717.
184. Id. (citing NAACP v. Button, 371 U.S. 415 (1963)). The Johnson court, writing in 1974, spoke of the very real danger that lawyers representing civil rights plaintiffs would be discriminated against by their "community or [their] contemporaries." Id. The court found this discrimination "can have an economic impact on [the lawyer's] practice." Id.
186. Id. at 76. The court did not decide exactly how to adjust the lodestar to account for this "undesirability." It proposed that either increasing the hourly rate awarded to reflect the increased fees charged by lawyers who take unpopular cases or an outright multiplier added to the lodestar would be appropriate. Id. at 76-77.
187. Id. at 76.
188. See Johnson, 400 F.2d at 717; Gomez, 804 F. Supp. at 76.
189. However, if a plaintiff can clearly establish that representation of a particular litigant has caused others to seek alternate counsel, courts should attempt to fashion appropriate remedies. The Gomez court took the right approach by evaluating alternative methods of compensating for "undesirability." Id. For a discussion of Gomez and the approach taken by the district court, see supra notes 185-87 and accompanying text.
in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [section 1988]."¹⁹¹ When considering this factor, courts should require litigants to make some showing as to the harm caused by delay in payment. As one court suggested, "[a]t a minimum, [a] court needs to have evidence of the rate of market interest and the time value of money over the period of the litigation."¹⁹²

Other factors may also exist in an individual case that require compensation to achieve a fully compensatory fee. Lawyers do not expect statutory-fee cases to provide windfall fees. However, they do expect to be fully compensated for the services they provide and the hardships they endure. Lawyers may well be more willing to take statutory-fee cases and to endure the hardships often associated with them if courts are careful to recognize and compensate for extraordinary circumstances when they exist.

VI. Conclusion

The current statutory fee system focuses almost exclusively on the lodestar to addresses the concern regarding the appropriate method for ensuring that potential civil rights litigants can get the representation they need. It is clear that the reasonable-hours-times-reasonable-rate calculation is fully compensatory in many cases. In Dague, the Court chose to focus exclusively on the lodestar because it was unable to conceive of a workable alternative.¹⁹³ The wholesale exclusion of certain considerations—those identified in Section V, for example—from a statutory fee may well be inconsistent with Congress' intent in enacting fee-shifting statutes.¹⁹⁴

Given the availability of methods other than contingency enhancement, such as those identified in Section V, Congress should take action soon to clarify its intent and to standardize the methods of fee shifting to ensure the predictability that will attract competent counsel. The fee-

¹⁹¹. Id. at 283-84. The Court's conclusion that an increase in the basic fee to account for delay in payment was rooted in the notion that "market" rates are presumed to be reasonable when calculating the lodestar. Id. Given the lost value of the money over the time that elapses between performance of the services and payment, the Court felt that some adjustment was necessary to arrive at "market rates" for the services performed. Id.


¹⁹³. For a discussion of the Dague Court's reasons for embracing the lodestar and rejecting other alternatives, see supra notes 90-116 and accompanying text.

¹⁹⁴. Congress' basic intent was that awarded statutory fees be "fully compensatory," See Hensley, 461 U.S. at 435 (reasonable fee must be one that fully compensates). For a discussion of congressional intent in enacting fee-shifting statutes, see supra notes 135-139 and accompanying text.
shifting system is, after all, a legislative creation and Congress must accept the responsibility of providing guidance to the courts when they seek it. Until Congress provides comprehensive guidance, however, courts should use the means still at their disposal, such as compensation for "undesirability" or adjustment for delay, to provide a rational fee-shifting structure "[i]f our civil rights laws are not to become mere hollow pronouncements." 196

Kyle R. Kravitz

195. See Lachman, Note, supra note 140, at 491 ("Congress has the ultimate responsibility to ensure that its statutory intent is carried out.").