City of Burlington v. Dague – Contingency Enhancement: The Court Buckles Under the Statutory Burden

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NOTES

CITY OF BURLINGTON V. DAGUE—
CONTINGENCY ENHANCEMENT: THE
COURT BUCKLES UNDER THE
STATUTORY BURDEN

Litigating parties are generally responsible for the costs of their own attorneys. However, to promote and strengthen the enforcement of individual federal rights, to encourage private parties to seek relief, and to ensure that private parties are able to afford and attract competent counsel, Congress has approved a number of statutory exceptions to this general rule. As such, federal fee-shifting statutes provide for an award of reasonable attor-


2. See Venegas v. Mitchell, 495 U.S. 82, 85 (1990) (noting that the goal of the Civil Rights Attorney's Fees Awards Act of 1976 is to ensure that civil rights plaintiffs can obtain competent counsel); Blanchard v. Bergeron, 489 U.S. 87, 95 (1989) (same); Delaware Valley I, 478 U.S. at 565 (finding that fee-shifting statutes are intended to ensure that private parties can employ competent counsel); Newman v. Piggie Park Enters., 390 U.S. 400, 401 (1968) (interpreting the fee award provision of Title II of the Civil Rights Act of 1964). Congress has utilized fee-shifting statutes extensively in a variety of statutory contexts prior to and after the Alyeska holding. See West Virginia Univ. Hospis., Inc. v. Casey, 111 S. Ct. 1138, 1141-42 (1991) (citing thirty-four fee-shifting statutes in ten titles of the United States Code). In Casey, Justice Scalia noted that "[t]hese statutes encompass diverse categories of legislation, including tax, administrative procedure, environmental protection, consumer protection, admiralty and navigation, utilities regulation, and, significantly, civil rights." Id. at 1142; see also Alyeska, 421 U.S. at 260-61 n.33 (listing specific fee-shifting statutes).
ney's fees to prevailing parties in actions brought to vindicate designated federal rights. By authorizing the award of attorney's fees, Congress acknowledged that private enforcement is an essential step in the implementation of various statutory policies. Furthermore, Congress directed that courts assess and apply twelve specific factors in calculating a reasonable attorney's fee. Among these factors is the contingent nature of payment.

In *Hensley v. Eckerhart*, the United States Supreme Court held that, in appropriate cases, the contingent nature of payment may require enhancement of an attorney's fee award in order to comply with the reasonable fee standard. In so doing, the Court has deferred to the statutory language.

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3. The specific language of individual statutes may vary, authorizing, for example, the award of "costs of litigation (including reasonable attorney and expert witness fees)." *Solid Waste Disposal Act*, 42 U.S.C. § 6972(e) (1982); *Federal Water Pollution Control Act* [hereinafter *Clean Water Act*], 33 U.S.C. § 1365(d) (1982), or the award of "a reasonable attorney's fee as part of the costs." *Civil Rights Attorney's Fees Awards Act of 1976*, 42 U.S.C. § 1988(b) (1988) [hereinafter *Fees Awards Act*].

4. Individual statutes may vary, authorizing, for example, the award of attorney's fees to a "prevailing party," 42 U.S.C. § 1988(b), or to a "prevailing or substantially prevailing party," 33 U.S.C. § 1365(d).

5. See, e.g., *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 483 U.S. 711, 715 (1987) (plurality opinion) [hereinafter *Delaware Valley II*] (affirming the fee-shifting principle that attorneys' fees are awarded to prevailing litigants enforcing certain federal rights); *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (same); *Maher v. Gagne*, 448 U.S. 122, 127 n.9 (1980) (finding that a fee award encourages the vindication of constitutional rights consistent with congressional intent); *Alyeska*, 421 U.S. at 260 ("What Congress has done . . . is to make specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights.").

6. *Delaware Valley I*, 478 U.S. 546, 560 (1986) (stating that the purpose of the fee-shifting provision of the Clean Air Act and the *Fees Awards Act* is to "promote" private enforcement of federal law); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 687 (1983) (noting that fee-shifting provisions are intended to "encourage litigation . . . [and] assure proper implementation" of federal law); *Alyeska*, 421 U.S. at 262 (same).

7. See S. REP. NO. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S.C.C.A.N. 5908, 5913 [hereinafter *SENATE REPORT*] (citing *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), as applying appropriate factors); see also *Blum v. Stenson*, 465 U.S. 886, 892 (1984) (citing the factors listed in *Johnson* as those Congress intended to be used in calculating fee awards); *Hensley*, 461 U.S. at 429 (same).

8. See *Johnson*, 488 F.2d at 718 (listing "[w]hether the fee is fixed or contingent" as one of twelve factors to be considered in calculating a reasonable fee); see also *SENATE REPORT*, supra note 7, at 6, reprinted in 1976 U.S.C.C.A.N. at 5913 (citing *Johnson* as containing factors necessary to calculate a reasonable fee). The contingent nature of payment, in its simplest form, means that if the party prevails, the attorney will receive a fee; if the party does not prevail, then the attorney will receive no compensation. See infra notes 196-202 and accompanying text.


10. See *Blum*, 465 U.S. at 887 (finding that "an enhanced award may be justified 'in some cases of exceptional success'"); *Hensley*, 461 U.S. at 433 n.9 (finding that the factors identified in *Johnson* may be considered in calculating a fee award). But see *Delaware Valley II*, 483 U.S. 711, 727 (1987) (holding that the enhancement of the lodestar to account for risk of loss is not permitted under general fee-shifting statutes).
and legislative history of the Civil Rights Attorney's Fees Awards Act of 1976 (Fees Awards Act), thus establishing that the analysis of this Act is the standard by which all fee-shifting statutes are to be interpreted. The Supreme Court has also recognized that while the product of the reasonable hours expended and a reasonable hourly fee, referred to as the lodestar, is the appropriate starting point for calculating an attorney's fee award, other considerations may require an upward or downward adjustment of the fee. The Court, however, has disallowed enhancement of a fee award when enhancement amounts to compensation for factors already included in the assessment of the reasonable fee.

The United States Supreme Court did not directly address the issue of whether enhancement of a fee award based on the contingent nature of payment was appropriate until Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley II). In Delaware Valley II, a four Justice plurality of the Court held that enhancement for contingency is never appropriate. The remaining five Justices, four in the dissent and one concurring in part and concurring in judgment, argued that contingency of pay-

12. See infra note 74 (citing cases establishing the primacy of the Fees Award Act); see also City of Burlington v. Dague, 112 S. Ct. 2638, 2641 (1992); Ruckelshaus v. Sierra Club, 463 U.S. 680, 691 (1983) (citing Hensley, 461 U.S. at 433).
13. The product of the reasonable hours expended on litigation by an attorney and the reasonable hourly rate charged by the attorney is known as the lodestar figure. This figure represents an attempt by courts to simplify the method authorized in Johnson for calculating a fee award. See infra notes 84-88 and accompanying text. However, the lodestar figure may still be adjusted to account for the existence of one or more of the factors listed in Johnson. See infra note 105 and accompanying text. In Dague, the Court addressed the issue of whether the contingent nature of payment, a factor listed in Johnson, justified enhancing the lodestar. Dague, 112 S. Ct. at 2640.
14. See Hensley, 461 U.S. at 434 & n.9; see also Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) (listing factors to be considered in setting a reasonable fee); supra note 7.
15. See Blum v. Stenson, 465 U.S. 886, 897-901 (1984). In Blum, the Supreme Court rejected the district court's justification of an enhancement based upon "[t]he novelty and complexity of the issues," "the quality of representation," and "the results obtained," because these factors were subsumed within the calculation of the number of hours expended and the reasonable hourly rate. Id. at 898-900.
16. The Blum Court, while not deciding the contingency issue, indicated in dictum that enhancement based upon the contingent nature of payment was not appropriate in this particular case. Id. at 901 & n.17.
17. 483 U.S. 711 (1987) (plurality opinion). Delaware Valley II involved a suit brought for violation of the Clean Air Act. The Court quoted the fee-shifting provision of the Act as providing that "[t]he Court . . . may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the Court determines such award is appropriate." Id. at 713 n.1 (quoting Clean Air Act, 42 U.S.C. § 7604(d) (1982)).
18. Id. at 725 (plurality opinion). Announcing the judgment of the Court, Justice White, joined by Chief Justice Rehnquist and Justices Powell and Scalia, held that enhancement of a fee award because of the risk of losing, and thus nonpayment, was inappropriate. Id.
ment is a factor that should be considered in calculating an attorney's fee award. In 1992, the Supreme Court in City of Burlington v. Dague, reconsidered the issue of enhancement of an attorney's fee award based upon the contingent nature of payment.

The Dague case originated as an action brought by local citizens against the City of Burlington, Vermont for violations of federal and state statutes in the operation of the Burlington Municipal Disposal Ground. The United States District Court for the District of Vermont found that the city's operation of the landfill violated federal statutory provisions prohibiting open dumping and the discharge of pollutants into United States waters. The district court held that because the plaintiffs "substantially prevailed," they were entitled to a fully compensatory attorney's fee award pursuant to the fee-shifting provisions of the Clean Water Act and Solid Waste Disposal Act. In calculating the fee award, the district court found that in order to determine whether enhancement of the lodestar was appropriate, it must inquire into the difficulty the fee applicant would have encountered in obtaining counsel, if compensation for the contingent nature of payment had

19. Id. at 731-40. Justice O'Connor, concurring in part and concurring in judgment, concluded that Congress did not prohibit the consideration of contingency when calculating a reasonable fee. In the case under consideration, however, she felt that sufficient evidence did not exist to support such an enhancement. Id. at 731 (O'Connor, J., concurring). Writing for the dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, reached a similar conclusion finding "that 'whether the fee is fixed or contingent' " was a consideration in calculating a fee award and may, in appropriate cases, require enhancement of the award. Id. at 736 (Blackmun, J., dissenting) (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.5(a), 1.5(a)(8)).


21. Id. at 2639. The fee-shifting statutes considered by the Court included the Clean Water Act and Solid Waste Disposal Act. Both provisions contain similar fee-shifting language: "The court, in issuing any final order in any action brought pursuant to this section, 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." 33 U.S.C. § 1365(d)(1988); 42 U.S.C. § 6972(e) (1982); see Dague, 112 S. Ct. at 2640-41 (finding the statutory language similar).


23. Id. at 1346-47. The city was found to have violated the open dumping provisions of 42 U.S.C. § 6945(a) (1982), provisions of 42 U.S.C. § 6972(a)(1)(B) (1982) protecting against danger "to health or the environment," and provisions of 33 U.S.C. § 1311 (1982 & Supp. III 1991), prohibiting the discharge of pollutants into a water-way. In Dague, the plaintiffs initiated the action pursuant to the "citizen-suit" provisions of the Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (1982) (Solid Waste Disposal Act), and the Clean Water Act, 33 U.S.C. § 1365 (1982). Dague, 935 F.2d at 1346. It is the fee-shifting language of these statutes that provides for an attorney's fee award and the interpretation of these statutes by the Supreme Court in Dague that form the basis of this Note.

not been available. Having found that such difficulty would be present, the court enhanced the lodestar figure by twenty-five percent to account for the contingent nature of payment. The United States Court of Appeals for the Second Circuit affirmed the district court's decision. The Second Circuit held that the fee enhancement was not an abuse of discretion and that the district court applied the appropriate standard to determine whether enhancement of the lodestar to reflect the contingent nature of payment was proper.

The United States Supreme Court granted certiorari, limiting the issue on appeal to reconsideration of the appropriateness of enhancement of an attorney's fee award based upon the contingent nature of payment. The Supreme Court reversed the holdings of the district court and the Second Circuit, and held that enhancement was inappropriate under the fee-shifting language at issue. The majority acknowledged that Supreme Court precedent explaining the calculation of a reasonable fee award applied to all statutes with similar fee-shifting language. However, the majority rejected the respondents' argument that the lodestar should be enhanced to reflect the contingent nature of payment in order to provide a reasonable fee award for attorneys retained on contingency and to mirror the compensation available

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25. Dague, 935 F.2d at 1360. The United States Court of Appeals for the Second Circuit held that the proper inquiry was "whether "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent clients thereby denying them effective access to the courts." Id. (quoting Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 298 (2d Cir. 1987)).

26. Id. at 1347. The twenty-five percent enhancement increased the fee award to $247,534.37. Id.

27. Id. at 1360.

28. Id. The Second Circuit concluded that Delaware Valley II, 483 U.S. 711 (1987), was not controlling due to the Supreme Court's extreme division in that decision. Dague, 935 F.2d at 1360. Accordingly, it determined that the question of contingency enhancement was open and therefore controlled by the Second Circuit precedent of Friends of the Earth. Id.

29. City of Burlington v. Dague, 112 S. Ct. 964 (1992) (granting certiorari). In granting certiorari, the Supreme Court stated:

Petition for writ of certiorari . . . granted limited to the following question: May a court, in determining a reasonable attorney's fee award under Section 7002 of the Solid Waste Disposal Act, 42 U.S.C. Section 6972(e), or Section 505 of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. Section 1365(d), enhance the fee award above the lodestar amount in order to reflect the fact that the attorneys had taken the case on a contingent-fee basis, thus assuming the risk of receiving no attorney's fees at all?

Id.


31. Id. at 2641 (citing Flight Attendants v. Zipes, 491 U.S. 754, 758 n.2 (1989) (superseded by statute)). The Court cited the Fees Awards Act, 42 U.S.C. § 1988, as an example of a statute where similar language required the same analysis. Id.
in the private market. Instead, the Court determined that enhancement for contingency would duplicate factors already considered in calculating the lodestar, resulting in a prohibited “double-counting” and encouraging attorneys to bring meritless claims. In addition, the Court rejected the approach espoused by Justice O’Connor in Delaware Valley II, reasoning that Justice O’Connor’s approach was not capable of practical application. In conclusion, the majority found that no other feasible basis could be discerned from the language of fee-shifting statutes to restrict contingency enhancement to less than all contingent-fee cases. Therefore, the contingency enhancement authorized in Dague was not appropriate under the fee-shifting language at issue.

In dissent, Justice Blackmun sharply criticized the majority’s approach, arguing that a fully compensatory fee consistent with that prevailing in the market is necessary to effectuate the congressional purpose of fee-shifting statutes. The dissent emphasized that the risk that should determine whether enhancement is available is not the riskiness of a particular case, but rather, “the risk of nonpayment associated with contingent cases considered as a class.” Because the Court must look to fee practices available in the

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32. Id. at 2641.
33. Id.
34. Id. at 2642. Justice O’Connor’s approach for determining whether enhancement for contingency is required is based on whether the fee applicant “would have faced substantial difficulties” in obtaining counsel absent enhancement for the contingent nature of payment, rather than on the risk of not prevailing inherent in a particular case. Delaware Valley II, 483 U.S. 711, 731-34 (1987) (O’Connor, J., concurring).
35. Dague, 112 S. Ct. at 2642. The Dague Court reasoned that the Delaware Valley II analysis could not “intelligibly be applied” given that the difficulty in finding counsel turned on the riskiness or merit of a particular case—a factor that could not be considered under Justice O’Connor’s analysis. Id. In addition, the majority found Justice O’Connor’s analysis in Delaware Valley II lacking in that it relied on mimicking the market treatment of contingency cases as a class when no true market existed and that any market that did exist was an imperfect guide for determining a reasonable fee. Id. Furthermore, in cases involving injunctive or equitable relief, the majority argued that no market existed against which contingent cases could be compared. Id. To the extent that a market does exist, the Court argued that it was created by fee-shifting statutes and that therefore, any reference to it to determine a reasonable award would be circular. Id.
36. Id. at 2642-43.
37. Id. at 2643-44. The Court cited “a number of reasons for concluding that no contingency enhancement whatever is compatible with the fee-shifting statutes at issue.” Id. at 2643. Specifically, in support of its position against contingency enhancement under fee-shifting statutes, the Court pointed to the language of the statute, its rejection of the contingent fee model in the past, and the administrative difficulties that would result from enhancement of a fee award based upon contingency. Id.
38. Id. at 2644 (Blackmun, J., dissenting). Justice Blackmun stated that the purpose of fee-shifting statutes was to “strengthen the enforcement of selected federal laws by ensuring that private persons seeking to enforce those laws could retain competent counsel.” Id.
39. Id. at 2645.
private market when it sets the lodestar, Justice Blackmun reasoned that it should also look to the market when assessing the appropriateness of contingency enhancement. The dissent concluded that consideration of the contingent nature of payment when calculating a reasonable fee would achieve administrative efficiency through the adoption of a model similar to the Delaware Valley II concurrence. Justice Blackmun argued that such a model would settle the standards courts must apply in calculating a reasonable fee and in determining whether enhancement of the lodestar for contingency is appropriate.

In a separate dissenting opinion, Justice O'Connor argued that a reasonable fee must be sufficient to "attract competent counsel," requiring, in some instances, an enhancement above the lodestar figure for the contingent nature of payment. Justice O'Connor, therefore, rejected the majority's position that a fee award can never be enhanced for contingency and reaffirmed her approach in Delaware Valley II, basing enhancement on the relevant market treatment of contingent cases as a class rather than on individual case factors. In conclusion, although acknowledging the difficulty of assessing the appropriate market, Justice O'Connor criticized the majority's rejection of contingency enhancement due to the "difficulty of the task" and agreed with Justice Blackmun that a contingency assessment would be simplified once appropriate markets became settled.

This Note examines the enhancement of attorney's fee awards based upon the contingent nature of payment. It first traces the development of federal fee-shifting statutes from the common law tradition of equitable attorney's fee awards. This Note then examines the purpose of these statutes based on factors employed to calculate a reasonable attorney's fee award. It also discusses the Supreme Court's decision in Delaware Valley II, setting out the dichotomy of positions on the appropriateness of contingency enhancement. Next, this Note analyzes the United States Supreme Court's decision in City of Burlington v. Dague in light of the legislative history and established Supreme Court precedent for interpreting the language of federal fee-shifting statutes. This Note argues that the majority's holding in Dague establishes a subtle break with Supreme Court precedent and runs contrary to the legislative purpose of fee-shifting statutes by sacrificing a greater statutory purpose

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40. Id. at 2647.
41. Id. "[I]f Justice O'CONNOR's standard were adopted, the matter of the amount by which fees should be increased would quickly become settled ... ." Id.
42. Id. at 2648 (O'Connor, J., dissenting).
43. Id.
44. Id. Citing Justice Blackmun's dissent, Justice O'Connor stated that "these initial hurdles would be overcome as the enhancements appropriate to various markets became settled." Id.
for administrative efficiency. Finally, this Note suggests that by ignoring the contingent nature of payment in calculating an attorney's fee award, the Court has limited the effectiveness and enforcement of important civil rights and environmental laws, thus hindering the essential private prosecution of these laws and inviting congressional overruling of its decision.

I. EXCEPTIONS TO THE AMERICAN RULE: THE NEED FOR PRIVATE ATTORNEYS GENERAL

In general, fee-shifting statutes provide that the prevailing litigant's attorney's fee will be shifted to the losing litigant in the payment of damages. The right to recover these fees, however, is conferred on the prevailing party, not the party's attorney. Most fee-shifting statutes also limit an award to parties who have "prevailed," or "substantially prevailed," basing the determination of prevailing status on the individual results and merits of each case. While the rights these statutes confer vary greatly, any award in contradiction to the traditional "American Rule" must uniformly represent a reasonable fee.


47. See Venegas v. Mitchell, 495 U.S. 82, 87-88 (1990) (applying the Fees Awards Act, 42 U.S.C. § 1988 (1988)); Evans v. Jeff D., 475 U.S. 717, 730 (1986) (superseded by statute) (same); Samuel R. Berger, Court Awarded Attorneys' Fees: What Is "Reasonable"?, 126 U. PA. L. REV. 281, 303-04 (1977); see also Delaware Valley I, 478 U.S. 546, 557 (1986) (explaining that under the Clean Air Act, attorney's fees may be awarded to any party); Blum v. Stenson, 465 U.S. 886, 888 (1984) (stating that under the Fees Awards Act, the award of attorney's fees is to the prevailing party); Hensley, 461 U.S. at 426 (same); Alyeska, 421 U.S. at 261 (explaining that the award of attorney's fees is to be made to the prevailing party under general fee-shifting statutes); Thomas D. Rowe, Jr., The Legal Theory of Attorney Fee Shifting: A Critical Overview, 1982 DUKE L.J. 651, 675 (1982) (supporting the proposition that a party is awarded attorney's fees to indemnify him for the cost of employing an attorney); Rochelle C. Dreyfuss, Note, Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act, 80 COLUM. L. REV. 346, 353 (1980) (explaining that "the prevailing party," either plaintiff or defendant, may be compensated for attorney's fees under Fees Awards Act).


49. Id. at 305. The term "prevailing party" was originally interpreted to require significant success on the litigant's "central issue." Ruckelshaus v. Sierra Club, 463 U.S. 680, 688 (1983). Therefore, inclusion of the terms "substantially prevailing" and "partially prevailing" permits courts to award attorney's fees to claimants who have achieved only limited success or only prevailed in part. Id.

50. See Delaware Valley I, 478 U.S. at 561-62. "There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these stat-
A. Limiting the Equitable Exceptions: The Role of Statutory Attorney's Fee Awards

Traditionally, American courts do not provide for the recovery of attorney's fees within damage awards.51 Rather, each litigating party must bear the cost of an attorney.52 This limitation, known as the "American Rule," is contrasted by the "English Rule," which routinely grants attorney's fees along with an award of damages.53 The United States Supreme Court has consistently reaffirmed the American Rule.54 In spite of this traditional limitation, however, American courts have recognized specific situations in which equity demands that courts shift the cost of attorney's fees from one litigant to another.55

One recognized situation in which courts have determined that equity demands fee-shifting occurs when a prevailing litigant benefits a class or creates a fund from which a particular class may recover.56 In this situation, courts exercise their equitable power to prevent those who benefit from the

51. See, e.g., Alyeska, 421 U.S. at 249 (citing Arcambel v. Wiseman, 3 U.S. 306 (1796)). In Arcambel, the Supreme Court rejected requests to create a judicial rule authorizing the award of attorney's fees, stating that "[t]he general practice of the United States is in opposition [sic] to it." Arcambel, 3 U.S. at 306.

52. Alyeska, 421 U.S. at 247. "In the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser." Id.; see also supra note 1 (citing cases affirming the American Rule).

53. The English authorization for fee awards is by statute. Alyeska, 421 U.S. at 247. Under English common law, such awards were prohibited. Id.; see also Environmental Litigants, supra note 1, at 678.


55. See Alyeska, 421 U.S. at 257-59 (examining situations in which application of court's equitable powers provide for an exception to the American Rule; see also F.D. Rich, 417 U.S. at 129 (affirming the equitable principle that attorney's fees may be awarded in response to bad faith); Hall v. Cole, 412 U.S. 1, 4-5 (1973) (superseded by statute) (supporting use of equitable power to award attorney's fees in contrast to the American Rule); Fleischmann Distilling Corp., 386 U.S. at 718 (affirming the equitable principle that attorney's fees may be awarded in response to the violation of a court order); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 165-66 (1939) (supporting the equitable principle that a party creating a common fund may recover attorney costs); Trustees v. Greenough, 105 U.S. 527, 536-37 (1881) (same); Berger, supra note 47, at 295-303 (commenting on Alyeska's confrontation of the equitable exception to the "American rule").

56. See Alyeska, 421 U.S. at 245 (explaining the application of the "common benefit" rule; see also Berger, supra note 47, at 295-96; Environmental Litigants, supra note 1, at 679-80 (explaining the unjust enrichment justification for the common benefit rule). The prevailing
litigation from being unjustly enriched at the expense of the acting litigant.\textsuperscript{57} In addition, courts have found that equity may demand fee-shifting against a party conducting bad-faith litigation.\textsuperscript{58} A third exception, the private attorney general doctrine, shifts the cost of attorney's fees to the losing litigant, encouraging private parties to bring suit and thereby ensuring enforcement.\textsuperscript{59} This exception is based on the principle that litigating parties, acting in the role of private attorneys general, who successfully enforce important statutory rights, benefit the public and ensure that governmental statutory schemes are effectively enforced.\textsuperscript{60}

In \textit{Alyeska Pipeline Service Co. v. Wilderness Society},\textsuperscript{61} the Supreme Court strictly limited situations in which federal courts may exercise their equitable fee-shifting power.\textsuperscript{62} Specifically, the Court restricted the use of the private attorney general doctrine to cases in which Congress has specifically mandated that the losing party bear the cost of the prevailing party's attorney's fees.\textsuperscript{63} In its decision, the Court noted that the numerous statutes providing for the award of attorney's fees depend heavily on private action to ensure their enforcement and the attainment of their desired policy goals.\textsuperscript{64}
The Court explained that Congress reserved for itself the role of determining when and under what circumstances a fee award would be available, thus limiting the power of federal courts to award attorney’s fees absent statutory authorization. The *Alyeska* decision not only reaffirmed the American Rule, but also expressly recognized the exclusive power of Congress to set policy and determine which statutes require fee awards to encourage private actions essential to furthering that policy.

**B. Response to Alyeska: The Nuts and Bolts of Fee-Shifting**

In several statutory schemes, Congress has authorized the award of attorney’s fees for suits brought to enforce federal rights. The lack of legislative guidance as to what standards determine a reasonable fee award has led some commentators to suggest that the only common element in determining what is reasonable is the lack of any uniform standard. In response to *Alyeska*, however, Congress endorsed a group of cases in the legislative history of the Fees Awards Act that established standards for determining a reasonable fee. Congress determined that a successful plaintiff should be

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66. Id. at 271. The *Alyeska* Court held that courts should not “invade the legislature’s province by redistributing litigation costs.” Id.

67. See *Marek v. Chesny*, 473 U.S. 1, 44-51 (1985) (Brennan, J., dissenting) (listing over 100 fee-shifting statutes); *Berger*, supra note 47, at 303 n.104 (citing seventy-five statutes with fee-shifting provisions); *Environmental Litigants*, supra note 1, at 680 & n.21 (citing fee-shifting statutes).


awarded attorney's fees provided that such an award would not be "unjust." As a general guide, the fee award must be sufficient to ensure that litigants can obtain "competent" counsel. As such, the award should represent the amount that the attorney would expect to receive for his services from a fee-paying client in a private action. The Supreme Court has also acknowledged that these principles, along with the standards suggested in the legislative history of the Fees Awards Act, serve as the basis for determining a reasonable attorney's fee and for ascertaining the purpose of fee-shifting statutes in general. This analytical basis provides the starting point upon which all subsequent fee-shifting analyses and case law are based.

C. Fee-Shifting: Purpose and Standards

The presence of fee-shifting provisions in statutory enactments is a reflection of a congressional determination that private enforcement is essential to full implementation of and compliance with the law. Fee-shifting recognizes that the availability of an attorney's fee award is necessary to ensure private enforcement. In the most basic sense, fee-shifting provisions acknowledge that if private litigants are to be encouraged to bring enforcement

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actions, they must be able to recover the costs of bringing such actions.\textsuperscript{77} Congress, however, did not intend this encouragement to be a mere token gesture.

It is Congress's intent that fee awards serve as a "remedy," ensuring that citizens proceeding as private attorneys general have a "meaningful opportunity" to enforce the law and thereby help effectuate congressional policy.\textsuperscript{78} In many situations, however, private fee arrangements prove insufficient to encourage effective enforcement because few injured parties can shoulder the cost of litigation.\textsuperscript{79} In this sense, statutory fee awards are designed to fully compensate attorneys for time reasonably expended on litigation, thus attracting competent counsel to represent citizens acting to facilitate compliance with statutory policies.\textsuperscript{80} The legislative history accompanying the Fees Awards Act points to a group of cases in which the fee award analysis fulfills the dual statutory goals of compensating prevailing counsel at rates on par "with attorneys compensated by a fee-paying client"\textsuperscript{81} and attracting competent counsel with fully compensatory fees.\textsuperscript{82}

The talisman of a fully compensatory fee sufficient to attract competent counsel is the "reasonable fee."\textsuperscript{83} Congress provided that a reasonable attorney's fee should be calculated based upon consideration of the twelve factors set forth in \textit{Johnson v. Georgia Highway Express, Inc.}\textsuperscript{84} However, these twelve factors proved to be an impractical framework for calculating a reasona-

\textsuperscript{77} \textit{Id.} If private parties were forced to bear their own costs, many injured parties would not be in a financial position to mount enforcement actions. \textit{See Newman}, 390 U.S. at 401.


\textsuperscript{79} \textit{City of Riverside v. Rivera}, 477 U.S. 561, 578 (1986). Congress recognized that private-sector fee arrangements were inadequate to ensure sufficiently vigorous enforcement of civil rights. \textit{Id.}

\textsuperscript{80} \textit{See id.; see also} \textit{SENATE REPORT, supra} note 7, at 6, \textit{reprinted in} 1976 U.S.C.C.A.N. at 5913 (listing cases providing a fee compensating attorneys for reasonable time).

\textsuperscript{81} \textit{SENATE REPORT, supra} note 7, at 6, \textit{reprinted in} 1976 U.S.C.C.A.N. at 5913.

\textsuperscript{82} \textit{See Berger, supra} note 47, at 306.

\textsuperscript{83} \textit{See Delaware Valley I}, 478 U.S. 546, 562 (1986) (describing the reasonable fee as the "benchmark" of fee-shifting statutes).

\textsuperscript{84} 488 F.2d 714 (5th Cir. 1974). The twelve-factor framework included the following: (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the "undesirability" of the case, (11) the nature and length of the professional relationship with the client, (12) and awards in similar cases. \textit{Id.} at 717-19. These basic factors are modeled upon the American Bar Association's guidelines for private fee setting. \textit{See Berger, supra} note 47, at 306.
sonable fee. When applied, some factors proved duplicative and it remained unclear which factors should receive a higher degree of scrutiny. Consequently, the checklist led to varying and inconsistent determinations of what constituted a reasonable fee.

II. CALCULATING THE REASONABLE ATTORNEY'S FEE

The lodestar approach, the product of the reasonable number of hours expended on litigation and a reasonable hourly fee, was developed to bring consistency and simplicity to the fee calculation analysis. However, even this simple formula required explanation. Specifically, it was unclear not only what constituted reasonable hours and a reasonable fee, but also where a court might look for instruction on the reasonableness of these elements. The United States Supreme Court answered these questions in *Hensley v.*...
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Eckerhart,91 addressing the reasonable hours issue,92 and Blum v. Stenson,93 addressing the reasonable fee issue.94 Nevertheless, questions remained as to which of the Johnson factors were already accounted for within the lodestar and which could be examined to enhance the lodestar figure.95

A. Uniform Calculation: The Lodestar

The lodestar approach for calculating an attorney's fee reduces the cumbersome application of the Johnson standards by providing a uniform framework that incorporates several of the Johnson factors.96 First, a court determines the number of hours reasonably expended by an attorney in connection with an action.97 Second, it determines the reasonable value of these hours based on an appropriate hourly billing rate.98 The product of these two figures constitutes the foundation of the court's fee award.99

The United States Court of Appeals for the Third Circuit pioneered the lodestar approach in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.100 The court in Lindy Brothers, however, viewed the lodestar figure simply as an objective base upon which to determine a reasonable fee.101 According to the Third Circuit, it was necessary to dete-
mine the existence of two additional factors in order to attain the true value of the attorney's services: the contingent nature of success, namely that payment was not guaranteed; and the quality of the attorney's work.112

1. The Calculation of Reasonable Hours

The United States Supreme Court adopted the Third Circuit's lodestar approach in *Hensley v. Eckerhart*.103 The Court established the lodestar figure as the starting point from which attorney's fees were to be calculated.104 In addressing the reasonable hours issue, however, the *Hensley* Court specifically limited the number of hours that could reasonably be considered and suggested that not all of the twelve *Johnson* factors were appropriate for consideration.105 *Hensley* modified the lodestar approach by limiting the hours included in the calculation to only those hours "reasonably expended" and, of these hours, only those expended in connection with claims on which the party actually prevailed or that were connected with prevailing claims.106 Limiting consideration to hours reasonably expended filtered out duplicative or wasteful hours, demanding the same accountability attorneys face when billing a client in the private sector.107 Refusing to compensate attorneys for hours spent on unsuccessful claims corresponded with congressional requirements that awards were limited to prevailing parties.108

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102. *Id.* at 168; see also Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102, 117 (3d Cir. 1976) (allowing an enhancement of the lodestar based on the contingent nature of payment and results obtained). As in *Lindy Bros.*, the Supreme Court supported consideration of other factors after the initial lodestar calculation in *Hensley v. Eckerhart*, 461 U.S. 424, 434 & n.9 (1983).

103. *Hensley*, 461 U.S. at 433 (stating that the "starting point for determining . . . a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate"). The lodestar approach that the Supreme Court adopted in *Hensley* was not as expansive as that used in *Lindy Bros.*; it sought to tighten up the factors included in a fee calculation. See Corson, supra note 68, at 575.

104. *Hensley*, 461 U.S. at 433 (addressing request for attorney's fees under the Fees Awards Act by prevailing civil rights litigants).

105. *Id.* Attorneys were expected to provide proof of hours reasonably expended and exercise the same "'billing judgment'" that would be required in private litigation. *Id.* at 434 (quoting Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980) (en banc)). "[E]xcessive, redundant, or otherwise unnecessary" hours were considered unreasonable. *Id.*; see also Corson, supra note 68, at 575 & n.32.

106. *Hensley*, 461 U.S. at 435-37. Through this action, the Court answered the suggestion in *Lindy Bros.* that all hours reasonably spent by an attorney could be included in the lodestar. *Id.*

107. *Id.* at 434. "In the private sector, ‘billing judgment’ is an important component in fee setting. It is no less important . . . [in calculating fee awards]. Hours that are not properly billed to one's *client* also are not properly billed to one's *adversary* pursuant to statutory authority." *Id.* (quoting Copeland 641 F.2d at 891 (D.C. Cir. 1980) (en banc) (emphasis in original)).

108. *Id.* at 435.
making this distinction, however, the Supreme Court acknowledged that in some cases an unsuccessful claim may be based on a "common core of facts" or otherwise related to a prevailing claim, such that consideration of those hours may be required.\textsuperscript{109} The Court, therefore, rejected a simple "mathematical approach" of subtracting unsuccessful claims from the total number of issues presented because it did not allow for the consideration of all relevant factors.\textsuperscript{110}

2. The Reasonable Hourly Fee

While \textit{Hensley} dealt with the calculation of a reasonable number of billable hours, \textit{Blum v. Stenson}\textsuperscript{111} addressed the second prong of the lodestar calculation—the hourly rate.\textsuperscript{112} In \textit{Blum}, the Supreme Court established that a reasonable hourly rate is measured by the rate prevailing in the relevant local market.\textsuperscript{113} The Court recognized that an attorney's hourly rate will vary based on "skill, experience and reputation."\textsuperscript{114} Furthermore, it noted that an attorney's fee is usually the product of negotiation with the client based on the premise that, win or lose, the attorney will be paid.\textsuperscript{115} This arrangement is fundamentally different from a court awarded fee paid by the losing litigant when another party prevails.\textsuperscript{116} The Court acknowledged that, while determining the appropriate market and market rate would prove difficult and inexact, the rates charged in the private market remained the proper inquiry.\textsuperscript{117} Accordingly, the prevailing attorney's

\textsuperscript{109}. \textit{Id}. Accordingly, the \textit{Hensley} Court argued that the focus should be on the significance of the results obtained on a prevailing party's claims, thereby helping to determine if related unsuccessful claims were justified, and therefore compensable in light of the results. \textit{Id}. at 435 \& n.11.

\textsuperscript{110}. \textit{Id}. As an example, the Court listed a party who sought damages but received only injunctive relief. \textit{Id}. The hours spent in an effort to recover damages may be accounted for if obtaining injunctive relief "justified" spending time pursuing damages. \textit{Id}. 465 U.S. 886 (1984).

\textsuperscript{111}. \textit{Id}. (addressing a request for attorney's fees under the Fees Awards Act by prevailing civil rights litigants represented by a nonprofit legal aid society).

\textsuperscript{112}. \textit{Id}. at 893-94 (citing cases listed in the legislative history accompanying the Fees Awards Act); see also Corson, \textit{supra} note 68, at 580 (finding that \textit{Blum} established the manner in which a reasonable rate was to be calculated).


\textsuperscript{114}. \textit{Blum}, 465 U.S. at 895 n.11

\textsuperscript{115}. \textit{Id}. 465 U.S. at 895 n.11

\textsuperscript{116}. \textit{Id}. "The § 1988 fee determination is made by the court in an entirely different setting: there is no negotiation or even discussion with the prevailing client, as the fee—found to be reasonable by the court—is paid by the losing party." \textit{Id}. at 895-96 n.11.

\textsuperscript{117}. \textit{See id}. at 896 n.11. The Court recognized that a prevailing market rate was essentially an artificial inquiry given the wide variance among the skill and reputation of attorneys. However, the Court believed that the rates charged in the private market were the best measure of this inexact determination. \textit{See id}; see also \textit{Hensley v. Eckerhart}, 461 U.S. 424, 447
hourly rate, if consistent with the rates of similarly situated attorneys in the private market, qualified as reasonable.\footnote{118}

\section*{B. Further Refinement of the Lodestar: Enhancement}

As in \textit{Lindy Brothers}, the \textit{Hensley} Court held that assessing a reasonable fee did not end with the calculation of the lodestar.\footnote{119} The Court required consideration of additional factors to reach a true valuation of the attorney's services, including those factors listed by the court in \textit{Johnson}.\footnote{120} Although the \textit{Hensley} Court recognized that the lodestar could be enhanced based on consideration of the factors enumerated in \textit{Johnson}, it cautioned that several of those factors were consumed within the initial lodestar calculation.\footnote{121} The Court, however, failed to specifically identify which factors were so consumed, primarily supporting enhancement of the lodestar based on the significance of the "'results obtained.'"\footnote{122} In addition, Justice Brennan, concurring in \textit{Hensley}, argued that economic reality\footnote{123} demanded that courts not stop at a calculation of the lodestar and an analysis of the results, but rather, continue the analysis to examine the effect of contingent payment.\footnote{124}

In \textit{Blum}, the more difficult task was determining which of the \textit{Johnson} factors remained viable sources for enhancement after the lodestar figure is calculated.\footnote{125} In considering the district court's assessment of the risk of the undertaking, the Supreme Court balked at a definitive ruling on whether enhancement for the contingent nature of payment was appropriate.\footnote{126}

\footnote{118. \textit{Blum}, 465 U.S. at 896 n.11. The Court specifically examined whether "the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and reputation." \textit{Id.}

119. \textit{Hensley}, 461 U.S. at 434 n.9 (holding that a district court may also consider factors in \textit{Johnson} as needed to award a reasonable fee).

120. \textit{Id.} "The 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 . . . ." \textit{Id.}

121. \textit{Id.}

122. \textit{See id. at 438-40.}

123. Justice Brennan found that in the private market, economic realities demanded that attorneys who take cases on a contingency basis charge more for assuming the risk of nonpayment, thus resulting in a larger payment than if the attorney had been paid at a fixed hourly rate. \textit{Id.} at 448 (Brennan, J., concurring). Justice Brennan also stated that: "Most attorneys paid an hourly rate expect to be paid promptly and without regard to success or failure. Customary rates reflect those expectations." \textit{Id.}

124. \textit{Id.} at 448-49. Justice Brennan argued that after a calculation of the lodestar, the "prelitigation likelihood" of success should be examined to see if enhancement is necessary to compensate for the contingent nature of payment. \textit{Id.} at 449.


126. \textit{Id.} at 901.
Moreover, the Blum Court cast doubt on whether any upward adjustment to the lodestar based on the risk of nonpayment would ever be necessary to provide for a reasonable fee.\(^{127}\) The Court rejected enhancement based on the novelty and complexity of the issues or claims litigated, holding that they were subsumed within the number of billable hours expended on the action.\(^{128}\) It reasoned that the more novel and complex the issue, the more billable hours would be required to properly address it; therefore, any enhancement to the lodestar based on these factors would be redundant.\(^{129}\) Similarly, the significance of a particular attorney's "'quality of representation'" would normally be accounted for within the hourly rate.\(^{130}\)

In an apparent break with the precedent set by Hensley, the Blum Court found that acknowledgement of the results obtained would generally occur in consideration of factors included in determining a reasonable fee.\(^{131}\) The Court reasoned that particularly significant results would be reflected in a greater hourly fee; therefore, any adjustment after the calculation of the lodestar based on extraordinary results or significant class benefit would be inappropriate.\(^{132}\) Echoing Hensley, the Court concluded that enhancement of the fee award may be justified, but only in exceptional circumstances and only when the prevailing party can provide specific evidence showing that an enhancement of the lodestar is necessary to reach a "fully compensatory" award.\(^{133}\) The calculation of the lodestar was presumed to result in a reasonable fee if the fee applicant met his burden of showing that the hours expended at the rate charged were reasonable.\(^{134}\)

In Blum, as in Hensley, Justice Brennan, joined by Justice Marshall in a concurring opinion, asserted that enhancement of the lodestar based on the

\(^{127}\) Id. at 901 n.17. The Court specifically reserved the question of contingency enhancement. Id.
\(^{128}\) Id. at 900-01. The Court, however, left some leeway to consider the fact that a more experienced and skilled attorney may spend fewer hours on a difficult or novel claim than an attorney of average skill. In this sense, the attorney's skill may be accounted for by adjusting the hourly fee for the attorney's services in calculating the lodestar, not by enhancing the lodestar after the fact. Id.
\(^{129}\) Id.
\(^{130}\) Id. at 899, 901. Some latitude for an upward adjustment is available if the services performed and results obtained by the attorney were of an "'exceptional'" quality above what might "reasonably" be expected given the hourly fee charged. Id. at 899.
\(^{131}\) Id. at 900. "Because acknowledgment of the 'results obtained' generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award." Id.
\(^{132}\) Id.
\(^{133}\) Id. at 901-02. The fee applicants in Blum failed to produce evidence that enhancement was necessary to provide for a reasonable fee. Id. Therefore, an upward adjustment of the lodestar was found to be inappropriate. Id.
\(^{134}\) Id. at 897. The Court left some opportunity for rebutting the presumption of reasonableness. Id.
contingent nature of payment was an appropriate exercise of the Court's discretion. Pointing to cases endorsed in the legislative history of the Fees Awards Act, Brennan argued that the market-based fee approach demanded a consideration of the contingent nature of payment, stating that to ignore this factor by failing to enhance either the hourly rate or the lodestar would be inconsistent with private market rates, thereby resulting in a fee inadequate to attract competent counsel.

The strong presumption of reasonableness which Blum attached to the product of reasonable hours and a reasonable market rate evolved into a virtually irrebuttable presumption. In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air (Delaware Valley I), the Supreme Court clearly expressed that "most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee" are included within the lodestar figure. In addition, the Court closed the small opening left in Blum for enhancement of the lodestar based on the rare situation where the quality of an attorney's representation is exceptional. It reasoned that an attorney is presumed to perform his duties diligently in order to obtain the best possible results; therefore, the quality of his work is accounted for within the reasonable number of hours expended or the reasonable hourly rate. Any enhancement for the quality of work would result in double counting and thus, would be a prohibited windfall. The Court concluded that the lodestar figure, while not necessarily reflecting the exact amount an attorney could obtain through a private fee arrangement, presumptively provides for an amount that fulfills the purposes of the typical fee-shifting statute—allowing an injured party to obtain counsel and seek relief for violation of certain federal laws. However, the Court, left the issue of enhancement of the lodestar based upon the contingent nature of payment for reargument in the

135. Id. at 903 (Brennan, J., concurring).
137. Delaware Valley I, 478 U.S. 546, 564-66 (1986). The Court noted that adjustment to the lodestar was limited to "'rare' 'exceptional' cases" where the record offered "'specific evidence' " of the necessity for enhancement. Id. at 565 (quoting Blum, 465 U.S. 898-901)).
139. Id. at 566.
140. Id. at 565-66.
141. Id. "[W]hen an attorney first accepts a case and agrees to represent the client, he obligates himself to perform to the best of his ability and to produce the best possible results commensurate with his skill and his client's interests." Id. at 565.
142. Id. at 566.
143. Id. at 564-66.
next term in \textit{Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air (Delaware Valley II)}.\textsuperscript{144}

\section*{III. Direct Confrontation of Enhancement of the Lodestar Based on the Contingency Factor}

\textit{Delaware Valley II}\textsuperscript{145} revealed the dichotomy of opinions regarding the role of contingency in the assessment of a reasonable fee.\textsuperscript{146} Three approaches were articulated: First, an exclusion of the contingency factor based upon administrative and equitable flaws;\textsuperscript{147} second, inclusion of the contingency factor founded on congressional intent and common sense market demands;\textsuperscript{148} and third, a hybrid of the previous two approaches, referred to as the "substantial difficulties" test, that entailed an objective and equitable response to congressional intent and the administrative difficulties inherent within consideration of the contingency factor.\textsuperscript{149}

A plurality of the Court excluded consideration of the contingent nature of payment and determined that the issue centered on whether the lodestar should be enhanced because the attorney assumed a risk of not being paid.\textsuperscript{150} After assessing the weight of various commentaries and noting conflicting approaches among the circuits,\textsuperscript{151} the plurality concluded that Congress did

\begin{itemize}
  \item \textsuperscript{144} \textit{Id.} at 567. "There remains the question of upward adjustment, by way of multipliers or enhancement of the lodestar, based on the likelihood of success, or to put it another way, the risk of loss." \textit{Id.} at 568. Again, the Court phrased the issue as an enhancement rather than questioning whether the contingency of payment must actually go toward a calculation of the reasonable hourly rate. \textit{Id.} at 567.
  \item \textsuperscript{145} 483 U.S. 711 (1987) (addressing the propriety of contingency enhancement of a fee award to prevailing environmental litigants under the Clean Air Act).
  \item \textsuperscript{146} \textit{Delaware Valley II} contained three separate opinions, none of which constituted a majority of the Court. See \textit{id.} at 727, 731, 738. Justice White, joined by Chief Justice Rehnquist, and Justices Powell and Scalia, held that contingency enhancement to the lodestar figure was inappropriate. \textit{Id.} at 727. Justice O’Connor, concurring in part and concurring in judgment, found contingency enhancement to be consistent with congressional intent. \textit{Id.} at 731 (O’Connor, J. concurring). In dissent, Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, believed that Congress intended to allow for an upward adjustment based on the contingent nature of payment. \textit{Id.} at 738 (Blackmun, J., dissenting).
  \item \textsuperscript{147} \textit{Id.} at 721-31.
  \item \textsuperscript{148} \textit{Id.} at 735-55 (Blackmun, J., dissenting).
  \item \textsuperscript{149} \textit{Id.} at 731-34 (O’Connor, J., concurring).
  \item \textsuperscript{150} \textit{Id.} at 738. "The issue before us is whether, when a plaintiff prevails, its attorney should or may be awarded separate compensation for assuming the risk of not being paid." \textit{Id.} at 715. The risk of nonpayment was determined by the risk of losing, which was measured by the "unsettled" nature of the law and the novelty of the particular issue presented. \textit{Id.} at 715-16. Simply stated, under the plurality approach a court must ask what the chances of success in a given case are, considering the facts, issues presented, and the state of the law.
  \item \textsuperscript{151} \textit{Id.} at 716-23. Several courts of appeals support enhancement of the lodestar to reflect the contingent nature of payment in certain circumstances. \textit{See e.g.}, Crumbaker v. Merit Sys. Protection Bd., 781 F.2d 191, 196-97 (Fed. Cir. 1986) (refusing to enhance lodestar unless attorney’s representation deemed exceptional); Wildman v. Lerner Stores Corp., 771 F.2d 605,
not specifically authorize enhancement of a fee award based upon the "risk of loss." The plurality found that enhancing fees based on the risk of loss would violate the statutory direction that only prevailing parties are entitled to an award. The plurality reasoned that the risk of loss is not a compensable factor attributable to a particular case. Thus, its inclusion in an award would, in effect, provide a fee to plaintiffs' attorneys for cases taken on a contingency basis in which their clients did not prevail. The plurality argued that if Congress would not provide a fee to a party who lost, then it would not authorize an enhancement for the risk of loss.

131-14 (1st Cir. 1985) (setting out factors to be considered in determining whether enhancement based on the contingent nature of payment is appropriate); Vaughns v. Board of Educ., 770 F.2d 1244, 1246 (4th Cir. 1985) (permitting enhancement where exceptional circumstances existed); Kelley v. Metropolitan County Bd. of Educ., 773 F.2d 677, 683, 686 (6th Cir. 1985) (en banc) (allowing fee enhancement where the court determined that the hourly rate and number of hours expended appeared unreasonably low given the complexity of the litigated civil rights issues); cert. denied, 474 U.S. 1083 (1986); Craik v. Minnesota State Univ. Bd., 738 F.2d 348, 350-51 (8th Cir. 1984) (granting enhancement to account for attorney success); Jones v. Central Soya Co., 748 F.2d 586, 591 (11th Cir. 1984) (stating that the fact that an attorney prevailed on all issues does not automatically entitle him to lodestar enhancement); Riddell v. National Democratic Party, 712 F.2d 165, 169-70 (5th Cir. 1983) (refusing to augment the lodestar but recognizing the possibility of enhancement under proper circumstances); White v. Richmond, 713 F.2d 458, 462 (9th Cir. 1983) (affirming enhancement of fee to account for attorney success); Ramos v. Lamm, 713 F.2d 546, 557-58 (10th Cir. 1983) (establishing guidelines for an award of attorney's fees). Other courts have either disallowed contingency enhancement in any situation or have denied such enhancement based on deficiencies in practical application. See, e.g., Lewis v. Coughlin, 801 F.2d 570, 576 (2d Cir. 1986) (requiring proof that lack of availability of an upward adjustment would have made finding counsel difficult); In re Burlington N., Inc., 810 F.2d 601, 608 (7th Cir. 1986), cert. denied, 484 U.S. 821 (1987) (disfavoring the use of contingency enhancement); Laffey v. Northwest Airlines, 746 F.2d 4, 26-29 (D.C. Cir. 1984) (discussing reasons why contingency enhancement should not be allowed, despite its theoretical attractiveness), cert. denied, 472 U.S. 1021 (1985). The division among commentators mirrors the division among the courts. Some scholars support contingency enhancement to ensure fulfillment of statutory purposes by providing compensation for fee-shifting litigation comparable to that available in the market. Berger, supra note 47, at 322-35; Rowe, supra note 47, at 676; Equal Access, supra note 68, at 708-11. Other writers have challenged contingency enhancement based on the difficulty of its application. See Leubsdorf, supra note 68, at 473-513 (formulating a more manageable contingency enhancement model); Corson, supra note 68, at 586-89; Kole, supra note 68, at 1104-05.

152. Delaware Valley II, 483 U.S. 711, 723-24 (1987). "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 723. The Delaware Valley II plurality discounts the weight of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), finding that while Johnson endorses an inquiry into the fee contract between the litigant and the attorney, it does not suggest that the contingent nature of payment should be reflected in the calculation of the reasonable fee. Delaware Valley II, 483 U.S. at 723.

153. Id. at 725.

154. Id.

155. Id.

156. Id. The plurality reasoned that enhancement based on the risk of loss would penalize defendants with strong defenses. Id. Furthermore, the plurality noted that compensating for
the plurality contended that in theory, every case would yield a potential enhancement because of the ever-present uncertainty of prevailing.\textsuperscript{157} The plurality acknowledged that some attorneys may decline to take cases because of the lack of enhancement, but that this number would be so small as not to frustrate the policy goals of fee-shifting statutes.\textsuperscript{158} Citing difficulty in administrability, along with the aforementioned inequities, the plurality held that without some further congressional guidance, enhancement of the lodestar to reflect the risk of loss was impermissible.\textsuperscript{159}

Justice O'Connor, concurring in the judgment, rejected the plurality's finding that Congress did not authorize consideration of contingency in calculating a reasonable fee.\textsuperscript{160} Her concurrence alternatively proposed the "substantial difficulties"\textsuperscript{161} test as an "objective and nonarbitrary" method by which to assess the need for contingency enhancement.\textsuperscript{162} This alternative test contained two elements. First, in order to achieve a level of consistency in fee awards it mandated that enhancement for contingency be based upon the market treatment of contingency cases viewed as a class, not on individual case risks.\textsuperscript{163} Second, the alternative test placed the burden on the fee applicant to show a different market treatment of contingency cases and to demonstrate that without compensation for the contingent nature of payment, the applicant "'would have faced substantial difficulties in finding counsel in the local or other relevant market.'"\textsuperscript{164} Even with the use of the...
substantial difficulties framework, Justice O'Connor acknowledged that basing fee enhancement on the riskiness of a particular case, viewed from a pre-litigation perspective, would be unworkable and would create the kind of administrative and equitable difficulties alluded to by the plurality. Justice O'Connor sided with the plurality in endorsing the lodestar as presumptively reasonable, arguing that the legal risks and the novelty of the issues of a particular case are reflected within the lodestar figure, thereby negating the need for enhancement.

Justice Blackmun's dissent stressed the significance of specific congressional authorization for contingency enhancement in the legislative history accompanying the Fees Awards Act. Furthermore, the dissent chided the plurality for its lack of common sense in refusing to acknowledge that contingency enhancement is essential to the accomplishment of the statutory purpose of fee-shifting provisions. It argued that the proper issue to consider when calculating a contingency enhancement is not the risk associated with a particular case or the chance of succeeding, but rather, how contingent cases as a whole are compensated in the market. The dissent emphasized that the plurality's decision to eliminate consideration of the contingent nature of payment would result in a fee award below that available in the relevant market, thereby making fee-shifting litigation less attractive.

Furthermore, the dissent criticized the plurality for disregarding Supreme Court precedent and congressional history requiring that a reason-

(1992) (O'Connor, J., dissenting). In her view, however, the adjustment calculated by the Court can not exceed the amount necessary to attract competent counsel. Delaware Valley II, 483 U.S. at 733.

165. Id. at 731.
166. Id.
167. Id. Justice O'Connor reasoned that because the lodestar accounted for difficulties overcome in a particular case within the reasonable hours expended and for the skill of an attorney in overcoming these difficulties in the reasonable hourly rate, any additional enhancement for these factors would create a windfall. Id. at 734.
168. Id. at 735-55 (Blackmun, J., dissenting). Justice Blackmun's dissent was joined by Justices Brennan, Marshall, and Stevens.
169. Id. The dissent stated:

Today, a plurality of the Court ignores the fact that a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case, may be inadequate and inappropriate when its payment is contingent upon winning the case. By not allowing an upward adjustment for a case taken on a contingent basis, the plurality undermines the basic purpose of statutory attorney fees . . . .

Id. at 735.
170. Id. at 745-46.
171. Id. at 742. The dissent reasoned that competent counsel would not take time away from more lucrative private practice for such litigation. As a result, the dissent argued that those attorneys who would be attracted would be "less than fully employed or . . . less capable." Id. at 743.
able fee reflect the rates prevailing in the market.\textsuperscript{172} Therefore, the dissent argued that a court's guide to fee assessment is simply to provide an enhancement such that the award for a case taken on contingency is "competitive" with an award in the private market.\textsuperscript{173} Hence, the enhancement could be accounted for by an adjustment to the reasonable hours or by an enhancement of the entire lodestar figure.\textsuperscript{174} In conclusion, the dissent took solace in the fact that contingency enhancement in selected cases was still approved by a majority of the Court.\textsuperscript{175}

The Supreme Court's failure to reach a clear majority on the issue in \textit{Delaware Valley II} caused confusion in the lower courts as to the role of the contingent nature of payment in the calculation of a reasonable attorney's fee.\textsuperscript{176} Due to conflicting interpretations and analyses, the Supreme Court was forced to address the issue of contingency enhancement again in \textit{City of Burlington v. Dague} and was finally able to reach a definitive majority.\textsuperscript{177}

\textsuperscript{172} \textit{Id.} Justice Blackmun argued that contingency enhancement was necessary for two reasons. First, to comply with the Court's position that statutory fees must be competitive with those available in the private market, and second, to comply with the requirements of the congressional purpose that fee awards attract competent counsel. \textit{Id.}

\textsuperscript{173} \textit{Id.} at 753. The dissent recognized that mirroring market treatment would not be exact. \textit{Id.} Unlike Justice O'Connor's concurrence, however, the dissent did not require any special showing that the fee applicant would have faced substantial difficulty in obtaining counsel barring contingency enhancement. \textit{Id.} at 747. "[A] court's job simply will be to determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment." \textit{Id.} The dissent and concurrence also diverged on the opportunity for enhancement for extra case-specific risks in the "exceptional" case; the dissent approved of such enhancement. \textit{Id.} at 748-51.

\textsuperscript{174} \textit{Id.} at 753.

\textsuperscript{175} \textit{Id.} at 755.

\textsuperscript{176} See \textit{King v. Palmer}, 950 F.2d 771, 775 (D.C. Cir. 1991) (en banc) (finding no precedential guidance on how to determine the statutory fee award in \textit{Delaware Valley II}), \textit{cert. denied}, 112 S. Ct. 1290 (1992). For example, in \textit{King}, the United States Court of Appeals for the District of Columbia rejected the Circuit's former approval of Justice O'Connor's concurrence in \textit{Delaware Valley II}. \textit{Id.} at 771. Instead, the D.C. Circuit found the plurality's position to be controlling on the issue of contingency enhancement. \textit{Id.} On the other hand, in \textit{Friends of the Earth v. Eastman Kodak Co.}, 834 F.2d 295 (2d Cir. 1987), the Second Circuit attached no weight to the Supreme Court's decision in \textit{Delaware Valley II}, contending that the Court had failed to reach a clear majority. \textit{Id.} at 298; see also \textit{Dague v. City of Burlington}, 935 F.2d 1343, 1359 (2d Cir. 1991) (holding that due to the outcome of \textit{Delaware Valley II}, the contingency issue was open and subject to Second Circuit precedent), \textit{rev'd in part}, 112 S. Ct. 2638 (1992). As a result, the Second Circuit held that the issue was still open and subject to interpretation by circuit precedent. \textit{Friends of the Earth}, 834 F.2d at 298 (adopting an approach similar to the common ground between the \textit{Delaware Valley II} concurrence and plurality). The inquiry authorized in \textit{Friends of the Earth} was whether "[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts." \textit{Id.} at 298 (quoting \textit{Lewis v. Coughlin}, 801 F.2d 570, 576 (2d Cir. 1986)).

IV. CITY OF BURLINGTON v. DAGUE: THE SUPREME COURT REJECTS ENHANCEMENT FOR CONTINGENCY

In City of Burlington v. Dague, the United States Supreme Court held that enhancement of the lodestar to reflect that the prevailing party's attorney was retained on a contingency basis is not permitted under the typical fee-shifting statute. Furthermore, Justice Scalia's majority opinion criticized and rejected the substantial difficulties test formulated by Justice O'Connor in Delaware Valley II, because of flaws in its application, holding that consideration of the contingent nature of payment is not required or needed to provide for a reasonable fee. In dissent, Justice Blackmun disagreed, arguing that both Supreme Court precedent and congressional authorization mandate that the contingent nature of payment be accounted for in order to assess a reasonable fee. Moreover, the dissent contended that compensation for contingency is an essential incentive for attorneys to choose fee-shifting litigation, effectuating the purpose of fee-shifting statutes in general. The primary dispute dividing the majority and the dissent was not so much the means by which contingency enhancement would be calculated into an award, but whether contingency may be a factor in determining an award at all.

A. The Majority Opinion: Contingency is Not an Appropriate Factor

The Supreme Court reversed the decision of the United States Court of Appeals for the Second Circuit and held that the contingent nature of payment is not an appropriate factor in calculating a fee award. The majority began with an examination of respondent Dague's contention that a reasonable fee award for attorneys whose payment is contingent on success, requires enhancement of the lodestar to reflect the risk of nonpayment and mirror the additional charge an attorney in the private market would expect. The Court, however, emphasized that an enhancement for contingency would duplicate factors already accounted for in the lodestar. The majority divided the assessment of contingency into two factors: "(1) the

178. Id.
179. Id. at 2643-44.
180. Id. at 2642-44.
181. Id. at 2644 (Blackmun, J., dissenting).
182. Id. at 2648.
183. Id. at 2644. Another important issue dividing the majority and dissent involved defining contingency and the means by which it is accounted for in a fee award. Id. at 2644-47.
184. Id. at 2643-44. Chief Justice Rehnquist, and Justices White, Kennedy, Souter, and Thomas joined Justice Scalia's opinion. Id. at 2638.
185. Id. at 2641.
186. Id. The majority rejected the respondent's argument, pointing to the lodestar as the "guiding light" of the Court's fee-shifting analysis. Id.
legal and factual merits of the claim, and (2) the difficulty of establishing those merits.\footnote{187} The majority asserted that the second factor is already accounted for in either the reasonable number of hours expended or the reasonable hourly fee.\footnote{188} The Court also contended that the first factor, while not accounted for in the lodestar, should be excluded from the calculation because it would place excessive demands on courts in contingent-fee cases and encourage attorneys to bring frivolous claims in the hope of obtaining a large fee award.\footnote{189}

The Court then rejected the argument that Justice O'Connor's substantial difficulties analysis in Delaware Valley II was controlling.\footnote{190} The majority found it impossible to determine if a party would have faced substantial difficulties in finding counsel without enhancement for contingency because such difficulties are determined by the riskiness of the case.\footnote{191} Because Justice O'Connor's approach did not provide for the consideration of individual case risks, the majority found that the analysis defied application.\footnote{192} Furthermore, treating contingent cases as a class and providing enhancement consistent with the market treatment of that class would be circular because the court would be turning to a market that it had created through prior awards.\footnote{193} In addition, this type of treatment would be imperfect because it would result in overcompensation of cases with less risk than the class average.\footnote{194} Barring the approach of Justice O'Connor's Delaware Valley II concurrence, the Court found no other method by which contingency enhancement could be limited to less than all contingent-fee cases.\footnote{195}

\footnote{187} Id.
\footnote{188} Id. The majority argued that accounting for the difficulty of the task or novelty of the issues after calculating the lodestar would result in a “double counting” of the lodestar and thus a prohibited windfall in the fee award. \textit{Id.}
\footnote{189} Id. at 2641-42. The majority contended that to require courts to assess the merits factor would result in an endless lodestar inquiry. \textit{Id.} Supporting the exclusion of contingency, the majority reiterated the Court's position in Delaware Valley I, that fee-shifting statutes "‘were not designed as a form of economic relief to improve the financial lot of lawyers.'" \textit{Id.} (quoting Delaware Valley I, 478 U.S. 546, 565 (1986)). The majority noted, however, that the merits factor was the principal determinant of contingent risk: "As discussed above, the contingent risk of a case (and hence the difficulty of getting contingent-fee lawyers to take it) depends principally upon its particular merits.” \textit{Id.} at 2642.
\footnote{190} Id.
\footnote{191} Id.
\footnote{192} Id. The majority stated that the primary reason it could not support the approach of the Delaware Valley II concurrence was that they could “not see how it can intelligibly be applied.” \textit{Id.} at 2642.
\footnote{193} Id. at 2643.
\footnote{194} Id. The Court failed to note that the converse could also be true because cases with less than the class average risk would be under-compensated.
\footnote{195} Id.
Finally, the majority examined the reasons supporting the exclusion of contingency from the calculation of a reasonable fee. The Court pointed to the prevailing party language in fee-shifting statutes as excluding recovery for unsuccessful claims.\textsuperscript{196} Given that attorneys attempt to offset the risk of not prevailing through a contingent-fee arrangement, thus pooling the risks of a group of cases so as to lessen the financial risk, the majority argued that compensation for the contingent nature of payment in a particular case would, in effect, compensate an attorney for unsuccessful cases in which their client did not prevail.\textsuperscript{197} Furthermore, the majority noted that because the Court had already rejected the contingent-fee model\textsuperscript{198} in favor of the lodestar model,\textsuperscript{199} linking contingency enhancement with the lodestar method would be inconsistent with that rejection and unnecessary for calculating a reasonable fee.\textsuperscript{200} In the interest of administrability, the Court rejected contingency enhancement because it would prolong litigation and increase the difficulty and uncertainty of calculating the fee award.\textsuperscript{201} Accordingly, the majority adopted the plurality approach of \textit{Delaware Valley II} and prohibited contingency enhancement under fee-shifting statutes.\textsuperscript{202}

\textsuperscript{196} Id. The majority noted that: An attorney operating on a contingency-fee basis pools the risks presented by his various cases: cases that turn out to be successful pay for the time he gambled on those that did not. To award a contingency enhancement under a fee-shifting statute would in effect pay for the attorney's time (or anticipated time) in cases where his client does not prevail. \textit{Id.} (emphasis in original).

\textsuperscript{197} Id.

\textsuperscript{198} The contingent-fee model calculates a fee award based on a percentage of the total damages. It is the primary system employed in the private market to set a fee in cases where the client is not obligated to pay throughout the course of the litigation. \textit{See} Leubsdorf, \textit{supra} note 68, at 475-77 (explaining the contingent-fee model and the calculation of a fee “as a percentage of the total recovery”); Corson, \textit{supra} note 68, at 586-87 (emphasizing the prevalence of contingent-fees in the private market whereby fees are taken from resulting damage awards); \textit{see also} Venegas v. Mitchell, 495 U.S. 82, 86-87 (1990) (discussing the difference between the Fees Awards Act and the contingent-fee model, which is based upon a percentage recovery of total damages awarded); Kole, \textit{supra} note 68, at 1099 (explaining that an attorney in a private contingency arrangement is paid based upon the extent of success). The majority argued that combining the contingency method, which calculated an attorney's fee based on a percentage of recovery, with the lodestar method, which calculated the fee based on the product of the number of hours expended and a reasonable hourly rate, would be inconsistent. \textit{Dague}, 112 S. Ct. at 2643.

\textsuperscript{199} \textit{See} Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (endorsing the lodestar approach for calculating a fee award); \textit{supra} note 13 (explaining the lodestar method).

\textsuperscript{200} \textit{Dague}, 112 S. Ct. at 2643 (citing \textit{Venegas}, 495 U.S. at 87).

\textsuperscript{201} \textit{Id.} “Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable.” \textit{Id.}

\textsuperscript{202} \textit{Id.} at 2643-44. The majority summarized its position by stating that “[i]t is neither necessary nor even possible for application of the fee-shifting statutes to mimic the intricacies of the fee-paying market in every respect.” \textit{Id.} at 2643.
B. The Dissenting Opinions: A Reasonable Fee May Include Contingency Enhancement

In his dissent, Justice Blackmun argued that consideration of the contingency factor when calculating a fee award followed “ineluctably” from an analysis of the Court’s fee-award precedent. Justice Blackmun reasoned that for a fee to be fully compensatory and thus reasonable, it must include compensation for the contingent nature of payment, a legitimate market factor. Justice Blackmun believed that the majority’s holding to the contrary violated the affirmed purpose of fee-shifting statutes and undermined enforcement of the statutory schemes for which Congress authorized fee-shifting. In addition, Justice Blackmun adopted Justice O’Connor’s substantial difficulties approach articulated in Delaware Valley II. Accordingly, Justice Blackmun argued that an enhancement should be calculated based on the market treatment of contingency cases, and that such a determination would control future court rulings for cases in the same market. Justice Blackmun concluded that this analysis would provide for objective

203. Id. at 2644 (Blackmun, J., dissenting). Justice Blackmun’s dissent was joined by Justice Stevens. Id.

204. Id. The dissent founded its conclusion on two principles. First, for a fee to qualify as reasonable it must be “‘fully compensatory,’” id. (quoting Hensley v. Eckerhart, 461 U.S. 424, 435 (1983), and based upon “‘rates and practices prevailing in the relevant private market.’” Id. (quoting Missouri v. Jenkins, 491 U.S. 274, 286 (1989). Second, in the private market an attorney whose payment is contingent upon success charges a greater fee than if he was guaranteed payment. Id. at 2644-45 (citations omitted).

205. Id. Justice Blackmun argued that in the private market it costs more to bring a case when payment is not guaranteed, therefore a client must pay more. His dissent argued that this fundamental reality should be reflected in the reasonable fee award. Id.

206. Id. Justice Blackmun contended that in the majority of actions brought under statutes authorizing fee-shifting, plaintiffs will not have the funds to retain an attorney other than on a contingent basis. Id. Therefore, eliminating compensation for contingency from an award would discourage attorneys from taking on such litigation when the private market will provide security from such a risk. Thus, the majority’s decision strikes at the core group of citizens Congress sought to reach with fee-shifting language. Id.; see also supra notes 75-82 and accompanying text (discussing Congress’s intent in fee-shifting statutes). In addition, Justice Blackmun reiterated his position in Delaware Valley II that the risk to be compensated is not the riskiness or merit of the particular case, but rather the risk of nonpayment associated with contingent cases as a whole. Id. at 2645; Delaware Valley II, 483 U.S. 711, 745-47 (1987).

207. Dague, 112 S. Ct. at 2645-47; Delaware Valley II, 483 U.S. at 731-34.

208. Dague, 112 S. Ct. at 2646. Consistent with the substantial difficulties test, Justice Blackmun found that a fee applicant must put forth evidence that a different treatment occurs. Id. This requirement clearly aligned the dissent with Justice O’Connor’s position in Delaware Valley II. See id. Justice O’Connor did not join Justice Blackmun’s dissent in Dague, however, because the respondents in Dague did not present “market-specific support for the 25% enhancement figure.” Id. at 2649 (O’Connor, J., dissenting).
and less arbitrary awards consistent with the effectuation of the purpose of fee-shifting statutes.\textsuperscript{209}

Justice Blackmun also discredited the majority's argument that contingency enhancement was inconsistent with the authorization of fee-shifting statutes in general. He posited that the majority's position resulted from a lack of attention to and understanding of general fee-shifting language and the contingency issue as a whole.\textsuperscript{210} The prevailing party limitation provides for an award to the party, not to the attorney.\textsuperscript{211} Therefore, an award based upon a contingency enhancement does not, as the majority argued, result in an award to a party who did not prevail.\textsuperscript{212} Justice Blackmun argued that the real issue troubling the majority was that an award enhanced for contingency would be "excessive," not that nonprevailing parties would be awarded fees.\textsuperscript{213} In addition, Justice Blackmun attacked the majority for rejecting the treatment of contingent cases as a class. Looking to market treatment of contingent cases to determine if a fee should be enhanced is consistent with the fact that the Court must look to a private market to determine the reasonable hourly rate.\textsuperscript{214} Justice Blackmun argued further that since no claim is guaranteed to succeed, the market reflects that an attorney will prefer an uncertain case with a guaranteed fee to an uncertain case in which payment is contingent.\textsuperscript{215} An award calculated as if the fee were guaranteed, disallowing enhancement, would frustrate congressional purpose because fee-shifting statutes are aimed at eliminating this preference.\textsuperscript{216}

\textsuperscript{209} Id. at 2646 (Blackmun, J., dissenting).

\textsuperscript{210} Id. Justice Blackmun specifically cited the majority's "inattention" to the statutory language and to a confusion of the "two meanings" of contingency. Id. Justice Blackmun contended that the majority was shaping the issue to indicate that the fee applicant desired a system in which a fee award would be based on a percentage of the total recovery, when in reality he was simply proposing that the risk of nonpayment be accounted for in the fee award. Id. at 2646-47.

\textsuperscript{211} Id.

\textsuperscript{212} Id.

\textsuperscript{213} Id. at 2646. Justice Blackmun's dissent asserted that the "threshold" inquiry concerned whether the fee applicant "prevailed." Only then did an inquiry into the size of the fee award ensue. Id. (citing Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)). While the lodestar model has replaced the contingent-fee model, the dissent found that the respondents were not arguing for a return to the contingent-fee model of a percentage of recovery, but rather, for the lodestar to reflect the contingent nature of payment. Id.; see also supra note 210.

\textsuperscript{214} Dague, 112 S. Ct. at 2647.

\textsuperscript{215} Id. "Even the least meritorious case in which the attorney is guaranteed compensation whether he wins or loses will be economically preferable to the most meritorious fee-bearing claim in which the attorney will be paid only if he prevails . . . ." Id. (emphasis in original).

\textsuperscript{216} Id. at 2647-48.
Justice O'Connor wrote a separate dissenting opinion to reaffirm her approach set out in *Delaware Valley II* and to underscore the dissent's criticism of the majority's misinterpretation of the "market-based" analysis. Justice O'Connor endorsed the lodestar, but contended that it must also provide incentive for attorneys to choose cases in which payment is contingent. She argued that contingency enhancement would provide this incentive and must be available to "attract competent counsel."  

**V. THE STATUS OF FEE-SHIFTING AFTER Dague**

The Supreme Court's fee-shifting jurisprudence is informed by the Civil Rights Attorney's Fees Awards Act of 1976 and the extensive legislative history accompanying the Act. In *Dague*, the Court's ruling ignores the legislative guidance of Congress and the Court's own fee-shifting precedent by holding that it is unnecessary to account for the risk of loss when calculating a reasonable fee. Although the Court acknowledges that this factor is an essential element of private sector fee calculation that is not fully accounted for in the lodestar, it refuses to take the necessary step, which Congress essentially took for it, to find that in appropriate cases, the contingent nature of payment must be accounted for when calculating a reasonable fee. This position not only discounts an important factor in the private mar-

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217. *Id.* at 2648 (O'Connor, J., dissenting).
218. *Id.*
219. *Id.* "I continue to be of the view that in certain circumstances a 'reasonable' attorney's fee should not be computed by the purely retrospective lodestar figure, but also must incorporate a reasonable incentive to an attorney contemplating whether or not to take the case in the first place." *Id.*
220. *See supra* note 74 and accompanying text (discussing judicial interpretations of the Fees Awards Act).
221. *See supra* notes 201-02 and accompanying text. The majority's dismissal of the instruction provided by the legislative history is not surprising given Justice Scalia's dissenting opinion in *Blanchard v. Bergeron*, 489 U.S. 87 (1989), a case interpreting the Fees Awards Act. In rejecting the importance of the Fees Awards Act's legislative history, Justice Scalia stated:

Congress is elected to enact statutes rather than point to cases, and its Members have better uses for their time than poring over District Court opinions. . . . [T]he references to the cases were inserted, at best by a committee staff member on his or her own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer, to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

*Id.* at 98-99 (Scalia, J., concurring in part).
222. *See supra* note 189 and accompanying text.
ket, but also violates the principle that in setting a reasonable fee the Court must look to the fee practices prevailing in the private market.223

A. Congressional Endorsement of the Contingent Nature of Payment

The Dague majority pays little attention to the guidance of the legislative history accompanying the Fees Awards Act.224 While, the language of the statute does not specifically endorse the principle of contingency enhancement, Congress instructed that the contingent nature of payment be considered within the contemplation of a reasonable fee.225 Congress's citation of Johnson v. Georgia Highway Express, Inc.226 and Stanford Daily v. Zurcher227 is indicative of this intent.228

In Stanford Daily, the United States District Court for the Northern District of California held that enhancement of the base fee based on the contingent nature of payment is appropriate.229 The court explains that the principle of contingency enhancement “simply suggests that the contingent nature of compensation be considered in assessing the reasonableness of any fee.”230 Similarly, in Johnson, the United States Court of Appeals for the Fifth Circuit cites the “fixed or contingent” nature of the fee arrangement as a factor to be considered in determining whether a fee award is reasonable.231 The holdings in these two cases are consistent with the general purpose of fee-shifting statutes and Congress's guidance that fee awards should represent what counsel would receive from a fee-paying client.232 This legislative guidance, combined with Justice Blackmun's common sense dissent

223. See supra notes 112-18 and accompanying text.
224. See supra note 210 and accompanying text; see also West Virginia Univ. Hosp., Inc. v. Casey, 111 S. Ct. 1138, 1146-47 (1991) (expressing preference for adhering to the plain language of the Fees Awards Act rather than alter the meaning by “the statements of individual legislators or committees during the course of the enactment process”). Justice Scalia's rejection of legislative history explains the lack of weight he attaches to congressional instruction on fee-shifting. In fact, in Blanchard, Justice Scalia commented that it was his position that the Court had “acknowledged [its] emancipation from Johnson,” and that legislative history was “unreliable evidence of what the voting Members of Congress actually had in mind.” Blanchard, 489 U.S. at 99 (Scalia, J., concurring).
226. 488 F.2d 714 (5th Cir. 1974).
227. 64 F.R.D. 680 (N.D. Cal. 1974).
230. Id. at 686.
231. Johnson, 488 F.2d at 718.
232. See supra text accompanying notes 69-82. But see Kole, supra note 68, at 1086-87 (arguing that the language of the Fees Awards Act is "ambiguous" on whether the enhancement based on the contingent nature of payment is acceptable).
explaining the market-based motivations of attorneys, explained clearly supports the proposition that the contingent nature of payment must be considered in some form in order to calculate a reasonable fee.  

B. Calculating a Fee Award: The Lodestar and Contingency

The Dague majority attempts to respond to the arguments supporting enhancement based on the contingent nature of payment by suggesting that contingency is already accounted for in the lodestar. The majority recognizes that its two-part breakdown of contingency imperfectly accounts for the contingent nature of payment because only one part, the difficulty of establishing the merits of a particular case, is be accounted for in the lodestar (either in increased hours, or in an increased hourly fee). In addition, the correctness of the Court's contingency breakdown is questionable in the context of Blum v. Stenson's separate consideration of the propriety of enhancement based on "the novelty and complexity of the issues" in a case, the "quality of representation," and on the "risk of nonpayment." If the contingent nature of payment were simply derived from the difficulty of the issues in a particular case (the novelty and complexity of the issues), and the skill required to resolve the issues (the quality of representation), as the majority suggests, then the Blum Court would not have had cause to consider the risk of nonpayment separately. Furthermore, given the Court's holding in Blum recognizing that both the novelty and complexity of the issues and the quality of representation are accounted for in the lodestar, the

233. See supra notes 214-16 and accompanying text.
234. City of Burlington v. Dague, 112 S. Ct. 2538, 2644 (1992) (Blackmun, J., dissenting). In his dissent Justice Blackmun stated: "If a statutory fee consistent with market practices is 'reasonable,' and if in the private market an attorney who assumes the risk of nonpayment can expect additional compensation, then it follows that a statutory fee may include additional compensation for contingency and still qualify as reasonable." Id.
235. See supra text accompanying notes 184-89. The majority itself only half-heartedly suggested that the contingent nature of payment were reflected in the lodestar figure, stating that contingency "would likely" be included. Dague, 112 S. Ct. at 2641.
236. Dague, 112 S. Ct. at 2641.
238. Id. at 898.
239. Id. at 899.
240. Id. at 901; see also supra text accompanying notes 116-27.
241. Dague, 112 S. Ct. at 2641. "The [difficulty of establishing the merits] is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so." Id.
242. Blum, 465 U.S. at 900-01; see supra notes 105-44 and accompanying text (explaining the lodestar calculation).
Court would not have considered the contingency issue anew in *Delaware Valley II* if it were truly composed of solely these two factors.\textsuperscript{243}

In addition, the lodestar analysis detailed in *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary*\textsuperscript{244} and adopted by the Court in *Hensley v. Eckerhart*,\textsuperscript{245} specifically authorizes separate consideration of the contingent nature of payment to determine whether enhancement of the lodestar figure is necessary.\textsuperscript{246} *Hensley*, while restricting the occasions for lodestar enhancement, leaves open consideration of the contingent nature of payment by specifically referencing enhancement based on the factors listed in *Johnson* in order to fulfill the purpose of the Fees Awards Act.\textsuperscript{247} Furthermore, *Blum* reasserts the principle set forth in *Hensley*, that enhancement of the lodestar is appropriate in rare circumstances that demand it for determining a reasonable fee.\textsuperscript{248} The *Dague* Court's failure to include the contingent nature of payment within those factors accounted for in the lodestar, coupled with the Court's acceptance of the principle of lodestar enhancement, support the proposition that the contingent nature of payment is not accounted for within the lodestar and may require enhancement of the lodestar in order to calculate a reasonable fee.\textsuperscript{249}

The majority's recognition of the deficiencies in its lodestar inclusion argument motivate it to suggest that the ultimate basis for excluding consideration of the contingent nature of payment is that lodestar enhancement based on this factor would be burdensome and difficult, if not impossible to accomplish in any viable manner.\textsuperscript{250} This argument simply amounts to an unacceptable admission that the contingent nature of payment, while a legit-

\textsuperscript{243} *Delaware Valley II*, 483 U.S. 711 (1987); see supra text accompanying notes 135-66.

\textsuperscript{244} 487 F.2d 161 (3d Cir. 1973).

\textsuperscript{245} 461 U.S. 424 (1983).

\textsuperscript{246} See supra text accompanying notes 100-10.

\textsuperscript{247} See supra text accompanying notes 119-26. "The 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 . . . ." *Hensley*, 461 U.S. at 434.

\textsuperscript{248} *Blum v. Stenson*, 465 U.S. 886, 901 (1984). "We therefore reject petitioner’s argument that an upward adjustment to an attorney’s fee is never appropriate . . . ." Id.; see supra text accompanying notes 125-36.

\textsuperscript{249} See supra note 247. In his dissent, Justice Blackmun noted that the Court's refusal to acknowledge contingency enhancement "violates the principles we have applied consistently in prior cases." *City of Burlington v. Dague*, 112 S. Ct. 2358, 2644 (1992) (Blackmun, J., dissenting).

\textsuperscript{250} See supra notes 240-42 (explaining the Court's recognition of the deficiencies of its lodestar inclusion argument). "Contingency enhancement would make the setting of fees more complex and arbitrary, hence more unpredictable, and hence more litigable." *Dague*, 112 S. Ct. at 2643.
imate source for enhancement, is not accounted for because of the difficulty of the task.251

C. The Substantial Difficulties Test: A Cure for Administrative Difficulty

The substantial difficulties test, outlined by Justice O'Connor in *Delaware Valley II*,252 is a viable method through which the contingent nature of payment may be factored into a fee award.253 If the fee applicant can affirmatively prove that the absence of contingency enhancement would have been an obstacle to obtaining competent counsel, then compensation for contingency is appropriate.254 Such an analysis correctly looks to the prevailing practice in the market, as the *Dague* dissents note, provides incentives for attorneys to take statutory fee cases, fulfilling the purpose of fee-shifting statutes, and is readily administrable by the Court.255

While enhancement for contingency may be more burdensome than the simple lodestar calculation, congressional purpose indicates that it is required.256 Frustration of this purpose will clearly invite response from Congress to rectify the Court's ruling,257 particularly given its severe undercutting of the enforcement provisions of several environmental and civil rights laws.258 The substantial difficulties test would answer the burdens of administration and fulfill the purpose of fee-shifting statutes.259

VI. CONCLUSION

Since the Supreme Court's adoption of the lodestar method in *Hensley* for calculating attorney's fee awards, the appropriateness and/or availability of

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251. *Dague*, 112 S. Ct. at 2641. "The first factor (relative merits of the claim) is not reflected in the lodestar, but there are good reasons why it should play no part in the calculation of the award." *Id.* As Justice O'Connor noted in her separate dissent, "the Court has never suggested that the difficulty of the task or possible inexactitude of the result justifies forgoing those calculations altogether." *Id.* at 2648 (O'Connor, J., dissenting).


253. See supra notes 161-65 and accompanying text; see also *Dague*, 112 S. Ct. at 2647 (Blackmun, J., dissenting). "[I]f Justice O'CONNOR's standard were adopted, the matter of the amount by which fees should be increased would quickly become settled in the various district courts and courts of appeals for the different kinds of federal litigation." *Id.*

254. *Dague*, 112 S. Ct. at 2648; see also supra notes 156-64.

255. *Dague*, 112 S. Ct. at 2644-49; see also supra note 250 and notes 160-62 and accompanying text.

256. See supra notes 78-84 and accompanying text.

257. See *Dague*, 112 S. Ct. at 2645 n.4 (noting the specific congressional prohibition on bonuses and multipliers in calculation of fee awards under 20 U.S.C. § 1415(e)(4)(C) (1988)).

258. *Id.* at 2648 (Blackmun, J., dissenting). "Congress intended the fee-shifting statutes to serve as an integral enforcement mechanism in a variety of federal statutes—most notably, civil rights and environmental statutes." *Id.*; see also supra notes 75-82 and accompanying text.

259. See supra notes 207-09 and accompanying text.
enhancement for the contingent nature of payment has been unclear. This uncertainty stems in part from the difficulty the Court has faced in reconciling Congress's endorsement of contingency enhancement with the administrative difficulties associated with such a calculation. Compounding this difficulty are the divergent views as to what such an enhancement reflects, and how to determine the degree to which it should be reflected. In its most basic form, the question revolves around whether the risks inherent in a particular case drive the inquiry or whether the uncertainty of payment standing alone supports enhancement in a given market regardless of the actual risk that nonpayment would occur. Rather than definitively resolving these difficulties, Delaware Valley II sharpened these distinctions among the members of the Court, leaving the law unsettled.

Unfortunately, the definitive answer that came in Dague, rejecting consideration of the contingent nature of payment, is a response to the difficulty of the issue rather than to the policy demands of fee-shifting statutes. In order to comply with the purpose of fee-shifting statutes, as defined by Congress, compensation for the risk of nonpayment must be available. The difficulty in formulating an equitable, nonarbitrary assessment should not be a bar to its inclusion. The Dague Court disallows the inquiry because of the administrative burden of the task. The majority opinion devalues the market test established in Blum, and discounts the guidance of the legislative history of the Fees Awards Act regarding consideration of the contingent nature of payment. While the Court should strive for a uniform method of fee calculation, this goal should not result in the elimination of factors necessary to award a fee that puts statutory fee cases on the same level with private actions. By refusing to consider the contingent nature of payment, the Court in Dague undercut the effectiveness and enforcement of those statutory schemes incorporating fee-shifting provisions. In so doing, the Court guts the incentive for private prosecution, thus inviting a congressional response to revitalize fee-shifting policy. The private market compensates for the contingent nature of payment; a statutory fee award must make this option available as well.

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